# Terms of Reference

I, ROBERT JAMES ELLICOTT, Attorney-General, HAVING REGARD TO -

(a) the function of the Law Reform Commission, in pursuance of references to the Commission made by the Attorney-General, of reviewing laws to which the Law Reform Commission Act 1973 applies, of considering proposals for the making of laws to which that Act applies and of considering proposals for uniformity between laws of the Territories and laws of the States;

(b) the special interest of the Commonwealth in the welfare of the Aboriginal people of Australia;

(c) the need to ensure that every Aborigine enjoys basic human rights;

(d) the right of Aborigines to retain their racial identity and traditional life style or, where they so desire, to adopt partially or wholly a European life style;

(e) the difficulties that have at times emerged in the application of the existing criminal justice system to members of the Aboriginal race; and

(f) the need to ensure equitable, humane and fair treatment under the criminal justice system to all members of the Australian community.

HEREBY REFER the following matter to the Law Reform Commission, as provided by the Law Reform Commission Act,

TO INQUIRE INTO AND REPORT UPON whether it would be desirable to apply either in whole or in part Aboriginal customary law to Aborigines, either generally or in particular areas or to those living in tribal conditions only and, in particular:

(a) whether, and in what manner, existing courts dealing with criminal charges against Aborigines should be empowered to apply Aboriginal customary law and practices in the trial and punishment of Aborigines;

(b) to what extent Aboriginal communities should have the power to apply their customary law and practices in the punishment and rehabilitation of Aborigines; and

(c) any other related matter.

IN MAKING ITS INQUIRY AND REPORT the Commission will give special regard to the need to ensure that no person should be subject to any treatment, conduct or punishment which is cruel or inhumane.

DATED this ninth day of February 1977

# Participants

**The Commission**

For the purpose of the Reference, the President in accordance with section 27(1) of the Law Reform Commission Act 1973 created a Division comprising members of the Commission. At the date of completion of this Report, the Division comprised the following members.

President

The Hon Xavier Connor AO, QC, LLB (Melb)

Commissioner in Charge

Professor JR Crawford, BA, LLB (Adel), D Phil (Oxon)
Commissioner in Charge 1982-completion

Commissioners

Professor M Chesterman, LLB, BA (Syd), LLM (Lond) (1983-completion)
Professor AE-S Tay, AM, Ph D (ANU) (1982-completion)
The Hon Justice Murray Wilcox, LLB (Syd) (1978-80, 1984-completion)

In addition, the following members were involved as members of the Division in the course of the Reference.

Previous Commissioners-in-Charge

The Hon Justice MD Kirby CMG, BA, LLM, B Ec (Syd) Commissioner in Charge 1977-1978 ; Chairman 1975-1984

Mr BM Debelle, QC, LLB (Adel). Commissioner in Charge 1978-1981. Retired 1983

Previous Commissioners'

The Hon Sir (Francis) Gerard Brennan KBE, BA, LLB (Qld). Retired 1977
Professor AC Castles, LLB (Melb), JD (Chicago). Retired 1981
Professor Duncan Chappell, BA, LLB (Tas), PhD (Cambridge). Retired 1979
Associate Professor GJ Hawkins, BA (Wales). Retired 1981
Professor D St L Kelly, BA, LLB (Adel), BCL (Oxon). Retired 1980
Mr R Scott, LLB (Syd). Retired 1978
Mr TH Smith QC, BA, LLB (Melb) Retired 1984

**Officers of the Commission**

Secretary and Director of Research

Mr IG Cunliffe, BA, LLB (ANU)

Legislative Draftsman

Mr Stephen Mason, BA, LLB, MTCP (Syd)

The legislation set out in Appendix A was settled in collaboration with Mr JQ Ewens, CMG, CBE, QC, LLB (Adel), formerly First Parliamentary Counsel. The Commission also acknowledges the assisted provided by Mr V Robinson BA, LLB (ANU), Senior Assistant Parliamentary Counsel, Office of Parliamentary Counsel, Canberra.

Legal Staff (* denotes principal responsiblities)

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Mr DT Gunter, LLB (Syd) LLM (Lond)
(Seconded from the Department of Aboriginal Affairs) (January 1978 to September 1979)
* Mr Peter K Hennessy, LLB (WA) B Ec (ANU)
Principal Law Reform Officer (September 1980-completion)
Ms Fiona Howarth BA (ANU)
(Executive Development Scheme: seconded from Department of the Prime Minister and Cabinet) (March-June 1982)
* Mr BA Keon-Cohen, BA, LLM (Melb), Dip Ed
Senior Law Reform Officer (October 1977-October 1980)
Mr Christopher J Kirkbright, LLB, B Juris (NSW)
Law Reform Officer (June 1982-March 1983)
Mr PJ Peters, LLB (Nimegen) (Australian-European Awards Program) (February 1979 to February 1980)
Ms A Sowden, BA (ANU) (Seconded from the Department of Administrative Services) (June 1980-August 1981)
Mr William J Tearle, LLB (Syd)
Senior Law Reform Officer (February 1977-October 1977)

Principal Executive Officer

Mr Barry Hunt, BA (Syd)

Library

Ms Virginia Pursell, BA (NSW) Dip Lib (CCAE), Librarian Ms Susan Collins, Library Officer

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Mrs Jennifer Clark Miss Cheryl Nilson Miss Maria Raiti Mrs Anna Raso Miss Janelle Roberts Ms Amanda Seeley

Consultants to the Commission*

Dr Diane Bell, Research School of Social Sciences, Australian National University Emeritus Professor RM Berndt, Department of Anthropology, The University of Western Australia
Mr Jimmy Biendurry, Commissioner with Aboriginal Development Commission, for the member of National Aboriginal Conference (deceased, April 1985)
Mr Richard Chisholm, Faculty of Law, University of New South Wales
Mr Ken Colbung, Deputy Chairman, Australian Institute for Aboriginal Studies
Ms Pam Ditton, Lawyer, formerly Senior Solicitor, Central Australian Aboriginal Legal Aid Service
Mr Patrick Dodson, Central Land Council, Alice Springs
Mrs Molly Dyer, formerly of the Victorian Aboriginal Child Care Agency
The Hon Sir William Forster, Judge of the Federal Court of Australia, former Chief Justice, Supreme Court of the Northern Territory
Mr GP Galvin, former Chief Stipendiary Magistrate, Northern Territory
Assistant Commissioner A Grant, Northern Territory Police
Mrs Ruby Hammond, formerly Aboriginal Legal Rights Movement, South Australia
Mr N Hayes, former Field Officer, Central Australian Aboriginal Legal Aid Service, Northern Territory
Dr John Howard SM, Magistrate, Broome
Mr Barney King, Field Officer, Aboriginal Torres Strait Islander Legal Service (deceased 1982)
Ms Marcia Langton, Central Land Council, Alice Springs
Mr Yami Lester, Director, Institute for Aboriginal Studies, Alice Springs (resigned June 1984)
Mr Tom Lewis, former President, Beswick Town Council
Mr Andrew Ligertwood, Faculty of Law, University of Adelaide

Mr JPM Long, Commissioner for Community Relation, Canberra
Associate Professor Kenneth Maddock, Macquarie University
Associate Professor Bradford Morse, Faculty of Law, University of Ottawa
Ms B Naparula, Tennant Creek, Northern Territory
Mr J Nayinggul, Field Officer, Bureau of the Northern Territory Land Council, Darwin
Mr John Newfong, formerly National Aboriginal Conference
Dr SS Richardson, former Principal, Canberra College of Advanced Education
Mr Silas Roberts, Roper River (deceased 1983)
Mr G Robinson, Department of Law, Government of Victoria, formerly Executive and Policy Unit, Department of Law, Darwin
Miss D Ross, Past President Country Women's Association, Member Australian Press Council
The Justice KW Ryan, Queensland Supreme Court, formerly Garrick Professor of Law, University of Queensland
Dr PG Sack, Fellow, Institute of Advanced Legal Studies, Australian National University
Professor JG Starke QC, Canberra (resigned February 1985)
Dr P Sutton, Head, Division of Human Science, South Australian Museum, Adelaide
The Hon Justice John Toohey, Judge of the Federal Court of Australia, former Aboriginal Land Commissioner, Northern Territory.
Dr John von Sturmer, Department of Sociology, University of New South Wales
Mr Neil Wareham, Attorney-General's Department, Canberra
Mr J Wauchope, Regional Director, Department of Aboriginal Affairs, Brisbane
Dr Nancy Williams, Australian Institute of Aboriginal Studies
Rev Silas Wolmby, Uniting Church Minister, Aurukun
Mr HF Woltring, Attorney-General's Department, Canberra

1. Members of the Commission who retired before 1982 did not participate in the detailed working out of the Commission's recommendations

* The recommendations in the report, its statements of opinion and conclusions are necessarily those of the Members of the Law Reform Commission alone. They may not be shared by the consultants nor by the departments or organisations with which the consultants are associated.

Note: It is considered incorrect under Aboriginal Customary Laws to mention the names of the deceased, particularly the recently deceased. The Commission would however like to acknowledge the assistance of Aboriginal people in the preparation of this Report and hopes that this written acknowledgment will not cause offence.

# PART I:

# INTRODUCTION

# 1. The Reference and its Background

1. ***A Reconsideration of Basic Questions.*** On 9 February 1977, the then Federal Attorney-General, Mr RJ Ellicott QC, referred to the Commission the question:

> whether it would be desirable to apply either in whole or in part Aboriginal customary law to Aborigines, either generally or in particular areas or to those living in tribal conditions only.

The Terms of Reference went on to specify particular questions — namely, whether existing courts should be able to apply Aboriginal customary law to Aborigines, and whether Aboriginal communities should have the power to apply their customary laws and practices in the punishment and rehabilitation of Aborigines. These questions are not new. One hundred and forty years earlier, the British House of Commons Select Committee on Aborigines had stated that to require from Aborigines 'the observation of our laws would be absurd and to punish their non-observance of them by severe penalties would be palpably unjust'.[1] But these views were not reflected in the actual recommendations of the House of Commons Select Committee, nor in subsequent policy decisions.[2] Indeed, in the same year, the Colonial Office had directed the Governor of New South Wales to ensure that all Aborigines within his jurisdiction were to be treated as British subjects. Aborigines and non-Aborigines were to be governed by the one, introduced, law?[3]

> I would submit, therefore, that it is necessary from the moment the Aborigines of this Country are declared British Subjects they should, as far as possible, be taught that the British Laws are to supersede their own, so that any native, who is suffering under their own customs, may have the power of an appeal to those of Great Britain, or, to put this in its true light, that all authorized persons should in all instances be required to protect a native from the violence of his fellows, even though they be in the execution of their own laws.[4]

Thus no specific recognition was to be given to Aboriginal customary laws and practices. Australian law, civil and criminal, substantive and procedural, was to be applied to Aborigines to the exclusion of their own laws except in the rare cases where legislation made specific provision to the contrary.[5] This, and other governmental policies applied since 1788 at the national, State and local levels, have had a drastic impact on Aboriginal customs and culture. The resulting destruction of traditional Aboriginal life and values in many areas has made the task of recognition nearly 200 years later both difficult and very different from what it would have been had Aboriginal peoples been treated with, from the first, as distinct peoples with their own institutions of government and laws. A basic question, implicit in the Terms of Reference, is whether the impact of the introduced culture and legal system, and the associated drastic changes in Aboriginal society, still permit measures for the recognition of Aboriginal customary laws. If they do, what form should such recognition now take?

2. ***Developments Towards Recognition.*** This underlying question has already had to be considered by Australian governments and other bodies, in a variety of contexts. In recent years, a number of factors have tended towards a reappraisal of the position that no specific recognition should be given to Aboriginal customary rules and practices. These have included:

- the perception that denying all recognition to distinctive and long-established Aboriginal ways of belief and action may be unjust;

- the apparent failure of the legal system to deal effectively or appropriately with 'many Aboriginal disputes;

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1 British House of Commons, Select Committee on Aborigines (British Settlements), *Report*, House of Commons Parl Paper 425, 1837, 84.
2 See para 24, 58.
3 Glenelg to Bourke, 26 June 1837, *Historical Records of Australia* (hereafter HRA) set 1, vol 19, 47.
4 Report by Grey on the Method for Promoting the Civilization of Aborigines, Enclosure in correspondence, Lord John Russell to Sir George Gipps, 8 October 1840, *HRA* ser 1, vol 21, 35.
5 cf MC Kriewaldt, `The Application of the Criminal Law to the Aborigines of the Northern Territory of Australia' (1960) 5 *UWALRev* 1, 20.

- published statistics indicating disproportionately high levels of Aboriginal contact with the criminal justice system, which have been seen as symptoms of failure and discrimination within that system; and

- the movement away from policies of 'assimilation' and 'integration' towards policies based on 'self-management' or 'self-determination' at federal level and to varying degrees also at State and Territory level.

Changes in government policy towards Aborigines have increasingly led to the acceptance of the idea that Aborigines have (within certain limits) the 'right' to retain their racial identity and traditional lifestyle. This idea is made explicit in the Commission's Terms of Reference. To assist in the exercise of this right, steps have begun to be taken by Australian legislatures to recognise Aboriginal traditions and the Aboriginal heritage in a variety of ways. These have included:

- the conferral in some areas of land rights based in part on traditional affiliations with land, and recognising traditional rights to use or control land;[6]

- a degree of protection of Aboriginal sacred sites and other aspects of the Aboriginal heritage;[7]

- the protection of Aboriginal hunting, gathering and fishing rights;[8]

- the recognition of traditional Aboriginal marriages for certain purposes;[9]

- some provision for traditional distribution of property on death.[10]

Similarly the courts, confronted with the reality of Aboriginal adherence to different or conflicting rules or values, have attempted to take Aboriginal customary laws and traditions into account in ways such as:

- the exercise of sentencing discretions;[11]

- the application of defences based on provocation, duress and claim of right;[12]

- treating loss of traditional status and privileges as a compensable injury in road accident cases.[13]

It is true that both legislative and judicial instances of recognition tend to be particular rather than general, that they may. be confined to particular jurisdictions, and that they often depend upon the exercise of discretions rather than existing as of right. It has been a very piecemeal approach to the problems by the general legal system,[14] but nevertheless it constitutes an important aspect of the background to the Reference.

3. ***Pressures for Change.*** The Reference also reflects concerns about the need for a reassessment of relations between the dominant non-Aboriginal population and Australia's indigenous peoples. The forces behind this reassessment are important to an understanding of the Reference. The pressures for change gained impetus from the 1967 Referendum, which, by an overwhelming majority, empowered the Commonwealth Parliament to make special laws for Aborigines.[15] Subsequent developments have included:

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6 See para 77, 212.
7 See para 78.
8 See para 79.
9 See para 74, 80.
10 See para 76.
11 See para 71.
12 See para 72.
13 See para 73.
14 In this Report the terms `general legal system' and `general law' will be used to refer to the body of federal, State and Territory laws (including the common law) applying in Australia. The term 'Aboriginal customary laws' will be used to refer to the distinctive rules, traditions, customs and practices adhered to by groups of traditionally oriented Aborigines. See further para 99–100.
15 In the Referendum, 5183113 (89.34%) voted in favour of the proposal; 527007 (9.08%) against; 91464 (1.58%) votes were informal.

- the enactment of legislation to recognise Aboriginal land, or to allow claims to be made to land, in the Northern Territory, South Australia and elsewhere;[16]

- attempts to establish representative Aboriginal bodies (successively the National Aboriginal Consultative Committee, then the National Aboriginal Conference) to act as an advisory body to the Federal Government;[17]

- the establishment of the Aboriginal Development Commission (as successor to the Aboriginal Land Fund Commission) to assist in providing economic independence for Aborigines;

- demonstrated Aboriginal self-management in particular fields, with the emergence of Aboriginal Medical and Legal Services, Aboriginal Child Care Agencies, Aboriginal Hostels Ltd and Aboriginal schools (eg Yipirrinya, NT);

- proposals for a Makarrata or treaty of commitment, developed by the Aboriginal Treaty Committee.[18]

4. ***Catalysts for the Reference.*** These events, though significant, did not provide any specific impetus for an inquiry into the recognition of Aboriginal customary laws. Apparently a number of concerns led the then Federal Minister for Aboriginal Affairs, Mr Viner, to press the then Attorney-General to raise the matter with the Standing Committee of Attorneys-General in June 1976.[19] Matters emphasised as demonstrating at least the need for flexibility in the administration of the law, included:

- the Report of the Western Australian Royal Commission into events at Skull Creek, Laverton;[20]

- the decision of Justice Wells in *R v Sydney Williams*.[21] His Honour sentenced Williams, who had been convicted of the manslaughter of an Aboriginal woman, to a two-year suspended sentence on his agreeing to submit himself to the tribal elders to be ruled and governed by them for one year and to obey their lawful directions.[22] The decision was construed (or rather misconstrued) as a form of licensing of 'traditional punishment' and aroused considerable controversy;

- the inadequacy of statistics showing the extent Aborigines figure in the criminal justice system;[23]

- relations between Aboriginal Legal Services and State-supported legal aid schemes;[24]

- the question of implementing this Commission's recommendations in its Report on Criminal Investigation (1975) as they related specifically to Aborigines,[25] in particular the recommendations relating to interpreters, prisoner's friends during police interrogations and the introduction of a notification system when an Aboriginal person is arrested?[26]

Impetus for the Reference came also from concerns expressed by other public figures and commentators. In 1976, Senator Bonner introduced a private member's Bill, the Aborigines and Torres Strait Islanders

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16 See para 77.

17 The NAC, which replaced the NACC in 1978, was wound up in June 1985 pursuant to recommendations made by Dr HC Coombs in a Report on *The Role of the National Aboriginal Conference*, AGPS, Canberra, 1984. It has been announced that a replacement body, to be called the Aboriginal and Tomes Strait Islander Congress, will be established: see L O'Donoghue, *Proposal for an Aboriginal and Islander Consultative Organisation*, AGPS, Canberra, 1985.

18 See Senate Standing Committee on Constitutional and Legal Affairs, *Two Hundred Years On* ..., AGPS, Canberra, 1983.

***19*** The matter was again raised by the Commonwealth at meetings of the Standing Committee of Attorneys-General on 16–17 October 1976 and 24–25 March 1977, and by Hon I Medcalf, the then WA Attorney-General, in July 1977. This Reference was given to the ALRC in February 1977, and later discussions were inconclusive.

20 *Report of the Laverton Royal Commission 1975–76*, Perth, Government Printer, 1976.

21 (1976) 14 SASR 1. See para 493.

22 Formally of course, as Senator Durack on behalf of the then Attorney-General pointed out, in reply to a question from Senator Jessop, `the decision was made by a South Australian court under State law and is therefore in no way the responsibility of the Commonwealth': Commonwealth of Australia 69 *Parl Debs (Sen)* (7 September 1976) 452.

23 See para 394–9.

24 This later became the subject of two Reports, the first by the House of Representatives Standing Committee on Aboriginal Affairs: *Aboriginal Legal Aid*, AGPS, Canberra, 1980; the second by Mr JP Harkins, *Inquiry into Aboriginal Legal Aid*, 3 vols, AGPS, Canberra, 1985.

25 ALRC 2, *Criminal Investigation*, AGPS, Sydney, 1975, para 371–7.

26 Correspondence, Minister for Aboriginal Affairs, Mr Viner to the Attorney-General, Mr Ellicott QC (10 July 1976).

(Admissibility of Confessions) Bill, into the Senate.[27] The Bill was modelled on this Commission's recommendations in its Report on *Criminal Investigation* (1975), but also sought to incorporate the guidelines for the police interrogation of Aboriginal suspects enunciated by Justice Forster in *R v Anunga*.[28] The Bill did not proceed past second reading stage. In 1974, GJ Hawkins and RL Misner submitted three reports on the Criminal Justice System in the Northern Territory to the Minister for the Northern Territory. The Reports outlined the inadequacy of the criminal justice system in dealing with Aboriginal offenders and called for a full-scale review.[29] Similar concerns about the inappropriateness and ineffectiveness of existing mechanisms to deal with law and order in Aboriginal communities in the Northern Territory were shared by many Aborigines. In particular, the positive step taken by the Yirrkala Council was a key factor leading to the Reference.[30] The 'Yirrkala proposal' and the more general issues it raises, will be discussed later in this Report.[31] But it is helpful to set out here some of the background to that proposal. In 1975, the Council for Aboriginal Affairs[32] visited Arnhem Land. Aboriginal leaders from Ngukurr, Groote Eylandt and Yirrkala appealed to the Council to help them reduce the despair in the communities, brought about especially by drunkenness. The resulting recommendations of the Council for Aboriginal Affairs related primarily to Yirrkala where Aboriginal leaders sought power to appoint local Aboriginal orderlies having limited powers of arrest and detention unimpeded by outside police intervention, with charges being heard by a magistrate sitting with Aboriginal assessors or justices of the peace. They expressed:

> strongly-held objections to direct action by European police, to the incarceration of Aborigines at Nhulunbuy, to the hearing of Aboriginal cases in a European setting, and to the kind and scale of penalties imposed according to European standards.

The members of the Council for Aboriginal Affairs endorsed these proposals in principle, and suggested they be put into effect, at least at Yirrkala but also in other Aboriginal communities 'prepared and able to accept similar responsibilities'.[33]

5. ***The Reference and its Scope.*** In a sense the giving of the Reference was itself a recognition of the existence of Aboriginal customary laws and of the continuing adherence by Aborigines to their customary laws and traditions. On the other hand the Terms of Reference do not imply that the formal recognition of Aboriginal customary laws is the best response to the problems identified. The initial question in the Terms of Reference is whether Aboriginal customary laws should be recognised. In this respect, the Commission's task differs from that of the Aboriginal Land Rights Commission, which, as stated by Commissioner Woodward in his *First Report*, was not to recommend:

> whether Aborigines should be granted rights in land, since the government had already decided that they should. My task was simply to advise on how such rights should be granted.[34]

In addition to the basic question whether Aboriginal customary laws should be recognised, the Reference required the Commission to report upon two matters in particular:

(a) whether existing courts should be empowered to apply Aboriginal customary law and practices in the trial and punishment of Aborigines; and

(b) to what extent Aboriginal communities should have the power to apply their customary law and practices in the punishment and rehabilitation of Aborigines.

The first question is largely subsumed in the more general and basic question on which the Commission is asked to report — that is, the recognition of Aboriginal customary laws. Thus it is necessary to consider whether the general law (both substantive and procedural) should be modified to take account of Aboriginal

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27 Commonwealth of Australia 69 *Parl Debs (Sen)* (15 September 1976) 695–700.

28 (1976) 11 ALR 412.

29 G Hawkins & R Misner, *Restructuring the Criminal Justice System in the Northern Territory*, 3rd Report, unpublished, Canberra, 1974, 19. See also RL Misner, 'Administration of Criminal Justice on Aboriginal Settlements' (1974) 7 *Syd L Rev* 257. See para 683, 685.

30 Hon RI Viner MHR, Minister for Aboriginal Affairs, Commonwealth of Australia 112 *Parl Debs (H of R)* (24 November 1978) 3449.

31 See para 820–832.

32 Dr HC Coombs (Chairman), Emeritus Professor WEH Stanner and Mr BG Dexter, then Secretary, Department of Aboriginal Affairs.

33 Council for Aboriginal Affairs, *Report on Arnhem Land*, AGPS, Canberra, 1975, 17–20. See further para 678. See also Report of the House of Representatives Standing Committee on Aboriginal Affairs *Present Conditions of Yirrkala People*, AGPS, Canberra, 1974, 69–75; Interim Report from the House of Representatives Standing Committee on Aboriginal Affairs, *Alcohol Problems with Aboriginals, Northern Territory Aspects*, AGPS, Canberra, 1976, para 64–70, 98-9.

34 Aboriginal Land Rights Commission, *First Report* (Commissioner, Justice AE Woodward), Canberra, AGPS, 1973, para 4.

customary laws, for example, whether defences to criminal charges should embrace customary law elements, whether rules of evidence require modification, and whether it would be appropriate for Australian law to enforce Aboriginal customary laws (eg through the creation of offences for violation of those laws). Issues of recognition also arise in the field of 'personal law' — for example, in relation to Aboriginal traditions of marriage, child care and property distribution — and in a number of other areas. On the other hand, bearing in mind the background of the Yirrkala proposal and similar suggestions, the second specific question in the Terms of Reference might be thought to raise issues of a distinct kind. This question refers to the application of 'customary law and practices in the punishment and rehabilitation of Aborigines'. In fact, most of the developments in Australia in the area of local 'justice mechanisms' have involved increasing Aboriginal input in various ways in the application of the general law, rather than in the specific application of Aboriginal customary laws or practices. In addition, it is not clear whether this second question is restricted to the treatment of Aboriginal offenders against the general law or whether it extends to offences against Aboriginal customary laws, regardless of whether they constitute offences against the general law. As will be seen, there are difficulties with either assumption.[35] Some have assumed that the question intended to be asked was whether Aboriginal communities should have control over their own law and order problems. These questions are about autonomy — a matter going to the heart of relationships between Aborigines and non-Aborigines. And the solutions are likely to go well beyond legal reforms, to matters of an economic, social and political kind. To treat the recognition of Aboriginal customary laws as the channel for Aboriginal self-determination is to distort the issues.[36] These difficulties have not prevented the Commission from examining a wide range of matters. Indeed, they support the view that such a wide-ranging inquiry is necessary. But it is as necessary to keep in mind that some of the demands being voiced by Aboriginal people and their organisations are essentially demands for self-government or autonomy, at least in certain areas, and that such demands are not able to be satisfied simply through recognition of Aboriginal customary laws and traditions. But the issues dealt with in this Report are important in their own right, however much it is necessary to place them in their proper context as part, and only part, of a wider debate.

6. ***Matters to be taken into Account.*** A variety of principles were set out in the Terms of Reference as relevant to the questions asked. Those principles do not point in anyone direction, nor do they provide any clear rationale for recognition. They allow more than one response, including the conclusion that Aboriginal customary laws should not be recognised. The Commission was directed to have special regard in particular to 'the need to ensure that no person should be subject to any treatment, conduct or punishment which is cruel or inhumane'. In addition the Commission was required to consider:

- *The special interest of the Commonwealth in the welfare of the Aboriginal people of Australia.* In recent years the Commonwealth has recognised the special needs of Aboriginal people, and has provided special programs to respond to these demonstrated needs. An important stimulus has been the fact that since 1967 the Commonwealth has had legislative power to enact laws for Aboriginal people under s 51(26) of the Constitution.

- *The need to ensure every Aborigine enjoys basic human rights.* International human rights standards enunciated in treaties to which Australia is a party may sometimes appear to conflict with the 'right of Aborigines to retain their racial identity and traditional lifestyle'. The emphasis on individual human rights, as distinct from the collective authority implicit in tradition, poses difficulties in certain areas. However, while the impression may be given that the 'right to retain a traditional lifestyle' is to be exercised only on the conditions laid down by the majority culture and legal system, the matter is not so simple. Values such as humane treatment and equality are an important aspect of the case which Aborigines assert for fairer and more equal treatment within Australian society. In many respects human rights arguments support, rather than contradict, the claims for recognition of Aboriginal customary laws and traditions.[37]

- *The right of Aborigines, should they wish to do so. to retain their racial identity and traditional life style.* This principle has frequently been articulated as an important one underlying recognition of

35 See para 679, 688–91.
36 See ch 39 for further discussion of these underlying issues.
37 These issues are discussed in detail in Chapter 10.

Aboriginal customary law.[38] Adopting this objective has wider implications. As Professor Stanner put it:

> Any such policy must become an empty platitude unless Aboriginal communities are given an extensive right to preserve and develop their system of law. No culture is selfsustaining: the 'custom' or 'way of life' depends on the observance of jural rules and moral evaluations under sanctions. In undertaking to let the Aborigines who choose to do so 'to retain their racial identity and traditional life style' the Government has undertaken to meet the necessary conditions of their doing so.[39]

Support for traditional authority is necessary if Aborigines are to be able to retain their traditional life style. The erosion of traditional authority of Aboriginal leaders and the resultant weakening of Aboriginal customary laws have often been cited as an argument for the recognition of customary laws,[40] although they have also been referred to as a justification for continued non-recognition, on the ground that it is 'too late' for anything else.[41]

- *Difficulties in applying the existing criminal justice system to Aborigines.* As is widely acknowledged, the criminal justice system has not been particularly effective in dealing with law and order problems in Aboriginal communities.[42] The high rates of Aboriginal imprisonment, and the inappropriateness of imprisonment as a form of 'treatment' or 'rehabilitation' of Aboriginal offenders, are symptoms of underlying difficulties, which have long concerned both Aborigines and non-Aborigines. The Reference was to a large extent impelled by concerns, such as those of the Yirrkala people, over the inadequacies of the criminal justice system.[43]

- *The need to ensure equitable, humane and fair treatment under the criminal justice system to all members of the Australian community.* The failure of the general legal system to accommodate Aboriginal customary laws can produce injustice in particular cases. As Elizabeth Eggleston pointed out:

> It seems unjust to an Aboriginal defendant who is ignorant of white law and acts in accordance with tribal law to subject him to criminal punishment in the ordinary courts. It seems equally unjust to convict an Aborigine who acts under the compulsion of tribal law, even though he knows his action is contrary to white law. He may have no real choice but to act in accordance with tribal law.[44]

But the Reference is not limited to crimes involving Aborigines only. The Commission is required to have regard to the interests of all members of the Australian community.

7. ***The Reference and Changing Patterns of Aboriginal/Non-Aboriginal Relations.*** The Reference was given to the Commission at a time of significant redefinition of the relations between Aborigines and non-Aborigines, a process which is continuing. Given the rapid and far-reaching changes occurring in Aboriginal communities, the need for reassessment of laws and administrative practices affecting the Aborigines is clear. For the same reason, any changes in these laws and practices will need to be reassessed in due course. 'In this sense the recommendations in this Report are provisional. They are provisional for another reason, too. Although the Commission has held discussions on the Reference and on its recommendations throughout Australia, especially with Aboriginal people and their organisations, the Commission is not an Aboriginal body and does not speak for Aboriginal people. The recommendations in this Report will have to be considered and discussed between the Government and Aboriginal people affected: recommendations to this effect are made later in this Report. These considerations have required the Commission to adopt certain basic guidelines:

- flexibility to cope with change, and caution that one does not inadvertently limit the scope for change;

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38 See para 103, 107, 127.
39 Professor WEH Scanner, *Submission 6* (20 February 1977) 7.
40 id, 3; N Williams, *Submission 41* (15 October 1977) 24; Commission of Inquiry into Poverty, *Law & Poverty in Australia. Second Main Report* (Commissioner: R Sackville), AGPS, Canberra, 1975, 28. See also para 104–5.
41 cf para 119, 122–4.
42 W Clifford, 'An Approach to Aboriginal Criminology' (1982) 15 ANZJ Crim 3, 8-9; EM Eggleston, *Fear, Favour or Affection. Aborigines and the Criminal Law in Victoria, South Australia and Western Australia*, ANU Press, Canberra, 1976, 170–2, 178–80; Misner, 260, 283; House of Representatives Standing Committee on Aboriginal Affairs, A*boriginal Legal Aid*, 1980, 7–24, 36–61.
43 See para 4.
44 Eggleston, 299. See further para 110.

- sensitivity in dealing with matters to some extent outside the Commission's experience;

- adherence to the principle that Aboriginal people should be involved, as far as possible, in decisions that affect them, and in the implementation of these decisions;

- a policy of minimum intervention in the way Aborigines choose to live their lives.

The Commission believes that its recommendations for the recognition of Aboriginal customary laws — as well as the way they have been arrived at — reflect these principles. But it is unrealistic to think that the whole range of problems that Aboriginal people experience with the legal system can be solved in any single program for reform. The Commission's proposals are presented as its assessment of what is appropriate, within the Terms of Reference, at the present time. In Part VIII of this Report, the Commission will discuss in more detail the implementation of its proposals, and the ways in which new or changing needs may be dealt with in the future.

# 2. The Commission's Work on the Reference

## Special Needs for Consultation and Discussion

8.***The Scope of the Problem.*** In its discussions on the recognition of Aboriginal customary laws, the Commission found expectations that something should be done, but often little appreciation of the complexity of the issues. In assessing what needs to be done, the Commission has sought to take into account the wide variety of factors relevant to the problem, but especially the views of Aboriginal people. In doing so, the Commission had to engage in interdisciplinary and field research and investigations in ways which were new to it, and not necessarily suited to a body composed exclusively of lawyers. The Commission has carried out extensive discussions with anthropologists, sociologists, historians, judges, lawyers, magistrates, and the police; with Aboriginal communities, many individual Aborigines, and organisations such as Aboriginal legal services, Aboriginal child care agencies and land councils, and with government departments both at the State and federal level. The Commission did not have the resources to undertake definitive or exhaustive consultations. But its program of seeking information has been extensive. It has been conducted over the 9 years of work on this Reference and has taken many forms. Three discussion papers and numerous field trip reports and research papers were produced and widely distributed. Research or field trips were made to most parts of Australia, especially to remote areas where the more traditionally oriented Aborigines live. Public hearings were held around Australia. A number of overseas trips were undertaken and a great deal of information about overseas developments received. A large number of submissions were made by many individuals and organisations; these submissions vary from short letters to detailed papers. A summary of the Commission's program is set out in the following paragraphs.

## The Commission's Program

9. ***Field Trips.*** In the initial stages of the Reference field trips were undertaken principally to gain as much information as possible. Later trips also had this function, but in addition they allowed tentative proposals to be put to people and organisations for consideration and discussion. Field trips have covered the top end of the Northern Territory, Alice Springs and the Central and Western Deserts (including the North West Reserve of South Australia, now Pitjantjatjara land), Cape York Peninsula, the Torres Strait Islands, the Kimberleys, the Eastern Goldfields of Western Australia, the capital cities, and major community centres with large Aboriginal populations. These field trips formed the basis for published Field Trip Reports as well as other less formal reports prepared by the Commission.[45]

10. ***Discussion Paper 17 (1980).*** In November 1980, the Commission issued its Discussion Paper 17, *Aboriginal Customary Law: Recognition?* This was circulated to several thousand interested organisations and individuals. Copies were sent to all Aboriginal communities in Australia, to councils and advisors in those communities and to Government officials. The Commission was anxious to communicate its proposals to both Aboriginal men and women in the more remote communities. It therefore had prepared a summary of the Paper in a simple English version.[46] Separate taped cassettes spoken in a male and female voice were made. Copies of these tapes were sent to Aboriginal communities, to regional officers of the Department of Aboriginal Affairs and to the Aboriginal Legal Services in remote areas. The simple English version was translated into three Aboriginal languages, Pitjantjatjara, Warlpiri and Gupapuyngu, and sent to communities where those languages are spoken.

11. ***Public Hearings.*** The Commission conducted public hearings to enable people to comments on its work and on the Reference generally. In particular between March and May 1981 the Commission conducted the most extensive series of public hearings in its history. Over nine week s, hearings were held at 32 venues in all States of Australia and the two mainland Territories. As well as the capital cities, the Commission held hearings in country towns and cities and in many Aboriginal communities. These hearings were supplemented by others in Arnhem Land, Alice Springs and Kalgoorlie during later field trips to those areas.[47] The hearings produced 3029 pages of transcript and were unique for a number of reasons. They provided an opportunity for Aboriginal people, in many cases for the first time, to express their views on the

45 See Appendix 13.1 for a summary of field trips.
46 This was prepared by Stephen Muecke.
47 For the program of hearings, see Appendix B.3.

general legal systems, and on the continued existence and importance to them of their customary laws. Many of the hearings took the form of meetings where few or no prepared submissions were presented. The Commission's tentative proposals were presented to the meetings and comments sought. Many meetings were held with the aid of interpreters. On a number of occasions separate meetings were held for men and women. Sometimes this was necessary because some aspects of customary laws could not be discussed with both men and women present. It was also done to ascertain the particular views of Aboriginal women. Discussion ranged widely during the public hearings. Most aspects of the Commission's tentative proposals ca me under scrutiny. In addition issues were raised which had not been dealt with, including matters which fell entirely outside the Terms of Reference. Although no clear cut solutions emerged, there was strong support for appropriate forms of recognition of Aboriginal customary laws, and a desire to see something effective done.

12. ***Later Research and Discussion Papers.*** In January 1982 it was decided to publish a series of research papers on various aspects of the Reference. Fifteen such papers were produced between March 1982 and June 1984;[48] these were distributed to interested persons and individuals and provoked a good deal of comment and response. Discussion Paper 18, *Aboriginal Customary Law — Marriage, Children and the Distribution of Property*, was produced in August 1982 as a summary of the tentative proposals in the first five research papers. The Institute for Aboriginal Development in Alice Springs and the Pitjantjatjara Council organised the translation of Discussion Paper 18 into Eastern Arrente, Warlpiri and Pitjantjatjara; these translations were recorded on cassette tapes and distributed throughout Central Australia. Discussion Paper 18 formed the focus for discussions during visits to central Australia in October 1982 and the Eastern Goldfields district of Western Australia in May 1983. In March 1984 the Commission produced Discussion Paper 20, *Aboriginal Customary Law — The Criminal Law, Evidence and Procedure*, which summarised its tentative conclusions in the Research Papers on these topics. Both Discussion Papers were widely distributed.

13. ***Seminars.*** In the early stages of the Reference, a number of seminars were organised to consider the scope and methodology of the Reference. The Commission, in conjunction with the Australian Institute of Aboriginal Studies, held a Working Seminar on the Reference in May 1983 in Sydney, opened by the Minister for Aboriginal Affairs, the Hon C Holding MHR. Papers were presented on key issues in all the major areas covered by the Reference. A report of the working seminar was prepared and distributed.[49] In addition Commissioners and Commission officers involved in the Reference attended numerous conferences and seminars and presented papers on the Reference.[50]

14. ***Honorary Consultants.*** In accordance with its usual practice, the Commission nominated for appointment by the Attorney-General a large group of honorary consultants, including knowledgeable Aborigines and other experts in the relevant disciplines, to provide advice on the legal, social, administrative and anthropological issues. Meetings with consultants, to which other interested persons were invited, were held in all capital cities and in Alice Springs. These proved invaluable in provoking discussion and opinions from participants.[51] However, the Commission's normal methods of consultation were much less appropriate for seeking information from more traditional Aborigines, especially those from remote communities. Hence the need for meetings and other forms of discussions with Aboriginal communities. This will be equally important in the consideration and implementation of the Commission's proposals.

15. ***Other Forms of Discussion and Consultation.*** In addition to the activities described in the preceding paragraphs, the Commission sought to maintain close contact with organisations with special responsibilities or interests in the area covered by the Reference, both in Australia and overseas. Most important among these were Aboriginal organisations and the many Federal, State and Territory governmental agencies

48 See Appendix B.4 for a list of Papers.

49 See Australian Law Reform Commission-Australian Institute of Aboriginal Studies, *Report of a Working Seminar on the Aboriginal Customary Law Reference*, Sydney, May 1983.

50 See MD Kirby, 'TGH Strehlow and Aboriginal Customary Law' (1980) 7 *Adel L Rev* 172; MD Kirby, 'should we Recognise Aboriginal Tribal Laws?' in *Reform the Law*, Oxford University Press, Melbourne, 1983, 121; BM Debelle, 'Aborigines, the Law and the Future' (1981) 57 (11) *CAB* 4; BM Debelle, 'Aboriginal Customary Law: Progress Report' in G Nettheim (ed) *Human Rights for Aboriginal People in the 1980s*, Legal Books, Sydney, 1983, 63; JR Crawford, 'The Australian Law Reform Commission's Reference on the Recognition of Aboriginal Customary Law' (1984) 17 *Verfassung and Recht in Uberset* 133; PK Hennessy, 'Aboriginal Customary Law and the Australian Criminal Law: An Unresolved Conflict', in B Swanton (ed) *Aborigines and Criminal Justice*, Australian Institute of Criminology, Canberra, 1984, 336.

51 See section on Participants for a list of honorary consultants on the Reference.

involved. Contacts were made with law reform agencies and other bodies in Papua New Guinea, the United States, the United Kingdom and Canada. Much helpful information was obtained from indigenous peoples' organisations and government officers overseas, especially in Canada and the United States. There were also many more formal comments on the Commission's work, in the form of over 500 written submissions,[52] and of published comments, reviews and notices.[53] The Commission expresses its gratitude to the very many people and organisations who contributed in these different ways.

## The Views of Aboriginal People

16. ***The Need for Aboriginal Involvement.*** In Discussion Paper 17 the Commission stated

> Questions in this paper affect all Aborigines. They must be consulted and their views considered. The Commission will not make its final recommendations until it has consulted them and other Australians.[54]

It is obvious that any recommendations for the recognition of Aboriginal customary laws require careful consultation with Aboriginal people who would be affected by that recognition. But consultation is not enough. The Commission believes that proposals for recognition of Aboriginal customary laws, which are special to and would specially affect Aboriginal people, require their general acceptance. The Commission has been keenly aware of the remarks of Justice Woodward in the two reports of the Aboriginal Land Rights Commission:

> I am convinced that an imposed solution to the problem of recognising traditional Aboriginal land rights is unlikely to be a good or lasting solution. Although a result reached, so far as possible, by process of consultation and agreement will undoubtedly take longer to achieve, it is far more likely to be generally acceptable and to have a permanent effect.[55]

The same is true of the recognition of Aboriginal customary laws generally.[56]

17. ***The Extent of Aboriginal Involvement.*** In the ways already indicated, the Commission has sought the views of Aboriginal people and organisations throughout Australia. In this process a considerable onus has been cast on Aboriginal organisations (eg Aboriginal Land Councils, Child Care Agencies and Legal Services) and individuals to articulate Aboriginal needs and demands. Although the Commission made mistakes in consultation (for example in failing to implement at an earlier stage better systems of seeking the views of Aboriginal women), steps were taken, within the limits of the Commission's resources, to correct these deficiencies when they were pointed out. In a number of cases return trips were made to Aboriginal communities where it was indicated to the Commission that further consultation was desired.[57] In the case of Groote Eylandt, for example, Commission staff returned in October 1985 to discuss issues raised in the Report of the Groote Eylandt Aboriginal Task Force.[58]

18. ***Discussions with Aboriginal Women.*** One important need which became clear as the Commission's work progressed was the need to implement better systems of consultation with Aboriginal women. As was pointed out in the Report of the Field Trip to the Pitjantjatjara lands, there was a great reluctance by the men

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52 A list of written submissions to the Commission is set out as Appendix B.5.

53 See eg K Maddock, 'Aboriginal Customary Law', in P Hanks & B Keon-Cohen (ed) *Aborigines and the Law*, George Allen & Unwin, Sydney, 1984, 212; TGH Strehlow, *Aboriginal Customary Law*, Strehlow Research Foundation, Pamphlet No 5, Adelaide, 1978; D Bell, 'Aboriginal Women and the Recognition of Customary Law in Australia' in Commission on Folk Law and Legal Pluralism, *Papers on the Symposium on Folk Law and Legal Pluralism, XIth International Congress of Anthropological and Ethnological Sciences, Vancouver, August 19-13 1983, Ottawa, 1983*, vol 1, 491; D Bell & P Ditton, Law: *The Old and the New. Aboriginal Women in Central Australia Speak Out*, 2nd edn, Aboriginal History, Canberra, 1984; D Vachon, 'Customary Law: The ALRC Discussion Paper' (1981) 6 *LSB* 229; PR Wilson, *Black Death White Hands*, George Allen & Unwin, Sydney, 1982, 70-2, 106-10; Panel Discussion (CJ Kirkbright, P Ditton, D Weisbrot), 'Customary Law', in G Nettheim (ed) *Human Rights for Aboriginal People in the 1980s*, Legal Books, Sydney, 1983, 84; N Rees, 'What do we Expect?' (1983) 8 *ALB* 10.

54 ALRC DP 17, 7.

55 Aboriginal Land Rights Commission, *First Report*, AGPS, Canberra, 1973, para 8; *Second Report*, AGPS, Canberra, 1974, para 8.

56 See ch 39 for further discussion.

57 See ALRC ACL Report Report 7, *Central Australia* (October 1982) 1-2; ALRC ACL Field Report 8, *Eastern Goldfields*, Western Australia (May 1983) 1.

58 The Groote Eylandt Aboriginal Task Force, *Report*, Angurugu, 1985, para 3.4 recommended that the ALRC 'undertake an investigation into the incorporation of Groote Eylandt Customary Laws within the judicial system presently operating in Groote Eylandt in close consultation with the leaders of the Aboriginal Communities'. For discussion see para 459-63, 683.

to involve the women in discussion, and by women to contribute to such discussion in large mixed groups.[59] Consequently, women's views were not always adequately presented to the Commission.

> 'Womens business' was rarely, if ever taken into account, very often for the simple reason that it was not the province of Aboriginal men. 'It is not their business', Pincher Numiari of Wattle Creek, NT in explaining to Southern Koorie people how Aborigines live in the north, said of women, 'Our women have their own secret business too, called jarata. I don't know much about it, because I am a man. The Mudbura, Walbiri, Pitjantjatjara, all have this business too.' He then went on to discuss his views as a man.[60]

The Commission's early response to this need took the form of separate women's meetings during the initial round of Public Hearings, and of tapes prepared on different occasions using a female voice both in English and some Aboriginal languages. The Commission was also assisted by a substantial report, prepared by Dr Diane Bell and Ms Pam Ditton, setting out the views of Aboriginal women living in Central Australia on the issues covered by the Reference. The report,[61] was requested by the Central Australian Aboriginal Legal Aid Service, and involved discussions with many Alyawarra, Warlpiri, and Warumungu women, together with women from Murray Downs, Willowra, Anningie, Tennant Creek, Ngurrantiji, and from the town camps in Alice Springs. Subsequently the Commission relied heavily on advice given by Dr Bell and Ms Ditton as consultants to the Commission, which ensured that the Commission was much better equipped to listen to Aboriginal women on its return visit to Central Australia in October 1982.[62] Women were also major participants in the meetings and hearings in south- western Australia and in parts of Queensland. There was also discussion with Aboriginal organisations such as the Federation of Aboriginal Women and the Aboriginal Child Care Agencies. The views of Aboriginal women in all parts of Australia are of great importance in ensuring that balanced and representative views are presented. As Bell and Ditton comment, this has not always been the case:

> Women made it abundantly clear that they did have a role and that they should be consulted on community affairs. How this is to be effected is more difficult to decide. Women had some suggestions as to the modifications required in the legal institutions with which they are in daily contact, others were apparent to us as we explored the literature on law reform and reconciled this with our understanding of women's roles. Immediately obvious is the lack of attention paid to women in the consultative process, the paucity of data on this topic of women's roles, and from what little exists and the comments we collected in response to our questions, the critical need to allow that women have a role in the maintenance of the system.[63]

19. ***The Adequacy of Consultation.*** There are difficulties, for an inquiry such as this, in ensuring proper consultation with Aboriginal people. Expressions of opinion from Aboriginal Councils, for example, may or may not represent the views of the local community. Many of the proposals are necessarily of a technical kind, on which non-specialists would find it difficult to express clear or concluded views. Many of the more articulate Aboriginal representatives come from urban or semi-urban areas, and their views may not be representative of rural or more traditionally oriented people.[64] Assessing the adequacy of the Commission's discussions with Aboriginal people requires first a statement of its purpose. The Commission has already drawn attention to its rather specialised role,[65] which is not to speak for Aboriginal people, but to articulate what it believes to be helpful and workable proposals for the recognition of Aboriginal customary laws at the present time, against a background of the general arguments for and against such recognition. What action should be taken on those recommendations is a matter for the relevant Governments and Parliaments, in consultation with Aboriginal people. For the Commission's purposes, discussion with Aboriginal people was relevant to allow the Commission:

- to suggest difficulties, needs and problems to be addressed, and ways in which this might be done; and
- to assess in a provisional way the general acceptability or otherwise of proposals.

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59 ALRC, ACL Field Report 1, *The Pitjantjatjara* (May 1978) 26, 29.
60 Bell & Dillon (1984) para 1.17.
61 ibid.
62 See ACL Field Report 7, 6, 9-10, 13-14, 15, 17-20, 24-5, 29-30, 35-7, 41-2, and Dr Bell's comments, id, 43-8. See also ALRC-AIAS, *Working Seminar* (1983) 21-35 for further discussion of the issues.
63 Bell & Ditton (1984) para 2.16.
64 Similar comments were made by the Senate Standing Committee on Constitutional and Legal Affairs, which was concerned at the lack of Aboriginal awareness or understanding of the 'Makarrata' or treaty proposals: Senate Standing Committee on Constitutional and Legal Affairs, *Two Hundred Years Later ... Report on the Feasibility of a Compact or 'Makarrata' between the Commonwealth and Aboriginal People*, AGPS, Canberra, 1983, 119.
65 See para 8.

20. ***The Commission's Assessment.*** On this basis, and despite the difficulties already referred to, the Commission believes that its program of seeking information and of discussion has been sufficient to enable it to make the recommendations that are made in this Report. There was widespread agreement among Aboriginal people on certain general matters, such as the need for the 'two laws' to work together. A number of Aboriginal communities expressed a keen desire for the general legal system to support those with traditional authority in their endeavours to deal with offenders in their own communities. For some, at least, the general Australian law was considered too weak. It did little, in particular, to solve alcohol-related conflicts. But Aboriginal people also wanted to ensure that they maintained the option to 'send their people through the white court system'.[66] Thus there was support for the general idea of recognition of Aboriginal customary laws alongside the general law. There were, of course, disagreements and differences of emphasis when it came to the detailed implementation of these objectives. These differences of opinion are another indication of the complexity of the issues. The difficulties inherent in understanding Aboriginal laws and traditions and in formulating an acceptable legal response to them presented real obstacles to consultation. As the then Deputy National Chairman of the National Aboriginal Conference commented:

> These are considerations for Aboriginals to anguish over and to decide. They cannot be rushed to suit the timetables of government Commissions. You cannot condense thousands of years of wisdom into a take it or leave it package.[67]

An additional feature was the way in which, as debate proceeded and the Commission's tentative proposals evolved, earlier views and perceptions of the issues tended to change. As one observer noted:

> This is a particularly difficult time for the Commission to be undertaking this reference. In several senses, it is aiming at a 'moving target'. Historical and anthropological views regarding the aboriginal/white interface are changing and developing rapidly. To a large degree, this is the result of recognition that there are real problems to be solved ...[68]

On the other hand, as attention was focused on specific measures or proposals in particular areas a measure of agreement emerged, both as to the Commission's basic approach and its particular recommendations. Taking into account all these factors, the Commission makes the recommendations set out in Chapter 37 in the belief that these recommendations are desirable on their merits at the present time, and that they are likely to gain the general support of the Aboriginal people affected by them.[69] However, for the reasons that have been given, this judgment needs to be confirmed by the Government though direct consultation with appropriate Aboriginal organisations and people. Recommendations to this effect, and discussion of other related issues of implementation of this Report, are set out in Chapter 39.

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66 G Blitner Northern Land Council, *Submission 92* (25 August 1978); RD Marika, *Submission 111* (14 December 1978); W Lanhupuy, *Submission 197* (17 February 1981); Peppimenarti Community Council, *Submission 150* (6 April 1981); D Hope, *Submission 264* (30 April 1981); Mossman Gorge Community, *Submission 272* (6 May 1981); N Tabagee, Yungngora Community, *Submission 298* (3 June 1981); and see para 195.

67 R Riley, 'Aboriginal Law and its Importance for Aboriginal People' in HW Finkler (comp) *Papers of the Symposium on Folk Law and Legal Pluralism, XIth International Congress of Anthropological and Ethnological Sciences*, Vancouver, Canada, August 19-23, 1983. Ontario, 1983, 1010, 1014.

68 JV Kimpton, *Submission 391* (7 November 1983) 2.

69 See further para 106, 194, 217.

# 3. Aboriginal Societies: The Experience of Contact

21. ***The Relevance of History.*** The questions raised by the Commission's Terms of Reference have been in one form or another the subject of debate and discussion since the earliest days of contact between Europeans and Aborigines. Government policies concerning the recognition or repression of Aboriginal culture and traditional life, and the place of Aboriginal people in the new society, have fluctuated, influenced by changing circumstances and public attitudes, by Aboriginal actions and reactions and by other factors. Indeed, so far as the recognition of Aboriginal culture and traditions is concerned it is possible to discern something of a cyclical process, with periods of tolerance, 'protection' or even qualified approval interspersed with periods of rejection when attempts were made to eradicate traditional ways and to 'assimilate' Aborigines, in the sense of absorbing them and denying them any separate identity. A similar cyclical pattern has long been identified in United States Indian policy.[70] The identification of such patterns or trends is of little help in leading to conclusions on matters of law or policy. But it does demonstrate the need for an historical understanding, for awareness of earlier debates and proposals. This Chapter sets out a brief account of the impact of European settlement on Aboriginal peoples, and of the development of 'Aboriginal policy'. Chapter 4 is an account of the contact between Aboriginal customary laws and traditions and the introduced, now Australian, legal system. Against this background Chapters 5 and 6 analyse the extent to which, and the ways in which, Aboriginal customary laws may now be recognised by the Australian legal system. Chapter 5 deals with the arguments that the common law itself is capable of incorporating or recognising Aboriginal customary laws, in particular through a reassessment of the view that Australia was a 'settled colony'. Chapter 6 deals with the ways in which courts and legislatures do now recognise Aboriginal customary laws in particular contexts. This survey forms the necessary historical and empirical basis for the analysis, in Part II of this Report, of the issues of principle and definition underlying proposals for the recognition of Aboriginal customary laws.

## Changing Policies Towards Aboriginal People

22. ***The Initial Impact.*** Aboriginal people have occupied' Australia for at least 40 000 years.[71] However, very little is known about the history of human occupation during this enormous length of time, even in outline, and practically nothing of the social, political and cultural changes that must have occurred.[72] Recorded Aboriginal history is a history of contact, with Macassan or Indonesian traders or fishermen,[73] with European, especially British, navigators and with British colonists and settlers. At the time of the arrival of the First Fleet in 1788, there was, of course, no single Aboriginal nation. Australia (including Tasmania) contained a large number of groups occupying more or less discrete areas and with considerable diversity in terms of language and culture.[74] Conflicts between settlers and Aborigines, and the devastation caused by introduced diseases and alcohol, reduced the Aboriginal population during the first hundred years of settlement from an estimated 300 000 to 60 000.[75] Most of those who survived had their traditional ways of life destroyed or at least suppressed. In the confined area of Tasmania the effects of white settlement were devastating, bringing Tasmanian Aborigines to the verge of extinction.[76] It has been conservatively estimated that at least 10 000 Aborigines died violently in Queensland between 1824 and 1908.[77]

23. ***Early Years of British Settlement.*** Governor Phillip's instructions on first settlement in 1788 had been to maintain peaceful and friendly relations with the native inhabitants. Aborigines were defined to be British subjects and entitled to the protection of British law.[78] The reality was to be very different.[79] As the frontiers

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70 See eg Task Force Three: Federal Administration and Structure of Indian Affairs, *Final Report to the American Indian Policy Review Commission*, Washington, US Government Printing Office, 1976, 6-7.

71 DJ Mulvaney, *The Prehistory of Australia*, rev edn. Penguin, Ringwood, 1975, 52.

72 For a detailed study of the archaeological evidence see J Flood, *Archaeology of the Dreamtime*, Collins, Sydney, 1983. cf also G Blarney, *Triumph of the Nomads*, rev edn, Sun Books, Melbourne, 1983.

73 See RM Berndt 8c CH Berndt, *Arnhem Land. Its History and its People*, Cheshire, Melbourne, 1954, 14-25.

74 For studies of the different languages and cultures see EM Cuff, *The Australian Race*, John Ferres, Government Printer, Melbourne, 1887, vols I-IV; RMW Dixon, *The Languages of Australia*, Cambridge University Press, 1980, and cf P Sutton, 'How Many Languages are There?' (1975) 2(1) *Aboriginal News*.

75 Department of Aboriginal Affairs, *Aboriginals in Australia Today*, AGPS, Canberra, 1981, 4. And see NG Butlin, *Our Original Aggression. Aboriginal Populations of Southeastern Australia 1788-1850*, George Allen & Unwin, Sydney, 1983, 119-48.

76 See L Ryan, *The Aboriginal Tasmanians*, University of Queensland Press, St Lucia, 1981; VR Ellis, *Trucanini*, Australian Institute of Aboriginal Studies, Canberra, 1981.

77 R Evans, K Sanders & K Cronin, *Exclusion, Exploitation and Extermination: Race Relations in Colonial Queensland*, ANZ Book Co, Sydney, 1973, 128.

78 See para 39-40.

of settlement expanded more and more Aboriginal land was taken and violence often erupted. The Aborigines, having no recognised title to the land but being regarded as British subjects for the purposes of the law, were likely to be treated violently if they resisted encroachments upon their land. Reece states that:

> Racial conflicts arose primarily from the rapid expropriation of the Aborigines' land — a process which had been going on steadily since first settlement. In this the white settlers had been assisted by soldiers and police and there was little reason for anyone to think that killing Aborigines was a crime, especially when it was done to protect sheep and cattle, and settlers' lives.[80]

The economic and political realities were masked by a view of Aborigines as primitive, if not sub-human, a view which revealed fundamental ignorance of Aboriginal cultures. Europeans were, Stanner has said:

> ... unable to see, let alone credit, the facts that have convinced modern anthropologists that the Aborigines are a deeply religious people. That blindness ... profoundly affected European conduct toward the Aborigines. It reinforced two opposed views — that they were a survival into modern times of a protoid form of humanity incapable of civilization, and that they were decadents from a once-higher life and culture. It fed the psychological disposition to hate and despise those whom the powerful have injured ... It allowed European moral standards to atrophy by tacitly exempting from canons of right, law, and justice acts of dispossession, neglect, and violence at Aboriginal expense.[81]

24. ***Colonial Attitudes Harden.*** Thus with the expansion of settlement and continuing clashes on the frontiers, attitudes hardened. Throughout the first half of the century, and beyond 1850, reprisals and punitive expeditions were common, and 'martial law' was sometimes declared, for example in Tasmania (1828-32)[82] and in the Bathurst area on the mainland in 1824. 'A number of massacres occurred, the best documented being the Myall Creek Massacre in 1838 in northern New South Wales (resulting in the conviction and execution of seven of the eleven convicts and assigned servants charged with the murders).[83] Some liberal minded Governors attempted to improve the plight of the Aborigines. For example, Governor Bourke, and to a lesser extent Governor Gipps, sought to inhibit pastoral expansion by refusing the protection of the law to whites either beyond the boundaries of squatter's licences in the case of Bourke,[84] or in certain interdicted areas in the case of Gipps.[85] But given the difficulties of law enforcement in the interior, there was little chance of controlling depredations; indeed many punitive expeditions throughout the century were officially or unofficially sanctioned. Depredations and punitive expeditions continued well into this century, especially in northern regions.[86] Aboriginal responses varied with time, place and circumstance, and included reprisals which sometimes led to trials and convictions for acts which Aborigines themselves regarded as fully justified.[87] But trials were rare, compared with the large number of incidents on both sides.

25. ***Protection.*** The reduction in the Aboriginal population, and a growing consciousness of the general mistreatment of Aboriginal people, combined with the need for more effective regulation of labour in pastoral areas to bring about changes in policy. The House of Commo ns Select Committee on Aborigines, which had reported in 1837, had recommended that there should be missionaries for Aboriginal people, protectors for their defence and special codes of law to protect them. Protectors were appointed, mostly by executive order, in New South Wales, South Australia and Western Australia at about this time; they were supposed to protect Aborigines from abuses and to provide the remnant populations around towns with some rations, blankets and medicine.[88] With limited formal powers they had even more limited success, and by the mid-nineteenth century the office of protector had for the most part either terminated or been vested *ex*

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79 See generally D Collins, *An Account of the English Colony in NSW,* T Cadell Jnr & W Davies, London, 1789, vol 1; and for a graphic summary, WEH Stanner, 'The History of Indifference thus Begins' (1963) in *White Man Got No Dreaming,* ANU Press, Canberra, 1979, 165.

80 RHW Reece, *Aborigines and Colonists: Aborigines and Colonial Society in New South Wales in the 1830s and 1840s*, Sydney UP, Sydney, 1974, 3.

81 WEH Stanner, 'Religion, Totemism and Symbolism' (1962), in Stanner (1979) 106, 108. cf CD Rowley, *The Destruction of Aboriginal Society,* repr, Penguin, Ringwood 1978, 7.

82 See Ryan, ch 5 and 6.

83 See Reece ch 4; Rowley (1978) 35-9. For an account of early Queensland and South Australian massacres see R Logan Jack, *North West Australia,* Simpkin Marshall Hamilton, London, 1921; K Hassell, *The Relations between the Settlers and Aborigines in South Australia* 1836-1860. Libraries Board of South Australia, Adelaide, 1966.

84 *Sydney Gazette* (2 January 1834). However, Bourke was willing to extend Government protection to the Aborigines: see *NSW Government Gazette* (1837) 652, cited by B Bridges, 'The Aborigines and the Law: New South Wales 1788-1855' (1970) 4 *Teaching History* 40, 44.

85 *NSW Government Gazette* (1842) 587, cited by Bridges (1970) 44. For a balanced account of Gipps' policy see Reece, ch 5.

86 In particular the Coniston massacre of 1928 in the Northern Territory (as to which see J Cribbin, *The Killing Times*, Fontana, Sydney, 1984).

87 For the killings of Japanese and Europeans in Arnhem Land in 1932-3 and the subsequent trials see Berndt & Berndt (1954) ch 14-16. For *Tuckiar's* case (the best known of these) see para 51. Generally on Aboriginal responses see Reece, ch 1; H Reynolds, *The Other Side of the Frontier. Penguin, Ringwood, 1982; N Loos, Invasion and Resistance: Aboriginal-European Relations on the North Queensland Frontier 1861-1897,* ANU Press, Canberra, 1982.

88 Rowley (1978) 55-63, 66-8, 75-7, 83-4.

*officio* in policemen. It was not until much later in the century that more formal and extensive policies of 'protection' were formulated, aimed at isolating and segregating full-blood Aborigines on reserves and at restricting contact (and interbreeding) between them and outsiders, while attempting to assimilate half-castes, and especially their children. The right to marry was limited, as were other civil rights. For full-blood Aborigines there was some *de facto* tolerance or allowance of a continuing traditional way of life, although the missions which were sometimes entrusted with the running of reserves and the care of their populations were often unsympathetic and sometimes overtly hostile to traditional ways. Legislation applying the policy of protection was adopted in Victoria in 1867, Western Australia in 1886, Queensland in 1897, New South Wales in 1909, South Australia and the Northern Territory in 1910-11.[89] Church missions and Government settlements were set up and Aborigines were moved onto them. Special laws prohibited the consumption of alcohol, restricted the movement of Aborigines and regulated their employment. There were systematic efforts through the establishment of 'boarding houses' to take 'part-Aboriginal' children away from their parents and to educate them in European ways.[90] The policy of protection was reinforced and the legislative restrictions and controls made more comprehensive during the first half of the century.[91] Its influence carried over into the period of assimilation, as can be seen from the euphemistic provisions of the Welfare Ordinance 1953 (NT) with its paternalistic arrangements for 'wardship' of incompetent (Aboriginal) persons.[92]

26. ***Assimilation.*** Continuing difficulties, and criticisms of the treatment of Aboriginal people especially in central and northern Australia, led in 1936 to demands by the States and by voluntary bodies for increased Commonwealth involvement in Aboriginal affairs. At the 1936 Premiers' Conference in Adelaide, it was agreed that while Commonwealth control might not be practical there should be regular meetings between the State and Commonwealth officers responsible for Aboriginal affairs.[93] At the first such meeting, held in Canberra in 1937, the Commonwealth and the States agreed that the objective should be the absorption at least of 'the natives of Aboriginal origin but not of the full blood'.[94] In a sense 'assimilation' was that aspect of the policy of protection concerned with the 'future' of Aborigines (mostly of 'mixed blood') in settled areas. In the 1950s 'assimilation' became a widely accepted goal for all Aboriginal people and was adopted as policy by the Commonwealth and by all State Governments. The policy was defined at the 1961 Native Welfare Conference of Federal and State Ministers in these terms:

> The policy of assimilation means that all Aborigines and part-Aborigines are expected to attain the same manner of living as other Australians and to live as members of a single Australian community, enjoying the same rights and privileges, accepting the same customs and influenced by the same beliefs as other Australians.[95]

Steps were taken to achieve this result. Expenditure on health, housing, education and training programs began to be increased in the Northern Territory and in the States. The decline in the Aboriginal population in the north and centre was halted and reversed in the 1950s, and in southern and eastern Australia the Aboriginal population was increasing rapidly. In the 1960s a concerted effort was made to review and repeal restrictive and discriminatory legislation, especially by the Commonwealth Government, and the mechanisms of 'protection' were phased out. Access to social security benefits for Aborigines came in 1960, Aborigines became entitled to vote at federal elections in 1962,[96] and the wardship system in the Northern Territory was dismantled in 1964. State legislation prohibiting access to alcohol for Aborigines was repealed and in most jurisdictions Aborigines became entitled to full award wages. In 1967 the Constitution was amended by referendum so that Aborigines would in future be counted in the Census,[97] and to authorise the

89 Rowley (1978) 172-5, 182-5, 189-98, 218-21.

90 See para 345.

91 Rowley (1978) 227-42. See esp JW Bleakley, *Report on the Aboriginals and Half-Castes of Central Australia and North Australia*, Commonwealth of Australia, Parl Paper 21/1929, for a developed statement of 'protectionist' thinking.

92 *Namatjira v Raabe* (1959) 100 CLR 664, esp 669, was one case which attracted wide-spread attention to these restrictive provisions; cf *Coe v Gordon* [1983] 1 NSWR 419, 423 where Lee J commented that 'The "protection" afforded by the [Aborigines Protection Act 1909-1943 (NSW)] was in its nature paternalistic rather than the granting of enforceable legal rights'.

93 Hon T Paterson MHR, Minister of the Interior, in *Aboriginal Welfare: Initial Conference of Commonwealth and State Authorities*, Canberra, 1937, 5.

94 Rowley (1978) 320-1.

95 Cited in H Reynolds, *Aborigines and Settlers: The Australian Experience 1788-1939*, Cassell Australia, Sydney, 1972, 175.

96 Commonwealth Electoral Act 1962. Previously, only Aborigines who were ex-servicemen, or who were entitled to vote for State Lower Houses (cf Constitution s 41), were entitled to vote at Commonwealth elections. Under the 1962 Act, s 3(5), Aborigines were entitled but not required to vote. This special exemption was only removed in 1983: Commonwealth Electoral Legislation Amendment Act 1983 (Cth) s 28(1).

97 s 123, which specifically excluded them, was repealed.

Commonwealth Parliament to pass laws specifically for the benefit of Aboriginal people.[98] An Office of Aboriginal Affairs was established by the Commonwealth Government to instigate and oversee programs of assistance for Aborigines.

27. ***Integration.*** While these developments were taking place, the general notion of assimilation was itself increasingly being questioned. That policy took no account of the value or resilience of Aboriginal culture, nor did it allow that Aborigines might seek to maintain their own languages and traditions. A basic assumption of the policy was that Aborigines would inevitably, and probably willingly, become like white Australians in terms of their 'manner of living', 'customs' and 'beliefs'. The paternalism, and arrogance, of such assumptions was discredited. There was also a greater awareness of Aboriginal problems by non-Aboriginal Australians. The language of 'assimilation', with the underlying assumption that Aboriginal equality could only be achieved by the loss of Aboriginal identity, was abandoned. The term 'integration' was sometimes used by the critics of the assimilation policy to denote a policy that recognised the value of Aboriginal culture and the right of Aboriginals to retain their languages and customs and maintain their own distinctive communities,[99] but there was a deliberate effort on the part of the Commonwealth authorities to avoid one-word descriptions of complex policies, and to focus on developing new approaches to problems rather than on long-term aims. The initial emphasis was on increased funding and improved programs in areas such as health, education and employment, to try to ensure that formal equality was accompanied by real social and economic advances. But measures were also adopted to in crease funding for Aboriginal community development projects, and the first steps were taken towards the granting of land rights. In 1972 a separate federal Department of Aboriginal Affairs was established, and in 1973 the Woodward Commission was appointed to investigate how land rights for Aborigines could be implemented. The Report led eventually to the Aboriginal Land Rights (Northern Territory) Act 1976 (Cth).

28. ***Self-Management or Self-Determination.*** In recent years the policy of the Commonwealth has been based on what has been described as 'the fundamental right of Aboriginals to retain their racial identity and traditional lifestyle or, where desired, to adopt wholly or partially a European lifestyle',[100] and has encouraged Aboriginal participation or control in local or community government, and in other areas of concern. This approach, variously described as a policy of self-management or self-determination, has been accompanied by government support programs managed by Aboriginal organisations. For example the Aboriginal Development Commission was established in 1980[101] to help further the economic and social development of Aboriginal people, to promote their development and self-management and to provide a base for Aboriginal economic self-sufficiency. The functions of the Aboriginal Development Commission are to assist Aboriginal people to acquire land, to engage in business enterprises and to obtain finance for housing and other personal needs.[102] Other Aboriginal organisations, both governmental and non-governmental, are proving increasingly important: these include land councils, incorporated community support groups, child care agencies, alcohol rehabilitation services, medical services, hostels, legal services and cultural organisations. Attempts have continued to establish a body which can represent Aboriginal and Torres Strait Islander opinion on all matters of policy, through giving advice to the Commonwealth and in other ways.[103] The Commonwealth's policy has been formulated by the Federal Minister for Aboriginal Affairs in the following way:

> This Government looks to achieve further progress for the Aboriginal and Torres Strait Islander people through the two principles of consultation and self-determination, that is, with the involvement of the Aboriginal people in the whole process ... All our policies, each of our programs and projects, have been and will continue to be fashioned in discussions with Aboriginal people and their organisations at national and community levels.[104]

98 The words 'other than the Aboriginal race in any State' were deleted from s 51(26). See para 3.

99 See eg the statement of policy cited in the Report of a Committee of Review (Chairman: Professor CA Gibb) *The Situation of Aborigines on Pastoral Properties in the Northern Territory,* AGPS, Canberra, 1973, 2-3. See also G Lyons, 'Official Policy towards Victorian Aborigines 1957-1974' (1983) 1/2 *Aboriginal History* 61; JPM Long, Commissioner for Community Relations, *Submission 490* (12 September 1985).

100 Hon RI Viner MHR, Minister for Aboriginal Affairs, Commonwealth of Australia 112 *Parl Debs (H of R)* (24 November 1978) 3442.

101 Aboriginal Development Commission Act 1980 (Cth), replacing the former Aboriginal Land Fund Commission and the Aboriginal Loans Commission.

102 s 8. See Aboriginal Development Commission, *Annual Report 1980-81,* AGPS, Canberra, 1982, 3.

103 See para 3.

104 Hon C Holding MHR, Commonwealth of Australia '134 *Parl Debs (H of R)* (8 December 1983) 3487.

There are, clearly enough, differences between the phrases 'self-management, 'consultation', and 'self-determination'.[105] Full self-determination in a particular field implies more than either management by or consultation with the 'self' involved.

## Impacts of Settlement on Aboriginal People

29. ***The Continuing Impact of Settlement.*** Changes in policy, even when addressed to problems created by the past, do not erase the past. The history of forced resettlement on reserves, the placing of many thousands of children in institutions, and the loss of land and culture are evident in the disadvantages still experienced by many Aboriginal people today. Even without forcible removal, Aborigines often had little choice but to 'come in' to the cities, rural centres or pastoral stations.[106] The coming together in settlements and missions of many different groups with different languages and customs created new tensions. The availability of Western medical skills, education and technology increased the degree of contact with the outside world and Anglo-Australian ways. The increasing availability of television in rural areas and the advent of satellite communications have added further pressures. Alcohol continues to have a devastating effect. Payments of social service benefits cut across traditional kinship rules. Aborigines seeking education for their children may find that Western education tends to undermine traditional lifestyles and social structures.

30. ***Impact on Traditional Authority.*** Traditional authority and Aboriginal customary laws have been markedly affected by the processes of settlement and dispossession. Indeed, as Dr von Sturmer has pointed out:

> Traditional authority was undermined even where there was no dispossession, certainly none of the sort that Aborigines were aware of. This may even be true of pastoral properties where people may have been aware that they are moving into new sorts of relationships but may have continued to believe that they owned/controlled the land. I recall that the people at Aurukun with whom I worked were quite shocked when I told them in 1970 that the government, not they, owned the land. And in many of the pastoral properties it seems that Aborigines believed they were 'working' the land in conjunction with the European pastoralists.[107]

The reasons for the undermining of traditional authority go much deeper than references to alcohol, to material goods or to the influence of the mass media would suggest. The general non-recognition of Aboriginal customary laws was another factor.[108] While the outstation movement and the granting of land rights are aspects of what has been seen as a 'revival' of Aboriginal traditionality and culture, it remains true that from the earliest days, European contact tended to undermine Aboriginal laws, society, culture and religion — a process which is a continuing one. Aboriginal people continue to face difficult choices about their lives and their place in their own communities. An example is the encouragement now given to the establishment of Aboriginal organisations. Aborigines elected to hold office in community councils are often younger, school-educated Aborigines who are more skilled in the ways and concepts of the wider Australian society than the elders. This can produce tensions or divisions within a community, cutting across and undermining traditional lines of authority. On the other hand this pattern is not universal' in some communities the holders of traditional authority continue to exercise their influence through the elected office holders, while elsewhere a clear distinction may be drawn between the powers exercised by the elected council and the authority of older men or women. The granting of land, the impact of mining and the payment of royalty money has similarly. had a significant effect on traditional Aboriginal authority.[109] Whatever the advantages to be gained by Aborigines from mining operations on Aboriginal land, or from the incorporation or registration of councils, such processes necessarily involve the members of the particular group in change and in redefinition of their relation to each other and to the wider society. These processes are Often painful, difficult and contentious.

31. ***Measuring Present Disadvantage.*** The extent of past dislocation and dispossession is well documented, but it is more difficult to assess its impact on current poverty and disadvantage among widespread and

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105 For comment on 'self-management' as a policy see J von Sturmer, 'Aborigines in the uranium industry: toward self-management in the Alligator Rivers region?' in RM Berndt (ed) *Aboriginal Sites, Rights and Resource Development*, University of Western Australia Press, Perth, 1982, 69.

106 The availability of tobacco, food and other introduced items was also an important factor. cf WEH Scanner, 'Durmugam: A Nangiomeri' (1959) in Scanner (1979) 74-5, 78-9, 81, 85.

107 J von Sturmer, *Submission 403* (March 1984) 19.

108 'Durmugam: A Nangiomeri' (1959) in Stanner, 67, 93-4.

109 See eg Australian Institute of Aboriginal Studies, *Aborigines and Uranium. Consolidated Report to the Minister for Aboriginal Affairs on the Social Impact of Uranium Mining on the Aborigines of the Northern Territory*, AGPS, Canberra, 1984, esp ch 4.

diverse Aboriginal populations. Statistics on poverty and disadvantage are inadequate and there has been a reluctance to collect or keep statistics identifying Aborigines as a separate group. Moreover statistics tend to show symptoms, not causes, and there is sometimes an assumption that the social realities they reflect are a product of external factors operating on passive (Aboriginal) populations. Statistics used to demonstrate disadvantage may also be reflecting cultural differences, and a preference by Aborigines to retain their own way of life despite those disadvantages. Nonetheless the symptoms, and the statistics, are important:

> [Aborigines] probably have the highest growth rate, the highest birth rate, the highest death rate, the worst health and housing and the lowest educational, occupational, economic, social and legal status of any identifiable section of the Australian population.[110]

There are other well known figures:

- A survey by the Aboriginal Development Commission in June 1983 showed that 6003 Aborigines were on the waiting lists of housing organisations and that an additional 2000 houses were needed to house fringe-dwellers.[111]

- The 1981 National Population and Housing Census indicated that the annual Aboriginal income per head was approximately one-half of that of the Australian population as a whole.[112]

- 1981 census figures show that approximately 12.5% of all Aborigines 15 and over have never attended school. This compares with 1% for the non-Aboriginal population.[113]

- Aboriginal unemployment is almost three times the rate of unemployment for non-Aborigines. Some 23474 Aborigines (1 in 8) were unemployed as at September 1985.[114] Twenty-five per cent of all unemployed Aborigines were under 20.

- The average life expectancy for Aborigines is much lower than for non-Aborigines. In 1981 the average life expectancy for Aborigines living in country areas in New South Wales was approximately 49 years for males and 56 years for females.[115]

- The prevalence of the eye disease, trachoma, has been estimated to be 15 times greater for Aborigines than for non-Aborigines. In some areas of the Northern Territory and Western Australia up to 77% of Aborigines are affected.[116]

- The number of Aboriginal children in substitute care arrangements is alarmingly high. In New South Wales, for example, as at 30 June 1981, 15% of children in substitute care (excluding adoption) were Aborigines (587 of 3836 children), although Aborigines make up less than 1% of the total population of New South Wales.[117] This represents 5% of all Aboriginal children in substitute care compared to 0.4% of all non-Aboriginal children. In Western Australia, over 54% of the children (937 of 1710) in foster care placements are classified as Aboriginal or Torres Strait Islander; and over 58% of the children (821 of 1411) in residential child care establishments are similarly classified.[118]

- Aborigines are grossly over-represented in Australian criminal statistics, both in terms of conviction rate and the rate of imprisonment. Aboriginal arrest rates are significantly higher than those for non-Aborigines. For example, in the Northern Territory in 1977-78, 78% of those arrested were

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110 National Population Inquiry, *Population & Australia. A Demographic Analysis and Projection*, AGPS, Canberra, 1975, vol 2, 455.

111 *Aboriginal Social Indicators 1984*, Department of Aboriginal Affairs, Canberra, 1984, 22-9.

112 id, 48 ($6000 pa compared with a national average of $12 000). For earlier studies see eg Commission of Inquiry into Poverty, Second Main Report, *Law and Poverty in Australia* (Commissioner: R Sackville) AGPS, Canberra, 1975, 262.

113 *Aboriginal Social Indicators 1984*, 36.

114 Commonwealth Employment Service Statistics: Department of Employment and Industrial Relations, September 1985.

115 NSW Department of Health, 'Aboriginal Mortality in NSW Country Regions 1980/81' (unpublished) Sydney, October 1983, 4. And see *Aboriginal Social Indicators 1984*, 10.

116 National Trachoma and Eye Health Program, *Report*, Royal Australian College of Opthalmologists, Sydney, 1980, Table 1.7.

117 Cited in Aboriginal Children's Research Project (NSW), *Draft Principal Report*, Sydney, 1982, 75. cf the Project's Discussion Paper No 3, *Assimilation and Aboriginal Child Welfare — the NSW Community Welfare Bill*, Sydney, 1981, 8, which points to the high rates of breakdown of foster care and adoption placements when Aboriginal children are placed with non-Aboriginal families.

118 Information provided through WELSTAT, Department of Social Security, Canberra. Figures as at 30 June 1981. See further para 346.

Aborigines, but Aborigines made up only 25% of the population.[119] Aborigines are statistically less likely to be released on bail, and more likely to be convicted than non-Aborigines. They are statistically more likely to receive a prison sentence than non-Aborigines.[120]

- The homicide rate on Queensland Aboriginal reserves was, according to statistics gathered between 1979-81, 39.6 per 100 000 or some ten times both the national and Queensland average.[121] The assault rate on Aboriginal reserves in Queensland was 226.05 per 100 000, while the Queensland rate was 43.85 per 100 000.[122] Aborigines in Queensland have an imprisonment rate of 410 per 100 000, seven times greater than the general population in that State.[123]

It is against this background of deprivation and dislocation that any examination of Aboriginal customary laws must take place. As the House of Representatives Standing Committee on Aboriginal Affairs reported:

> While it would be difficult to suggest that in 1980 Aboriginals are still being subjected to the level of overt oppression and persecution that they have suffered during the past 200 years, the disadvantaged position which Aboriginals hold in society reflects this historical pattern. As a group, Aboriginals still cannot participate fully, effectively and equally in the day-to-day life of a community, notwithstanding the fact that changes in the law and social attitudes have occurred. The recent history of Aboriginal people is one of hostile dealings with non-Aboriginals and with policies of governments which have had an extraordinary impact on the Aboriginal people's consciousness. This has helped separate Aboriginals as a group within Australian society. It is reinforced by a common resentment by Aborigines of past treatment and control by non-Aborigines and by a lack of trust of authorities including the courts, the police and the welfare.[124]

32. ***The Variety of Aboriginal Experiences.*** However there are among Aboriginal people enormous variations in experiences and circumstances. Such variations must always have existed, but they also reflect the extent to which Aborigines have been subjected to external contact, and the very different responses different groups have adopted to such contact. For certain purposes at least, it may be necessary to distinguish Aborigines living in more remote areas whose life is still predominantly traditionally oriented from those Aborigines who have been living for some considerable time in or around cities or larger country towns, and who have modified their ways of life and social organisation to a greater or lesser extent to reflect their changed circumstances and the new pressures upon them. Three bro ad groups are commonly identified: traditionally oriented Aborigines, 'fringe-dwelling' Aborigines and urban Aborigines. However there are many difficulties in attempting to adopt classifications which do not take into account fluctuations in the composition and nature of the different groups, or the extent to which groups converge. Such classifications fail to take account of important Aboriginal distinctions along lines of tribe, kinship, sex and region. Nor should it be assumed that there is any inevitable or regular movement away from more traditional to less traditional ways of life. The situation varies greatly in different areas, and is influenced by such factors as economic development, the level of Aboriginal and non-Aboriginal population, the degree of government intervention or non-intervention, land rights, the outstation movement and the internal dynamics of particular communities. Some social, economic and legal difficulties are common to Aboriginal people wherever they live, and there are many continuities or similarities in Aboriginal responses to such difficulties.[125] But it is important to be aware of varying legal and other needs and demands of Aborigines in remoter areas compared with those in urban or semi-urban areas, and of the consequent need for care and flexibility in formulating recommendations for change.

33. ***A Demographic Survey.*** The Commonwealth Department of Aboriginal Affairs estimates that there are approximately 167 600 Aborigines,[126] representing 1.1% of the population of Australia. In contrast with the non-Aboriginal population, a considerable proportion of the Aboriginal population lives outside the metropolitan area. In 1981 some 128 000 Aborigines (80% of the total) were then living outside major urban centres.[127] Proportionately many more Aborigines live in the Northern Territory (23.6% of the total

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119 House of Representatives Standing Committee on Aboriginal Affairs, *Aboriginal Legal Aid*, AGPS, Canberra, 1980, para 111.
120 ibid. See further para 394-7.
121 Evidence of Dr Paul Wilson, *R v Alwyn Peter*, unreported Queensland Supreme Court (Dunn J) 8-11, 18 September 1981, transcript 34-6; P Wilson, *Black Death, White Hands*, George Allen and Unwin, Sydney, 1982, 4.
122 id, 5.
123 ibid. And cf W Clifford, 'An Approach to Aboriginal Criminology' (1982) 15 *ANZJ Crim* 3, 8-9.
124 *Aboriginal Legal Aid*, para 25.
125 See K Gilbert, *Living Black*, Penguin, Ringwood, 1977.
126 The figures are based on projections for 1983 using the 1981 National Population and Housing Census.
127 *Aboriginal Social Indicators 1984*, 4 (defining major urban centres as cities of 100 000 or more). 41.6% of Aborigines in 1981 lived in rural areas (compared with 55.7% in 1971).

population) than in any other State or Territory. However, the total number of Aborigines in each of Queensland, New South Wales and Western Australia is higher than in the Northern Territory. What these figures do not bring out is the fact that Aborigines in Australia today live in communities which vary enormously in size, character and location. These include small, remote communities, outstations, missions, government reserves (though the numbers of both of these have declined greatly in the last decade), groups on pastor al properties, pastoral properties owned by Aborigines, residents of country towns, camps in and around larger urban centres (eg Alice Springs, Port Augusta, Bourke), and communities in metropolitan areas. The Department of Aboriginal Affairs has made surveys of all Aboriginal communities in each State and the Territories. This statistical survey[128] contains not only demographic details, but also information as to the educational, health, employment, community services (water supply, sewerage, electricity), housing and welfare services available. The figures obtained are very approximate, but they do give some idea of the situation. The 1977 Survey estimated the total population in these communities to be 125 097. In 1978, it was 135 600; in 1981, 208 485.[129] Approximately two-thirds lived in or around cities and towns. In 1981 there were 893 Aboriginal communities, 500 of which were in urban areas or on reserves or camps in urban areas. According to the 1981 survey, the numbers in each community were as follows: of 893 communities,

| | |
|---|---|
| 44% had up to | 50 members |
| 18% had from | 50-100 members |
| 16% had from | 100-200 members |
| 8% had from | 200-300 members |
| 4% had from | 300-400 members |
| 2% had from | 400-500 members |
| 8% had more than | 500 members |

Thus 86% of these communities had fewer than 300 members and 90% fewer than 400. Indeed if urban communities are subtracted, 92% of these communities number less than 400. There were then 116 communities numbering more than 400, of which only 37 were not in or around urban areas. In all communities at least half the population would be children.[130]

34. ***Traditionally Oriented Aborigines.*** For practical purposes there are no Aboriginal people who have not had at least some contact with Australian society. A group of nine members of the Pintubi language group, remade contact with their relations at an outstation in Western Australia in October 1984 after living for more than twenty years in complete isolation near Lake Mackay.[131] This process of 'coming in' had been occurring, even in the remote areas of Australia, for a considerable time. For particular groups the following dates of first substantial contact have been given:

| *Language group* | *Date of first substantial contact* |
|---|---|
| Walmatjarri | 1930-40 |
| Mantjiltjarra | 1930-50 |
| Mangala | mid-1930s or earlier |
| Pintupi | 1950-early 1960s (Northern) |
| Ngatatjarra | 1930-40 |
| Nakaku | probably 1930-40[132] |

'Coming in' did not mean that the areas from which groups and families came remained unpopulated or unvisited. And some family groups remained outside the orbit of European influence (though not necessarily 'uncontacted') until very recently. The following dates have been given for the time the last members of a language group left their nomadic life and joined relatives on settlements and missions:

128 Department of Aboriginal Affairs, Community Profile Statistical Collection 1981.
129 The 1977 and 1978 Surveys did not include all Aborigines, but attempted to identify discrete communities.
130 Department of Aboriginal Affairs, *Community Profile Statistical Collection 1981*, Tables 1-11.
131 A rather similar example, in 1977, was that of Warn and Yatungka, who were Mantjiltjana speakers from the central Gibson desert. In their case it was not a matter of making contact with outsiders for the first time: they had stayed away from a 'settled' area because they had contravened a marriage rule.
132 Information provided by RM Berndt, *Submission 449* (11 September 1984) 2.

| *Language group* | *Date of last stay in desert* | *Point of entry* |
|---|---|---|
| Walmatjarri | 1974 | La Grange (WA) |
| Mantjiltjarra | 1972 | Wiluna (Warri and Yatungka) (WA) |
| Mangala | 1968 | La Grange (WA) |
| Pintupi | 1968 | Papunya (NT) |
| (Northern) Ngatatjarra | 1965 | Warburton (WA) |
| Nakaku | 1963 | Etnabella (SA)[133] |

The gradual effects of contact have been, in most cases, so clear and disturbing that nearly 30 years ago a leading scholar sympathetic to Aboriginal people and Aboriginal tradition, in referring to Aboriginal societies and cultures that had 'the minimum of association with Europeans', could confidently assert that:

> Aboriginal traditional life as a functioning reality and as a major emphasis will have virtually disappeared from the face of this continent within the next ten years or so.[134]

At that time the evidence suggested an acceleration of the disappearance of traditional Aboriginal cultures and societies. That process has been stemmed (at least to some extent) by developments such as the gradual modification and eventual abandonment of the policy of assimilation, the upsurge of interest, as well as advantages, in developing and emphasising Aboriginal identity, the spread of the 'homeland' or 'outstation' movement and the conferral of land rights based on traditional affiliations. Even before the land rights movement really took shape, the concern in some States to protect Aboriginal sites of significance was a contributing factor.[135] Non-Aboriginal Australians have consistently tended to understate the continuity and flexibility of Aboriginal traditions and patterns of living, including their capacity to adapt to changing circumstances. The point was made by Professor Berndt in a submission to the Commission:

> Today, I would still say that while change is proceeding at a rate greater than ever before, what passes for a traditional Aboriginal life-style continues and is still significant in a number of areas. However, while Aboriginal identification, among other things, has sustained the continuing importance of this life-style, it is substantially different from what it was in most areas, say, two decades ago.[136]

Thus it is possible to suggest that there has been a revival, in some areas and in some respects, of traditional ways,[137] assisted perhaps by a climate of opinion more accepting of Aboriginal traditions, and of Aboriginal self-management or self-determination.[138] Alternatively, what is perceived as a 'revival' may be only a more open assertion of practices, beliefs and traditions which had not been suppressed as much as concealed.[139] Whichever is the better view of these processes, the conferral of land rights based on traditional associations with land has undoubtedly been an important factor.[140] The availability of land has been one factor in the 'outstation' movement, which has resulted in many Aboriginal people moving from towns, missions or settlements to remote areas of northern and central Australia to establish small communities ('homeland centres') where they may retain and develop or redevelop a more traditional lifestyle. Such places have provided, in many cases, an environment where traditional leadership may be re-established, controls placed on the availability of alcohol, and traditional family and kin ties strengthened.[141] In recent years the movement has gained momentum, particularly in the Northern Territory. In 1978, there were 113 outstations or homeland centres in the Northern Territory with approximately 3300 residents. By 1981, there were 158

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133 Information provided by M de Graaf, *Submission 451* (13 September 1984).

134 RM Berndt, `Groups with Minimal European Associations' in H Sheils (ed) *Australian Aboriginal Studies*, OUP, Melbourne, 1963, 387, 394.

135 RM Berndt, *Submission 449* (11 September 1984) 3.

136 *Submission 86* (11 July 1978).

137 A number of submissions drew attention to this phenomenon in particular areas. See eg K Maddock, *Submission 128* (23 August 1979); C McDonald, *Submission 303* (28 August 1979); D Vachon, *Submission 166* (1 May 1981); N Tabagee, *Submission 298* (3 June 1981). cf also K Akerman, `The Renascence of Aboriginal Law in the Kimberleys', in RM Berndt 8c CH Berndt (ed) *Aborigines of the West*, University of WA Press, Perth, 1980, 234.

138 Professor RM Berndt commented that 'the "revival" ... had begun before the "self-management" or "self-determination" policy really got under way'. In his view the revival 'is not the "re-appearance" of traditional forms but, rather, a revamping of ... aspects which have been changing over time but which have continued to be important to a particular people': RM Berndt, *Submission 449* (11 September 1984).

139 cf M de Graaf, *Submission 451* (13 September 1984).

140 See para 77.

141 On this movement cf P Loveday (ed) *Service Delivery to Outstations*, Australian National University, North Australia Research Unit, Darwin, 1982; HC Coombs, BG Dexter and LR Hiatt, 'The Outstation Movement in Aboriginal Australia', in E Leacock and R Lee (eds) *Politics and History in Band Societies*, Cambridge University Press, 1982, 427; House of Representatives, Standing Committee on Aboriginal Affairs, *Report on Strategies to Help to Overcome the Problem of Aboriginal Town Camps*, AGPS, Canberra, 1982, para 434-6.

such centres with a population of approximately 4100 residents.[142] Aborigines living on outstations come into contact with the legal system to a much lesser extent than do other Aborigines. These developments do not however solve the problems of isolation and socio-economic disadvantage. Few Aborigines living in remote communities are employed. Compared with earlier years, few participate in the pastoral industry, which now requires a reduced, and predominantly seasonal, labour force. Traditionally oriented Aborigines have limited access to health and education facilities — a problem also for non-Aborigines residing in remote areas. Adequate sanitation and water supplies are high priorities, as are improved means of communication.[143] There are also problems in providing appropriate educational facilities in remote regions. The alternative of leaving the community for schooling in cities many miles aw ay can be fraught with difficulties.

35. ***Urban Aborigines.***[144] Urban Aborigines include those living in towns (such as Alice Springs, Bourke and Lismore), or in capital cities (including communities such as La Perouse and Redfern in Sydney, Fitzroy in Melbourne and Port Adelaide). Most city dwellers live in conventional houses and make use of general services such as schools, hospitals and shopping facilities. Unemployment problems are particularly severe, making it difficult to pay the sums necessary for rental accommodation. The creation of Aboriginal Hostels Ltd and the provision of Aboriginal housing have to some extent reduced, but by no means fully met, these housing needs. Discrimination in the work force, in acquiring accommodation and in relation to the law is evident in the city areas, and is exacerbated, in some cases, by poor Aboriginal/police relations. Kin obligations and other practices such as sharing can create conflicts with welfare and housing authorities and may place heavy demands on the economic resources of city dwellers, but they may also help people overcome problems of limited resources.[145]

36. ***Fringe Dwellers or Town Campers.*** Between these two groups is a large number of Aborigines for whom traditional Aboriginal law, culture and ways of life have been extensively modified by residence close to towns or cities. Fringe-dwellers (or town campers) have been defined as:

> ... any group of Aboriginals living at identified camp sites near or within towns or cities which form part of the socio-cultural structure of the towns and cities, but which have a lifestyle that does not conform to that of the majority of non-Aboriginal residents and are not provided with essential services and housing on a basis comparable to the rest of the community.[146]

In its Report on strategies to overcome the economic and social problems of fringe dwellers, the House of Representatives Standing Committee on Aboriginal Affairs estimated that there were in 1982 between 15650 to 19600 town campers in approximately 206 communities in mainland Australia,[147] and identified three types of people who lived in town camps. They were the permanents (who had been forced into fringe settlements by loss of employment opportunities or lack of facilities in their home communities, by the effects of government policy, by pressures of urban life, or possibly in an attempt to flee from tribal authority and laws), the transients, and the homeless drifters.[148] The Committee found that employment opportunities in the camps were few[149] and that most of the income of the communities was derived from government services.[150] Alcoholism and alcohol abuse present continuing problems,[151] although town campers have their own strategies for living and coping with problems.[152] For example, there is evidence that women are demonstrating leadership and strength in Aboriginal town camps.[153] Fringe communities in general face

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142 The Department of Aboriginal Affairs provides funds to assist with basic necessities such as safe water supplies, shelter, communications and transport.

143 See generally E Young, *Tribal Communities in Rural Areas*, Development Studies Centre, Canberra, 1981, 15-40.

144 See F Gale, *Urban Aborigines*, ANU Press, Canberra, 1972; CD Rowley, *Outcasts in White Australia*, Penguin, Ringwood, 1972; JW Brown, R Hirschfeld, D Smith, *Aboriginals and Islanders in Brisbane*, Commission of Inquiry into Poverty, Research Report, AGPS, Canberra, 1974; KF Hill, *A Study of Aboriginal Poverty in Two Country Towns*, Commission of Inquiry into Poverty, Research Report, AGPS, Canberra, 1975; H Dagmar, *Aborigines and Poverty*, Nijmegen, 1978; F Gale & J Wundersitz, *Adelaide Aborigines. A case study of urban life 1966-1981*, ANU Press, Canberra, 1982; RE Ball, 'The Economic Situation of Aborigines in Newcastle, 1982' (1985) 1 *Australian Aboriginal Studies* 2.

145 cf Gale & Wundersitz, 181-2.

146 House of Representatives Standing Committee on Aboriginal Affairs, *Strategies to Help Overcome the Problems of Aboriginal Town Camps*, Canberra, 1982, para 31; see generally id, para 15-33.

147 id, para 93; and see id, Appendix V for a list of town camps so identified.

148 id, para 34-66.

149 id, para 103.

150 id, 102.

151 id, 105-8.

152 See B Sansom, *The Camp at Wallaby Cross*, AIAS, Canberra, 1980.

153 *Aboriginal Town Camps Report*, 109-10.

problems of inadequate housing[154] and lack of water, sewerage, transport and other facilities.[155] The Department of Aboriginal Affairs has stated that educational problems are 'almost certainly worse for all children coming from fringe areas than for their peers from elsewhere'.[156] Social disruption and frequent conflict with the police and the courts are similarly part of fringe dwelling life.[157] These are characteristic examples of the economic and social deprivation shared both by remote and urban Aboriginal communities. They do not, for the most part, involve questions of the recognition of Aboriginal customary laws, although issues such as the policing of town camps and local justice mechanisms are relevant.[158]

154 id, 116-34.
155 id, 138, 151-4.
156 id, Evidence, 16. For further information see Department of Aboriginal Affairs, Town Campers Assistance Program, *Annual Report*, AGPS, Canberra, 1985.
157 For a telling account see R Bropho, *Fringedweller*, Alternative Publishing Cooperative Limited, Sydney, 1980.
158 See below para 758, 767, 844-7, 862.

# 4. Aboriginal Customary Laws and Anglo-Australian Law After 1788

## Aboriginal Societies and Their Laws

37. ***The Character of Aboriginal Customary Laws***. British settlers who came into contact with the Australian Aborigines came into contact with a people having their own well-developed structures, traditions and laws. These were not the same (or even necessarily similar) for the different Aboriginal groups, and the risk of inaccuracy inherent in any generalisation about them has been greatly increased by the impact of settlement and the interactions between Aborigines and settlers. Despite such differences, an 'Aboriginal commonality' has been perceived,[159] and some basic generalisations can be made. In particular, it can be said that mechanisms for the maintenance of order and resolution of disputes, that is, a system of law, existed within Aboriginal groups. Responsibilities for maintaining the law varied with the context and the persons involved, and the roles which individuals played were strongly influenced by considerations of kinship. This was one major reason why, except with respect to certain very serious infringements of a fundamental or religious character, there was no consistent or inevitable correlation between wrongdoing and response. By contrast, in the 'religious' realm the sanctions for violations of the law were perceived as 'supernatural', even where human agency might be involved. Rules of behaviour were thought of as inscribed in social relations and in features of the landscape. These rules dealt with many aspects of life, and included responsibilities of various kinds for land and for objects and ideas associated with land, complex structures of kinship and family groupings, patterns and rules of marriage and. child care, and procedures for the conduct and resolution of disputes. This variety was stressed by Dr Diane Bell, who commented that customary laws need to be seen as:

> both a body of rules backed by sanctions and as a set of dispute resolution mechanisms. At a more informal level it was also a series of accepted behaviours which allowed daily social life to proceed. The formal rules ate backed by sanctions and ate clearly articulated in terms of what one should do and why. These shade into more informal areas of behavioural controls which may never be clearly stated, but which are the staff of interpersonal relationships, the self-regulating patterns of interaction.[160]

There is a considerable body of literature which seeks to record and analyse these traditions and patterns of behaviour — part of a much larger body of writing on Aboriginal societies themselves. However, so far as Aboriginal traditions and societies today are concerned, more is known about some aspects of some of these societies than about others. For example, more is known about kinship and marriage,[161] the role of women,[162] local economic activities (including hunting, fishing and foraging)[163] and Aboriginal myths and religion[164] than about such matters as concepts of authority or the dynamics of dispute resolution[165] or the precise ways

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159 B Sansom, 'The Aboriginal Commonality' in RM Berndt (ed) *Aboriginal Sites, Rights and Resource Development*, University of Western Australia Press, Perth, 1982, 117.

160 D Bell, 'Aboriginal Women and the Recognition of Customary Law in Australia' in Commission on Folk Law and Legal Pluralism, *Papers of the Symposium on Folk Law and Legal Pluralism, XIth International Congress of Anthropological and Ethnological Sciences, Vancouver, Canada, August 19-23, 1983*, Ottawa, 1983, vol 1, 491, 503. Generally on Aboriginal customary laws see RM Berndt Bt CH Berndt, *The World of the First Australians*, 4th rev edn, Rigby, Adelaide, 1985 esp ch 10, and the works referred to in the following footnotes. See further para 99-101.

161 AP Elkin, *The Australian Aborigines*, rev edn, Angus & Robertson, Sydney, 1979, chs IV-VI; LR Hiatt, *Kinship and Conflict*, Australian National University, Canberra, 1965 esp chs 3 & 4; Berndt & Berndt (1985) chs III & VI; K Maddock, *The Australian Aborigines*, 2nd edn, Penguin, Ringwood, 1982, 57-83, 89-95, and the works cited in para 223.

162 See eg PM Kaberry, *Aboriginal Woman, Sacred and Profane*, Border Press, New York, 1973; CH Berndt, 'Digging sticks and spears, or the two-sex model', in F Gale (ed) *Women's Role in Aboriginal Society*, Australian Institute of Aboriginal Studies, Canberra, 1974, 64; A Hamilton, 'Aboriginal Women: The Means of Production', in J Mercer (ed) *The Other Half*, Penguin, Sydney, 1975, 167; D Bell, *Daughters of the Dreaming*, McPhee, Gribble, Sydney, 1983 esp ch IV; Berndt & Berndt (1981) Index sv 'Women, status of'; F Gale (ed) *We are Bosses Ourselves*, Australian Institute of Aboriginal Studies, Canberra, 1983. A good concise account is CH Berndt, 'Aboriginal Women and the Notion of "The Marginal Man"', in RM Berndt and CH Berndt (ed) *Aborigines of the West*, 2nd rev edn, University of Western Australia Press, Perth, 1980, 28.

163 See the works cited in para 882-7.

164 See eg WEH Scanner, 'Religion, Totemism and Symbolism' (1962) in WEH Stanner, *White Man Got No Dreaming*, Australian National University Press, Canberra, 1979,106; TGH Strehlow, *Aranda Traditions*, Melbourne University Press, Melbourne, 1968; Elkin (1979) ch IX; E Kolig, *The Silent Revolution*, Institute for the Study of Human Issues, Philadelphia, 1981; Berndt & Berndt (1985) chs VIII & IX; Maddock (1982) chs 5, 7.

165 On the importance of land as a source of authority see TGH Strehlow, 'Geography and the Totemic Landscape in Central Australia: a functional study' in RM Berndt (ed) *Australian Aboriginal Anthropology*, U of WA Press, Perth, 1970, 92. For examples of particular systems of conflict resolution see NM Williams, 'Two Laws: Managing Disputes in a Contemporary Aboriginal Community', unpublished, Canberra, 1983; J Taylor, *Submission 388* (11 October 1983); N Peterson, 'Buluwandi: A Central Australian Ceremony for the Resolution of Conflict' in RM Berndt (ed) Australian Aboriginal Anthropology, U of WA Press, Perth 1970 200; AP Elkin, 'The Kopara: the Settlement of

in which contact with Europeans and British law affected those societies, and their responses to such influences.[166] In particular few attempts have been made to describe in any systematic way the character of Aboriginal customary laws.[167]

38. ***The Survival of Aboriginal Customary Laws***. Despite the lack of detailed knowledge in certain areas, there are many indications that Aboriginal customary laws and traditions continue as a real controlling force in the lives of many Aborigines.[168] It is not necessary to describe those laws and traditions in detail. Some understanding of them is necessary, however, if appropriate forms of recognition are to be formulated. This Report will examine proposals for recognition in a range of different social and legal fields, and the relevant aspects of Aboriginal customary laws or traditions be discussed in these specific contexts. But the continuance of Aboriginal customary laws and traditions has been paralleled by changing legal and administrative policies towards its 'recognition' or 'suppression' — and a brief outline of these is necessary, in the same way as an understanding of the history of Anglo-Australian policy towards Aborigines which was outlined in Chapter 3.

## Australian Law as Applied to Aborigines

39. ***The Application of British Law to Aborigines.*** With the colonisation of Australia after 1788, a new legal regime was applied, based on the common law. The Colonial Office treated Australia, for the purposes of its acquisition and the application of English law, as a settled colony, that is, one uninhabited by a recognised sovereign or by a people With recognisable institutions and laws.[169] Thus there were no treaties concluded with Aboriginal group,[170] and no arrangements were made with them to acquire their land, or to regulate dealings between them and the colonists. They were treated as individuals, not as groups or communities. The decision to classify the 'new' country of Australia as a settled colony, rather than as conquered or ceded, meant that the new settlers brought with them the general body of English law, including the criminal law. The application of that law to Aborigines was in practice less certain, especially for offences (especially killings) committed by one Aborigine against another. For some time the practice was to apply English law at least to offences committed by colonists against Aborigines and by Aborigines against colonists,[171] so as to provide a measure of protection for each group against the other. However the amenability of Aborigines to English law presented many problems, whether the victims were colonists[172] or other Aborigines. In 1829 the New South Wales Supreme Court advised the Attorney-General that it would be unjust to apply English law to the killing of an Aborigine by members of another tribe.[173] Similar doubts were entertained in South Australia[174] and in Melbourne.[175]

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Grievances' (1951) 2 *Oceania* 191; GC Wheeler *The Tribe and Intertribal Relations in Australia*, John Murray, London, 1910, 116-147; RM Berndt, 'Law and Order in Aboriginal Australia' in CH Berndt and RM Berndt (ed) *Aboriginal Man in Australia*, Sydney, Angus & Robertson, 1965, 166; D Bell, 'Re Charlie Jakamarra Limbiari. Report to the Court' unpublished report tendered in *R v Charlie Limbiari Jagamara*, unreported, NT Supreme Court, 28 May 1984. For further discussion see para 692-720 and the works there cited.

166 See ch 3 and the works there cited, esp Stanner (1959); Reynolds (1981); Loos (1982).

167 See K Maddock, 'Aboriginal Customary Law' in P Hanks & B Keon-Cohen (ed) *Aborigines and the Law*, George Allen &c Unwin, Sydney, 1984, 212. See further para 98-101.

168 A fact that was repeatedly borne out during the Commission's public hearings and field trips. See eg on: kinship and marriage: G Gleave *Transcript of Public Hearings* Willowra (21 April 1981) 1578; J Bucknall, *Transcript* Strelley (24 March 1981) 401; P Roe, *Transcript* Broome (25 March 1981) 475-6; *Transcript of Womens Meetings*, Kowanyama (28 April 198) 179; C Yirrwala, *Transcript* Maningrida (7 April 1981) 1042; on local economic activities: H Toby, *Transcript* Mornington Island (25 April 1981) 1802; on traditional punishments: J Roberts, *Transcript* Darwin (3 April 1981) 902-3; D Frazer, *Transcript*, Alice Springs (13 April 1981) 1443-4; D Manjeriju & others, *Transcript* Maningrida (7 April 1981) 1050-7; T Baloy, *Transcript* Maningrida, (8 April 1981) 1072; L Roughsey, *Transcript* Mornington Island (24 April 1981) 1723-26; on dispute resolution: J Mungudja, *Transcript* Maningrida (7 April 1981) 1046-50; traditional authority figures: J Biendurry, *Transcript* Derby (27 March 1981) 601; on secrecy and ritual life: D Manjeriju & others *Transcript* Maningrida (7 April 1981) 1050-2; L Lennard, *Transcript* One Arm Point (28 March 1981) 642-7; L Roughsey & others, *Transcript* Mornington Island (25 April 1981) 1795. And see para 103, 226-32, 455-7, 694-720, 882-91.

169 This question is examined in more detail in ch 5.

170 For Batman's disowned 'treaty' see AC Castles, *An Australian Legal History*, Law Book Co, Sydney, 1982, 28-31.

171 According to Bridges, from 1788-1855, 68 whites were committed and 59 tried for murder of Aborigines; 44 Aborigines were committed and 29 tried for murder of whites or other Aborigines: B Bridges, 'The Aborigines and the Law: New South Wales 1788-1855' (1970) 4 *Teaching History* 40, 47. These figures are unrepresentative of the actual number of killings during this period.

172 The Colonial Office condemned the military execution of two Aborigines in South Australia for the murder of certain whites, as itself murder, because it lacked due process of law. But the judge of the Supreme Court had declared himself without jurisdiction to try the Aborigines. See SD Lendrum, 'The Coorong Massacre: Martial Law and the Aborigines at First Settlement' (1977) 6 *Adel L Rev* 26; K Hassell, *The Relations Between the Settlers and Aborigines in South Australia*, 1836-1860, Libraries Board of South Australia, Adelaide, 1966, 52-72.

173 B Bridges, 'The Extension of English Law to the Aborigines for Offences Committed Inter Se, 1829-1842' (1973) 59 *JRAHS* 264, 264.

174 cf Lendrum; Castles (1982) 524-6.

175 *R v Bon Jon* (1841); see para 41.

40. ***Jack Congo Murrell's Case.*** That the Aborigines were British subjects seemed to have been conclusively settled, so far as colonial courts were concerned, by the various proclamations[176] and statutes[177] establishing the Australian colonies, but the implications of this status for the application of English law took surprisingly long to establish. The decisive case was *R v Jack Congo Murrell*,[178] in which the Full Court of the New South Wales Supreme Court held unanimously that it had jurisdiction to try one Aborigine for the murder of another. The Full Court had to deal with two distinct cases. In *Murrell's* case, the defendant alleged that he was so drunk he could not help killing. In the other case, the defendant relied on Aboriginal customary laws. His victim was, apparently, a member of the group which had killed his brother: 'this was clearly a case of obedience to the native custom of revenge killing'.[179] The argument for the defence was lucidly put by Alfred Stephen:

> This country was not originally desert, or peopled from the mother country, having had a population far more numerous than those that have since arrived from the mother country. Neither can it be called a conquered country as Great Britain was never at war with the natives, not a ceded country either, it, in fact, comes within neither of these, but was a country having a population which had manners and customs of their own, and we have come to reside among them: therefore in point of strictness and analogy 'to our law, we are bound to obey their laws, not they to obey ours. The reason why subjects of Great Britain are bound by the laws of their own country is, that they are protected by them; the natives are not protected by those laws, they are not admitted as witnesses in Courts of Justice, they cannot claim any civil rights, they cannot obtain recovery of, or compensation for, those lands which have been torn from them, and which they have probably held for centuries. They are not therefore bound by laws which afford them no protection.[180]

In response, the Court simply denied that the binding quality of the laws was contingent upon their effectiveness as 'protection':

> If the offence had been committed on a white, he would be answerable, was acknowledged on all hands, but the Court could see no distinction between that case and where the offence had been committed upon one of his own tribe. Serious cases might arise if these people were allowed to murder one another with impunity, our laws would be no sanctuary to them. For these reasons the Court had jurisdiction.[181]

Despite the reality of the coexistence of two laws for Aborigines, the case came to be regarded as having settled the question for Australian law.[182] But in practice, both before and after 1836, the law was applied differentially and, especially in remoter areas, haphazardly, so that few killings (whether an Aborigine was offender or victim) were prosecuted.[183]

41.***The Application of the Law in Practice: Colonial Policy.*** Such recognition as was given to Aboriginal customary laws and traditions was thus a matter of 'administrative flexibility', or simply the result of a policy of non-involvement in Aboriginal quarrels or disputes which did not affect the British settlements. Colonial Office policy required that every effort be made to live peacefully with and respect local Aborigines. Governor Phillip and later Governors were directed to 'educate and Christianize the Aborigines, to protect their persons and the enjoyment of their possessions, to prevent and restrain violence and injustices towards them, and to punish any of our subjects who harmed them'. Thus the Aborigines were to be protected by the punishment of white offenders 'according to the degree of the offence'.[184] Similarly, Governor King, in his Port Regulations of 1800, warned that 'If any of the natives are killed, or violence offered to their women, the offenders will be tried for their lives'.[185] However, official ambivalence soon emerged; it is recorded that during Governor King's time, '(military) officers kept the crowd back to give native duellists room to spear each other, according to native custom, in the streets of Sydney, and then led

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176 eg Proclamation of Governor Hindmarsh (28 December 1836) extending 'the same protection to the native population as to the rest of His Majesty's subjects': JM Bennett & AC Castles, *A Source Book of Australian Legal History*, Law Book Co, Sydney, 1979, 258. Similarly the official proclamation of Western Australia conferred the protection of the law on Aborigines as equals of 'other of His Majesty's subjects': R Cranston, 'The Aborigines and the Law: An Overview' (1973) 8 *U Queens LJ* 60, 61 citing H Schapper, *Aboriginal Advancement to Integration: Conditions and Plans for Western Australia* (1970) 11.

177 eg Australian Courts Act 1829 (9 Geo IV c 83) s 3, 24.

178 (1836) 1 Legge 72.

179 Bridges (1973) 264.

180 (1836) 1 Legge 72. Although not reported in Legge, apparently Stephen also argued from the fact of double jeopardy: 'even if acquitted, a native would have to face another trial in the bush according to native law': Bridges (1973) 265.

181 1 Legge 72, 73. For a fuller account of the judgment see Bridges (1973) 265-6.

182 It has since been reaffirmed on numerous occasions. See eg *Tuckiar v R* (1934) 52 CLR 335; *Milirrpum v Nabalco Pty Ltd* (1971) 17 FLR 141, 261-2 (Blackburn J); *R v Wedge* [1976] 1 NSWLR 581. In the latter case, Rath J concluded that `all the reasons of the court in *R v Murrell* are as valid today as they were when judgment in that case was given': id, 587.

183 See RHW Reece, *Aborigines and Colonists*, Sydney University Press, Sydney, 1974, 194-5, 225-7.

184 Instructions to Arthur Phillip Esq (25 April 1787) *Historical Records of Australia* (hereafter HRA) ser 1 vol 9, 13-4.

185 *HRA* ser 1 vol 4, 143.

troops out against the natives for spearing whites'.[186] In his Port Regulations and Orders of 1810, Governor Macquarie stated:

> The natives of this territory are to be treated in every respect as Europeans; and any injury or violence done or offered to the men or women natives will be punished according to law in-the same manner and in equal degree as if done to any of his Majesty's subjects or foreigners residing there.[187]

But Macquarie's famous Proclamation to the Aborigines of 4 May 1816[188] is ambivalent as to whether Aborigines were to be considered British subjects, subject to British law. The proclamation imposed certain restrictions upon Aborigines and stated that tho se who wished to be considered under the protection of the British Government and who were 'disposed to conduct themselves in a peaceful, inoffensive, and honest manner' would, upon application to the Secretary's office on the first Monday of each month, be provided with a passport signed by the Governor which would entitle them to protection so long as they did not break his regulations against carrying arms. This in effect made protection of the law for an Aborigine a privilege to be granted or withheld at the Governor's discretion. Macquarie's Proclamation of 1816 also represented the first explicit regulation of Aboriginal traditional practices as such. The Proclamation prohibited Aborigines from carrying any spears, and prohibited them from pursuing their customary punishment against transgressors of customary law at or near Sydney or other settlements, stating that such practices were repugnant to British laws.[189]

42. ***The Exercise of the Prerogative of Mercy.*** Such prohibitions were legally unnecessary, on the theory, established by Murrell's case, that Aborigines were British subjects equally subject to British law.[190] But the reality in many cases was that Aborigines neither understood nor felt allegiance to that law. In such cases, judicial punishments was usually mitigated through the Governor's exercise of the prerogative of mercy, under which he could remit or mitigate punishment for all offences other than treason and wilful murder (where he was limited to postponing execution until the Monarch's pleasure was known). Another safeguard for Aborigines lay in the fact that in the Colony, the Attorney-General exercised the functions of a Grand Jury. Without his initiative, an Aborigine would not be sent for trial. Thus both the initiation and final review of criminal prosecutions against Aborigines lay with the Government. According to Bridges:

> On the whole executive review took much of the sting out of major sentences in that a significant proportion of capital sentences imposed on natives were commuted to transportation which in effect often becomes a term for Cockatoo or Goat Islands (in Sydney Harbour) for instruction in secular and religious matter preparatory to an early release. A review of the cases tried (for the period 1788-1855) leads one to believe that with the sole exception of Charley, no Aboriginal was executed who would not have qualified for death also under native laws ... Governor Gipps stated explicitly that this was the test applied by the Executive Council in his time.[191]

While the attitude of Gipps' Executive Council may have been enlightened for its time, in practice, law enforcement and the activities of private citizens were not at all consistent with it.[192]

43. ***Early Enquiries into Aboriginal Policy and the Law.*** Meanwhile there was considerable debate and controversy in Britain over the treatment of native peoples in Britain's overseas colonies, including the Australian Aborigines. In 1835 the Aboriginal Protection Society was established in Britain. The Society helped to bring about the establishment of a Select Committee of the House of Commons to examine the conditions of Aborigines in British settlements. As has been noted,[193] the Committee in its Report in 1837 recognised the absurdity and injustice inherent in applying British notions of law automatically to Aboriginal people. However, the Committee reaffirmed the position that Aborigines should be subject to that law, provided that its full rigours were tempered by the exercise of discretions, for example, by reducing the penalty in certain cases. The Committee stated that:

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186 *Sydney Gazette* (29 December 1805) cited by Bridges (1973) 42.
187 *Historical Records of New South Wales* vol 7, NSW Government Printer, 1901, 418. But in the same paragraph, he banned the supply of intoxicants to Aborigines.
188 *HRA* ser 1 vol 9, 141.
189 id, 142-3.
190 Those who argued against this sometimes did so because if Aborigines where amenable to the law this implied that whites could also be punished for killing or harming Aborigines: cf Reece, 182, 194.
191 Bridges (1970) 62.
192 cf Reece, ch 5.
193 See para 1.

> when British law is violated by the Aborigines within the British dominions, it seems right the utmost indulgence compatible with a due regard for the lives and properties of others, should be shown for their ignorance and prejudices. Actions which they have been taught to regard as praiseworthy we consider as meriting the punishment of death. It is of course impossible to adopt or sanction the barbarous notions which have urged the criminal to the commission of the offence, but neither is it just to exclude them from our view in awarding the punishment of his crimes.[194]

The Committee recommended further study on the possibility of special measures for Aborigines:

> To determine under what special regulations they should be placed is a task to be performed only by those who can study the case with the aid of the most minute and close observation. It should therefore be part of the duty of the Protector to suggest to the Local Government, and through it to the local legislature, such short and simple rules as may form a temporary and provisional code for the regulation of the Aborigines, until advancing knowledge and civilisation shall have superseded the necessity for any such special laws.[195]

This — one of the first of many suggestions for special laws and special studies — does not appear to have been taken particularly seriously by the Australian colonies.

44. ***Grey's Report (1840).*** In 1840, the British Government set out its views on the application of British laws to Aborigines, in a despatch to all Governors in Australia and New Zealand.[196] These despatches contained a Report from Captain (later Sir George) Grey with the advice that his recommendations:

> appear ... fit for adoption generally within your Government subject to such modifications as the varying circumstances of the Colony may suggest.[197]

Grey was critical of allowing Aborigines to exercise their customary law in any circumstances. He stated:

> 1. The Aborigines of Australia having hitherto resisted all efforts which have been made for their civilization. it would appear that. if they are capable of being civilized. it can be shewn that all the systems, on which these efforts have been founded, contained some common error. or that each of them involved some erroneous principles: the former supposition appears to be the true one, for they all contained one element, they all started with one recognized principle, the presence of which in the scheme must necessarily have entailed its failure.
>
> 2. This principle was that. although the Natives should, as far as European property and European subjects were concerned. be amenable to British laws, yet, so long as they only exercised their own customs upon themselves and not too immediately in the presence of Europeans. they should be allowed to do so with impunity.
>
> 3. This principle originates in Philanthropic motives and a total ignorance of the peculiar traditional laws of this people.

In Grey's view, English law should entirely supersede customary law, in order to protect an Aborigine from the violence of his fellows, and to prevent the older natives from obstructing the civilisation of members of their tribe. Grey commented:

> ... I do not hesitate to assert my full conviction, that whilst those tribes, which are in communication with Europeans, are allowed to execute their barbarous laws and customs upon one another, so long will they remain hopelessly immersed in their present state of barbarism.[198]

Grey's views on punishment, which echoed those of the Select Committee, were clear:

> 12. To punish the Aborigines severely for the violation of laws to which they are ignorant, would be manifestly cruel and unjust, but to punish them in the first instance slightly for the violation of true laws would inflict no great injury on them...
>
> 13. I imagine that this course would be more merciful than that at present adopted, viz., to punish them for the violation of a law they are ignorant of, when this violation affects a European, and yet to allow them to commit this crime as often as they like, when it only regards themselves.[199]

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194 House of Commons Select Committee on Aborigines (British Settlements), *Report*, Parl Paper, House of Commons no 425, 1837, 79-80.
195 id, 84.
196 eg Lord Russell to Sir George Gipps, *HRA* set 1 vol 21, 33.
197 ibid.
198 *HRA* ser 1 vol 21, 35.
199 id, 36.

In addition to the House of Commons inquiry and Captain Grey's Report, several early inquiries on related questions were conducted within the Australian colonies, though none were specifically concerned with Aboriginal law.[200]

45. ***Continuing Judicial Doubts and Reservations.*** The Colonial Office entertained no doubts that Aborigines were to be treated as British subjects for all purposes, but the appropriateness and justice of applying this principle was questioned by members of the colonial judiciary even after the decision in *R v Jack Congo Murrell*.[201] In 1841, Justice Cooper of the South Australian Supreme Court still held the view that it was:

> ... impossible to try according to the forms of English law, people of a wild and savage tribe whose country although within the limits of the province of South Australia, has not been occupied by Settlers, who have never submitted themselves to our dominion and between whom and the Colonists there has been no social intercourse.[202]

Similar views were expressed by Justice Willis in Melbourne in 1841 in the *Bon Jon* case.[203] Justice Willis stated that 'there is no express law which makes the Aborigines subject to our Colonial Code'. The case did not proceed and Bon Jon was handed over to the Protectorate to be educated. The Chief Protector, Robinson, was accused by the victim's kin of being an accessory to his escape[204] and Bon Jon himself was murdered in a payback killing,[205] thus lending weight to the argument of Stephen in *Murrell's* case that 'the British were not filling a void with their laws and it was absurd to ignore native law while its practice continued'.[206] Willis requested Governor Gipps to bring the question to Lord Stanley's notice for reference to the Law Officers.[207] Gipps himself considered having legislation passed to clarify the position that Aborigines were amenable to the courts like any other of Her Majesty's subjects.[208] However he was advised by the Supreme Court that *Murrell's* case had decided the matter and that no legislative action was necessary.[209] In South Australia Justice Cooper remained unwilling to concede that Aborigines should always be tried for offences under British law. In 1846, an Aborigine was brought before the court for killing another Aborigine. Justice Cooper argued that he required a legislative direction if such cases were to be justiciable and the accused was discharged because no competent interpreter was available.[210] In 1848, Justice Cooper accepted jurisdiction but indicated before the trial commenced that 'in the case of conviction he would stay any execution required by law and specifically refer the case to the Governor'.[211] In Western Australia, Captain Grey's Report, which confirmed the view of the British authorities that Aborigines were and should be subject to European law for offences committed on each other, was rejected by Governor Hurt. According to Hasluck:

> In spite of the indication given by the Secretary of State of his views, Hurt held to his own opinion regarding disputes between natives, and during his term no notice was taken of acts by natives against natives in accordance with their own law.[212]

By contrast Hutt's successor, Governor Fitzgerald, adopted a policy of 'cognisance of all aggravated cases of assault committed even by bush natives *inter se*'.[213] This policy produced considerable debate, and attempts were made in successive years to mitigate its effects by reduced sentences or by non-prosecution. But there were cases in which severe penalties were imposed.[214]

46. ***The Problem of Aboriginal Evidence***. Applying British law to Aborigines produced special difficulties in the presentation of Aboriginal evidence. In theory Aborigines were British subjects, but in practice they

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200 NSW: Select Committee on the Conditions of the Aboriginals, *Votes & Proceedings (Legislative Council)* (1845); Report from the Select Committee on the Native Police Force, id (1856-7); Qld: Report of the Select Committee on the Native Police Force and the Conditions of the Aboriginals Generally, *Votes & Proceedings (1861)*; Vic: Report of the Select Committee on the Aboriginals, *Votes and Proceedings (Legislative Council)* (1859 no D8); SA: Select Committee of the Legislative Council on the Aboriginals, *Report* (Part Papers 1860 no 165).

201 See para 40.

202 CSO 511/1840, Advice from Cooper J to the Government of South Australia.

203 *Port Phillip Gazette* (18 September 1841); State Library of Victoria Archives, Crown Law Section, *R v Bon Jon*.

204 Dixon Library, Sydney Add 77, Robinson to La Trobe (9 April 1842).

205 A Sutherland, *Victoria and its Metropolis*, Melbourne, 1888, vol 1, 249.

206 Bridges (1973) 267.

207 Sir George Gipps to Lord Stanley, 24 January 1842: *HRA* set 1 vol 21, 653-4.

208 Colonial Secretary Thomson to Sir James Dowling (4 January 1842): id, 654-5.

209 Sir James Dowling, advice to Sir George Gipps (8 January 1842): id, 656.

210 *Larry v R, The Register* 14, 25, 28 November 1846. Cooper J referred the matter to the Governor: CSO 1564 (1851).

211 Castles, 530, citing *The Register* 14, 17 June 1848; Robe to Grey, 10 July 1848, GRG 2/6/4.

212 P Hasluck, *Black Australians*, Melbourne UP, Melbourne, 1942, 129.

213 ibid.

214 id, 129-34. See generally Castles (1982) 520-42; Bennett & Castles, 247-63.

were not, and perhaps could not be, given the same rights as British subjects in judicial proceedings. The paradox caused considerable concern to colonial administrators. Captain Grey put the problem thus:

> 15. The greatest obstacle that presents itself in considering the application of British Law to these Aborigines is the fact that, from their ignorance of the nature of an oath, or of the obligations it imposes, they are not competent to give evidence before a Court of Justice
>
> ...
>
> 17. The fact of the Natives being unable to give testimony in a Court of Justice is a great hardship on them, and they consider it as such: the reason that occasions their disability for the performance of this function is at present quite beyond their comprehension and it is impossible to explain it to them. I have been a personal witness to a case in which a Native was most undeservedly punished for the circumstance of the Natives, who were the only persons who could speak as to certain exculpatory fact s, not being permitted to give their evidence ...
>
> 19. The Natives being ignorant of our Laws, of the forms of our Courts of Justice, of the language in which the proceedings are concluded, and the sentence pronounced upon them, it would appear that but a very imperfect protection is afforded to them by having present in the Court merely an interpreter ... who knows nothing of legal proceedings and can be but very imperfectly acquainted with the Native language: it must also be borne in mind that the natives are not tried by a jury of their peers, but by a jury having interests directly opposed to their own and who can scarcely avoid being in some degree prejudiced against Native offenders ...[215]

Attempts were made in South Australia, New South Wales and Western Australia to relax the rules regarding the administering of oaths and the admissibility of evidence for Aborigines, and in some instances to enable magistrates to award summary punishment in certain offences.[216] But these early attempts were defeated by hostile local legislatures, or disallowed by British law officers as being 'contrary to the principles of British jurisprudence'.[217] Any such special measures for Aborigines, it was said, were:

> dangerous in its tendency and faulty in principle. By thus establishing inequality in the eye of the law itself between the two classes, on the express ground of national origin, we foster prejudices, and give a countenance to bad passions.[218]

In 1839 the British Aboriginal Protection Society commented on the paradox of regarding Aborigines as British subjects while at the same time refusing Aboriginal testimony, unless they had been converted to Christianity:

> It is evident that the rejection of the Evidence of these Natives renders them virtually outlaws in their Native Land which they have never alienated or forfeited. It seems to be a moral impossibility that their existence can be maintained when in the state of weakness and degradation, which their want of civilisation necessarily implies; they have to cope with some of the most cruel and atrocious of out species, who carry on their system of oppression with almost perfect impunity so long as the Evidence of Native Witnesses is excluded from Our Courts.[219]

Local opponents, echoing WC Wentworth's comparison of Aboriginal evidence with 'the chatterings of the ourang-outang', managed to postpone the enactment of such legislation for many years.[220]

47. ***Non-Recognition in other Contexts: Land Rights and Civil Law.*** As this brief account reveals, most, if not all, of the debate was focused on the criminal law (and on problems of Aboriginal evidence in criminal cases). This obscured what was perhaps the more fundamental point, which was never questioned or debated — that is, the complete absence of recognition of Aboriginal rights to land, or of the recognition of Aboriginal customary laws in the civil law. Aborigines were not treated as trespassers on Crown land, but the Crown freely alienated land to settlers who then displaced local Aborigines, often by force.[221] Aboriginal marriages were not recognised[222] and rights to the custody of children were precarious or non-existent.

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215 *HRA* ser 1 vol 21, 37.
216 See Bridges (1970) 65-70; Hasluck, 135-43.
217 Campbell and Wilde to Russell (27 July 1840): *HRA* ser I vol 20, 756.
218 Lord John Russell to Hutt (30 April 1841) cited in Hasluck, 136-7.
219 *HRA* ser 1 vol 20, 303.
220 See Reece, 181 for Wentworth's statement, and generally id, 179-82 for the issue. See further para 605n.
221 See para 41-2, 899-902.
222 See para 237 for the few early cases.

Although Aborigines as British subjects had formal capacity to make contracts, to own property, and to sue in the courts,[223] in practice these facilities were irrelevant.

48. ***Phases of the Non-Recognition Policy.*** Despite doubts and uncertainties, it was firmly established by 1850 that no formal recognition of Aboriginal customary laws should be accorded. This remained the situation until this century. Instead the emphasis moved to policies based on 'protection' (with the underlying expectation that Aboriginal identity and tradition was a rapidly passing phenomenon).[224] But there was a distinguishable phase during the 1920s and 1930s when some attempt was made to recognise Aboriginal customary laws. These legislative and administrative responses are of considerable interest.

## Protest and Reform in the 1920s and 1930s

49. ***The Need for Change.*** By the 1920s the problems of the frontier had changed from those of first contact to those of coping with the reality that fairly large Aboriginal populations had survived settlement. What was to be the future of Aboriginal society? What institutions should be created for Aborigines?[225] At the time conditions for Aborigines were particularly bad. Poverty, ill health and malnutrition were endemic. Events such as the Kimberley Massacre (1927), the mistreatment of lepers in the far north-west of Western Australia, clashes between Aborigines and the Japanese in Arnhem Land, and disagreement over the provision of minimum wages for Aborigines employed in the pastoral industry, captured public attention.[226] In 1928 the Commonwealth Government responded to pressure from, among others, the Association for the Protection of Native Races, by requesting the Queensland Chief Protector, JW Bleakley, to report on conditions in central and northern Australia. His report described the lack of effective shelter and clothing, the problems of malnutrition and health, and the operation of institutions provided for half-caste Aborigines.[227] Bleakley made only passing comments on the injustice of applying British law to crimes involving tribal law, and on the possibility of some form of tribal court.[228] At this time the Western Australian Government set up a Royal Commission into Aboriginal conditions under Moseley.[229] Later the Queensland Government set up Aboriginal Courts and Aboriginal police on the reserves.[230] The efforts of all State Premiers eventually led to the calling of the 1937 Conference of Protectors involving Commonwealth and State administrators.[231]

50. ***Attention Given to Aboriginal Customary Laws.*** Meanwhile attention was also being paid to the possibility of reform of the criminal law as applied to Aborigines. In 1931 the Commonwealth Minister for Home Affairs (Interior), the Hon A Blakeley MHR, advocated that for the Northern Territory Aborigines, there should be:

> a simple tribunal, presided over by a person or persons with a thorough knowledge of native customs, who can sift native evidence. I do not want a court restricted by all kinds of legal technicalities and procedures.[232]

The following year, the Hon Archdale Parkhill MHR, Blakeley's successor as Minister for the Interior, was advised by Sir Hubert Murray[233] that there should be no legislation abrogating the general law to allow for the operation of native law. British law must prevail, as was the practice in Papua. Murray considered that customary law was sufficiently taken into account in the Magistrates Court and the Supreme Court in the Northern Territory by way of 'substantive defence as negativing criminal intent or, more frequently in mitigation of sentence'. But he did suggest some changes in the Northern Territory, including machinery to ensure that evidence of native custom could properly come before the court in mitigation of sentence, a greater emphasis on Aboriginal customary law in determining criminal intent, and regular sittings of the

223 These common law rights were modified or removed by legislation under the 'protection' policy: see para 25.
224 See para 25.
225 Rowley (1978) 357.
226 Rowley (1978) 255-304.
227 JW Bleakley, *The Aboriginals and Hay' Castes of Central Australia and North Australia*, Commonwealth of Australia, Parl Paper 21/1929.
228 id, 29.
229 See para 53.
230 See para 55.
231 See para 26, 54.
232 *The Aborigine's Protector* (Sydney, 1936) vol no 3, 5, cited by AP Elkin, 'Aboriginal Evidence and Justice in North Australia' (1947) 17 *Oceania* 173, 199.
233 Sir Hubert Murray to Mr Archdale Parkhill (Minister for the Interior), 29 June 1932, cited Elkin, (1947) 204. Murray was Chief Judicial Officer of British New Guinea from 1904 and became the first Lieutenant-Governor of the territory under Australian administration in 1908, a position he held until his death in 1940. See AP Elkin, 'The Place of Sir Hubert Murray in Native Administration' (1940) 12 *Aust Q* 23.

Supreme Court in Arnhem Land, the Roper and McArthur River districts, the Daly and Victoria River districts, Tennant Creek, Darwin and Alice Springs. Murray also urged the abolition of the jury system for offences between Aborigines, and the use of assessors or special juries in cases where Aborigines and non-Aborigines were involved. Similar calls for reform were made from a number of quarters. In 1933, a panel of 60 jurors presented a petition to Acting Judge. Sharwood of the Supreme Court in Darwin[234] calling for Aborigines to be tried in accordance with customary law in circumstances where the offence was known to be of a tribal nature. They pointed out that very often tribal elders were charged with an offence for inflicting punishment on another Aborigine in accordance with customary law. The jurors sought:

> the establishment of a tribal court, especially created to deal with cases of the nature abovementioned, functioning under milder laws of punishment than our present criminal system provides. It is known that if one Aboriginal unlawfully and violently injures another, his tribe will see to his proper punishment, irrespective of what the white man does to him. It is strongly urged that the whole question should be investigated and reported to the Government by men who have lived amongst the natives and have knowledge of their codes, and by men who have studied their laws and customs from a scientific point of view, and by men who are genuinely and sympathetically interested in the Aborigines. Such men are the likeliest to point out the best manner in which to achieve the desired result. Leaving the matter in the hands .of those who have no knowledge of the Aboriginal would only result in a remedy worse than the disease.[235]

In the same year the Aborigines Friends' Association argued that:

> In all cases of breaches of law in which Aborigines are concerned, full consideration should be given to tribal traditions and customs, in order that full justice may be done. It would be the duty of the field officers not only to be familiar with tribal language, laws, traditions and customs, but to explain to the Aboriginal so much of the white man's law as he is expected to obey. Many casa could very well be dealt with in the locality in which they arise, whereby many complications and much expense and inconvenience would be avoided.[236]

In addition, the press and missionary and other bodies made representations on the need for a positive policy on Aborigines to the Commonwealth.[237]

51. ***Tuckiar's Case.*** At this time attention focused on a case involving the killing of a white man, Constable McColl, at Woodah Island in the Gulf of Carpentaria by an Aborigine named Tuckiar. The incident occurred against a background of considerable tensions within the Aboriginal communities in Arnhem Land, due in part to increased mission activities and to the operation of Japanese pearlers. Three Japanese fisherman were killed in 1932 by a group of Aborigines, and another five were killed in 1933.[238] Constable McColl and three other constables were sent to inquire into these killings: during this expedition McColl was fatally speared. Three Aborigines were sentenced to 20 years gaol by Justice Wells in 1934 for their part in the killings.[239] Protests were made about comments the trial judge was reported to have made,[240] but it was the trial and conviction of Tuckiar, for the murder of McColl, that produced the greatest indignation. Justice Wells sentenced Tuckiar to death. In doing so he refused to take account of the accused's background and customs, despite recent legislation specifically allowing him to do so.[241] This refusal to take account of mitigating circumstances where a white man had been killed, and the fact that similar difficulties had arisen in at least four other cases, led to a large public meeting at Kings Hall, Sydney in 1934 and the involvement of the Prime Minister and the Australian High Commissioner in London.[242] Public pressure led ultimately to the case being appealed to the High Court. The Court unanimously quashed the conviction, concluding among other things, that the judge's comments on the accused's failure to give evidence amounted to a misdirection.[243] It also held that evidence of McColl's good character should not have been allowed. As the joint judgment said:

> the purpose of the trail was not to vindicate the deceased constable but to inquire into the guilt of the living Aboriginal ... The prisoner should not have been exposed to the danger of the jury's regarding the matter as a

234 *The Daily Telegraph* (Sydney) 13 April 1933, cited Elkin (1947) 200.
235 ibid.
236 *Seventy-Fifth Annual Report* (1933) 25, cited Elkin (1947) 200. See also JS Needham, White and Black in Australia, National Missionary Council for Australia, London, 1935, 167.
237 Elkin (1947) 200. See also Rowley (1978) 295.
238 See further D Thomson, *Donald Thomson in Arnhem Land*, Currey O'Neil, 1983, 19-27; VH Hall, *Dreamtime Justice*, Rigby, Adelaide, 1962; Rowley (1978) 290-7.
239 *The Argus* (Melbourne) 2 August 1934; Rowley (1978) 291-2.
240 *The Argus*, 12 July, 2 August 1934; *The Herald* (Melbourne) 17 May 1934, cited Rowley (1978) 292.
241 Criminal Procedure Ordinance 1933 (NT) s 6; Crimes Ordinance 1934 (NT) s 6A. See para 52.
242 AP Elkin, 'Aboriginal Policy 1930-1950: Some Personal Associations' (1957) 1 *Quadrant* 29-30, cited Rowley (1978) 295.
243 (1934) 52 CLR 335, 344 (Cavan Duffy CJ, Dixon, Evatt, McTiernan JJ).

> dilemma between an imputation on the dead and the conviction of an Aboriginal. That danger is likely to have been much increased by the manner in which the Judge expressed himself ...[244]

The conviction was quashed, the Court holding that the public statement by Tuckiar's counsel precluded the ordering of a new trial. Tuckiar was released but disappeared on his way home.[245] In his foreword to *White and Black in Australia*, published in London in 1935, Burton commented:

> The story of that thai is pathetic and tragic reading; but the glaring injustice and inhumanity of it aroused afresh the indignation of Australia.[246]

With public feeling running high on the perceived injustice of a strict application of British laws to Aborigines, a number of steps were taken or proposed by the Commonwealth Government in the Northern Territory, and by several States, to make the criminal law more responsive to Aboriginal needs. This was done by reforms at the substantive and at the sentencing level.

## Administrative Responses

52. ***Northern Territory Responses.*** The Commonwealth Government, acting in response to public pressure and on the advice of Sir Hubert Murray introduced some wide-ranging reforms. In 1933, juries were abolished in the Northern Territory for all offences except those punishable by death.[247] The court was given a discretion not to apply the death penalty to an Aborigine convicted of murder, but could impose such a penalty as just and proper in the circumstances. In determining the appropriate sentence the court was able to take into account any relevant native law and custom and any evidence in mitigation.[248] According to Elkin (writing in 1945), the potential of this provision was not fully realised because personnel with an adequate knowledge of customary law, anthropology and psychology were not available.[249] There were also other difficulties with the legislation. Some judges were reluctant to take native custom into account in cases involving a white victim.[250] Justice Wells in *Tuckiar's* case (probably the first case under the legislation) was reported to have described the Crimes Ordinance 1934 (NT) as 'ill-considered legislation hampering both judge and counsel'.[251] In 1946, a judge hearing a case involving a tribal killing at Milingimbi was reported to have told the jury that 'the idea pre valent in the community that native wrong-doers should not be punished by the white man's law was sloppy sentimentality and should be discouraged'.[252] In 1939 the Evidence Ordinance (NT) removed the requirement for Aborigines to take an oath before giving evidence in civil and criminal matters[253] and enabled Aboriginal testimony to be taken through an interpreter, reduced to writing and used in evidence in later proceedings without further appearance by the witness. In the same year, EWP Chinnery, the Director of Native Affairs in the Northern Territory and Commonwealth Adviser on Native Affairs, announced plans for the introduction of Courts for Native Matters. The Native Administration Ordinance 1940 (NT) enabled the establishment of such courts, limited in jurisdiction to matters arising between Aborigines and between the Administration and Aborigines. Draft regulations were prepared, similar to those applying to the village courts in Papua New Guinea at the time. Patrol officers were sent to Sydney University for training in anthropology, native administration and law. However the war years and post-war difficulties effectively put an end to the proposal, which was not proceeded with.[254]

53. ***Western Australian Responses.*** Malnutrition and disease, the continuing decline in the Aboriginal population in Western Australia, the failure to pay Aborigines adequate wages (if any at all, north of the Pilbara) and criticism of the conditions under which lepers were taken by lugger to Broome from Darwin, helped to persuade the Western Australian Government to establish a Royal Commission, headed by a Police

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244 id, 345 (Cavan Duffy CJ, Dixon, Evatt, McTiernan JJ), 353 (Starke J). In addition, the whole court was critical of the conduct of Tuckiar's counsel in making a damaging public statement to the court. This was to the effect that Tuckiar had admitted that one of two reported statements by witnesses was true and thus the allegation that McColl had committed adultery with one of Tuckiar's wives was false: id, 346, 354.

245 See Berndt & Berndt (1954) 134-52 for further details of the case.

246 Needham, vi.

247 Criminal Procedure Ordinance 1933 (NT).

248 Crimes Ordinance No 10 of 1934 (Cth) s 6A.

249 Elkin (1947) 201-2.

250 Elkin (1947) 202.

251 *Sydney Morning Herald*, 7 August 1934, cited Elkin (1947) 203. See para 51.

252 *The Northern Standard*, 25 October 1946, cited by Elkin (1947) 204.

253 Evidence Ordinance 1939 (NT) s 9A, repealed by Oaths Ordinance 1967 (NT). Thereafter the only provision was s 25A of the Ordinance, allowing evidence to be given by persons incapable of comprehending the nature of an oath or affirmation.

254 See para 56, and see further para 721.

Magistrate, D Moseley. Moseley's task was to inquire into the 'social and economic conditions of Aborigines' and including questions relating to the trial of Aboriginal offenders, the administration of the Aboriginal Department and recent allegations of mistreatment.[255] Moseley's Report, published in 1935, included a discussion of the problem of:

> the bush native who commits what under our law would be a crime but which is perfectly in order according to his tribal customs — which amount to his law. In such a case, the whole procedure, from the moment of arrest, seems inappropriate.[256]

Nonetheless Moseley rejected any customary law defence for criminal charges, referring to the conflict in the role of the police who must, at the same time, arrest and protect Aborigines.[257] In his view, imprisonment was not an appropriate form of punishment, whipping in front of the members of the tribe being preferable. A proposal had been made for an Aboriginal court, to consist of a resident magistrate, the Chief Protector or his nominee, some person to be nominated by the minister, and the head man of the tribe to which the accused belonged, but Moseley rejected this idea, preferring instead the establishment of special courts for trial of certain natives.[258] He stated:

> For the North of the State, I should prefer to see the divisional protector, if a man with the qualifications ... can be obtained, clothed with magisterial powers, so that on his patrol he could, on the spot, investigate complaints, explaining when the white point of view conflicts with the black, and exercising his influence over the members of the tribe.[259]

In the event the kind of special court preferred by the Chief Protector, but not supported by Moseley, was established in 1936 by the Native Administration Act 1905-1936 (WA).[260] This Act was largely concerned with the reorganisation of the Aborigines Department in Western Australia, and was otherwise thoroughly assimilationist in nature.[261] The court was to consist of a special magistrate, nominated by the Governor, a headman of the accused's tribe if practicable, and the Commissioner of Native Affairs or a Protector nominated by him. Its jurisdiction was limited to offences committed by Aborigines against Aborigines. The Act allowed for customary laws to be taken into account in mitigation of punishment.[262] These courts were ad hoc courts, to be established by proclamation when the need arose. They were in fact constituted on a number of occasions between 1936 and 1954 when the relevant provisions were repealed.[263] There was a maximum penalty of 10 years for offences previously punishable by death. The proceedings were final and without appeal.'[264] The Act also provided that offences committed by whites on Aborigines (which were not part of the jurisdiction of the special court) should be tried summarily by a magistrate, thus abolishing jury trials.[265] Perhaps more significant was a provision[266] which prohibited entirely the obtaining, and the use in evidence, of admissions and confessions of Aboriginal defendants for offences punishable by death or imprisonment. Section 61 also provided that no plea of guilty could be entered for any offence unless the court was satisfied as to the accused's understanding of the nature of the occasion, his awareness of his fight to trial, and that he had acted without duress. The Protector's approval was required before such a plea could be entered.[267] Despite these safeguards, Elkin was critical of what he considered to be excessive power to imprison (up to 10 years) given to the magistrates, on the grounds that there was no appeal, that the power was not given to justices of the peace in respect of non-Aboriginal defendants, and that it far exceeded that exercised by the Papua New Guinea courts at the time.[268]

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255 WA, *Report of the Royal Commission appointed to Investigate. Report and Advise upon Matters in Relation to the Condition and Treatment of Aborigines* (Parl Paper 2/1935) vol 1, 23.
256 id, 18.
257 id, 19.
258 id, 23.
259 id, 19.
260 s 59D, inserted by Act No 43 of 1936, renumbered s 63 in the 1936 reprint, s 64 in the (unpublished) 1941 reprint.
261 Rowley (1978) 303, 312; Hasluck, 160-1.
262 s 63(2).
263 Elkin states that in 1943 such courts were convened twice: Elkin (1947) 206. Eggleston details six cases heard between 1947-52 at Broome: Eggleston, 284-5. See further para 721.
264 For the procedure to be adopted by the court see Elkin (1947) 206.
265 Originally s 59C when inserted in 1936, this provision was renumbered as s 62 and s 63 respectively in the 1936 and 1941 reprints. It was repealed in 1954.
266 This was inserted as s 59A(1) by the 1936 Act, and was renumbered as s 60(1) and s 61(1) respectively in the 1936 and 1941 reprints.
267 These provisions dated back to 1911, when s 59A was inserted in what was then called the Aborigines Act 1905.
268 id, 208. cf also Hasluck, 160.

54. ***The Conference of Protectors. 1937.*** This burst of activity led to the question of Aboriginal courts being discussed by the States and Commonwealth at the 1937 Protectors' Conference.[269] The Conference resolved:

> That the jurisdiction of the Court for Native Affairs shall be confined to cases in which both parties are natives.
>
> That mixed cases — those in which a native is involved against a white man or a man of other race — be dealt with by the ordinary courts of the State or territory.
>
> That natives be not allowed to plead guilty in any case, except with the approval of the Chief Protector.
>
> That a native charged before a white man's court shall have adequate representation by counsel or a protector, or both.
>
> That no confession or statement before trial shall be sought or obtained, or, if obtained; it shall be disregarded by the court ...
>
> That for the purpose of this resolution a native shall be a native as defined by this conference.[270] The definition of 'native' was to be based on the definition contained in the Native Administration Act 1905-1936 (WA), that is, 'a person of Aboriginal descent with a quarter or more of Aboriginal blood'.[271]

The resolution relating to native courts was rather inconclusive. No vote appears to have been taken on the question whether such courts should be established, the Commonwealth, Queensland and Western Australian administrations being the only participants in the debate.[272] The Commonwealth representative considered that native courts are 'all right when the case is one between natives[273] but stated that the Commonwealth had not established such courts for offences between natives in the Northern Territory.[274] Bleakley, the Chief Protector of Aboriginals in Queensland, advised the conference that the Queensland Government had rejected the idea of a special court. Instead guilty pleas by Aborigines were restricted and special provision for legal defence and pleas in mitigation was made.[275] Neville, the Commissioner for Native Affairs, Western Australia, argued that:

> A special court for natives should deal only with offences between natives. Where white men are concerned, the trial should be in the ordinary courts of the State ... In my opinion, not only tribal offences, but all offences between natives, including charges of murder, should be heard before a native court, such court to consist of a special magistrate appointed by the Crown and a nominee of the Chief Protector. It should be given practically a free hand. Difficulty was experienced in obtaining convictions by juries of white men charged with assaulting natives. Invariably, the white man was acquitted, and consequently juries have been abolished in such cases. In Western Australia, all such cases are now heard by a magistrate; they are not dealt with by Justices. Tribal practice is accepted as evidence in a native court)[276]

55. ***Queensland Aboriginal Courts.*** In Queensland the Aboriginals Preservation and Protection Act 1939 provided for the establishment of Aboriginal police on Reserves,[277] gave formal legal status to Aboriginal courts established on Reserves,[278] and provided that the Superintendent of the Reserve could constitute the court.[279] These courts were intended to maintain order on the Reserves and to hear charges for breaches of the Aboriginal regulations. Dealing with minor cases they were different in nature and purpose from the Western Australian special courts.[280] They continue still in the form of Queensland Aboriginal Courts: as such they are dealt with in Chapter 29.[281]

56. ***Outcome of the 1930s Debates.*** During the 1920s and 1930s there was thus a considerable degree of interest in the reform of the law as it related to Aborigines. But many of the reforms suggested or introduced at this time were short lived. Although a few speakers favoured them, no resolution directly supporting

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269 For the background to this Conference see para 26.
270 *Aboriginal Welfare — Initial Conference of Commonwealth and State Aboriginal Authorities, held at Canberra*, 21st-23rd April, 1937, AGPS, Canberra, 1937, 31.
271 id, 21.
272 id, 30, 31.
273 id, 30.
274 ibid.
275 id, 31.
276 ibid.
277 s 12(4).
278 Courts were to be established by regulation: s 12(3).
279 s 10(1). Elkin (1947) 209 was critical of the fact that the Superintendent had both magisterial power and appointed the police.
280 As Bleakley pointed out in 1937: Conference Report, 31.
281 See para 723-46.

systems of native courts was passed by the 1937 Conference of Protectors.[282] The Northern Territory Courts for Native Matters never sat.[283] The Western Australian Native Courts sat on only a few occasions from 1939 before ceasing to exist in 1954.[284] The Queensland Aboriginal Courts alone have continued to exist.[285] The longest surviving of the Northern Territory changes — the sentencing discretion in Aboriginal murder cases — was repealed in 1983.[286]

57. ***From the 1940s to the 1970s.*** Questions of Aboriginal affairs policy, including the recognition of Aboriginal tradition, receded as matters of public concern or controversy during and after the Second World War. The framework of policy in the pre-war years had remained, as has been seen, very much a paternalistic one of protection, with little general concern for Aboriginal rights or Aboriginal customary laws.[287] Various factors, including the obvious failure of those policies to achieve the 'advancement' or to further the interests of Aboriginal people, eventually led to the dismantling of the institutions of protection, but the movement was towards assimilation, that is, a policy not merely of treating Aborigines as equal with all other Australians, but of attempting to make Aboriginal life-styles the same in all respects as those of the general community.[288] Against that prevailing opinion there was no movement towards recognising distinct Aboriginal traditions or ways of life. Such recognition as existed in the 1950s and 1960s was essentially local or particular, the result of judicial decisions or administrative acts in specific cases, which did not challenge the underlying policies.[289]

## Conclusion

58. ***A Denial of Right.*** Thus the customary laws and practices of Aboriginal people were denied any formal recognition by the general law as it applied in Australia. Recognition was denied not only in cases arising between Aborigines and settlers, but also in cases between Aborigines themselves. The refusal to accord recognition extended to Aboriginal customary laws as they related to land, enabling vast areas of land to be granted to settlers by the Crown without regard to prior Aboriginal occupation.[290] Policies of non-recognition continued, with only minor exceptions or modifications, until recent times. Those exceptions or modifications were largely of an informal kind, without any secure statutory basis. They included the use of discretions not to prosecute and sentencing discretions, and, in some cases, policies of 'benign neglect' with respect to internal Aboriginal disputes. But general non-recognition remained the rule, whether in the context of the criminal law,[291] customary land rights,[292] recognition of Aboriginal marriages[293] or child care arrangements.[294] This general non-recognition has been changed in various ways over the last decade or so, but it nonetheless constitutes the essential background to the Commission's Reference, and is its basic starting point. To what extent (if at all) and in what ways should the original denial of recognition now be reversed or varied, so as to take account of continuing Aboriginal adherence to various forms of their laws and traditions?

59. ***Recognition Now: Common Law or Legislation?*** In answering this question, it is first necessary to see to what extent the courts may be able, without any comprehensive legislative provision on the subject, to recognise Aboriginal customary laws and tradition under the present law. This could happen in two broad ways. First, the common law rules for the recognition of custom (or for the recognition of indigenous rights or institutions in territories acquired by the Crown) might be able to be used to recognise at least some aspects of Aboriginal customary laws. Secondly, apart from any common law rules dealing with custom as

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282 See para 54.
283 The Native Administration Ordinance 1940 (NT) was never proclaimed and was repealed by Ordinance No 16 of 1964.
284 The Native Welfare Act 1954 (WA) repealed much of the Native Administration Act 1905-1936 (WA), including s 63. For the modification and later replacement of the provisions dealing with Aboriginal evidence, see para 558n.
285 See para 55.
286 The Criminal Code 1983 (NT) s 164, removed the discretion as to penalty for murder, established by the Criminal Procedure Ordinance 1933 s 6, and the Crimes Ordinance 1934 (Cth) s 6A. See further para 519-20.
287 See para 25.
288 See para 26-7.
289 Many of the issues faced by courts in remote areas in the 1950s were canvassed by Kriewaldt J in an article published posthumously: `The Application of the Criminal Law to the Aborigines of the Northern Territory of Australia' (1960) 5 *UWAL Rev* 1. For the 1960s see especially E Eggleston: though published in 1976 the substance of the work was completed in 1970 and the field research was done in the mid-1960s. On Eggleston's work see the notes by L Waller and CD Rowley, `Elizabeth Eggleston' (1976) 3 *Monash UL Rev* 1, 5.
290 See para 47, and cf Castles, 2-3.
291 cf *Tuckiar v R* (1934) 52 CLR 335.
292 *Mitirrpum v Nabalco Pty Ltd* (1971) 17 FLR 141.
293 *R v Neddy Monkey* (1861) 1 W&W(L) 40; *R v Cobby* (1883) 4 LR (NSW) 355.
294 See para 345.

such, it may be that the general law (whether common law or statutory) already allows for various forms of recognition. These possibilities are discussed in turn in the following two Chapters.

# 5. Recognition of Aboriginal Customary Laws at Common Law: The Settled Colony Debate

60. ***An Issue of Continuing Relevance.*** One way, it has been argued, in which a degree of recognition of Aboriginal customary laws may be achieved is through the application — or reapplication — of common law rules for the recognition of custom. The argument usually centres on the question whether it is correct to classify Australia as a settled colony, but it can also be put in terms of claims to customary or usufructuary rights or to the recognition of 'local custom'. On whatever basis, it can be argued that Aboriginal custom has, either generally or in specific contexts such as customary land claims, a legitimate claim to recognition in Australian law.[295] The common law's approach to the process of settlement, and to the Aboriginal inhabitants of Australia, remains the subject of considerable debate. This has involved, among other things, a re-examination of the methods by which British sovereignty was acquired over Australia, and of the appropriateness of the classification of Australia as a settled colony which was an integral part of that process. Thus, it is said, it is necessary to recognise that Australia as a country was conquered, not settled. To take the view that Australia was settled is, on this view, to continue the 'convenient fiction'[296] that on settlement it was uninhabited in the sense of having neither civilised inhabitants nor settled laws. In the words of the Minister for Aboriginal Affairs, the Hon Clyde Holding MHR:

> We must not dwell on the past, but at the same time we have to be prepared to face up to the past and what has happened in order to apply effective solutions to the future. We have to face the fact that Australia as a country was conquered, not settled. If you take the view that Australia was settled then you see it as a colony which was uninhabited and had no system of law. But in the *Gove* case, although the plaintiffs were unsuccessful, Mr Justice Blackburn did hold that Aboriginal customary law was recognizably a system of law.[297]

On the other hand the view that Australia was conquered, has been challenged as equally inconsistent with the facts.[298] This Chapter examines the two distinct ways in which the common law might recognise Aboriginal customary laws. These are, first, through the recognition of customary rights or titles, and, secondly, through reclassification of Australia as a conquered colony. These will be dealt with in turn.

## Recognition of Custom at Common Law

61. ***The Recognition of Native Customs under the Common Law.*** Quite apart from the dichotomy between 'settled' and 'conquered' colonies, the common law itself has at least potentially the capacity to recognise some customary rights or titles. This could occur in two distinct ways. The common law rules for recognition of custom, if received in the relevant colony or territory, could apply to bring about the recognition of at least some local customs. Alternatively, in the specific context of rights over land, the common law could directly or indirectly recognise 'communal native title' as such — either because a doctrine of communal native title as a personal or proprietary right in land under the Crown is recognised as part of the common law, or because the Crown's recognition of such title (eg by proclamation or other executive act) is treated as effective by the courts. Something should be said about each of these methods.

62. ***The Common Law and Custom.*** The common law has always allowed that local customs which meet its criteria for recognition could be applied as law.[299] No clear limits seem to have been set to the customs that could be recognised in this way. They have included distinctive forms of land tenure, special rules of inheritance, rights to use common land or the seashore for particular purposes, rights of way, hunting, fishing and foraging rights and rights to hold a market. But the categories of customary rights are not, it seems, closed, and those that have been recognised do not fit into any defined class or classes.[300] The courts have controlled claims to local customary rights more through the application of the general criteria for recognition; and in practice relatively few claims to local customs have been recognised. Briefly, the

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295 See eg B Hocking, 'Does Aboriginal Law Now Run in Australia?' (1979) 10 *Fed L Rev* 161; B Hocking, 'Is Might Right? An Argument for the Recognition of Traditional Aboriginal Title to Land in the Australian courts', in E Olbrei, *Black Australians: The Prospects for Change*, Students Union, James Cook University, Townsville, 1982, 207; G McIntyre, 'Aboriginal Land Rights — a Definition at Common Law', id, 222. See further para 67, 900-4.

296 *Coe v Commonwealth of Australia* (1979) 24 ALR 118, 137 (Murphy J).

297 Australian Law Reform Commission — Australian Institute of Aboriginal Studies *Report of a Working Seminar on the Aboriginal Customary Law Reference* Sydney, 1983, 2.

298 See the works cited in para 66.

299 See CK Allen, *Law in the Making*, Oxford University Press, 7th edn, Oxford, 1964, 112-60 for a full account.

300 For cases where customary adoptions were recognised see para 384.

common law requires that the custom not be inconsistent with any statute or fundamental principle of common law, that it have existed 'from time immemorial', that it have been exercised continuously and peaceably, as of right, that it should be sufficiently certain both as to its content and its beneficiaries, and that it be regarded as 'reasonable' by the court.[301] The requirements of antiquity and reasonableness are particularly relevant for present purposes. The common law came to equate 'time immemorial' with the year 1189 AD, the limit of 'legal memory' (although it was sufficient that there was no evidence against the custom's continuation since 1189 and that it could have existed then).[302] Clearly, the year 1189 AD is irrelevant to conditions in British colonies: after one early decision applying it,[303] colonial courts required only that the custom be shown to have existed for a sufficiently long but unspecified period of time.[304] Even so, the proof of long continuance by a claimant and his predecessors has often, and especially among groups with predominantly or exclusively oral cultures, been a matter of great difficulty.[305] The requirement of 'reasonableness' also allows courts to avoid recognising customs regarded as unconscionable or 'repugnant'; this power was quite often used both in England[306] and abroad.[307] It has never been decided whether the common law rules relating to recognition of local custom were received in Australia, and the application of those rules to Aboriginal customs has not yet been examined by Australian courts.[308] The attitude of early courts to Aboriginal customary laws was such that recognition was most unlikely to have been accorded: the Supreme Court in *Murrell's* case, for example, stated that Aborigines 'had no law but only lewd practices and irrational superstitions contrary to Divine Law and consistent only with the grossest darkness'.[309] By contrast Justice Blackburn in *Milirrpum's* case (a case dealing with communal native title rather than local custom in the strict sense) had no difficulty in finding that 'the social rules and customs' of the clans in question constituted a system of law.[310] But in other respects his decision illustrates the formal and evidentiary difficulties that are likely to stand in the way of claims to local custom. Given these difficulties, as well as the general coverage by statute of most of the areas in which 'local Aboriginal custom' might be relied on in Australia, it is clear that any such common law recognition is likely to be, at best, peripheral to the questions dealt with in this Report.[311] The Australian experience bears this out: after nearly 200 years there is no case where the common law rules for recognition of custom have been relied on in this context.

63. ***Communal Native Title.*** A second way in which the common law in settled colonies might recognise at least Aboriginal customary law rights in land is through a doctrine of 'communal native title'. This would involve the recognition of a special collective right vested in an Aboriginal group by virtue of its long residence and communal use of land or its resources. In *Milirrpum's* case Justice Blackburn held that such a doctrine had no application to a settled colony, or, at least, to Australia as a settled colony.[312] However at Feast three, and perhaps all six, of the judges of the Canadian Supreme Court who discussed the question in *Calder v Attorney-General of British Columbia*[313] disagreed with this view in relation to British Columbia (also a settled colony), and later Canadian decisions have also taken a different view.[314] So far as Australia is concerned the question is clearly still an open one, as the High Court recognised in *Coe v Commonwealth*.[315] It is currently before the High Court in a case, *Mabo v Queensland and the Commonwealth*, involving a

301 See Allen, 130-46; McIntyre, 224-6.
302 *Simpson v Wells* (1872) LR 7 QB 214; *Bryant v Foot* (1868) LR 3 QB 497.
303 *Welbeck v Brown* (1882) Sarbah FCL 185 (Gold Coast).
304 See AN Allott, 'The Judicial Ascertainment of Customary Law in British Africa' (1957) 20 *Mod L Rev* 244, 246; cf Allen, 159, citing *Garurudhwaja Parshad Singh v Saparandhwaja Parshad Singh* (1900) 27 IA 238, 247 (80 years continuance).
305 eg *R v Simon* (1982) 134 DLR (3d) 72. cf *Milirrpum v Nabalco Pty Ltd* (1971) 17 FLR 141, 183-98 (Blackburn J).
306 An early and well-known example of English ethnocentrism was *Le Case de Tanistry* (1608) Davis 28, where the Court of King's Bench held the Irish custom of tanistry (succession by the oldest person of highest rank (senior et dignissimus) who was of the same name) was 'unreasonable, & va en destruction del commonwealth' (id, 35) because it could lead to an abeyance of seizin. See Allen, 144-5.
307 See AN Allott, *New Essays in African Law*, Butterworths, London, 1970, 145-79 and cases there cited.
308 cf AC Castles, *An Australian Legal History*, Law Book Co, Sydney, 1982, 528.
309 As quoted by B Bridges, `The Extension of English Law to the Aborigines for Offences Committed Inter Se, 1829-1842' (1973) 59 *JRAHS* 264, 265-6. See para 40.
310 (1971) 17 FLR 141, 267-8. See para 100.
311 The only possible exception is the recognition of traditional hunting, fishing and foraging rights. The relevance of common law arguments in that context is discussed in Chapter 34.
312 (1971) 17 FLR 141, 198-262.
313 (1973) 34 DLR (3d) 145.
314 See *Hamlet of Baker Lake v Minister of Indian Affairs and Northern Development* (1979) 107 DLR (3d) 513 (Federal Court, Mahoney J); *Guerin v R* (1984) 6 WWR 481 (SC)).
315 (1979) 24 ALR 118, 129-30 (Gibbs J, with whom Aickin J agreed), 135-6 (Jacobs J), 137 (Murphy J). For comment on Blackburn J's decision in *Milirrpum* see eg J Hookey, 'The Gove Land Rights Case: A Judicial Dispensation for the Taking of Aboriginal Lands in Australia?' (1972) 5 *Fed L Rev* 85; G Lester & G Parker, 'Land Rights: The Australian Aborigines Have Lost a Legal Battle But ...' (1973) 11 *Alberta L Rev* 189; LJ Priestley, 'Communal Native Title and the Common Law: Further Thoughts on the Gove Land Rights Case' (1974) 6 *Fed L Rev* 150; R Bartlett, 'Aboriginal Land Claims at Common Law' (1983) 15 *UWAL Rev* 293. See also the criticism of Blackburn J's dismissal of the common law arguments, by Canadian judges in *Calder's* case (1973) 34 DLR (3d) 145, 217 (Hall J) and in the *Baker Cake* case (1979) 107 DLR (3d) 513, 541 (Mahoney J).

claim to communal native title or ownership of Murray Island in the Torres Strait, ownership said to have been recognised by Great Britain, Queensland and the Commonwealth on and after the acquisition of British sovereignty in 1879.[316] The claim in *Mabo's* case — and other Aboriginal claims to land on the basis of traditional associations — can be regarded as claims to the recognition of one important aspect of customary laws (in this case, the customary law of Torres Strait Islanders) . The question of Aboriginal land rights is not directly dealt with in this Report.[317] The importance of traditional land claims, and of land rights issues generally, must be acknowledged,[318] but their resolution, though it may help to create more secure conditions in which traditionally oriented Aborigines may live, will still leave unresolved a range of questions related to the recognition of Aboriginal customary laws. These questions, which are the focus of this Report, must be specifically addressed, and cannot be left to the very limited protection of the common law rules relating to recognition either of local custom or communal native title.

## The Settled Colony Debate

64. ***The Distinction Between Settled and Conquered Colonies.*** A more usual — though not necessarily more fruitful — approach to the question of common law recognition of customary law is through a reassessment of the way in which the basic common law rules with respect to colonial acquisition were applied to Australia in 1788 and thereafter. It has been argued that such a reassessment would open the way to wider recognition of customary laws by the common law.[319] It is clear that these rules were the vehicle by which recognition of Aboriginal laws was denied. From the first days of settlement, the interaction of British administrative policies and legal principles relating to the colonies provided the foundation for asserting of English law at the expense of the customary laws and practices of Aboriginal groups.[320] The general principles for the introduction of English law into a 'settled' as distinct from a 'conquered' colony were laid down by Blackstone in 1765.[321] Justice Blackburn in *Milirrpum's* case put the distinction thus:

> There is a distinction between settled colonies, where the land, being desert and uncultivated, is claimed by right of occupancy, and conquered or ceded colonies. The words 'desert and uncultivated' are Blackstone's own; they have always been taken to include territory in which live uncivilized inhabitants in a primitive state of society. The difference between the laws of the two kinds of colony is that in those of the former kind all the English laws which are applicable to the colony are immediately in force there upon its foundation. In those of the latter kind, the colony already having law of its own, that law remains in force until altered.[322]

As the Privy Council pointed out in passing in *Cooper v Stuart*, New South Wales had been regarded as 'a tract of territory, practically unoccupied, without settled inhabitants or settled land, at the time when it was peacefully annexed to the British dominions'.[323] The classification of the British acquisition of Australia as acquisition by settlement might therefore seem to be established, although it is possible that the question may be reopened in the High Court. Two of the four justices in *Coe v Commonwealth*[324] thought the point arguable, though two did not. Chief Justice Gibbs held that:

> It is fundamental to our legal system that the Australian colonies became British possessions by settlement and not by conquest. It is hardly necessary to say that the question is not how the manner in which Australia became a British possession might appropriately be described. For the purpose of deciding whether the common law was introduced into a newly acquired territory, a distinction was drawn between a colony acquired by conquest or cession, in which there was an established system of law of European type, and a colony acquired by settlement in a territory which, by European standards, had no civilized inhabitants or settled law. Australia has always been regarded as belonging to the latter class ...[325]

316 For details see para 901.
317 See para 212.
318 For the relation between common law land claims and hunting, fishing and foraging rights see para 899-904.
319 See para 66 for statements of this view. In practice, difficulties such as those encountered in Milirrpum's case would be encountered, given the enormous changes in Aboriginal societies and traditions since settlement. See para 68. However it is desirable to deal with the issue at the general level at which it is raised.
320 See para 39-41.
321 *Commentaries on the Laws of England* (1765) vol 1, 107.
322 (1971) 17 FLR 141, 201.
323 (1889) 14 App Cas 286, 291.
324 (1979) 24 ALR 118.
325 id, 129, citing *Cooper v Stuart*, Aickin J agreed: id, 138.

On the other hand, Justice Jacobs pointed out that there was no Privy Council decision directly on the matter and that the plaintiffs should be entitled to argue the point.[326] Justice Murphy considered neither *Cooper v Stuart* nor *Milirrpum* to have settled the point:

> Although the Privy Council referred in *Cooper v Stuart* to peaceful annexation, the aborigines did not give up their lands peacefully: they were killed or removed forcibly from the lands by United Kingdom forces or the European colonists in what amounted to attempted (and in Tasmania almost complete) genocide. The statement by the Privy Council may be regarded either as having been made in ignorance or as a convenient falsehood to justify the taking of aborigines' land.[327]

Discussion of Australia's status on colonisation has not been limited to judicial pronouncements. The Select Committee of the House of Commons on Aborigines stated in 1837:

> The land has been taken from them without the assertion of any other title than that of superior force and by the commission under which the Australian colonies are governed, Her Majesty's Sovereignty over the whole of New South Wales is asserted without reserve. It follows that Aborigines must be considered within the allegiance of the Queen and as entitled to her protection. Whatever may have been the injustice of this encroachment, there is no reason to suppose that either justice or humanity would now be consulted by receding from it.[328]

Cook's secret instructions had provided that he should acquire territory 'with the consent' of the Natives. But they also empowered him to take possession of 'uninhabited country', by setting up 'Proper Marks and Inscriptions' as 'first discoverers and possessors'.[329] According to Castles, each of the steps taken by Cook 'demonstrated that he was following those parts of his instructions which assumed that Australia was to be treated as uninhabited'.[330] Subsequent extensions of British rule were made:

> on the assumption that the entire continent was to be acquired through settlement and not conquest. The last lingering doubts, if there were any, were firmly removed when the British authorities refused to give any form of legal recognition to John Barman's claim that he could acquire land rights by treating with Aboriginal tribes in the Port Phillip district.[331]

65 ***The Australian Courts Act 1828 (Imp) s 24.*** Thus British law was applied in the colony from the first. But problems regarding its application led in 1828 to the passing of the Australian Courts Act,[332] s 24 of which provided that:

> ... all laws and statutes in force within the Realm of England at the time of passing of this Act ... shall be applied in the administration of justice in the Courts of New South Wales and Van Diemen's Land respectively, so far as the same can be applied within the said colonies ...

The decisive date was deliberately made the date of the passing of the Act, 25 July 1828, in order to gain the benefit of Peel's criminal law reforms introduced during the 1820s. Section 24, in effect, reaffirmed that New South Wales was a settled colony, but provided a later date of reception for reasons of convenience. British law, both common law and statute law, as at this date was thus declared to be the law of the two eastern colonies New South Wales and Van Diemen's Land — but only so far as it 'could then be reasonably applied within the said colonies'. South Australia was not founded until 1836, and the relevant date of reception is 28 December 1836.[333] In Western Australia, the State was deemed to have been established on 1 June 1829 for the purposes of determining the application of Imperial Acts.[334] Except so far as it has been altered by Australian Parliaments or courts, or by Imperial Acts applying to Australia, British law as it existed at these dates is still the law applicable to all citizens, including Aborigines. By this means the Australian colonies directly inherited a vast body of English statute and common law.

66. ***The Settled/Conquered Colony Debate.*** Had Australia been treated as a 'conquered' colony, Aboriginal customary laws, to the extent that they had not been expressly abrogated, would presumably have been

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326 id, 136.
327 id, 138. It is possible that the point may be dealt with by the High Court in *Mabo v Queensland and Commonwealth*, although the claim there does not depend on the 'conquered colony' argument. See para 61.
328 *Report* (1837) 82, 83.
329 Additional Instructions for Lt James Cook, appointed to command His Majesty's Bark Endeavour, 30 July 1768, in JM Bennett & AC Castles, *A Source Book of Australian Legal History*, Law Book Co, Sydney, 1979, 253-4.
330 Castles, 6.
331 id, 6.
332 9 Geo IV c83.
333 4 & 5 Win IV c95 s 1; and see Acts Interpretation Act 1915 (SA) s 48.
334 Interpretation Act 1918 (WA) s 43.

recognised, at least in their application to Aborigines.[335] The recognition of Aboriginal customary laws now, it has therefore been argued, depends at least in part on a reassessment of the initial classification of Australia for the purposes of the application of law. The Commission has received several submissions arguing that the 'settled' colony notion should be rejected in the strongest terms as an initial step in its inquiry. As one submission put it:

> I suggest that the Commission should take the opportunity to reject in the strongest terms possible the notion that has hitherto prevented any recognition of customary law among the Australian aboriginal people, namely the doctrine that upon colonisation Australia fell into the category of a settled colony, a land either without previous inhabitants or whose inhabitants lacked any social organisation worth recognising ... [T]his myopic view of aboriginal society (excusable as it might have been by the standards of the eighteenth and early nineteenth centuries) has been conclusively shown by anthropologists and historians to be quite wrong as a matter of fact ... Yet the Australian courts persist to the present day in maintaining the fiction of the uninhabited colony, on the ground that it is a question of law which was authoritatively settled by the Privy Council in *Cooper v Stuart* (a reading of which indicates that the Privy Council hardly addressed its mind to the question). It is neither correct nor just to say that it is 'too late' to change now. To acknowledge the error and to admit that the country was inhabited by human beings whose customs could have been recognised (as they were recognised on the other side of the Torres Strait) does not involve the overthrow of the established Australian legal order. It does involve the concession that justice has been denied to the Aboriginal people through a fundamental misconception of fact from which legal consequences have followed. We should be mature enough to make that concession. If we do not, the Australian legal system will continue to rest on ... a dubious basis of either fraud or a mistake of fact.[336]

The assumption, which underlay the proclamation of British sovereignty over Eastern and later Western Australia and the subsequent gradual occupation of the continent, that Australia was legally 'uninhabited' because it was 'desert and uncultivated'[337] was, it has been argued, wrong as a matter of fact. In the light of subsequent anthropological research, the assumption that Eastern Australia in 1788 had neither 'settled inhabitants' nor 'settled law' cannot be sustained. Whether Eastern Australia was 'desert and uncultivated' in Blackstone's sense may be another question. There is now considerable evidence of Aboriginal techniques of land management and conservation, including the deliberate use of fire,[338] but Aborigines were not in the European sense a pastoral or farming people, if that was what was required. But unease at the insensitive disregard for the facts of Aboriginal life, and at the way in which terms such as 'peaceful annexation' gloss over the reality of the relations between European settlers and Aboriginal groups,[339] has been a significant factor in recent suggestions that the question needs to be re-evaluated. There are other factors also. For example, the classification of a country such as Australia was in 1788 as unoccupied territory (*terra nullius*) might well be incorrect if that classification had to be made by the standards of modern international law.[340] But it does not follow that the position under international law in the eighteenth and early nineteenth century was the same[341] or that the international law category 'unoccupied territory' was synonymous with the 'settled colony' of the common law, or even that the acquisition of the Australian colonies is appropriately re-classified as one by 'conquest'. As Alfred Stephen, counsel in *Murrell's* case, recognised, the actual

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335 This was the case, at least initially, in New Zealand. But the Maori experience suggests that such recognition would have been grudging and temporary. cf A Frame, 'Colonizing Attitudes towards Maori Custom' (1981) NZLJ 105; MR Litchfield, 'Confiscation of Maori Land' (1985) 15 *Vict U Well L Rev* 335.

336 Justice JA Miles, *Submission 263* (29 April 1981) 2-3. To similar effect S Jones, *Submission 16G* (7 June 1977); P Gray & R Williams, *Submission 19* (15 June 1977) 1. The contrary view was expressed, for example, by Justice H Zelling, *Submission 369* (26 January 1983) 1, on the grounds that the settled colony rule was established practice for other colonies with indigenous inhabitants, and that it was in any event established, for South Australia at least, by statute (4 & 5 Wm IV c95), not merely by judicial decision. For differing views on the question of classification see GS Lester, *Inuit Territorial Rights in the Canadian Northwest Territories*, Tungavik Federation of Nunavut, Ottawa, 1984, esp 37-41, a summary statement of the arguments developed by the same writer in *The Territorial Rights of the Inuit of the Canadian Northwest Territories: A Legal Argument*, Ph D Thesis, York University, 2 vols, 1981; and MJ Detmold, *The Australian Commonwealth*, Law Book Co, Sydney, 1985, ch 4. See also GS Lester, *Submission 468* (19 February 1985).

337 Blackstone, vol 1, 108.

338 cf G Blainey, *Triumph of the Nomads*, rev edn, Sun Books, Melbourne, 1983, 67-83, and see further para 883-7.

339 See eg the discussion of initial European contact in Cape York in R Logan Jack, *North West Australia*, Simpkin Marshall, Hamilton Kent and Co Ltd, London, 1921. See also para 23, 24.

340 *Western Sahara Advisory Opinion* ICJ Rep 1975, 12; J Crawford, *The Creation of States in International Law*, Oxford, Clarendon Press, 1979, 181. However even this is not entirely clear. The International Court in the *Western Sahara* case emphasised that what was required was occupation by 'tribes or peoples having a social and political organisation' (para 80). The Western Saharan tribes, it held, 'were socially and politically organised ... under chiefs competent to represent them (para 80, & cf para 149). Whether Aboriginal groups could be said to have constituted nations (they were, of course, not a single nation), to have had sovereignty, or to have had a political organisation outside family organisation, has been the subject of considerable debate. See eg RL Sharp, 'People without Politics', in VF Ray (ed) *Systems of Political Control and Bureaucracy in Human Societies*, University Of Washington Press, Seattle, 1958; P Sutton 'People with Politics: Management of Land and Personnel on Australia's Cape York Peninsula', in NW Williams and ES Hunn (eds) *Resource Managers: North American and Australian Hunter-Gatherers*, Westview Press, Colarado, 1982, 155. But it is doubtful whether they were organised under `chiefs competent to represent them'. See para 37, 203. On the process of classification see further E Evatt, 'The Acquisition of Territory in Australia and New Zealand', in CH Alexandrowicz (ed) *Grotius Society Papers 1968*, The Hague, Nijhoff, 1970, 16; B Hocking, 'Aboriginal Land Rights: War and Theft' (1982) 20 (9) *Australian Law News* 22, Castles, 20-31.

341 Crawford, 177-80.

process was complex, perhaps sui generis.[342] Certainly the process of 'conquest' by attrition took much longer than the acquisition of the territory of Australia as a matter of international law.[343]

67. ***Legal and Moral Issues.*** To a considerable extent this reassessment or reevaluation of the processes of British acquisition of Australia is an aspect of the moral and political debate over past and present relations between Aboriginal and non-Aboriginal Australians. That debate is of great importance, quite apart from any specifically legal consequences it may have. As a matter of present Australian law it is clear that the Crown's acquisition of sovereignty over Australia was an act of state unchallengeable in the courts.[344] The classification of Australia as a 'settled' rather than a 'conquered' colony may also have been an act of state; at least, it may now be a classification settled by legislative or judicial decision. Whether all the consequences of that classification are legally beyond dispute — that is, beyond the reach of judicial reassessment — is another question.[345] And it is another question again what the consequences would be of a reassessment now of the status of the acquisition of Australia, and of its classification as uninhabited and uncultivated. It is necessary to distinguish three separate issue s. The first is the acquisition of sovereignty by the British Crown over Australia as a matter of international law (and the international consequences for the Aboriginal inhabitants). The second is the application of British law to Australia, and the con sequences of that application for the continued existence and enforcement of Aboriginal customary laws and traditions. The third is the consequences of acknowledging now, as a result of an increased understanding of those laws and traditions, that the processes of territorial acquisition and application of law involved a classification of Australia which reflected the insensitivity shown (and perhaps aggravated the injustices caused) to the Aboriginal peoples of Australia. A similar distinction was made by the Senate Standing Committee on Constitutional and Legal Affairs in its report on the feasibility of an 'Aboriginal treaty' or Makarrata:

> It may be that a better and more honest appreciation of the facts relating to Aboriginal occupation at the time of settlement, and of the Eurocentric view taken by the occupying powers, could lead to the conclusion that sovereignty inhered in the Aboriginal peoples at that time. However, the Committee concludes that, as a legal proposition, sovereignty is not now vested in the Aboriginal peoples except insofar as they share in the common sovereignty of all peoples of the Commonwealth of Australia. In particular, they are not a sovereign entity under our present law so that they can enter into a treaty with the Commonwealth. Nevertheless, the Committee is of the view that if it is recognised that sovereignty did inhere in the Aboriginal people in a way not comprehended by those who applied the terra nullius doctrine at the time of occupation and settlement, then certain consequences flow which are proper to be dealt with in a compact between the descendants of those Aboriginal peoples and other Australians.[346]

68. *The Issue for the Commission.* The issue for the Commission in the present Reference is the extent to which Aboriginal customary laws and traditions should be recognised by the Australian legal system now, nearly two hundred years after permanent European entry into Australia. The reassessment now of Australia's status as a settled colony would not as such bring about appropriate forms of recognition. Whatever the position in 1788 or in 1837, it is much too late to suggest that justice to Aboriginal people today can be achieved thro ugh attempts to[347] reconstruct or recreate the past. This is particularly the case with respect to the recognition of Aboriginal laws and traditions, which are now in many respects different from those the European settlers saw, but only dimly comprehended. The question is whether and how those laws and traditions, as they now exist, should be recognised. The acknowledgment of past injustice provides no particular answer to that question. What it may provide is a direction or a presumption, that where recognition is possible it should occur, as an aspect of the acknowledgment of past wrongs (and perhaps as a form of compensation to Aboriginal people thereby affected).[348] But such a presumption is hardly needed. The case for the forms of recognition of Aboriginal customary laws and traditions recommended in this Report is, in the Commission's view, a clear one. What underlies those proposals, and the Commission's

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342 See I Hookey, 'Settlement and Sovereignty' in P Hanks and B Keon-Cohen (eds) *Aborigines and The Law*, George Allen and Unwin, Sydney, 1984, 16, 17. See also Logan Jack (1921), and cf para 39.

343 See para 29, 34, and cf J von Sturmer, *Submission 403* (March 1984) 10.

344 *Coe v Commonwealth* (1978) 18 ALR 592 (Mason J);. (1979) 24 ALR 118 (Full Court).

345 GS Lester, *Submission 468* (19 February 1985) argued that the only secure basis for asserting Aboriginal rights at common law is to accept that Australia was settled and to controvert the decision in the *Nabalco* case that the consequence of settlement was to vest all land (and associated rights) in the Crown. As he points out, if Australia had been regarded as 'conquered', no Aboriginal rights would have been enforceable against the Crown without recognition by the Crown (which did not occur); even the application of Aboriginal customary laws as between Aborigines themselves would have been excluded because those laws would have been regarded as *malum in se: Calvin's case* (1608) 7 Co Rep 1a, 77 ER 377, and cf para 62.

346 *Two Hundred Years Later* (1983) para 3.46.

347 When the House of Commons Select Committee on Aborigines reported: see para 64.

348 But see para 109 for difficulties with 'compensation' in this context.

general approach, is an acknowledgment of the present realities, and the present needs, of the Aboriginal people of Australia.

# 6. The Recognition of Aboriginal Customary Laws and Traditions Today

69. ***Introduction***. As Chapter 5 concludes, the common law does not provide an appropriate general basis for the incorporation or recognition of Aboriginal customary laws, or at least it has not done so so far. While the common law rules for the recognition of custom, of communal native title, or of local laws and institutions in territories acquired by the Crown may provide some scope for recognition, there is yet no basis in Australian case law for such developments[349] and no good reason to predict that they will occur. Even if such developments were to occur they would not, given the many changes in the lives of Aborigines affected, be of general application, nor would they resolve many of the problems which now have to be faced in recognising Aboriginal customary laws and traditions. But there are other ways in which Aboriginal customary laws can be said to be 'recognised', as an examination of the ways in which Australian courts, administrators and legislators have responded to Aboriginal customary laws will show. It may be that in an unsystematic, indirect way Australian law does now sufficiently allow for the recognition of Aboriginal customary laws and traditions, so that no new or more systematic form of recognition, and in particular no special legislation for recognition is required. As was noted earlier, the general direction of Aboriginal affairs policy began to change in the late 1960s and early 1970s, and the increased interest in these questions which again came to be expressed[350] has been accompanied, at least in particular contexts and in a piecemeal way, by measures to accommodate Aboriginal traditions and practices.[351] This Chapter summarises briefly the various ways in which Australian law can now be said to recognise Aboriginal customary laws and traditions.

## Recognition through the Courts

70. ***Judicial Responses.*** With their day-to-day experience of the difficulties and the potential for injustice that can arise in applying the general law to traditionally oriented Aborigines, the courts have sometimes been able to reduce the effects of non-recognition. Thus some judges, confronted with the reality of Aboriginal adherence to different and often conflicting rules or values, have attempted to refine or mitigate the general law's basic non-recognition of those rules and values. This continues to occur in a variety of ways. These include taking customary laws into account in determining sentence,[352] and in the application of established defences such as provocation, duress and claim of' right.[353] Courts have been prepared to recognise that loss of traditional status and privilege may constitute compensable injury in road accident cases.[354] There has been one instance in which a traditional marriage was recognised for the purposes of adoption legislation'.[355] Rules establishing special interrogation rules to protect some Aboriginal defendants have also been enunciated or accepted by some courts.[356]

71. ***Sentencing Discretions.*** The exercise of judicial discretions to take into account customary law in mitigation of sentence was supported by the House of Commons Select Committee on Aborigines and by Governor Grey in the 1830s[357] and has continued to occur. In the last decade there have been many cases, especially in the Supreme Courts of the Northern Territory, South Australia and Western Australia, where Aboriginal customary laws have been regarded as relevant in sentencing. These cases, and the principles underlying them, will be discussed in Chapter 21 of this Report.

72. ***The Substantive Criminal Law.*** There have also been cases where Aboriginal customary law and traditions have been claimed to be relevant to the determination of criminal responsibility. For example an Aboriginal defendant may have been affronted by the disclosure of tribal secrets, or the use of certain prohibited words. These acts, while regarded as particularly serious by many Aborigines, may be treated as unimportant by non-Aboriginal Australians. The House of Lords held in *Bedder v DPP*[358] that for the

349 See para 61-3, 66-7 respectively.
350 See para 28.
351 See para 57.
352 See para 58.
353 See para 72.
354 See para 73.
355 See para 74.
356 See para 75.
357 See para 43-4.
358 [1954] 2 All ER 801.

defence of provocation to be established, it was necessary both that the defendant actually lost his self-control and that the circumstances were such that a reasonable man, with no physical or mental peculiarities or specific cultural background, would have lost his self-control. On this basis the defendant's cultural background would be considered a peculiarity of the accused and irrelevant to the question of provocation. Despite this decision, Justice Kriewaldt was prepared, in a series of Northern Territory decisions in the 1950s, to take account of the defendant's Aboriginality in such situations.[359] The courts took account, for example, of the fact that an Aboriginal defendant had been provoked by the uttering of prohibited words, or by the disclosure of tribal secrets.[360] This approach has since been followed and extended, in Australia and elsewhere.[361] It is likely that a similar approach would be taken in determining the reasonableness of acts under other criminal law defences (for example duress).

73. ***Compensable Injury.*** In several cases, courts have held that loss of traditional status, which may result from brain damage or other incapacity, could be included in assessing damages in road accident cases. In *Napaluma v Baker*,[362] the plaintiff had begun to undertake the traditional ceremonies of the Pitjantjatjara people and had been initiated. In assessing damages for loss of amenities resulting from the injuries, Justice Zelling said:

> ... in the ordinary course of events, further secrets would be entrusted to him and he would, in our parlance, rise to higher degrees. It is now certain that the plaintiff will not be advanced to further degrees in Aboriginal lore for two reasons, firstly, he may not keep secret what is entrusted to him, and secondly, he has not the ability to pass on accurately the secrets to others. Accordingly, he is left out of some ceremonies and he plays a merely minor passive role in others and he is therefore less than a full member of the Aboriginal community. He will not play the part in relation to reciprocal relationships with other Aborigines of his own peer group, nor will he be consulted, at least not as much as others, in making tribal decisions. I feel that this position may worsen after his father's death. At the moment his father is an Aboriginal of high degree within the tribe. He looks after the plaintiff and as long as his father is present I have no doubt that that will shield the plaintiff from much of his disabilities within tribal life. That may well not be so, or at least be so to a less degree, when his father dies.[363]

*Napaluma v Baker* was followed in the Northern Territory case of *Dixon v Davies*.[364] Loss of the ability to participate in ceremonies has also been taken into account in assessing damages for assault.[365] It is true that such decisions can be regarded as only an application, in the particular circumstances of the case, of the general principle that the plaintiffs actual loss is to be assessed in quantifying damages. They are nonetheless a judicial recognition of the value attributed to traditional Aboriginal ways of life.

74. ***Traditional Marriage: A Northern Territory Decision.*** In an unreported decision in 1981, Chief Justice Forster of the Northern Territory Supreme Court declined to take the view that a tribal marriage did not count as a marriage for the purposes of an adoption. He held that the reference to 'husband and wife jointly' in the legislation[366] included Aborigines living a traditional life who had been traditionally married according to tribal custom and who felt bound by that custom.[367] Other decisions on similar questions have not been uniform. Either the court has concluded that traditional marriages could not be recognised[368] or existing common law rules (eg the presumption of marriage on cohabitation) have been manipulated to achieve a just result.[369] The general question of the recognition of traditional marriages is discussed in Part III of this Report.[370]

75. ***Interrogation Rules.*** It is not only at the substantive and sentencing levels that non-recognition of Aboriginal customary laws and traditions can cause injustice. Aboriginal people, and particularly more traditionally oriented Aborigines, are, because of language difficulties, differing concepts of time and distance, cultural differences and other problems, at a considerable disadvantage when interrogated by

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359 eg *R v Patipatu* [1951] NTJ 18; *R v Muddarubba* [1956] NTJ 317.
360 *R v Sydney Williams*, reported on another point (1974) 14 SASR 1. See para 493.
361 See esp *DPP v Camplin* [1978] AC 705; *Mofja v R* (1977) 13 ALR 225. And see further para 421-7.
362 (1982) 29 SASR 192.
363 id, 194.
364 (1982) 17 NTR 31 (O'Leary J).
365 *Roberts v Devereux*, unreported, NT Supreme Court (Forster CJ) 22 April 1982.
366 Adoption of Children Act 1964 (NT) s 12.
367 See para 276.
368 *Police v Ralph Campbell*, unreported, NT Court of Summary Jurisdiction (Mr J Murphy SM) 8 June 1982. See para 315.
369 *R v Pilimapitjimiri, ex parte Gananggu* [1965] NTJ 776.
370 See Chapters 13-14.

police. In recognition of this, Justice Forster (as he then was) established certain guidelines for overcoming these disadvantages in *Anunga's* case.[371] What have come to be called the Anunga rules require:

- an interpreter to be present if the suspect is not fluent in English;
- the presence of a 'prisoner's friend';
- great care in administering the caution (right to silence) and ensuring that it is understood;
- reasonable steps to obtain legal assistance if requested;
- the provision of substitute clothing and basic refreshments if needed;
- no questioning while the suspect is ill, drunk or tired.

As Justice Forster explained:

> It may be thought by some that these guidelines are unduly paternal and therefore offensive to Aboriginal people. It may be thought by others that they are unduly favourable to Aboriginal people. The truth of the matter is that they are designed simply to remove or obviate some of the disadvantages from which Aboriginal people suffer in their dealings with police.[372]

Similar special rules now exist in some other Australian jurisdictions and have been endorsed by the Federal Police and by Police Departments in some States.[373] The extent to which such rules are necessary as a recognition of the characteristics of traditionally oriented Aborigines when under police interrogation, will be discussed in Chapter 22 of this Report.[374]

## Recognition through Legislation

76. ***Legislative Responses.*** In a number of respects Federal, State and Territory legislation now has the effect of recognising aspects of Aboriginal customary laws and traditions. This is so, for example:

- in conferring land rights on the basis of traditional claims or associations;[375]
- in the protection of sites which are sacred or significant as a matter of Aboriginal tradition;[376]
- in making special provision to permit forms of traditional food-gathering;[377]
- in limited provisions recognising traditional Aboriginal marriages;[378]
- in recent initiatives recognising Aboriginal child care practice;[379]
- in allowing a distribution of property on death which is more in accordance with Aboriginal family and kin relationships;[380]
- in establishing local courts or other machinery staffed by Aborigines, which may be more aware of local circumstances and better able to take issues of Aboriginal tradition and custom into account.[381]

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371 *R v Anunga* (1976) 11 ALR 412.
372 id, 415.
373 See para 549-60.
374 See para 546-73.
375 See para 77.
376 See para 78.
377 See para 79.
378 See para 80.
379 See para 81.
380 See para 82.
381 See para 83.

77. ***The Grant of Land Rights.*** The point has already been made that legislation conferring land on the basis of Aboriginal tradition, or allowing traditional claims to land to be made, can be regarded as a recognition of Aboriginal customary laws.[382] The first and most important example of such legislation was the Aboriginal Land Rights (Northern Territory) Act 1976 (Cth). The Act specifically recognises Aboriginal traditions in a number of ways. In addition to the provisions for land grants and claims, s 71(1) provides that:

> Subject to this section, an Aboriginal or a group of Aboriginals is entitled to enter upon Aboriginal land and use or occupy that land to the extent that that entry, occupation or use is in accordance with Aboriginal tradition governing the rights of that Aboriginal or group of Aboriginals with respect to that land ...

The Aboriginal Land Act 1978 (NT), which is complementary to the 1976 Commonwealth Act, likewise regulates entry onto Aboriginal land through a form of recognition of traditional rights. Section 4 provides that Aborigines entitled under Aboriginal tradition to enter or remain on Aboriginal land may do so under the Act.[383] These Acts apply, of course, only to Aboriginal land. They do not protect customary interests or rights of access in land which is not 'unalienated Crown Land' under the 1976 Act. In South Australia the Pitjantjatjara Land Rights Act 1981 (SA) s 15 vests land in the Anangu Pitjantjatjaraku, the body corporate of the Pitjantjatjara, in a way which in effect constitutes a recognition of traditional association with land.[384] Legislation in a number of other States in various ways and to varying extents recognises customary land use.[385]

78. ***Sites and Sacred Sites.*** Before 1965 there was no legislation protecting Aboriginal sites, with the minor exception of certain regulations in the Northern Territory. In 1965 the South Australian Government was the first to enact such legislation, and all other States have since done so.[386] Interim Federal legislation designed to protect areas and objects of 'particular significance to Aborigines in accordance with Aboriginal 'tradition' has also been enacted.[387] Many thousands of sites have been recorded by State authorities; over 6000 by the Australian Institute of Aboriginal Studies, and over 3000 by the Heritage Commission — although registration provides no guarantee of protection from development or interference. In addition, the protection extended by these various Acts differs considerably, and they do not necessarily provide protection for Aboriginal traditions as such. For example, definitions of 'site' or 'relic' that require some 'trace ... of Aboriginal culture'[388] may well not extend to natural objects or sites which are sacred or significant, while they may cover archaeological sites (eg kitchen middens) which have no special significance to Aborigines now. On the other hand, such provisions may allow Aborigines to protect traditional interests in sites in various ways.[389] For example, in *Onus and Frankland v Alcoa of Australia Ltd*, the High Court held that the traditional or customary law responsibilities of the plaintiffs with respect to a particular site were a recognisable or sufficient interest to give them standing to challenge an industrial development affecting that site.[390] In response to a statement by a judge in the court below that the court could not recognise matters of cultural significance outside the Western European or common law traditions without legislative encouragement, Justice Murphy commented:

> Australia is a nation composed of peoples deriving from a variety of cultures, which are not restricted to Western European. Our people also adhere to a variety of religions many of which are not 'Judeo-Christian', and many have no religion. 'Western-European Judeo Christian culture', if there is such a culture, has no privileged status in our courts. Aboriginal culture is entitled to just as much recognition. If a cultural or religious interest founded on 'Judeo-Christian Western-European' traditions is enough to establish standing, then a cultural or religious interest founded on Aboriginal tradition is also enough.[391]

79. ***Hunting and Fishing Rights.*** The traditional rights of Aboriginal people to hunt and fish have received legislative recognition, for example, in the form of reservations in pastoral leases.[392] Thus s 106(2) of the Land Act 1933 (WA) provides that the Aboriginal natives may at all times enter upon any unenclosed and

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382 See para 61.
383 See also Cobourg Peninsula Aboriginal Land and Sanctuary Act 1981 (NT) s 3.
384 cf s 4. The Maralinga Tjarutja Land Rights Act 1984 (SA) contains similar provisions.
385 See para 212-3, 909-68 for further details and references.
386 Aboriginal and Historical Relics Preservation Act 1965 (SA); Aboriginal Sacred Sites Act (NT); Aboriginal Relics Preservation Act 1967 (Qld); Aboriginal Relics Act 1975 (Tas); Archaeological and Aboriginal Relics Preservation Act 1972 (Vic); Aboriginal Heritage Act 1972 (WA).
387 Aboriginal and Torres Strait Islanders Heritage (Interim Protection) Act 1984 (Cth).
388 eg Aboriginal Relics Preservation Act 1967 (Qld) s 3.
389 See further ch 19.
390 (1981) 36 ALR 425.
391 id, 439. cf the explanation by Lee J in *Coe v Gordon* [1983] 1 NSWLR 419, 427.
392 eg Pastoral Act 1936 (SA) Schedule 1; Crown Lands Ordinance 1978 (NT) s 24.

unimproved parts of land the subject of a pastoral lease to seek their sustenance in the accustomed manner. Section 47 of the Aboriginal Land Rights Act 1983 (NSW) makes provision for Aboriginal people, in certain circumstances, to have access to land for the purpose of hunting and fishing. Recognition may also be accorded by exempting Aboriginal people engaged in traditional hunting or fishing from the operation of certain provisions of wildlife and fisheries legislation. The National Parks and Wildlife Conservation Act 1975 (Cth) s 71(1) for example empowers the Governor to make regulations on a wide range of matters, but provides that these regulations should not in the absence of express provision, be interpreted as affecting traditional use of land by Aborigines.[393] Recognition of hunting and fishing practices has also been extended at the international level, under the Treaty between Australia and Papua New Guinea of 1978.[394] These and similar provisions in State and Federal legislation are important especially where Aboriginal people are supplementing their diet with bush foods of various kinds, in what are essentially traditional, established ways.[395]

80. ***Aboriginal Traditional Marriages.*** In particular cases and for particular purposes, traditional Aboriginal marriage has been equated to 'marriage' under some Australian legislation. A number of Northern Territory Acts recognise traditional marriage for certain specified purposes.[396] Traditional marriage is also recognised for the purposes of the Compensation (Commonwealth Government Employees) Act 1971 (Cth) and in Victoria for the purposes of adoption and guardianship.[397]

81. ***Aboriginal Child Care Practices.*** The Northern Territory is the first Australian jurisdiction specifically to recognise and protect Aboriginal child care practices. The Community Welfare Act 1983 (NT) s 69 provides for an Aboriginal child placement principle, in some respects similar to that in the Indian Child Welfare Act 1978 (USA), and governing decisions with respect to Aboriginal children in need of care. A similar provision applies in the case of adoptions of Aboriginal children in Victoria.[398]

82. ***Traditional Distribution on Death.*** The Administration and Probate Act 1979 (NT) recognises traditional Aboriginal marriage[399] and also makes provision for a 'traditional distribution' of property to be ordered in appropriate cases where an Aborigine dies intestate.[400] Section 35 of the Aboriginal Affairs Planning Authority Act 1972 (WA) also allows for a traditional distribution of the estate of a deceased Aborigine on intestacy, although only in very limited circumstances.[401]

83. ***Aboriginal Courts.*** The second of the two specific questions in the Commission's Terms of Reference concerns the ways in which Aboriginal people may be empowered to apply their customary laws in the resolution of disputes within their communities. This might take different forms, including the creation of Aboriginal courts of various kinds. In fact there are 'Aboriginal courts' currently operating in Queensland and Western Australia.

- *Queensland Courts*. Aboriginal courts operate on 14 'trust areas' (former Aboriginal reserves) throughout Queensland, although not always on a regular basis. These courts had their origins in the Aboriginal Preservation and Protection Act 1939 (Qld) which gave extensive powers to the Chief Protector of Aborigines. Amendments to this Act in 1945 extended these powers to include Aboriginal courts, police and gaols. Today the courts are staffed by Aborigines, but their jurisdiction is limited to a range of minor offences committed within the trust areas.[402]

393 cf Fisheries Act 1905 (WA) s 56; Wildlife Conservation Act 1950 (WA) s 23.
394 See para 942.
395 See Part VII of this Report for a full discussion.
396 These include Status of Children Act 1978 (NT), Family Provision Act 1979 (NT), Administration and Probate Act 1979 (NT), Workmen's Compensation Act 1978 (NT), Motor Accidents (Compensation) Act 1979 (NT) and Criminal Code 1983 (NT). See also para 74.
397 Adoption Act 1984 (Vic) s 11; Children (Guardianship and Custody) Act 1984 (Vic) s 12(12). See ch 13-14.
398 Adoption Act 1984 (Vic) s 50. See ch 16.
399 s 6(4).
400 s 71B. See para 334 for details.
401 And contrast the Community Services (Aborigines) Act 1984 (Qld) s 75. See further ch 15.
402 See para 723-46 for a full discussion.

- *Western Australian Courts*. A system of Aboriginal courts operates at a number of Aboriginal communities in the north-west of the State. These were introduced on an experimental basis under the Aboriginal Communities Act 1979 (WA).[403]

- *South Australian Tribal Assessor*. The Pitjantjatjara Land Rights Act 1981 (SA) provides for giving effect to the customs and traditions of the Pitjantjatjara people in the hearing of certain disputes. Section 35 enables a tribal assessor to be appointed . Any member of the Pitjantjatjara aggrieved by any action of the body corporate and its members may appeal to the tribal assessor.[404] In hearing the appeal the assessor is not bound by the rules of evidence,[405] and should observe and where appropriate give effect to relevant customs and traditions.[406] The Maralinga Tjarutja Land Rights Act 1984 (SA) contains similar provisions.[407]

## Conclusion

84. ***Lessons from Experience.*** This summary gives a general indication of the extent to which, and ways in which, Australian courts and legislatures already recognise Aboriginal customary laws and traditions. It is true that such recognition tends to be limited and to represent a specific response to particular situations or needs. But the range of legislative and judicial responses provides a background against which proposals for further recognition must be considered, and it may also suggest ways in which recognition should be extended. In this sense both the earlier attempts at forms of recognition,[408] and the present range of provisions and rules, are instructive. Few of the issues considered in this Report are new. In an area as diverse, contentious and difficult as this, a sensible approach to reform may well be to build on the best aspects of present practice, and to draw upon the experience and suggestions made by those who have examined the issues over the years.

85. ***The Need for a Comprehensive Review.*** The value of this accumulated experience may be conceded, but the fact remains that the recognition of Aboriginal customary laws by the general law has continued to be erratic, uncoordinated and incomplete. One major reason is that recognition has occurred by way of exceptions from a general, and continuing, rule of non-recognition. Moreover no thoroughgoing review of the question of recognition has taken place in recent decades. The need for such a review, as required by the Commission's Terms of Reference, is clear. It may be that in particular legal contexts, Aboriginal customary laws are already sufficiently recognised, or that further recognition now is undesirable in principle. But it cannot be said that the present situation is the result of any consistent or coherent review of basic policy issues and their application in practice. Such a review is undertaken in the remaining Parts of this Report.

403 This is not the first system of Aboriginal courts to have been established in Western Australia. Courts of Native Affairs had operated on an ad hoc basis between 1939 and 1954. See para 53. On the 1979 Act see further para 747-58.
404 s 36(1).
405 s 36(3).
406 s 36(4).
407 See para 766.
408 Outlined in ch 4.

# PART II:

# THE RECOGNITION OF ABORIGINAL CUSTOMARY LAWS: GENERAL PRINCIPLES

# 7. The Scope of the Report

## Questions of Interpretation and Approach

86. ***The Terms of Reference: Narrow or Broad?*** The Terms of Reference were set out, and briefly explained, in Chapter 1. The Commission is to examine:

> whether it would be desirable to apply either in whole or in part Aboriginal customary law to Aborigines, either generally or in particular areas or to those living in tribal conditions only and, in particular:
>
> (a) whether, and in what manner, existing courts dealing with criminal charges against Aborigines should be empowered to apply Aboriginal customary law and practices in the trial and punishment of Aborigines;
>
> (b) to what extent Aboriginal communities should have the power to apply their customary law and practices in the punishment and rehabilitation of Aborigines: and
>
> (c) any other related matter.

It is clear that the focus of inquiry is the recognition of Aboriginal customary laws and practices. This has led to the criticism that the Terms of Reference are 'no wider than a bandaid'[409] and that the Commission should have been asked to concentrate on the real issues underlying law and order problems in Aboriginal communities, in particular such matters as alcohol abuse, petrol sniffing, juvenile offenders, and more fundamentally, lack of Aboriginal autonomy and land rights.[410] The Terms of Reference do not cover the whole range of general problems Aborigines have with the Australian legal system, this does not mean that they leave only a restricted field for inquiry. It would be possible to regard Aboriginal customary laws as restricted to the tradition al laws and practices followed by Aboriginal people before European contact, and to deny that adaptive or modern forms are entitled to be called 'customary laws'. Adopting such views would lead to the conclusion either that Aboriginal customary laws no longer exist, or that they are such a restricted or isolated phenomenon as not to warrant recognition. But it is also possible to take the view that Aboriginal customary laws include modern versions or developments, that they deal with ways of life and social ordering still followed by many traditionally oriented Aborigines today.[411] Similarly, the notion of 'recognition' can be regarded in different ways — narrowly, as extending only to the incorporation or enactment of particular rules (eg by way of codification), or widely, as covering a variety of methods of recognition, reinforcement or accommodation of Aboriginal customs or traditions. In determining which view of these questions to adopt, some assistance is given by the matters listed in the Terms of Reference as relevant to the Commission's inquiry. These are:

- the special interest of the Commonwealth in the welfare of the Aboriginal people of Australia;
- the need to ensure that every Aborigine enjoys basic human rights;
- the right of Aborigines to retain their racial identity and traditional lifestyle or, where they so desire, to adopt partially or wholly a European lifestyle;
- the difficulties that have at times emerged in the application of existing criminal justice system to members of the Aboriginal race; and

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409 P Roberts, *Submission 208* (5 March 1981) 2.

410 ibid; R Kimber, *Submission 106* (28 February 1981); D Vachon, *Submission 166* (1 May 1982); National Society of Labor Lawyers (D Merryfull), *Submission 322* (5 April 1982).

411 See para 29-30, 34, 38.

- the need to ensure equitable, humane and fair treatment under the criminal justice system to all members of the Australian community.[412]

The breadth of these considerations strongly suggests that the Commission was intended, within the general parameters of the 'recognition of Aboriginal customary laws', to consider practical measures addressing the difficulties arising from the interaction between the general legal system and Aboriginal groups with their own traditions and customary laws.

87. ***Purpose of this Part.*** The purpose of this Part is to consider these basic issues of definition and approach, as well as the general arguments about the recognition of Aboriginal customary laws. As the Terms of Reference suggest, arguments about whether Aboriginal customary laws should in principle be recognised are of a wide-ranging character. They include, in particular, the arguments that special laws recognising Aboriginal customary laws or traditions may be discriminatory or unequal, or that they may involve in some cases at least a denial of other basic human rights. It is only if recognition is considered desirable in principle that specific questions — for example, what changes in the law may be necessary to take account of Aboriginal traditions and customary practices, and to what extent Aborigines should be empowered to apply customary practices in maintaining law and order in their communities — arise for consideration. This Chapter will discuss:

- the definition of 'Aborigine' for the purposes of the Reference (para 88-95); and
- the position of Torres Strait Islanders, and of Pacific Islanders in Australia (para 96-7): and
- the meaning of the term 'Aboriginal customary laws' (para 98-101).

The remaining chapters in this Part will go on to consider basic issues underlying the Reference as a whole, that is to say:

- general arguments for and against the recognition of Aboriginal customary laws (Chapter 8);
- arguments from the notions of discrimination, equality and equal protection, and legal pluralism (Chapter 9);
- arguments from the standpoint of basic human rights (Chapter 10).

Chapter 11 will then summarize the Commission's general approach to the Reference and the different forms that recognition may take and will outline the consequent scope of the Report. This leads to an examination in detail of specific areas for recognition, in Parts III–VII of this Report.

## The Definition of 'Aborigine'

88. ***Who is an Aborigine?*** The Terms of Reference refer to 'the Aboriginal people of Australia', to 'Aborigines', to 'members of the Aboriginal race', to 'Aborigines ... living in tribal conditions' and to 'Aboriginal communities'. Questions of the definition of these terms, and in particular of 'Aborigine', arise both generally and in relation to s 51(26) of the Constitution, which is the main source of Commonwealth legislative power for this purpose.[413] It is possible that the ordinary definition and the constitutional definition may diverge. In addition, alternative definitions are still in use by some State government departments, and existing Commonwealth and State legislation contains a variety of formulations of 'Aborigine' or 'Aboriginal'.[414]

89. ***Early Attempts at Definition.*** Early attempts at definition tended to concentrate on descent, without referring to other elements of 'Aboriginality'. This is not surprising, given that few (if any) persons of

412 See para 6.

413 Since 1967 the term 'Aboriginal' does not appear in the Constitution. However the deletion of the phrase 'other than the Aboriginal race in any State' from s 51(26) extended the scope of the power to 'the Aboriginal race', and the meaning of that phrase therefore continues to be relevant. See para 90.

414 The nouns 'Aboriginal' and 'Aborigine' are both in current use. This Report follows the Terms of Reference in using 'Aborigine'.

Aboriginal descent were not Aboriginal in this other sense. Problems of definition did however arise in deciding whether descendants of unions between Aborigines and settlers were to be regarded as Aboriginal for the purposes of various restrictive or discriminatory laws (eg disentitling Aborigines from voting or enrolling to vote). In applying such restrictive laws it was necessary to identify who was Aboriginal, and tests based on 'quantum of blood' were commonly applied.[415] The notion that Aboriginality was exclusively a matter of descent, and that 'preponderance of [non-Aboriginal] blood' meant that one was not Aboriginal, became and remained influential, and were sometimes applied by courts with total disregard for context.[416] However the term 'Aborigine' in ordinary use has increasingly been taken to mean a person of Aboriginal descent identifying as an Aborigine and recognised as such. Definitions based on 'quantum of blood' have correspondingly been rejected as unsatisfactory, indeed discriminatory.

90. ***The Constitutional Question.*** Until recently, however, it has not been clear whether the meaning of 'Aborigine' for constitutional purposes was similarly wide. The problem arose as early as 1901 when Attorney-General Denkin had to consider the meaning of 'Aboriginal native' for the purpose of s 127 of the Constitution (repealed in 1967):

> Section 127 of the Constitution makes a particular exception that in reckoning the numbers of the people of the Commonwealth or a State, 'Aboriginal natives shall not be counted'. The rule as to the construction of such exceptions, where, as in this case, they are not remedial, is that they should be construed strictly. I am of the opinion that half-castes are not 'Aboriginal natives' within the meaning of this section, and should be included in reckoning the population.[417]

Section 127 was concerned with census-taking, a context requiring certainty of definition and as few exceptions as possible.[418] It was therefore an open question whether the exclusion of 'the Aboriginal race in any State' from the power to make special laws for the people of any race, conferred by s 51(26) of the Constitution, was to be interpreted in the same way. However a similar view was taken to the power as to the prohibition though it was never directly tested in the courts. In 1961, the Solicitor-General, Sir Kenneth Bailey, sought to define the words 'Aboriginal race' as then contained in s 51(26). He advised the House of Representatives Select Committee on Voting Rights of Aboriginals that:

> it has been the consistent view of this Department ... that certain persons of mixed blood properly belong to the constitutional category of aboriginal natives. The test, metaphorically rather than scientifically stated, is whether the aboriginal blood preponderates. Thus a half-caste. strictly so called, eg the offspring of one parent of pure aboriginal and another of pure European descent would not answer the description of a person of 'aboriginal race'. Persons of the half-blood. strictly so called, 'cannot be regarded as persons of any race', as the then Solicitor-General Sir Robert Garran, put it in an opinion given in 1921. But a person, for example. three of whose grandparents were full-blood Aboriginals would I think answer the description of a person of 'Aboriginal race'. The question therefore is basically one of descent.[419]

The 1967 Referendum deleted the exclusionary provisions for Aborigines in s 51(26) and 127. and thus significantly changed the issue of interpretation. It is one thing to interpret a reference to the 'Aboriginal race' as an exclusion of power, and quite another to interpret a power to legislate for the people of any race (including Aborigines). Yet earlier opinions continued, at least for a time, to be influential. In 1968 the then Secretary of the Attorney-General's Department discussed s 51(26) in the following terms:

> the definition of race is a matter of law, for this purpose no working definition can extend the area of power ... I agree with the view put by Sir Kenneth [Bailey]. I think myself that the view can confidently be held that a person who is predominantly of Aboriginal descent is a person of the Aboriginal race for the purposes of s 51(xxvi). There may be a case for seeking to include in the scope of legislation enacted in pursuance of s 51(xxvi) some persons who cannot be said to be predominantly of Aboriginal descent, but ... the Constitutional problems in relation to s 51(xxvi) could be finally determined only in the context of proposals for specific legislation and the particular circumstances to which the legislation would apply.[420]

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415 cf *Muramats v Commonwealth Electoral Officer* (WA) (1923) 32 CLR 500.

416 eg *Attorney-General of Victoria v Public Trustee, ex parte Hillerbrand*, unreported, Full Supreme Court of Victoria (23 October 1970). But cf *Re Dryning* [1976] VR 100 (Lush J) where a more expansive view was taken.

417 P Brazil and B Mitchell (eds) *Opinions of Attorneys-General of the Commonwealth of Australia* vol 1, AGPS, Canberra, 1981, 24. In a later opinion Isaacs concurred in this view: ibid. For other opinions on the point see id, 75, 217, 558.

418 G Sawer, 'The Australian Constitution and the Australian Aborigine' (1966) 2 *Fed L Rev* 17, 26.

419 House of Representatives, Select Committee on Voting Rights of Aborigines, *Report*, Parl Paper 2/1961, Appendix V, 44.

420 EJ Hook, unpublished opinion of 30 October 1968, 3.

In 1974, the Department referred to its previous advice that, 'in the absence of a High Court decision, no assurance could be given that the expression "the people of any race" would include descendants in any degree', and advised that s 51(26) 'would not support the application of any law, regardless of its content, to persons in any degree descended from people of the Aboriginal race'.[421]

91. ***The Impact of a Broader Definition.*** By this time the Commonwealth had developed an administrative definition of 'Aborigines' which was considerably broader than the old 'preponderance of blood' or 'substantial descent' tests:

> It was realised very early in the development of Commonwealth involvement in Aboriginal affairs that definitions of Aboriginality based on an interpretation of the constitution and relying on assessments of an individual's 'preponderance of blood' were not satisfactory for administrative purposes. Assessments of degree of descent were generally considered unreliable and capable of giving offence. Such definitions also failed to take sufficient account of concepts of self-identification and community acceptance central to the rationale for Commonwealth Aboriginal advancement programs and the remediation of Aboriginal's state of disadvantage.[422]

The current form of that definition states that:

> An Aboriginal or Torres Strait Islander is a person of Aboriginal or Torres Strait Islander descent who identifies as an Aboriginal or Torres Strait Islander and is accepted as such by the community in which he lives.[423]

Of course, the primary purpose of the definition is administrative, given its use to determine eligibility for various entitlements or programs. For constitutional purposes, the question is a broader one: it is whether the particular law is one 'with respect to' the people of any race for whom special laws are deemed necessary. It is not a requirement for the validity of a law passed for Aboriginal people that the subjects or objects of the law should all be 'Aborigines' according to some definition.[424] Nonetheless whether a law meets the description contained in s 51(26) depends in part on the identification of the 'Aboriginal race', or its members as in some sense the beneficiary or object of the law. The question is whether the definition of 'Aboriginal race' for this purpose excludes persons who are, for example, 'half-caste' or who do not have 'predominant Aboriginal blood'.[425]

92. ***The High Court Adopts the Broader View.*** The High Court's decision in *Commonwealth v Tasmania*[426] makes it clear that this is not the case, and that the broader definition applies for the purpose of the constitutional power. None of the justices (including the three dissentients) was prepared to hold that Tasmanian Aborigines are not members of the 'Aboriginal race' for the purposes of s 51(26). Those who addressed the question made it clear that those people are Aborigines for this purpose.[427] In particular Justice Brennan stated that:

> Though the biological element is ... an essential element of membership of a race, it does not ordinarily exhaust the characteristics of a racial group. Physical similarities, and a common history, a common religion or spiritual beliefs and a common culture are factors that tend to create a sense of identity among members of a race and to which others have regard in identifying people as members of a race. As the people of a group identify themselves and are identified by others as a race by reference to their common history, religion, spiritual beliefs or culture as well as by reference to their biological origins and physical similarities, an indication is given of the scope and purpose of the power granted by para (xxvi). The kinds of benefits that laws might properly confer upon people as members of a race are benefits which tend to protect or foster their common intangible heritage or their common sense of identity. Their genetic inheritance is fixed at birth; the historic, religious, spiritual and cultural heritage are acquired and are susceptible to influences for which a law may provide. The advancement of the people of any race in any of these aspects of their group life falls within the power.[428]

Similarly Justice Deane said:

> It is unnecessary, for the purposes of the present case, to consider the meaning to be given to the phrase 'people of any race' in s 51(xxvi). Plainly, the words have a wide and non-technical meaning ... The phrase is, in my view,

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421 Unpublished opinion of 1 August 1974, 1-2.
422 Department of Aboriginal Affairs, *Report on a Review of the Administration of the Working Definition of Aboriginal and Torres Strait Islander*, unpublished, Canberra, 1981, 1. This was an internal Departmental working paper, which had no official endorsement.
423 id, 8.
424 See further Chapter 38.
425 See para 90.
426 (1983) 46 ALR 625.
427 cf id, 639 (Gibbs CJ), 719-20 (Mason J), 737 (Murphy J), 854 (Dawson J). Wilson J did not refer to the point.
428 id, 792-3.

> apposite to refer to all Australian Aboriginals collectively. Any doubt, which might otherwise exist in that regard, is removed by reference to the wording of para(xxvi) in its original form. The phrase is also apposite to refer to any identifiable racial sub-group among Australian Aboriginals. By 'Australian Aboriginal' I mean, in accordance with what I understand to be the conventional meaning of that term, a person of Aboriginal descent, albeit mixed, who identifies himself as such and who is recognised by the Aboriginal community as Aboriginal.[429]

It seems clear, therefore, that the broader 'administrative' definition does not diverge from the scope of constitutional power under s 51(26).[430]

93. ***State Definitions.*** At State level, the definition of 'Aboriginal' has varied quite considerably in the past.[431] In recent years most States have moved to a definition in terms of descent, although there is still a good deal of variation even within the legislation of a single State.[432] Some State Acts have adopted the Department of Aboriginal Affairs working definition involving descent, self-identification and community acceptance.[433]

94. ***Practice under the Aboriginal Land Rights (Northern Territory) Act 1976 (Cth).*** Section 3(1)(g) of the Aboriginal Land Rights (Northern Territory) Act 1976 (Cth) defines an 'Aboriginal' as a person who is 'a member of the Aboriginal race of Australia'. There is no attempt to define the expression 'Aboriginal race'.[434] The Aboriginal Land Commissioner, Justice Toohey, discussed this section in his Report on the Finniss River Land Claim:

> the definition of the Act is 'genetic rather than social' ... The dictionary definitions are framed in such a way that people having mixed racial origins are not excluded from a race with which they are genetically linked. Despite submissions made to the contrary there is nothing in the Act to compel the view that a person who is descended from both Aboriginal and non-Aboriginal ancestors cannot be considered an Aboriginal. References to Aboriginal tradition and sacred sites and the elements of traditional Aboriginal ownership do not operate to narrow the scope of the definition. They are directed at the beliefs, roles and responsibilities of Aboriginal people, not at who is an Aboriginal. Membership of a race is something which is determined at birth and cannot, in a sense, be relinquished, nor can it be entered into by someone lacking the necessary racial origin. It is unnecessary and unwise to lay down rigid criteria in advance. As situations arise in which the Aboriginality of claimants is put in issue, those situations can be looked at. In saying this I adopt the comments of Mr Justice Woodward in his Second Report on Land Rights.
>
> Differences between Aborigines should be allowed for, but any artificial barriers, in particular those based on degrees of Aboriginal blood, must be avoided (para 62). This is not to say that persons whose predecessors were predominantly non-Aboriginal will necessarily qualify as Aboriginals within the Act.[435]

Although this passage does not refer to the elements of community identification or self-identification in the working definition, the experience under the 1976 Act is significant in its acceptance of a broad definition of 'Aborigine', and in showing how that definition has been applied in practice in a closely related context.

95. ***The Commission's View.*** Experience under Commonwealth and State legislation suggests that it is not necessary to spell out a detailed definition of who is an Aborigine, and that there are distinct advantages in leaving the application of the definition to be worked out, so far as is necessary, on a case by case basis.[436] Constitutionally this presents no difficulties, as the High Court's decision is *Commonwealth v Tasmania* show.[437] On the other hand, it has sometimes been suggested that a special and more restrictive definition of 'traditional Aborigine' should be adopted for the purposes of this Report and its implementation.[438] There are

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429 id, 817.

430 See further ch 38 for discussion of constitutional issues arising in this Report.

431 WC Wentworth, 'The Position of the Aboriginals in Law and Society' (1969) 2 *Justice* 20, 22-3.

432 eg Community Services (Aborigines) Act 1984 (Qld) s 6; Community Services (Torres Strait) Act 1984 (Qld) s 6; Aboriginal Lands Act 1970 (Vic) s 2; Archaeological and Aboriginal Relics Preservation Act 1972 (Vic) s 2; Community Welfare Act 1972 (SA) s 6(1); Aboriginal and Historic Relics Preservation Act 1965 (SA) s 3(1); Aboriginal Heritage Act 1972 (WA) s 4; Aboriginal Affairs Planning Authority Act 1972 (WA) s 4; Aboriginal Relics Act 1975 (Tas) s 2(2); Aborigines Act 1969 (NSW) s 2; Aboriginal Land Rights Act 1983 (NSW) s 4.

433 eg Fisheries Act 1905 (WA) s 56(3); Aboriginal Land Rights Act 1983 (NSW) s 4(1). For an analysis of earlier definitions see EM Eggleston, *Fear, Favour or Affection. Aborigines and the Criminal Law in Victoria, South Australia and Western Australia*, ANU Press, Canberra, 1976, 199-202; CD Rowley, *The Destruction of Aboriginal Society*, Penguin, Ringwood, 1978, 341-64.

434 See also Aboriginal and Torres Strait Islander (Queensland Discriminatory Laws) Act 1975 (Cth) s 5; Aboriginal and Torres Strait Islander Heritage (Interim Protection) Act 1984 (Cth) s 3(1).

435 Report, AGPS, Canberra, 1981, para 119-21, referring to *Uluru (Ayers Rock) National Park and Lake Amadeus/Luritja Land (Claim)*, AGPS. Canberra, 1980, para 114-6. See also *Borroloola Land Claim*, AGPS, Canberra, 1978, para 131.

436 On the application of the definition in practice see further DAA Report (1981) 8-22. See also Report of the Parliamentary Committee of Enquiry, *The Role of the NACC*, AGPS, Canberra, 1976, Appendix D.

437 See para 90.

438 eg Energy Resources of Australia Ltd (BG Fisk) *Submission 167* (4 May 1981) 4, proposing the following definition:
A traditional Aborigine is one who — A. resides in an Aboriginal Community within a recognised tribal area,

several reasons why such a special definition is both unnecessary and undesirable. Restrictive definitions of this kind have not been adopted in other related contexts.[439] Experience so far does not suggest a need for more stringent definitions.[440] The application of the Commission's recommendations in appropriate cases is to be achieved by the substantive requirements of the provision in question, and by related evidentiary requirements. Indeed, there may be cases where it is appropriate that provisions for the recognition of Aboriginal customary laws should apply to persons who are not Aborigines. These questions have to considered on their merits, and cannot be resolved through the adoption of any more-or-less restrictive definition of 'traditional Aborigine'.

## The Position of Torres Strait Islanders and South Sea Islanders

96. ***Torres Strait Islanders.*** The indigenous peoples of Australia include both Aborigines and Torres Strait Islanders, though the history of the two groups is very different.[441] In general it appears that Torres Strait Islander practices and customs are different from those even of North Queensland Aborigines, and more adaptable to the general law. Torres Strait Islanders are strictly monogamous, mostly church-married.[442] The most significant area of Islander 'customary' practice noted in the Field Report was that of adoption, especially of extra-marital children, by grandparents or other members of the extended family.[443] In recent years it appears that the practice has been followed of taking steps, after a year's trial, to formalise such adoptions under the general law.[444] Torres Strait Islanders are not included in its Terms of Reference, which clearly refer to Aborigines only. The need for separate consideration of Torres Strait Islanders is supported by the acknowledged differences between the two groups, especially in the field of customary laws, and by the difficulty of dealing with disparate groups in the same Report. It is also consistent with most legislative and administrative practice. For example, the Racial Discrimination Act 1975 (Cth) s 3(1) defines an Aborigine as 'a descendant of an indigenous inhabitant of Australia but does not include a Torres Strait Islander' — the latter being defined separately. In September 1971 the definition of 'Aboriginal' adopted by the Department of Aboriginal Affairs read:

> An Aboriginal is a person of Aboriginal descent who claims to be an Aboriginal and is accepted as such by the Community with which he is associated.

Following representations from Torres Strait Islanders in 1972, the definition was amended to read:

> An 'Aboriginal' or 'Torres Strait Islander' is a person of Aboriginal or Islander descent who identifies as an Aboriginal or Islander and is accepted as such by the Community with which he is associated.[445]

However, difficulties could arise from the exclusion of Torres Strait Islanders from the scope of this Report for all purposes. Irrespective of their differences, the fact remains that Islanders, are indigenous inhabitants of parts of Australia, who, like Aborigines, have been greatly affected by European settlement. In other respects too the Reference is relevant to both groups. Questions of local 'community justice' mechanisms are equally relevant, since both groups face difficulties in the maintenance of order in isolated communities. Other shared problems include the need for community development and for a measure of self-government. The Terms of Reference are directed at the recognition of Aboriginal customary laws, rather than the distinct

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B. communicates predominately in the local Aboriginal language,
C. has been initiated into the sacred traditional rites,
D. has direct patrilineal or matrilineal descent from an Aborigine,
E. accepts the system of customary law operating in that community as applicable to him,
F. considers himself and is considered by others in that community as a Traditional Aborigine.
Unless all the above six criteria are met, the person in question should not be considered a Traditional Aborigine and application of Aboriginal Customary Law would not be permitted.

439 See para 94.

440 There was no suggestion in Justice Toohey's review of the 1976 Act that the definition should be changed: *Seven Years On. Report to the Minister for Aboriginal Affairs on the Aboriginal Land Rights Act (Northern Territory) Act 1976 and Related Matters*, AGPS, Canberra, 1984, 4-5, 37-9.

441 See ALRC, ACL Field Report 6, *The Torres Strait Islands, Queensland*, 1979, 14, 18, 38-9, 43.

442 id, 15.

443 ACL Field Report 6, 14, 18.

444 The Field Report concluded that
It cannot be said that the Queensland Islander Courts administer customary law. This does not necessarily mean that customary law or traditional rules do not exist in these communities and are not dealt with by the courts from time to time.
id, 38. Further on the Queensland Courts see para 723-46. For claims to land and marine resources in the Torres Strait based on tradition see para 901, 942-5.

445 DAA Report (1981) 5-7.

traditions of Torres Strait Islander societies. To the extent that Torres Strait Islanders seek legal or administrative changes to deal with their special problems, these will have to be the subject of separate investigation. However the difficulties referred to above demonstrate that no clear-cut distinction can be drawn for all purposes between Aborigines and Torres Strait Islanders. In the course of its inquiry the Commission has been made aware of some of the problems shared by Aborigines and Torres Strait Islanders. Some of the proposals in this Report can appropriately apply to both groups to deal with these shared problems, for example, in the areas of local justice mechanisms[446] and hunting and fishing rights.[447] In Part VIII of this Report the Commission recommends that a process of consultation take place with representatives of Aboriginal communities who would be affected by the proposals in this Report. Given the relevance of some at least of these recommendations to Torres Strait Islanders, they should also be part of this process of consultation, with a view to the possible extension of specific recommendations to their own situation.

97. ***South Sea Islanders.*** The Commission did receive submissions that South Sea Islanders should be included with the scope of the Report.[448] But the Commission's Terms of Reference do not allow for any such extension. In 1975, after an inter-departmental investigation,[449] it was decided that South Sea Islanders should not be equated with the indigenous peoples of Australia for Commonwealth purposes. A further variation of the Commonwealth's administrative definition, to clarify the distinction between Torres Strait Islanders and South Sea Islanders and to simplify the provision of documentary evidence of Aboriginality from Aboriginal communities, was accordingly introduced in November 1975.[450] South Sea Islanders do have special needs in the light of their own history. The Interdepartmental Committee on South Sea Islanders in Australia found that after 80 years in Australia, the 3000-3500 Islanders were a disadvantaged minority:

> Their socio-economic status and conditions have generally been below those of the white community, thus giving the group the appearance of being a deprived coloured minority. The Committee feels that it has accumulated sufficient evidence that Islanders suffer some disadvantages ... Islanders in general are not fully aware of existing community programs and benefits and ... a systematic effort should be made to ensure that such programs ... are brought directly to the attention of, and are utilised by, eligible Islanders. Islanders are dispersed in small communities in a semi-rural environment where there is little incentive for change ... They lack the financial resources and organisational skills necessary to overcome the problems of dispersion and to develop programs of self help ...[451]

However the Committee concluded that this did not establish a case for equating South Sea Islanders with the indigenous peoples of Australia.[452] In the light of this conclusion, the Commission's view is that the Terms of Reference do not extend to South Sea Islanders.

## The Definition of Aboriginal Customary Laws

98. ***A Composite Phrase.*** The phrase 'recognition of customary laws' is a highly ambiguous one. This is true both of the term 'recognition' and, more obviously, of the term 'Aboriginal customary laws'. With the composite phrase, 'recognition of Aboriginal customary laws', the ambiguities are multiplied. There are different ways in which a law or system of laws or values might be 'recognised'.[453] At a basic level, to say that Australian law should 'recognise' Aboriginal customary laws is to say that it should acknowledge their reality and existence, that it should take account of them as a phenomenon.[454] This sense of 'recognition', though not a specifically legal one, is primary: without this level of 'recognition', which implies at least some understanding or comprehension, questions of legal recognition cannot arise. The early Australian experience demonstrates this clearly. Despite the willingness of particular administrators or judges to take account of Aboriginal traditions and customary laws, the prevailing attitude was one of total non-recognition, accompanied in most cases by blank incomprehension.[455] In the changed circumstances of today, the

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446 See Chapter 31.
447 See Chapter 36.
448 F Bandler & J Homer, *Submission 113* (2 January 1979), *Submission 119* (20 February 1979).
449 Interdepartmental Committee on South Sea Islanders in Australia, convened under the chairmanship of the Department of Social Security.
450 DAA Report (1981) 7-8.
451 Summary of the main findings of the Inquiry by the Interdepartmental Committee on South Sea Islanders in Australia, 78 *Parl Debs (Senate)* (13 September 1978) 528, 529.
452 ibid.
453 The Shorter Oxford English Dictionary lists six meanings of 'recognition', none specifically legal in the present sense.
454 As the reference implies '... Aboriginal customary law exists and this fact must be kept squarely in mind in coming to terms with it. Recognising and dealing with the reality of customary law is the issue facing the Commission': C McDonald, *Submission 161* (24 April 1980) 7.
455 See para 23, 30.

question at this primary level must be: what it is that is being recognized, and what are the implications of that recognition? These questions are not confined to recognition of Aboriginal customary laws. According to a recent study of the 'law and custom' of the Tswana, what is identified as customary law may be 'a loosely constructed repertoire rather than an internally consistent code'.[456] This was written of a society with an elaborate and much studied body of rules, and with developed formal institutions for resolving disputes. Aboriginal societies are, in a number of respects, very different: is it possible to say that they have a body of laws in any accepted sense?

99. ***Characteristics of Aboriginal Customary Laws.*** There are, as we have seen, no systematic accounts of 'Aboriginal customary laws' as such. There are no manuals or handbooks similar to those found in other countries, in particular in Africa. There is no code of customary law such as the Natal Code of Native Law. But there is a large body of material on Aboriginal traditions and ways of life, including detailed studies of kinship, religion, and family structures.[457] Whether this can be regarded as 'Aboriginal customary law' may be thought a rather arid definitional question, and it is one to which lawyers and anthropologists, in Australia and elsewhere, have tended to give different answers.[458] But it is necessary to distinguish clearly two separate questions: first, what are the shared norms, rules, values or institutions accepted by particular Aboriginal groups; second, whether some or all of that body of shared norms, rules, values or institutions can properly be regarded as 'Aboriginal customary laws'. As to the former question there is substantial agreement in principle, although there is disagreement on some questions, and more is known about some groups than others.[459] For example, there have been disagreements, or at least differences in emphasis, among anthropologists as to the existence of persons with instituted authority to resolve disputes. Elkin and Hoebel emphasised the role of tribal elders or headmen.[460] Meggitt acknowledged the existence of explicit social rules among the Warlpiri, but in his view there did not appear to be any 'group of elders' who exercised power:

> In short, the community had no recognised political leaders, no formal hierarchy of government. People's behaviour in joint activities was initiated and guided largely by their own acknowledgment and acceptance of established norms.[461]

Hiatt said of the Gidjingali:

> There was no institution to deal with such disputes, but there was a community of people with a set of common values and a system of formally defined rights and obligations.[462]

Although writers may disagree on particular issues, all agree that there existed, in traditional Aboriginal societies, a body of rules, values and traditions, more or less clearly defined, which were accepted as establishing standards or procedures to be followed and upheld.[463] Furthermore, these rules, values and traditions continue to exist, in various forms, today.[464]

100. ***Attempts at Definition.*** The classification of this body of rules, values and traditions as 'law' has, however, caused divisions of opinion, especially for lawyers in the positivist tradition of jurisprudence, and for anthropologists adopting definitions of 'law' from that tradition. The difficulty is greater because most systems of indigenous customary laws include customs or principles which may appear to observers to be more like rules of etiquette or religious beliefs, as well as other more obviously 'legal' rules and procedures Yet these may all be treated by their adherents as indistinguishably 'law'. The point has been made about very different indigenous cultures and traditions. Comaroff and Roberts point out that:

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456 JL Comaroff & S Roberts, *Rules and Processes*, University of Chicago Press, Chicago, 1981, 18. cf AL Epstein, 'The Reasonable Man Revisited' (1973) 7 L*aw & Soc Rev* 643, 653-5.

457 See para 37.

458 A Dickey, 'The Mythical Introduction of "Law" to the Worora Aborigines' (1976) 12 *UWALRev* 350, 350-1. For an analysis of the differing perspectives see K Maddock 'Aboriginal Customary Law' in P Hanks & B Keon-Cohen (ed) *Aborigines and the Law*, George Allen & Unwin, Sydney, 1984, 212, and cf W Twining, 'Law and Anthropology. A Case Study in Interdisciplinary Collaboration' (1973) 7 *Law & Soc Rev* 571.

459 See para 37-8.

460 AP Elkin, *The Australian Aborigines*, rev edn, Angus and Robertson, Sydney, 1979, 114; EA Hoebel, *The Law of Primitive Man*, Harvard UP, Cambridge, Massachusetts, 1954, 302.

461 MJ Meggit, *Desert People. A Study of the Walbiri Aborigines of Central Australia*, Angus and Robertson, Melbourne, 1974, 250.

462 LR Hiatt, *Kinship and Conflict. A Study of an Aboriginal Community in Northern Arnhem Land*, Australian National University Press, Canberra 1965, 146. For the view that these disagreements are more apparent than real see Maddock (1984) 227-30.

463 Maddock (1984) 230-2.

464 cf para 30, 34, 37, 38, 103, 223-31, 499-501, 695-720, 882-891.

> The stated rules found in Tswana communities, known collectively as *mekgwa le melao ya Setswana*, constitute an undifferentiated repertoire, ranging from standards of polite behaviour to rules whose breach is taken extremely seriously ... [T]he norms that are relevant to the dispute-settlement process are never distinguished or segregated. Mekgwa le melao thus do not constitute a specialised corpus juris ...[465]

Similarly, Elizabeth Eggleston, writing of the Australian Aborigines, commented that:

> Law and religion were intimately bound up in Aboriginal society ... and any attempt to identify certain segments of Aboriginal life as 'legal' involves the imposition of alien categories of thought on the tribal society. Some modern Aborigines have made comparisons between their law and the Australian legal system on the basis of common notions of rules and sanctions for their breach but they have also interpreted the word 'law' to mean 'way of life' and 'religion' ... This is not to deny that there was a system of 'law' in traditional Aboriginal society. I am using a functional definition of 'law': one which places primary emphasis on law as a means of social control ... The use of the word 'law' to describe measures of social control in Aboriginal society is justified ... by the belief that every society must have means for settling disputes, and must have law in this sense, no matter how difficult it might be to identify binding rules or institutions corresponding to the legal system in our own society.[466]

It is significant that in *Milirrpum v Nabalco Pty Ltd* Justice Blackburn had no difficulty in treating the institutions and traditions of the Aboriginal plaintiffs as a system of law. It had been argued by the Solicitor-General that there must be a definable community, and also some recognised sovereignty giving the law a capacity to be enforced, before a system could be recognised as a system of law. Justice Blackburn disagreed:

> Implicit in much of the Solicitor-General's argument ... was ... an Austinian definition of law as the command of a sovereign. At any rate, he contended, there must be the outward forms of machinery for enforcement before a rule can be described as a law. He did not deny the deep religious sanctions which underlay the customs and practices of the aboriginals: indeed, he stressed them, and contended that such sanctions as there were religious ... The inadequacy of the Austinian analysis of the nature of law is well known ... The argument amounted to saying that in a system where people merely behave in certain predictable or patterned ways, apparently without the inclination to behave otherwise, and with no recognizable section of the community design ed for the repression of anti-social behaviour, or the application of compulsion to ensure adherence to the pattern, or the determination of disputes, there is no recognizable law. Where, it was asked, was there any indication of authority over all the clans, and where, beyond the influence of the elders, was the authority within each clan? Feuds were admitted to be common: did not this show that law was absent? None of these objections is in my opinion convincing ... The specialization of the functions performed by the officers of an advanced society is no proof that the same functions are not performed in primitive societies, though by less specially responsible officers. Law may be more effective in some fields to reduce conflict than in others, as evidently it is more effective among the plaintiff clans in the field of land relationships than in some other fields ... [T]he same is patently true of our system of law. Not every rule of law in an advanced society has its sanction.[467]

Increasingly there is agreement on the need to emphasise the procedural aspects of traditional or customary law systems, and to avoid assuming that the supposed characteristics of 'advanced' legal systems are necessarily shared by other systems,[468] or that institutions, procedures or rules which appear comparable have similar consequences or functions:

> Aborigines may talk about [spears or other presents given in response to a 'wrong'] as 'fines' (eg, as in the case at Oenpelli where someone other than one's mother-in-law's brother cuts one's hair, and the latter then claims payment). It would be wrong to go from the use of the term 'fine' to argue that the principles underlying its use by Aborigines are closely analogous to those underlying its use by non-Aborigines. They are not.[469]

101. ***The Need for a Broad Approach.*** It is clear that narrow legalistic definitions of Aboriginal customary laws will misrepresent the reality. Distinctively Aboriginal customs and traditions continue to exist: it is these to which the Commission is directed by the Terms of Reference as 'Aboriginal customary laws'. Their characteristics, and their importance for Aboriginal people, can be acknowledged and recognised without resorting to a precise definition, in the same way as Justice Blackburn in *Milirrpum's* case rejected the confines of an all-purpose legal definition of customary law:

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465 Comaroff and Roberts, 9-10. The phrase referred to could be loosely translated as 'the law and custom of the Tswana'. See further para 37. For a different perspective see I Schapera, 'Tswana Concepts of Custom and Law' (1983) 27 *JAL* 141.

466 Eggleston (1976) 278.

467 (1971) 17 FLR 141 266, 268.

468 Comaroff & Roberts; AL Epstein, 'The Reasonable Man Revisited' (1973) 7 *Law and Soc Rev* 643; S Stoljar, 'How can Feud-Law be Law Properly So-Called' (1978) 13 *UWAL Rev* 262; J von Sturmer, *Submission 383* (25 July 1983) 1, and for emphasis on 'personal law' in Aboriginal communities, id, 1-6.

469 id, 6. And cf K Maddock, *Submission 22* (31 October 1977) 21.

> I do not believe that there is utility in attempting to provide a definition of law which will be valid for all purposes and answer all questions. If a definition of law must be produced, I prefer 'a system of rules of conduct which is felt as obligatory upon them by the members of a definable group of people' to 'the command of a sovereign', but I do not think that the solution to this problem is to be found in postulating a meaning for the word 'law'. I prefer a more pragmatic approach ... What is shown by the evidence is, in my opinion, that the system of law was recognized as obligatory upon them by the members of a community which, in principle, is definable, in that it is the community of aboriginals which made ritual and economic use of the subject land. In my opinion it does not matter that the precise edges, as it were, of this community were left in a penumbra of partial obscurity.[470]

Exactly how Aboriginal customary laws are to be defined will depend on the form of recognition adopted: the various forms of recognition will be discussed in more detail in Chapter 11.[471] But it is clear that definitional questions should not be allowed to obscure the basic issues of remedies and recognition. It will usually be sufficient to identify Aboriginal customary laws in general terms, where these are recognised for particular purposes. This has been the practice both in Australia and elsewhere,[472] and it has not led to special difficulties of application. In some contexts (eg customary law 'offences' under by-laws) more specific provisions may be necessary, but these issues only arise in those contexts, and only once it is determined that recognition is, in principle, desirable.[473]

470 (1971) 17 FLR 141, 266, 267.
471 See para 199-208.
472 See para 70-82.
473 See ch 19 for discussion of the question whether 'customary law offences' should be created.

# 8. Aboriginal Customary Laws: Recognition?

## Introduction

102. ***Assessing the Different Arguments about Recognition.*** A wide variety of particular arguments have been made for and against the recognition of Aboriginal customary laws. Most of these arguments are not new: they have been debated in one form or another since settlement. This Chapter sets out the main arguments made to the Commission, in submissions, at public hearings and in other ways. Specific arguments about equality, non-discrimination and other basic human rights are addressed in the two subsequent chapters. As far as possible the general arguments are presented in this Chapter through direct quotation, especially of submissions, since they provide a vivid account of the issues. However in the Commission's view, the arguments are of differing value and cogency. The recognition of Aboriginal customary laws may take a variety of forms.[474] The strength of the arguments depends to a considerable extent on the particular form of 'recognition' which is proposed. Criticisms of recognition, for example, may be valid for one form of recognition but not for others.[475] This needs to be taken into account in assessing the arguments for, and against, the recognition of Aboriginal customary laws.

## Arguments for the Recognition of Aboriginal Customary Laws

103. ***Aboriginal Customary Laws as a Continuing Aspect of Traditional Culture and Belief.*** A basic precondition for the recognition of Aboriginal customary laws is the simple assertion that it exists as a real force, influencing or controlling the acts and lives of those Aborigines for whom it is 'part of the substance of daily life.[476] The reality and relevance of customary laws as a guiding force for many Aborigines became increasingly apparent during the public hearings and during the field trips.[477] The strength of this influence in the case of traditionally-oriented Aborigines was attested by a Baptist Minister who discussed the Commission's proposals with older Warlpiri and Alyawarra men at Warrabri.

> I found a tremendous depth of feeling in all discussions relating to their traditional law. It is so patently clear that traditional law is much more than simply matters of crime and punishment. The term 'law' is quite inadequate in fact, and does not accurately translate the various language terms used. Rather it is a religion — a way of life completely governed by a system of beliefs ... The Dreaming is the ever-present unseen ground of being — of existence — which appears symbolically and becomes operative sacramentally in ritual.
>
> The Dreaming is the Law — almost a personification. Behaviour and misbehaviour flow logically from the Dreaming, for Dreaming is a unitary principle involving determinism. It is the road that the individual must follow from birth to death, and from it the re is no escape. The men to whom I spoke found it very difficult to correlate particular aspects of their law to the 'European' law, for the reason I have tried to give above — that their law is an extremely complex whole, and it is not possible to extract one piece without affecting the rest of the structure.[478]

This 'tremendous depth of feeling' exists for women of the same groups:

> law [should] be seen as encompassing far more than the legal institutions which are the visible representations of the new law in Aboriginal communities. Law ... has to do with peace maintaining strategies, resolution of conflict mechanisms and the ability to enter into and sustain correct relationships with one's kin and the country of one's ancestors. In all these areas of law women are important.[479]

This applies also, the Commission has been told, in other areas of Australia:

> There can be no doubt that all persons at Port Keats believe that recognition by Australian authorities should be given to the customary law of their region. All persons I spoke to on this point proffered their views unhesitatingly: there is

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474 See para 199-208.

475 See para 113, 116.

476 Ambassador B Dexter, *Submission 40* (28 September 1977) 3.

477 Particularly for eg at Strelley *Transcript* of Public Hearings (23-4 March 1981) 287-446; Broome, *Transcript* (25 March 1981) 447-529; Peppimenarti, *Transcript* (6 April 1981) 992-1034; Maningrida, *Transcript* (7-8 April 1981) 1035-1138; Derby, *Transcript* (27 March 81) La Grange *Transcript* (26 March 1981) 530-565; 566-624; One Arm Point, *Transcript* (28 March 81) 625-61; Fitzroy Crossing, *Transcript* (30 March-1 April 1981) 685-877; Nhulunbuy, *Transcript* (9-10 April) 1139-1276; Amata, *Transcript* (14-15 April 1981) 1409-49; Doomadgee, *Transcript* (23 April 1981) 1667-1718; Momington Island, *Transcript* (24-25 April 1981) 1719-1827; and see examples cited para 37, 38, 195.

478 J Whitbourn, *Submission 269* (5 May 1981).

479 D Bell and P Ditton, *Law: The Old and the New. Aboriginal Women in Central Australia Speak Out*, 2nd edn, Aboriginal History, Canberra, 1984, 114; cf id, 21-2, 40, 42.

> a real need for a full and practical recognition of Aboriginal customary law. The principal reason for this is that customary law is that law which the Port Keats people recognise as binding upon them and to which they owe their prime allegiance. In considerations of personal duties and obligations a Port Keats Aborigine reflects upon what is binding upon him first in his tribal law context before he considers formal Australian law (if he considers Australian law at all) ... If practical recognition of customary law is accorded to the people at Port Keats it will conform with the people's self appraisal of what legal system binds them in their social and ceremonial conduct. Nor does the matter stop there: a cogent reason for the need for full recognition of customary law in the Port Keats region is that it will facilitate black and white Australians' relations in the area. A hidden and quiet resentment is held by a significant number of people with the present formal Australian law as seen to operate at Port Keats (and where applicable, in Darwin). Australian law is seen as arrogant, ignorant and inept in its approach to Port Keats Aborigines: arrogant in that it does not recognise the binding nature of customary law and asserts itself as the sole law applicable to the Port Keats region; ignorant in that it does not take into account Aboriginal realities, Aboriginal offences, Aboriginal approaches to things legal; inept in that Australian law proceeds in a social vacuum — stipulations, rules and principles are operative at one level whilst tribal behaviour proceeds at another irrespective of the contents of that law. The universalist pretensions of Australian law are a little absurd in the context of the Port Keats region. With recognition given to their customary law by Australian authorities, the people would see this as a real attempt to communicate with and have respect for Aborigine values.[480]

In the words of a senior Aboriginal community worker with a State Department of Community Welfare:

> Aboriginal Customary Law which is still recognised and practised in traditional areas today is the same law which has been handed down from generation to generation and it must be recognised and respected by the Law Reform Commission.[481]

104. ***Adverse Consequences of Non-Recognition.*** The existence and strength of Aboriginal customary laws need not, of itself, require specific legal recognition.[482] One question is whether non-recognition has adverse consequences for those following Aboriginal customary laws. Implicit in many of the claims for recognition based on the reality of Aboriginal customary laws is the assertion that its non-recognition has been harmful, and that these harmful consequences can be avoided or alleviated through some form of recognition. In some specific ways the harmful effects of non-recognition are clear. Traditionally oriented Aborigines continue, in very many cases, to marry in accordance with their traditional law rather than under the general law. Except in the Northern Territory, these traditional marriages are not recognised for almost any purposes. The parties may encounter difficulties with the general law, because their children are illegitimate, or because they cannot adopt children, or in claiming compensation for accidents or social security benefits to which wives or widows are entitled, and so on.[483] In other contexts, similar difficulties may exist. Actions required by Aboriginal customary laws may be prohibited, and punished, by the general law. Or an Aborigine may be dealt with within his own group for acts contrary to customary laws, and then be subject to a form of 'double jeopardy' through additional punishment under the general law.[484]

105. ***Impact of Non-Recognition on Traditional Authority.*** It is, however, often argued that the non-recognition of Aboriginal customary law by the general law has had harmful effects extending far beyond specific problems such as these. A Sub-committee of the Queensland Law Society commented that there are:

> very few areas or communities in Queensland where the effects of European settlement have been less than devastating on Aboriginal Customary Law and culture.[485]

The non-recognition of customary laws in Australia has contributed to the undermining of authority in many Aboriginal communities:

> If the immediate consequences of the interaction between Aboriginals and European law is confusion, the long-term effect has been the erosion of traditional culture and tribal authority. The authority of the community in general, and of the elders in particular, is challenged whenever an individual is punished for doing something which he has never

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480 C McDonald, Submission 130 (28 August 1979) 3-4. cf C McDonald, *Submission 162* (January 1980) 7-8: 'Recognition should flow as a matter of course from the fact that customary law is the law to which many Aborigines owe their prime allegiance. Recognition is the first step in coming to terms with "the real"; it is the necessary first step in accepting the fact that an Aborigine may have different principles, a different code and concept of the conduct of his life ...'. On the continued vitality of Aboriginal customary laws see also K Maddock, 'Two Laws in One Community' in RM Berndt (ed) *Aborigines and Change: Australia in the '70s*, Australian Institute of Aboriginal Studies, Canberra, 1977, 13; and see para 57, 61-3.

481 G Tongerie Aboriginal Co-ordinating Unit, SA Department for Community Welfare, *Submission 201* (16 January 1981) 1.

482 cf para 199.

483 See para 237-9, 256-7.

484 See para 53, 492-8.

485 Sub-Committee of Queensland Law Society, *Submission 301* (22 June 1981) 1. cf CD Rowley, *Outcasts in White Australia*, Penguin, Ringwood, 1972, 3.

> been told is wrong. Their power is eroded whenever offences committed within the community are tried and punished by someone else and a strange punishment is imposed. Similarly knowledge of the ultimate 'superiority' of European law is a further challenge to the power of the elders ... In our view the basic problems can be attacked only if an attempt is made to restore and maintain the traditional authority of tribal Aboriginals so that, to the maximum extent possible, European law is applied in tribal areas only at the request of the tribal community.[486]

If such views are accepted, the question becomes, not whether Aboriginal customary laws should be recognised, but what form of recognition is most likely to give appropriate support to Aboriginal communities in maintaining order.

106. ***Aboriginal Support for Recognition.*** An essential pre-requisite of proposals for the recognition of Aboriginal customary law is that they are supported by those Aborigines to whom they will apply. The process of consultation in this Reference, both with men and women in Aboriginal communities and with Aboriginal organisations, was described in Chapter 2. Although there are great difficulties in consulting with Aboriginal communities, especially in remoter areas, difficulties which are greatly magnified when the consultation has to occur on an Australia-wide basis, it was possible to overcome these to some degree. The Commission found consistent support among Aboriginal communities, and Aboriginal people generally, for the basic idea of recognition of Aboriginal customary laws. There was, understandably, great caution about particular ways by which this recognition would occur. Many were concerned that 'recognition' might involve the loss of Aboriginal control over their law,[487] and thus further deprivation. There was concern that secret aspects of Aboriginal laws would have to be revealed, or that outsiders would seek to change these laws.[488] But recognition, in the sense of greater support for Aboriginal law and better contact and communication between the two systems, was strongly supported:

> The Law Reform Commission needs to see some Aboriginal laws written into the non-Aboriginal law to be able to deal with these problems in a fair way to both sides.[489]

The National Aboriginal Conference commented that:

> One particular area that requires a great deal of attention is the integration of traditional law and western law.[490]

The support of Aborigines themselves for the concept of recognition is only a beginning. Major questions of implementation remain. But this support is the essential foundation for recognition in any form, as well as a vital argument in itself for appropriate forms of recognition.[491]

107. ***Australian Government Policy Towards Aborigines.*** Towards Aborigines. Federal Government policy towards Aborigines, which is based on the notion of self-management or self-determination, has already been referred to.[492] This policy is reflected in the Commission's Terms of Reference, which refer among other things, to:

> the right of Aborigines to retain their racial identity and traditional life-style or, where they so desire, to adopt partially or wholly a European life-style.

To the extent that the exercise of the right to retain their racial identity and traditional lifestyle is prevented or impeded by the law's failure to recognise Aboriginal customary laws, or is accompanied by unnecessary legal disabilities or disadvantages, that is itself a reason for recommending recognition. As Professor WEH Stanner pointed out in 1977:

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486 Commission of inquiry into Poverty, Second Main Report, *Law and Poverty in Australia* (Commissioner: R Sackville), AGPS, Canberra, 1975 280-1. 'In summary, the future of Aboriginal customary law is linked with the issue of maintaining traditional authority structures and maximising the possibilities for traditional leaders to be seen exercising their authority not just in customary matters but also in the wide range of community affairs': C McDonald, *Submission 162* (January 1980) 20.

487 See para 116.

488 See para 115.

489 Mossman Gorge Community, *Submission 272*, (6 May 1981). See further para 20, 454-70, and *Transcripts of Public Hearings* cited in para 195.

490 National Aboriginal Conference, Submission to the World Council of Indigenous People from Australian Aboriginal People on our National Issues, May 1981, 42.

491 General community support for or at the least the lack of strong opposition to, proposals to recognise Aboriginal customary laws, is also relevant. The state of general public opinion on these issues is discussed at para 169, 118.

492 See para 28, and for the relevance of Government policy on law reform cf Senate Standing Committee on Constitutional and Legal Affairs, *Reforming the Law*, AGPS, Canberra, 1979, para 2.8-2.15.

> No culture is self-sustaining: the 'custom' or 'way of life' depends on the observance of jural rules and moral evaluations under sanctions. In undertaking to let Aborigines who choose to 'to retain racial identity and traditional life-style' the Government has undertaken to meet the necessary conditions of their doing so.[493]

An acknowledgement of this view was given by the Commonwealth Minister for Aboriginal Affairs, the Hon C Holding MHR in the House of Representatives on 8 December 1983. He commented that:

> Aboriginal people have always had different concepts of guilt and innocence, crime and punishment. They have often settled disputes by consensus, recognising that there can be collective responsibility for misdemeanour. However, it is only recently, through such bodies as the Australian Law Reform Commission, that we have been prepared to see the value of Aboriginal attitudes towards the exercise of authority and responsibility. As legislators, we, especially, can learn much that can guide us to better laws, to a better view of the law, in these Aboriginal perceptions ... We must also now reassess many of our attitudes towards Aboriginal customary laws reflecting all aspects of Aboriginal life.[494]

108.***The Maintenance of Order.*** One basis for recognition is the claim that Aboriginal customary laws can be seen to work, while existing non-Aboriginal law and order mechanisms have not been particularly effective in maintaining law and order in Aboriginal communities. According to Clifford:

> our Western systems ... have proved as socially ineffective as they have proved technically sophisticated. If we now wished to get nearer to the desirable balance between law and order and human rights, we need to develop customs and practices in ways previously neglected ... When we think of Aboriginal customary law, therefore, we are not graciously recognising an inferior species of social control, but looking at a source of inspiration for the invigoration and improvement of the law of the land generally. Aboriginal problems with the criminal justice system are, therefore, opportunities for Australian initiatives and development in the prevention of crime and the improvement of criminal justice.[495]

Thus there is support for the reinforcement of traditional authority within Aboriginal communities to assist in the maintenance of order:

> The traditional Aboriginal punishment system is more effective in the case of the traditionally oriented Aboriginal person because the punishments are couched in terms of traditional values and are therefore both relevant and of impact. Punishments that are not based on the prevailing value system are either ineffective because they are meaningless and are therefore not felt as punishment, or, they can be destructive and repressive because they are so out of tune with prevailing values that they are considered barbaric and inhumane. This is a common reaction from non-Aboriginal persons when they hear of acts of traditional Aboriginal law enforcement. The reverse is equally true.[496]

One view is that this support for traditional authority should be as wide-ranging as possible:

> In my view either the conclusion should be reached that there is no scope in present day Australian society for the application of Aboriginal customary law (except possibly in relation to sentence) or the other step should be taken of providing, in certain circumstances, for Aboriginal customary law to be the law to be applied in the trial and punishment of particular offenders ... Where ... land belongs to a Land Rights group upon the basis of traditional ownership it is in my view appropriate for Aboriginal customary law to be applied within that area. It would be applied by the elders of the tribe who traditionally control that area ... [I]n my view the scope [of tribal jurisdiction] should be as wide as possible ... On the one hand, to give these powers to the traditional owners and, on the other hand, to take them away in the more significant and important cases is in effect to achieve nothing of practical value.[497]

In contrast, others suggested that it would be possible to entrust only 'small local trouble' to Aboriginal law, with the general law dealing with the more serious or important cases.[498] Many intermediate positions were

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493 WEH Stanner, *Submission 6* (20 February 1977) 7.

494 See Commonwealth of Australia *Parl Debs (H of R)*, 8 December 1983, 3488-9. Responding, the Shadow Minister, Mr J Porter MHR, said: Many of our outback, fringe-dwelling Aboriginal communities live in conditions with inadequate shelter, high unemployment, enormous health problems, educational difficulties and the social despair and distressing situation facing those who have suffered the breakdown of their traditional lifestyle and culture. The result of this breakdown in traditional culture, in many cases through dispersal and the severing of Aboriginal links with the land, are problems which we all have a responsibility to address. The restoration of Aboriginal independence, dignity, and self-esteem must be the goal of all Australians. It will require understanding, tolerance and a genuine commitment on the part of us all. (id, 3494).

495 W Clifford, 'An Approach to Aboriginal Criminology' (1982) 14 *ANZJ Crim* 3, 20.

496 M de Graaf, *Submission 139* (27 August 1979); and cf SF Davey, *Transcript*, Darwin (3 April 1981) 918.

497 Justice JF Fogarty, *Submission 43* (26 October 1977) 1-3. AJ Cannon SM, *Submission 271* (8 May 1981), stating that the prohibition of traditional punishments would be 'a continuation of our past destructive policies'.

498 eg S Brumby, *Submission 138* (11 May 1981).

suggested. But a common theme was the need to assist and support Aborigines in maintaining order in their communities, even though there was no agreement on how this could best be done.

109. ***Compensation for Aborigines.*** It is quite often argued that special measures should be taken by way of compensation to Aboriginal people for past wrongs.[499] There can be no doubt of the reality of these wrongs. A House of Commons Select Committee pointed out in 1837 that:

> It might be presumed that the native inhabitants of any land have an incontrovertible right to their own soil: a plain and sacred right, which seems not to have been understood. Europeans have entered their borders uninvited, and when there, have not only acted as if they were undoubted lords of the soil, but have punished the natives as aggressors if they evinced a disposition to live in their own country ... If they have been found upon their own property they have been treated as thieves and robbers. They are driven back into the interior as if they were dogs and kangeroos.[500]

But the compensation argument is difficult to apply in the present context. The relationship between the European settlement of Australian and its impact on Aboriginal peoples, and the present position of Aboriginal people, was discussed in Chapter 5. It is one thing to argue that the initial non-recognition of Aboriginal customary laws was shortsighted or wrong, and another to claim that recognition of Aboriginal customary laws is an appropriate form of restitution or compensation now. Apart from the question of the identity of the groups to and by whom 'compensation' is due, there is the difficulty that the form of compensation will not be of the same kind as what was lost. If recognition is to be extended to Aboriginal customary laws, this can now only be done by legislative action.[501] The justification for such legislation can only be determined by taking into account the needs and wishes of Aboriginal Australians now. The compensation argument is a more direct one in the context of traditional land rights, where the grant of land has been described as 'the doing of simple justice to a people who have been deprived of their land without their consent and without compensation'.[502] Its importance for the recognition of Aboriginal customary laws is less direct.[503] However, recognition as a form of redress for past wrongs may have real symbolic value:

> I believe that formal recognition of the acceptance of customary law will have effects, viz:
>
> (1) Aboriginals will be shown that customary law is recognised and respected by the wider community
>
> (2) those non-Aboriginals assisting Aboriginal communities will know that traditional law is of importance and has been recognised as such by the Australian Government. There will therefore be less chance of it being ignored in the day-to-day administration of communities.[504]

110. ***The Injustice of Non-Recognition.*** Where Aboriginal customary laws retain their traditional values and functions there is a strong argument for their recognition within the Australian legal system:

> [S]ome Aboriginal laws are based on great wisdom and a deep understanding of human nature. We regard it as necessary, that the existence of such laws should be brought into consideration when tribal Aboriginal people stand on trial in Australian courts.[505]

Failure to acknowledge the existence of such laws can produce injustice:

> It is obviously wrong that a person should be punished when he not only did not know that the alleged offence was an offence against the law, but positively thought that he was obliged or entitled to carry out the act for which he is charged.[506]

There is general agreement that certain forms of non-recognition are unjust. To fail to acknowledge, for example, the legitimacy of (and the need for protection of the parties to) a traditional marriage has been

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499 cf D Partlett, 'Benign Racial Discrimination: Equality and Aborigines' (1979) 10 *Fed C Rev* 238, 254-6; NSW, Select Committee of the Legislative Assembly upon Aborigines, *First Report* (Chairman: M Keane MLA) (1980) 65-6.

500 House of Commons, Select Committee on Aborigines (British Settlements), *Report*, Parl Paper, no 425, 1837, 5-6.

501 See para 68, 85.

502 Aboriginal Land Rights Commission *Second Report* (Commissioner: Justice AE Woodward) AGPS, Canberra, 1974, 2.

503 As one submission put it: The task is not one of belatedly redefining the relations between the Aboriginals and the British settlers on more equitable terms ... It is a matter of finding the appropriate place for Aboriginals in the multi-racial, multi-cultural Australian society of the future. P Sack, *Submission 110* (12 December 1978) 10.

504 JL Wauchope, *Submission 384* (25 July 1983). See also N Rees, 'What do We Expect?' (1983) 8 *ALB* 10.

505 United Aborigines Mission (WA), *Submission 151* (9 April 1981) 2.

506 HA Wallwork, *Submission 35* (3 August 1977) 1; Eggleston, 411. See further para 443, 483.

variously described as 'absurd',[507] 'offensive'[508] and 'plainly unjust',[509] although exactly what form that acknowledgement should take, given the differences between traditional marriage and Marriage Act marriage, is another question.

111. ***The Need for Consistency and Clarification of the Law.*** The strength of the arguments for recognition of Aboriginal customary laws has been reflected in the efforts of judges, magistrates and other law-enforcement authorities in a number of cases to take account of Aboriginal customary laws even without legislative support. This practice has been common in sentencing, but has occurred in other areas, including the admissibility of evidence, court practice and procedure, the exercise of prosecutorial discretion, and the recognition of traditional marriages for particular purposes.[510] This form of case-by-case development allows for local or particular difficulties to be taken into account, and for a necessary measure of flexibility. It deals with particular cases rather than abstract propositions, in an area where abstract propositions are more than usually dangerous. But this form of 'recognition' may not be a complete answer. It depends very much on the judge, magistrate or official in the particular case, and therefore tends to be inconsistent. Few of the judicial or other developments have become firmly established through the approval of appeal courts or Parliaments. Such forms of recognition of Aboriginal tradition and custom may therefore be dependent on executive or judicial discretion.[511] In other cases there can be disappointment and frustration, or pressures leading to unacceptable distortions of the legal system. For example, there can be great difficulty in proving Aboriginal customary laws where they may be relevant. Assertions about Aboriginal customary laws, or about Aboriginal community opinion, may be made from the Bar table, without being properly tested or verified. This can lead to poorly informed decisions. Similarly, there is no regular way of presenting Aboriginal community opinion direct to a court. The pressure of community opinion is, in the absence of regular procedures, often directed at the Aboriginal legal aid organisation or its lawyer, putting defence lawyers in a difficult situation of conflicting interests:

> Legal Aid face an impossible dilemma in deciding whether they can put forward community views adverse to their client and still honour their professional obligation in the solicitor/client relationship.[512]

As a Sub-Committee of the Queensland Law Society pointed out, legislation establishing a proper procedure for proof of customary law or community opinion:

> would enable the law to be established in the particular case impartially and without distortion, as may happen in the case where either of the usual parties in the proceedings has an interest in seeking a particular result.[513]

The Commission has been told of cases where Aboriginal Legal Aid has been instructed by particular communities not to defend certain persons or classes of persons, or where statements or opinions adverse to a defendant have been given to counsel for the defence to be used in court.[514] There is an obvious need for clarification of the issues and procedures.[515]

112. ***Other Arguments.*** Other arguments that are or could be made in support of the recognition of Aboriginal customary laws tend to be of a general character, and do not provide specific guidance. For example the effect on Australia's international reputation of its treatment of Aboriginal people is frequently given as a reason for action:

> More than any foreign aid program, more than any international obligation which we meet or forfeit, more than any part we may play in any treaty or agreement or alliance, Australia's treatment of her Aboriginal people will be the thing upon which the rest of the world will judge Australia and Australians ... The Aborigines are a responsibility we cannot escape, we cannot share, cannot shuffle off; the world will not let us forget that.[516]

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507 CD Rowley, *Submission 136* (3 July 1979) 2.
508 M de Graaf, *Submission 307* (14 July 1981) 1.
509 WJ Faulds, Crown Counsel (Tas), *Submission 275* (8 May 1981) 2 (in the context of spousal non-compellability).
510 See para 70-5 for a brief summary.
511 See para 84-5.
512 TI Pauling SM, *Submission 140* (9 November 1979) 2; SN Vose, *Transcript* Pt Hedland (24 March 1981) 390 and see para 527.
513 Sub-Committee of Queensland Law Society, *Submission 301* (22 June 1981) 13.
514 ALRC ACL Field Report 7, *Central Australia*, October 1982, 35.
515 See para 523-31.
516 Hon EG Whitlam QC MP, Australian Labor Party Policy Speech (1972) 41 cited by the same speaker, 'Australia's International Obligations', in G Nettheim (ed) *Human Rights for Aboriginal People in the 1980s*, Legal Books, Sydney, 1983, 11.

On the other hand there is no international consensus on the extent to which it is obligatory, or even desirable, to recognise indigenous law and tradition.[517] A degree of international interest in and concern for the relations between Aborigines and other Australians exists, and is an aspect of a wider concern for indigenous minorities throughout the world. That interest and concern does not dictate particular solutions or approaches. It does, however, provide an opportunity for Australia to give a lead by establishing more enlightened laws and policies, in cooperation with Aboriginal people.

## Arguments against the Recognition of Aboriginal Customary Laws

113. ***An Overview.*** Most of the submissions and other material presented to the Commission support the recognition of Aboriginal customary laws. But some serious objections to recognition have been raised. Some of these involve objections to any form of recognition; others relate only to some forms of recognition.[518] Arguments based on notions of discrimination, equality and legal pluralism and on human rights receive detailed analysis in the two following Chapters.[519]

114. ***Unacceptable Rules and Punishments.*** An argument often used against recognition is that some aspects, at least of Aboriginal customary laws involve unacceptable or inhumane treatment or punishment of individuals, which cannot be tolerated, let alone recognized, Basic human rights must be guaranteed to all Aborigines, as to all other members of the Australian community: indeed, this is expressly stipulated in the Commission's Terms of Reference. But the application of this principle to cases where Aboriginal customary laws are relevant, is by no means simple. Many traditional Aborigines share the view of the Yirrkala Community that:

> punishments ... such as prolonged imprisonment especially among alien strangers and away from their own country [are] markedly more 'inhumane and inconscionable' than a spear through the thigh — usually voluntarily accepted as part of a consensus settlement.[520]

But human rights arguments are not a general objection to the recognition of Aboriginal customary laws. Everything depends on the way in which, and the extent to which, recognition is accorded.[521]

115. ***Secret Aspects of Aboriginal Customary Laws.*** Some aspects of Aboriginal customary laws, especially concerning certain sacred and ritual matters, are secret, and disclosure to unqualified persons is a serious offence. Even when the holders of particular secret information which is relevant in a case are prepared to reveal it for the purposes of the case, they may only be prepared to do so on conditions (eg as to confidentiality) which may be inconsistent with the judicial function. A court could not receive or act on evidence which the defendant had no opportunity to test. This problem is, of course, not new. In various ways, the existing law protects, or has been used to protect, secret or confidential ritual material or information entrusted to outsiders. Courts have sometimes used their general powers to protect such material.[522] The question of secret or confidential material has also arisen frequently before the Aboriginal Land Commissioner under the Aboriginal Land Rights (Northern Territory) Act 1976 (Cth). The Commissioner is not bound by the law of evidence, but he is subject to the rules of natural justice, and land claims have in practice been conducted in a judicial way. They provide useful guidance in assessing the problem of secrecy. According to Graeme Neate:

> For the most part the reception of evidence on a restricted basis has posed no practical problem. As counsel involved in land claim hearings have tended to be male and much of the restricted evidence has been given by Aboriginal men, interested parties have been represented at restricted sessions and where permitted by the Aboriginals, have been able to ask questions. Where women have given evidence, they have sometimes relaxed their usual rules and revealed certain information to those men to whom, for the purpose of making out the claim, it was deemed necessary.[523]

In one claim the Commissioner was asked to admit written descriptions of certain secret women's ceremonies on condition that they be read only by the Commissioner and by female counsel and female

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517 See para 172-8.
518 For comment on these arguments see Rees, J Crawford (1983) 9 *ALB* 12.
519 See para 128-93.
520 HC Coombs, *Submission 262* (29 April 1981) 2.
521 See generally ch 10, esp para 192-3, and see para 502-3, 512-3.
522 See further para 649-61.
523 See G Neate, 'Keeping secrets secret' (1982) 5 *ALB* 1, 17.

anthropologists. In a written decision, the Commissioner admitted the evidence on this condition.[524] Perhaps the main concern underlying the argument about secrecy is that it would be wrong or dangerous for the general law to recognise Aboriginal customary laws when the consequences of recognition cannot be known. Experience suggests that this difficulty can be avoided either by the use of existing procedures, or by appropriately drafted alternatives. These questions will be discussed in more detail in Chapter 25.

116. ***Loss of Control over the Law.*** Many Aborigines fear that the incorporation of their law would result in their loss of control over it, similar to the lack of control or participation they now feel with respect to the general law. This fear would only be justified if it was sought to codify Aboriginal customary laws, or directly to enforce them through the machinery of the general law. But this by no means exhausts the ways in which Aboriginal customary law can be 'recognised'.[525] As will be seen, the Commission does not believe that either codification of that law, or its direct enforcement by the general law, are appropriate forms of 'recognition'.[526]

117. ***The Position of Aboriginal Women***. Different opinions are held about the position and the power women exercise relative to men in traditional Aboriginal societies.[527] But there is no doubt that Aboriginal women have been particularly vulnerable to the effects of cultural change and societal disruption. They are victims of most of the domestic violence which occurs in some Aboriginal communities.[528] It has been suggested that the abandonment of Aboriginal traditions and laws may be in the long-term interests of Aboriginal women. This view assumes that the non-recognition of Aboriginal customary laws would lead to or hasten its abandonment. It also assumes that the status and living standards of Aboriginal women would thereby be improved. There is no evidence to support either assumption.[529] The Commission has been urged to take particular care to find out the views of Aboriginal women as well as men on issues arising in the Reference.[530] The material and opinions available to the Commission support the view that Aboriginal women agree on the need for the recognition of their customary laws in various areas, and for better communication with officials on issues which affect their lives. The need to ensure appropriate forms of protection and support to women (especially in the context of domestic violence) has been a major consideration in formulating measures for the recognition of Aboriginal customary laws.[531]

118. ***Divisiveness and the 'One Law'.*** A view strongly stated in several submissions was that recognition would create an undesirable form of legal pluralism, and that it would be divisive or an affront to public opinion. Proponents of these views argue that there should be 'one law for all,[532] and that the goal should be 'social equality for Aborigines within the concept of racial unity and integration'. The question of 'legal pluralism' is considered in detail in Chapter 9. Although some forms of legal pluralism carry risks of duplication, or of drawing arbitrary distinctions between people, the Commission does not believe that, provided these risks can be avoided or minimised, 'legal pluralism' is necessarily undesirable. It may well be an appropriate response to a society containing plural cultures or traditions. Federalism itself is a form of legal pluralism, carrying some of the same risks of inefficiency and lack of uniformity, but it may well be an appropriate system for a geographically wide-spread and culturally diverse society.[533]

119. ***Synthetic Customary Law.*** Another view, expressed in particular by the late Professor TGH Strehlow, is that it is now too late to recognise Aboriginal customary laws because they have ceased to exist in meaningful form. We must take care not to create a synthetic law which is neither Aboriginal nor Australian. Such a development would be dangerous for the rule of law and of uncertain value to Aborigines generally. In Professor Strehlow's words:

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524 Report of the Aboriginal Land Commissioner, *Daly River (Malak Malak) Land Claim* AGPS, Canberra, 1982, 86-9. cf Neate, 17-18. For the former Land Commissioner's own assessment see (1982) 3 *ALB* 5-6.

525 See para 200-7.

526 See para 208, 241-57, 442-50, 460-5, 622-4, 687-91, 804-8.

527 See references cited in para 37.

528 See para 394-400, 482-483.

529 cf P Wilson, *Black Death White Hands*, George Allen and Unwin, Sydney, 1982, 16, 18, 45.

530 See para 18; and for comment to the Commission, see Bell and Ditton; Women's Electoral Lobby (A Rebegetz), *Submission 127* (22 July 1979); NSW Women's Advisory Council, *Submission 303* (16 June 1981); Office of Women's Affairs (K Taperell), *Submission 293* (29 May 1981); National Society of Labor Lawyers (D Merryfull), *Submission 322* (5 April 1982).

531 See para 251-3, 447-9.

532 Hon RC Katter, Queensland Minister for Northern Development and Aboriginal and Islander Affairs, *Submission 436* (25 July 1984). For similar arguments see NT Police (Commissioner WJ MacLaren), *Submission 34* (15 July 1977); NSW Law Society (D McLachlan), *Submission 358* (16 November 1982); H Morgan, 'The noble savage is no more' *Sydney Morning Herald*, 19 March 1985, 11.

533 See para 169.

> There is little real understanding today by either black or white people of traditional Aboriginal customary law ... Who today can speak with real authority on tribal law? Who can advise the courts of the validity of claims of breaches of tribal law? I have great reservations about the validity of claims in some recent murder hearings involving tribal Aboriginals that the killings had resulted from breaches of tribal law. I suspect that the quarrels that lead to at least some were more likely to have been domestic-based and, sadly, aggravated by alcohol a not too uncommon situation in society at large. If this is the case then we are creating in our community scope for a small sector to get away with murder or to avoid punishment normally required under European law on the ground that tribal elders would extract retribution. These ill-considered theories could therefore lead to a legal no-man's land between white and black society in Australia. I do not believe that thinking white or Aboriginal people want this.[534]

Professor Strehlow amplified these ideas in a submission to the Commission:

> As long as aboriginal beliefs were strong, and there were no prisons for offenders ... aboriginal law played a vital role in holding groups together and in keeping aboriginal Australia safe for its inhabitants ... Today there would be few people left in Australia, black or white, who have any detailed knowledge of what 'aboriginal law' really stood for. It was in no way a black mirror-image of our own body of laws: and the most common modern aboriginal offences that come before our own courts — violent assaults, thefts, offences due to drunkenness, and murders — were never punishable by those persons who are today called 'tribal elders' in the press ... Some of these offences did not even occur in the old 'tribal' days. I therefore believe that justice would be best met in our own days if the principle of one system of law for all Australians was firmly adhered to, with the proviso that the proved norms of 'aboriginal law' should be taken into account when determining the actual punishments. Where vital principles of justice were at stake, perhaps a plea of nolle prosequi could be entered by the Crown. But at all costs a legal no-man's-land must be avoided.[535]

And again, more bluntly:

> True 'tribal law' is probably dead everywhere. It could not change, for there were no aboriginal agencies that had the power to change any of the traditional 'norms'.[536]

120. ***Opposing views.*** In part these comments were addressed at the prospect of the legal recognition of two separate legal systems, Aboriginal and non-Aboriginal. In that context they have weight. But if they are taken to support the view that Aboriginal customary laws no longer exist, or that no form of recognition of Aboriginal customary laws is possible, they are much less persuasive, as many submissions have pointed out. For example, Professor Geoffrey Blainey stated:

> Strehlow argues that it is too late to recognise Aboriginal tribal law because we do not know enough about that law ... Strehlow adds that much which is now seen as traditional Aboriginal law may really be a perverted or twisted law that arose during the recent breakdown of their society. I am not sure how far one should accept that argument, valuable as it is. Most of those people — black or white — who say today that we should recognise Aboriginal law, or facets of it, are not necessarily affirming that Aboriginal law was — or is — a summit of legal and social wisdom. They are rather affirming that the Aboriginals have a vital place in the world, that their traditions and many of their values differ from those of European society, and that by reviving a version of Aboriginal law even in a limited way we give them respect, some sense of identity and independence, and a greater chance of self fulfillment. Thus it does not matter if the law they revive is not traditional law but rather a modem variation which Aboriginals are likely to accept and which Europeans are likely to respect.[537]

Similarly, Father MJ Wilson MSC wrote:

> When Strehlow spoke about Aranda affairs, the duty of the rest of us was to listen. When however he offers interpretation and prognostication of trends of social change, his authority is not so absolute ... [H]is wide knowledge, and deep feeling for traditional Aranda values can in this instance function also as a handicap. Knowing the richness and complexity of the Aranda cultural patrimony he could easily pass from the moderate judgmental position of knowing that it cannot be translated through social change in its fullness to the extreme position of denying that it should take place at all. Thus ... I do not think the only reasonable option left at this stage of history is abandonment of the attempt to wed Aboriginal legal custom with the laws of the Commonwealth ... I would like to distinguish clearly between acceptance in principle of legal adaptation under its various respects and the actual ways of going about it. For instance, it might be hard to find ways of coping with the secrecy characteristic; no way might be really perfect, and an acceptable way might be hard to find and require various experiments. But that is different from saying that secrecy is 'unacceptable' in principle. We are dealing with a social value that is not static. Certainly it cannot be transported holus bolus into the western legal system: it will need to be adapted. But that is precisely what

534 *The Advertiser* (Adelaide), 19 February 1977.

535 WH Hilliard, *Submission 138* (13 August 1979) enclosing Strehlow Research Foundation, Pamphlet No 5, 'Aboriginal Customary Law', August 1978, 3-4. See also TGH Strehlow, *Submission 79* (3 June 1978).

536 TGH Strehlow, *Submission 33* (14 July 1977) 1-2. For a fuller account of Strehlow's views see Justice MD Kirby, 'TGH Strehlow and Aboriginal Customary Law' (1980) 7 *Adel L Rev* 172.

537 G Blainey, *Submission 115* (8 January 1979) 1.

> many Aboriginal people themselves are trying to do in their pursuit of the process of co-ordinated independence ... Adaptation of their legal procedures is a more difficult and complicated but, under the aspect of an item in the ongoing process of desired social change, not essentially different endeavour. I see the various Aboriginal values as open-ended: their essential dynamic can be maintained under a diversity of social expressions.[538]

According to Professor Maddock:

> Strehlow appears to have assumed that customary law means the law of communities unaffected by outside ideas, concepts and values. As there are no such communities left, there can be no such law. He was judging present-day Aborigines by the standards of their forbears. This argument against recognition loses its force if we see present-day rules and customs as having grown out of the pre-European past but as having been formed and malformed also through the shock of foreign contact and the process of adaptation that followed. Sometimes the outcome may have been a degenerate travesty of an older and purer standard, but there is no reason to view every change with so little sympathy.[539]

121. ***The Commission's View.*** Changes or adaptations in traditional rules or customs, in an attempt to cope with the great changes European settlement has brought about, no doubt produce something which could be described as 'synthetic'. All legal and cultural systems with a long history are synthetic in this sense.[540] The fact that legal systems are synthetic does not mean that they are less real or important to those whom they affect. In the present context, it does not mean that efforts should not be made to recognise those aspects of Aboriginal traditions and laws which can helpfully and effectively be recognised. Indeed, Strehlow himself saw the need for some such measures, at least in areas such as prosecution policy and sentencing. His comments on the mistakes made over Aboriginal customary laws in particular cases support the introduction of better methods of consultation and of proof. The Commission believes that Strehlow's views represent a counsel of despair. Accepting that Aboriginal traditions and laws have been subject to outside interference and to pressures of various kinds does not entail that those traditions and laws have vanished, or have ceased to be valid or recognisable. On the contrary they have in many areas survived and adapted. These changes, and the continuing interaction of Aboriginal societies with the general Australian community, must influence the ways in which recognition can occur. They do not preclude it.

122. ***The Decline of Customary Law.*** A related, though less categorical, argument does not deny the continuing existence, among some Aboriginal groups, of what can properly be termed 'Aboriginal customary laws'. However, their scope, compared with the range of new problems arising for those groups, is said to be slight and diminishing. It is argued that the increasing impact of the general Australian culture and language is such that in a relatively few years, Aboriginal customary laws in any real sense will have ceased to exist, or to have any relevance:

> Aboriginal culture has become, and continues to become, more westernised. Hence customary law is becoming decreasingly relevant in its application.[541]

The inference is that it would be wrong to give formal recognition to a disappearing phenomenon. The possibility that customary laws are declining or diminishing clearly requires the Commission to exercise great care in framing its proposals, so as not to 'freeze' or entrench traditions or rules which Aborigines may wish to change or abandon. But, these requirements having been satisfied, it is difficult to see why necessary measures of recognition should not now be implemented, even if it turns out at so me later time that they are no longer necessary. There are, undoubtedly, factors which are tending to undermine Aboriginal customary laws and traditions, such as the availability of alcohol[542] and the influence of the mass media. But there are also countervailing factors, such as the outstation movement,[543] the revival of Aboriginal ceremonies and tradition,[544] and the conferral of land rights, in certain areas of Australia, on the basis of traditional relationships or claims.[545] Few of these factors could have been foreseen a generation ago. Neither the

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538 MJ Wilson MSC, *Submission 287* (20 May 1981) 3-4.

539 K Maddock, *The Australian Aborigines*, 2nd edn, Penguin, Ringwood, 1982, 175-6. See also K Maddock, 'Aboriginal Customary Law' in P Hanks & B Keon-Cohen, *Aborigines and the Law*, George Allen & Unwin, Sydney, 1984, 212, 232-7; M de Graaf, *Submission 307* (14 July 1981); Sgt F Warner, *Transcript*, Adelaide (17 March 81) 66.

540 As Professor A E-S Tay has pointed out: 'Law and Legal Culture' (1983) 27 *Bull ASLP* 15, 16.

541 G Tambling MHR, *Submission 355* (11 October 1982) 8.

542 House of Representatives, Standing Committee on Aboriginal Affairs, *Alcohol Problems of Aboriginals*, AGPS, Canberra, 1978; L Sackett, 'Liquor and the Law: Wiluna, Western Australia', in RM Berndt (ed) *Aborigines and Change. Australia in the '70s*, AIAS, Canberra, 1977, 90. See further para 397, 436-40, 482.

543 See para 34.

544 See para 34, 38.

545 See para 77, 212.

Commission nor the Parliament should concern itself with essentially transient phenomena. But the evidence does not support the view that Aboriginal customary laws and traditions are transient in this sense. What the position will be in 25 years time it is unnecessary (even if it were possible) to predict. There are good arguments for action to be taken now' to recognise aspects of Aboriginal customary laws and traditions which do now exist, and which are likely to continue to exist in much the same form for the foreseeable future. This recognition should:

- be as flexible as possible, to allow for change and development on the part of Aboriginal communities:
- be recognised as tentative, in the sense that it will need careful oversight, and review at an appropriate time [546]

123. ***Difficulties resulting from Changes and Disruptions in Aboriginal Communities.*** A related objection, at least to any general recognition of Aboriginal customary laws, is the difficulty of such recognition 'after irrevocable damage has been done' to traditional Aboriginal society:[547]

> I frankly do not know how you can implement customary law in a community which is undergoing very rapid change and, in some respects, disintegration. Customary law assumes a stable society in which change is gradual.[548]
>
> It is true that Aboriginal people in certain places do exercise customary law and want to continue to do so and want to re-establish customary law. Let me say that I am in favour of this, law and Law. However, to re-establish small '1' law where the lawholders, the elders, have lost jurisdiction over their children, their nephews, nieces and grandchildren, is a nonsense. It is starting at the end, not the beginning.[549]

This is more an argument against certain forms of recognition than against any form of recognition at all. Many of those who drew the Commission's attention to the problems nonetheless urged that at least some form of recognition be tried, even if only in specific ways or on an experimental basis. Most of the submissions and evidence before the Commission support the view that some steps can and should be taken to make the general legal system more responsive to the needs of those Aborigines for whom Aboriginal customary laws remain important. It is also possible that recognition may help to halt the process of disruption. The difficulties which result from the impact of western technology, from alcohol, from the law itself, must influence the form and content of any recommendations. They call for caution and restraint, and an appreciation that even apparently sensible proposals may prove counter-productive in their effects. But they do no more than that.

124. ***The Geographical Restriction of Customary Laws.*** Some submissions took the view that recognition of Aboriginal customary laws was justified only in relation to separate Aboriginal communities living in a strict traditional way. According to this view, there are no recognisable forms of Aboriginal customary laws, or at any rate none that ought to be recognised, among Aborigines living in the urban or town-camp setting. Proponents of this argument draw support from some observations of Justice Wells in *Wanganeen v Smith*:

> The tribal Aboriginal native may have to be dealt with in a very special way if he is brought before one of the ordinary courts of the land for an offence allegedly committed by him against the criminal law; but where an Aboriginal native has established himself in the more general community and intends to remain there and work side by side with other members of that community, he must accept the ordinary standards of behaviour expected of his fellow citizens ... If he inhabits and uses the cities and tow ns of our country, then he must expect to abide by the ordinary rules by which law and order are there maintained. He cannot expect that special exceptions will be made for him. No doubt his personal characteristics and background and history will be taken into account by a court in the ordinary way; but he cannot expect special treatment just because he is an Aboriginal native, ... In such a case, he comes as a citizen of Australia and must be treated just like any other citizen who lives in a town or in a city, and who makes use of the various facilities provided there.[550]

Thus, it has been suggested that any proposal for the recognition of Aboriginal customary law must be geographically restricted in its application to tribal Aborigines living in their own separate communities.[551]

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546 See further para 208-9, 217-20.
547 MJ Wilson MSC, *Submission 111* (14 March 1981) 1.
548 Justice H Wootten, *Submission 9* (15 March 1977) 1.
549 P Roberts, *Submission 208* (5 March 1981) 3.
550 Unreported, Supreme Court of South Australia, 28 January 1977; [1977] *Australian Current Law* DT 54.
551 eg Australian Mining Industry Council (GP Phillips), *Submission 15* (17 May 1977); Attorney-General's Department, Victoria (G Golden), *Submission 177* (11 May 1981).

Certainly it would be undesirable, if not entirely unworkable, to have two separate and distinct systems (especially of criminal law) regulating conduct in the same locality — whether that locality was a country town, a large city or a remote Aboriginal community.[552] But none of the Commission's proposals involve recognising or establishing such separate systems, Nowhere in Australia do Aboriginal customary laws remain as an exclusive legal system. Aborigines, including traditionally oriented Aborigines, look to the general law, to guarantee equal wages, entitlement to social security benefits, compensation for accident or injury, the protection of sites of significance, or to redress acts of discrimination. This is not to say that in all these respects the general law is successful in affording such protection. But criticisms which are made of it are directed not at its removal but at its improvement. The question of recognition of Aboriginal customary laws arises in the context of the continued application of the general law. Except where that law is modified or varied to bring about a recognition of Aboriginal customary laws, the problem of competing or concurrent standards in the one locality does not arise. Where the general law is so modified, then it will itself define the extent to which local customary laws are to be recognised, and the consequences of such recognition.

125. ***Concurrent Customary Laws.*** There are good reasons why the coexistence of Aboriginal customary laws should be recognised, without imposing restrictive geographical limits. Traditional Aborigines do not consider themselves entirely exempt from Aboriginal customary laws while absent from their communities (although their operation may be different when they are on their own land compared with when they are on someone else's land or country). The recognition of Aboriginal customary laws risks being ineffective if it is geographically limited to particular communities (even assuming that they could be appropriately identified). In addition, the fact that some Aboriginal customary laws have ceased to be practised in a particular area does not mean that other aspects may not still be relevant. This point was made in a number of submissions. For example, the Victorian Minister responsible for Aboriginal Affairs wrote:

> The point ... is that all Aborigines are descended from a traditional situation. Whilst I agree ... that most Aborigines no longer live a tribal lifestyle, many may still be influenced by customs or beliefs from the past. This may not be apparent, because they appear to be living an average urban lifestyle ... The point is that the urban Aborigine is still making social adjustments and this must affect his comprehension and dealings with the legal system.[553]

A similar comment was made by the Victorian Aboriginal Legal Service:

> The Aboriginal population of Victoria both rural and metropolitan could be said to be 'urbanised'. There are no Victorian Aborigines living in (what is commonly known as) a tribal situation and accordingly the Victorian Aboriginal Legal Service makes no submission as to legislation incorporating customary laws into the European legal structure (VALS would have some reservations about the adoption of this procedure even in tribal areas). Although no complete system of customary law is still operative in Victoria, it is stressed that many traditional values and obligations still exist in the Victorian Aboriginal community. Perhaps the most important traditional values that survive in Victoria are those that relate to family organisations and structure and kinship obligations ... Victorian Aborigines continue to suffer from a legal system that fails to recognise a different system of family structure and obligations.[554]

As this comment implies, the recognition of Aboriginal customary laws can take a variety of forms, and the application of particular proposals will vary depending upon the proposal. General geographical limitations are both impractical and likely to be irrelevant. This applies equally to proposals for specific recognition and for adjustment of the general law to take Aboriginal customary laws or practices into account. In each case the appropriate range or ambit of the proposal is a matter for judgement on the merits. Aborigines, whatever their background, will not be able to gain the benefit (or more neutrally, attract the application) of particular proposals simply by asserting the impact of Aboriginal customary laws or traditions. That will be a matter for proof in each case, with the assistance of any improved procedures which may be necessary.[555] It is this requirement, not the delineation of certain areas as 'tribal' or 'traditional', that should ensure that the Commission's proposals are applied only in appropriate cases.

126. ***Problems of Definition.*** It can be argued that, even if a particular measure of recognition of Aboriginal customary laws is desirable in principle, the problems of formulating an acceptable provision in statutory

552 A corollary might be that in separate Aboriginal communities where Aboriginal customary law is to be recognised, it should apply to all residents, although its proponents do not seem to support this.

553 Hon J Kennett MLA, Minister responsible for Aboriginal Affairs in Victoria, *Submission 224* (19 March 1981) 1.

554 Victorian Aboriginal Legal Service, *Submission 283* (20 May 1981) 1. On the other hand, some submissions emphasised the non-existence of Aboriginal customary laws in any form in wide areas of Australia. Tasmanian Police (Mr KH Viney), *Submission 164* (16 July 1980); NSW Police (Asst Cmr Abbott), *Submission 234* (2 April 1981).

555 See ch 24-6.

form are too great to be overcome. For example, it has been said that, while in principle Aboriginal traditional marriage should be recognised, in practice it is impossible to define.[556] In fact, this kind of objection has not been very frequent in submissions to the Commission. For example, there has been general support for recognition of traditional marriage, whatever the technical difficulties of drafting. Many submissions drew the Commission's attention to the large number of overseas countries where customary marriage or other aspects of customary law are recognised , and where the definitional problems, although genuine, have not caused major difficulties in practice. One reason for definitional objections may be that lawyers often attempt to draft statutes in great detail and precision, with consequent complexity and rigidity. Whatever the merits of this practice in the context, say, of taxation Acts, in the present context it is a mistake to attempt a degree of precision greater than the subject will allow.[557] On the other hand, extensive practice in many jurisdictions supports the view that, with care and attention, sufficient precision can be achieved.

## Summary of Arguments

127. ***General Conclusion.*** In the Commission's view, the objections to recognition set out in this Chapter are either not objections to recognition as such (as distinct from considerations in framing proposals for recognition), or are not persuasive, for the reasons given. On the contrary there are good arguments for recognising Aboriginal customary laws, including in particular:

- the need to acknowledge the relevance and validity of Aboriginal customary laws for many Aborigines;

- their desire for the recognition of their laws in appropriate ways;

- their right, recognised in the Commonwealth Government's policy on Aboriginal affairs and in the Commission's Terms of Reference, to choose to live in accordance with their customs and traditions, which implies that the general law will not impose unnecessary restrictions or disabilities upon the exercise of that right;

- the injustice inherent in non-recognition in a number of situations.

The approach adopted in this Report towards recognition of Aboriginal customary laws is also consistent with stated policies and those principles relating to Aboriginal affairs which enjoy substantial bipartisan support at federal level.[558] Before reaching any definite conclusion, however, it is necessary to examine in detail two key arguments against recognition. These revolve around questions of discrimination, equality and human rights which are basic to the Reference. They are discussed in the following chapters.

556 See para 265-9 for discussion of the problems of definition of traditional marriage.
557 See para 95, 101, 208-9.
558 See para 107.

# 9. Discrimination, Equality and Pluralism

128. ***Influential Arguments.*** A significant issue for the Commission, if it is to recommend legislation for the recognition of Aboriginal customary laws, is the argument that such legislation would be in some way 'discriminatory' or 'unequal', or that it would contravene what is said to be a principle that all Australians are, and should be, subject to the 'one law'. These are powerful and influential arguments. It cannot be expected that Parliament would pass discriminatory or unequal legislation, especially in the light of the Racial Discrimination Act 1975 (Cth), implementing the International Convention on the Elimination of all Forms of Racial Discrimination of 1966 (to which Australia is a party).[559] Internationally-accepted principles of equality and non-discrimination are also enunciated in the International Covenant on Civil and Political Rights of 1966 (to which Australia is also a party).[560] These instruments express Australia's commitment to equality and non-discrimination, including especially non-discrimination on account of race. The Commission ought not to recommend legislation or administrative action which would infringe these important principles.

129. ***Purpose of this Chapter.*** However the application of these principles is not free from difficulty. Before discussing the major Australian decisions on the point,[561] it is helpful to look at experience in comparable overseas jurisdictions, where guarantees of 'equality before the law' or 'equal protection of the law' have to be applied judicially. These experiences, and developments at the international level, may not determine the issue for Australia, but they do provide helpful guidance. It is proposed to discuss, first, the tests applied by the United States and Canadian Supreme Courts, especially in cases involving their Indian minorities, under their respective Bills of Rights; secondly, the international law tests for equality and non-discrimination both generally and as expressed in the Racial Discrimination Convention, and thirdly, the Australian position. Even if the Commission's recommendations are consistent with these standards, there remains the argument that 'legal pluralism', or the enactment of special rules for particular groups, is inherently undesirable. This, and related arguments, will be dealt with in the final section of this Chapter.

## Criteria for Equality: A Comparative Perspective

130. ***Distinctions and Discriminations.*** Many, if not most, laws in some way distinguish or differentiate between people on grounds thought to be relevant for the purposes of the law in question. Given the nearly universal need of laws to distinguish or 'discriminate', the principles of 'equality before the law' or 'equal protection of the law' cannot require that laws apply universally or in the same way to all members of the community:

> It is incontestable that Parliament has the power to legislate in such a way as to affect one group or class in society as distinct from another without any necessary offence to [the principle of equality before the law in] the Canadian Bill of Rights. The problem arises however when we attempt to determine an acceptable basis for the definition of the special class, and the nature of the special legislation involved. Equality in this context must not be synonymous with mere universality of application. There are many differing circumstances and conditions affecting different groups which will dictate different treatment.[562]

The difficulty, then, is to find a workable test for distinguishing laws which involve proper or acceptable distinctions or differences from those which involve improper or invidious ones. This difficulty is particularly acute when the 'group or class' which the law singles out has common features such as a shared culture or language. These features may justify special treatment, or they may be associated with other features which do so. They may also be indicia of a common race, descent or ethnic origin. Yet it is universally agreed that discrimination on the grounds of race or ethnicity is improper, involving a particularly serious violation of the principle of equality. There is thus a tension between the principle of equality and non-discrimination, and the need to make special provision, including special legal provision, for members of minority groups because of the distinct problems they face.

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559 7 March 1966; *Australian Treaty Series* 1975 No 40.

560 19 December 1966: *Australian Treaty Series* 1980 No 23. The proposed Australian Bill of Rights, Art 1, 4 (based on the International Covenant) would also, if and when it comes into force, provide additional protection for these equality rights: see Australian Bill of Rights Bill 1985 (Cth).

561 The most significant of these is *Gerhardy v Brown* (1985) 57 ALR 472. See also para 152-7.

562 *Mackay v R* (1980) 114 DLR (3d) 393, 422-3 (McIntyre J). See J Stone, 'Justice not Equality', in E Kamenka & AE-S Tay, *Justice*, Edward Arnold, London, 1979, 97, 100.

131. ***Special Laws or Treaties with Indigenous Peoples.*** The question of 'special treatment' for indigenous peoples raises this issue in a clear, and often acute, form. This is especially so in a country such as Australia where the initial response to the Aborigines was to deny them collective rights or any special status by virtue of their own political and social organisation.[563] The early imposition of individual 'equality' might be thought to be directly linked to the present situation of many Aborigines; certainly, as a group, equality in fact has not been achieved, according to any of the social indicators.[564] But, economic and material conditions apart, there is the question whether responses to Aboriginal demands of a collective kind (for example traditional claims to land) are now illicit. Had treaties been concluded initially with the various Aboriginal groups, it could not have been argued that compliance with them was discriminatory because the other party to the treaty was composed of members of a particular race or ethnic group. Is the recognition now, to the descendants of those people, of rights or entitlements initially denied, less legitimate? No doubt there are limits to such a recognition: rights may have vested in, others on the faith of earlier transactions; Aborigines themselves may have ceased to share the characteristics which initially called for recognition, or they may not now seek recognition. Recognition now may need to take a different form. But that is not to say that recognition is wrong in principle because those claiming recognition, as an indigenous people, share a particular race, descent or ethnic origin. The history of dealing with such questions in the United States and Canada is different in a number of respects from the Australian history, but the problems now being faced a re not so different, and their experience is therefore of particular interest.

## The Position under the United States Constitution

132. ***Equal Protection under the Constitution.*** The Fourteenth Amendment to the United States Constitution requires that the States not deny to the people 'the equal protection of the laws'. A similar guarantee of equality as against the United States itself has been read into the Fifth Amendment, which guarantees 'due process'. The nature of the test or tests for equal protection applied by the Supreme Court has, of course, been extensively discussed and litigated.[565] As Chief Justice Burger stated in *Reed v Reed*:

> this court has consistently recognized that the Fourteenth Amendment does not deny to States the power to treat different classes of person in different ways. The Equal Protection Clause of that amendment does, however, deny to States the power to legislate that different treatment be accorded to persons placed by a statute into different classes on the basis of criteria wholly unrelated to the objective of that statute. A classification 'must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike'.[566]

In applying this basic test, the Court is, inevitably, engaged in a form of judicial review of the merits of legislation. In recognition of the delicacy of this task, and of the principle of the separation of powers, the Court will normally be satisfied with an arguable, as distinct from clear or conclusive, link between the legislative aim and the classification adopted by the law.[567] This is the so-called 'rational basis' standard of review. Moreover, classifications need not be mathematically exact: for example, considerations of legislative efficiency or reasonable priorities may account for under inclusiveness in a particular law.[568] But in cases involving certain fundamental rights[569] or 'suspect classifications,[570] the standard is very much more stringent. In particular:

> Racial and ethnic classifications of any sort are inherently suspect and thus call for the most exacting judicial examination.[571]

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563 See para 21-3, 39, 64-8.
564 See para 31-6.
565 See esp PG Polyviou, *The Equal Protection of the Laws*, London, Duckworth, 1980. For a summary see G Evans, 'Benign Discrimination and the Right to Equality' (1974) 6 *Fed L Rev* 26, 58-68.
566 404 US 71, 75-6 (1971), citing *Royster Guano Co v Virginia* 253 US 412, 415 (1920).
567 Polyviou, 66-7, 71-8.
568 'Underinclusiveness' is the failure to extend the benefits of a law to persons who ought, given the legitimate aims of the law, properly to be covered by it. Over-inclusion is, conversely, the extension of the law to persons who ought not to be covered by it, given those aims. Under-inclusion may be accounted for by a reasonable legislative choice to deal with some claimants rather than all as a matter of priority of resources. This argument cannot apply to over-inclusive laws, which are accordingly more difficult to justify. cf Polyviou, 78-80. See further L Re and A Brown, *Flying South*, William Collins, Sydney, 1986.
569 id, 191-214.
570 id, 234-98.
571 *University of California Regents v Bakke* 438 US 265, 291 (1978) (Powell J).

133. ***The Test for 'Affirmative Action'.*** The doctrine of 'equal protection' extends beyond the protection of minorities against discrimination. It is often thought necessary to provide special advantages to deprived minorities, eg by way of preferential housing, education or employment programs to achieve real equality or to provide for conditions of future equality. But such programs of 'benign' or reverse discrimination are also subject to scrutiny under the Fifth and Fourteenth Amendments,[572] although the rigour which will be applied in different fields remains to be seen. The most important recent decision in this field, Regents of the University of *California v Bakke*,[573] leaves the matter unclear. One view of the majority position there was that:

> Government may take race into account when it acts not to demean or insult any racial group, but to remedy disadvantages cast on minorities by past racial prejudice, at least when appropriate findings have been made by judicial, legislative or administrative bodies with competence to act in this area.[574]

134. ***The Special Position of American Indians.*** With one exception, the continuing debate over reverse discrimination relates almost entirely to matters such as housing, employment and education,[575] rather than to the recognition of minority customs or institutions. The exception involves the special position of American Indians. Originally, they were treated with, as separate communities, rather than treated as individual subjects. They came to be classified as 'domestic dependent nations',[576] retaining considerable autonomy over their own affairs on their 'reserve' land. But continuing legislative and administrative incursions into Indian sovereignty, such as the Major Crimes Act[577] and the Indian Civil Rights Act,[578] have resulted in a substantial body of special federal law dealing with American Indian tribes and their members. This is an expression of a doctrine of 'wardship', whereby the United States has a special responsibility for the welfare of American Indians:

> Not only does the Constitution expressly authorize Congress to regulate commerce with the Indian tribes, but long continued legislative and executive usage and an unbroken current of judicial decisions have attributed to the United States ... the power and duty of exercising a fostering care and protection over all dependent Indian communities within its borders ... whether within or without the limits of a state.[579]

In fact federal Indian law itself contains relatively few elements of Indian custom or tradition. But it does provide a degree of freedom on the part of Indian tribes to regulate themselves, a freedom which can be used to incorporate or apply Indian customs and traditions. This is true, for example, of traditional Indian marriages, which are recognized by virtue of their conformity, or presumed conformity, with the law and custom of the Indian reservation to which they relate.[580]

135. ***Equal Protection and American Indians.*** Problems of equal protection can arise with respect to American Indians in two distinct ways. Indian tribal law is not delegated from and does not form part of federal law. Nor does the Fourteenth Amendment to the United States Constitution apply to action taken by the Indian tribes under their 'original' powers. But there is a modified form of equal protection guarantee in the Indian Civil Rights Act of 1968.[581] Violation of equal protection by Indian tribes is, however, a matter for tribal courts rather than federal courts, except in respect of criminal cases (where the remedy of habeas corpus is available).[582] In addition federal or state action with respect to Indians and Indian tribes is subject to the equal protection guarantee under the Fifth and Fourteenth Amendments. The consistency of special protective rules for Indian tribes with equal protection is, therefore, a significant issue. In *Morton v Mancari*,[583] non-Indian employees of the federal Bureau of Indian Affairs (BIA) challenged a provision of the Indian Reorganization Act 1934 which established a preference in promotion for employees who were members of Indian tribes. It was claimed that such a preference violated their right to equal protection. The

572 Polyviou, 348-79, 703-21.
573 438 US 265 (1978).
574 id, 325 (Brennan, White, Marshall, Blackmun JJ). And see *Fullilove v Flutznick* 448 US 448 (1980).
575 cf AH Goldman, *Justice and Reverse Discrimination*, Princeton University Press, Princeton NJ, 1979, 4.
576 *Cherokee Nation v Georgia* 30 US 1, 17 (1831) (Marshall CJ); *Worcester v Georgia* 31 US 515, 554-60 (1832) (Marshall CJ).
577 23 Stat 385 (1885); see now 18 USC 1153. For the circumstances of its enactment, cf US Commission of Civil Rights, *Indian Tribes. A Continuing Quest for Survival*, Washington, 1981, 139-40.
578 25 USC 1301ff (1976).
579 *United States v Sandoval* 231 US 28, 45-6 (1913).
580 GW Bartholomew, 'Recognition of Polygamous Marriages in America' (1964) 13 *ICLQ* 1022, 1033-68.
581 25 USC 1302(8) (1976).
582 *Santa Clara Pueblo v Martinez* 436 US 49 (1978); US Commission on Civil Rights, 30-1.
583 417 US 535 (1974).

Supreme Court held unanimously that the employment preference did not violate the Fifth Amendment. Speaking for the Court, Justice Blackmun said:

> Literally every piece of legislation dealing with Indian tribes and reservations, and certainly all legislation dealing with the BIA, single out for special treatment a constituency of tribal Indians living on or near reservations. If these laws, derived from historical relationships and explicitly designed to help only Indians, were deemed invidious racial discrimination, an entire Title of the United States Code (25 USC) would be effectively erased and the solemn commitment of the Government toward the Indians would be jeopardized. Contrary to the characterization made by appellees, [the preference in employment under the 1934 Act] does not constitute 'racial discrimination'. Indeed. it is not even a 'racial' preference. Rather, it is an employment criterion reasonably designed to further the cause of Indian self-government and to make the BIA more responsive to the needs of its constituent groups. It is directed to participation by the governed in the governing agency. The preference as applied, is granted to Indians not as a discrete racial group, but, as members of quasi-sovereign tribal entities whose lives and activities are governed by the BIA in a unique fashion.[584]

The Court concluded:

> On numerous occasions this Court specifically has upheld legislation that singles out Indians for particular and special treatment. As long as the special treatment can be tied rationally to the fulfilment of Congress' unique obligation toward the Indians, such legislative judgments will not be disturbed. Here, where the preference is reasonable and rationally designed to further Indian self-government, we cannot say that Congress' classification violates due process.[585]

An important aspect of the decision was its denial that the classification was inherently a racial one. The United States stood in a 'political' relationship of wardship to the Indians, for whom it had special constitutional responsibility. The classification was thus 'political rather than racial in nature'.[586] This broader rationale has been upheld and extended in later Supreme Court cases. In *Fisher v Rosebud District Court*, it was argued that a provision of the Indian Reorganization Act 1934, pursuant to which a tribal court had exclusive jurisdiction over intra-tribal adoptions, violated equal protection because it deprived tribal members of access to state courts. The Supreme Court summarily rejected the argument:

> The exclusive jurisdiction of the Tribal Court does not derive from the race of the plaintiff but rather from the quasi-sovereign status of the Northern Cheyenne Tribe under federal law. Moreover, even if a jurisdictional holding occasionally results in denying an Indian plaintiff a forum to which a non-Indian has access, such disparate treatment of the Indian is justified because it is intended to benefit the class of which he is a member by furthering the congressional policy of Indian self-government.[587]

136. ***United States v Antelope.*** More important was the decision in *United States v Antelope*[588] in the following year. This followed a series of cases in lower courts examining the equal protection aspects of inequalities produced by the complex rules for criminal jurisdiction with respect to Indians. These rules bear no particular relation to specific Indian needs or to 'the maintenance of the separate values of the Indian cultures'.[589] Lower courts had oscillated between the benevolent approach of *Morton v Mancari*[590] and a more exacting inquiry into the real justification for the differences at stake.[591] *United States v Antelope* was specially significant in that the challenged legislation had an adverse impact on the Indian defendant, and did not involve 'protective' or 'benevolent' purposes. Indian defendants were charged under the Major Crimes Act for the murder of a non-Indian on a reservation. If a non-Indian had committed the offence, Idaho law would have applied and required proof of actual intent to kill. But under the Major Crimes Act the felony-murder rule was applicable, and the difference may have been important in this case. The Supreme Court unanimously rejected the equal protection claim. As in the earlier cases, it rejected the argument that differentiation between tribal Indians and others was racially based, but it did so in a context where the 'political' aspect of the classification was by no means obvious:

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584 id, 552-4. Among earlier decisions see eg *Board of County Commissioners v Seber* 318 US 705, 718 (1943) (tax exemption favouring certain Indian lands upheld as an 'appropriate means by which the federal government protects its guardianship and prevents the impairment of a considered program undertaken in discharge of the obligations of that guardianship').

585 417 US 535, 555 (1974).

586 id, 553 n 24.

587 424 US 382, 390-1 (1976).

588 430 US 641 (1977).

589 DH McMeekin, 'Red, White and Gray: Equal Protection and the American Indian' (1969) 21 *Stanford L Rev* 1236, 1247.

590 *Gray v United States* 394 F2d 96 (1968), cogently criticised by MacMeekin, *United States v Analla* 490 F2d 1204 (1974), vacated and remanded on other grounds 42 Led (2d) 40.

591 *United States v Cleveland* 503 F2d 1067 (1974); *United States v Big Crow* 523 F2d 955 (1975), cert den 424 US 920. cf *Keeble v United States* 412 US 205, 213 (1973).

> The decisions of this Court leave no doubt that federal legislation with respect to Indian tribes although relating to Indians as such, is not based upon impermissible racial classifications. Quite the contrary, classifications expressly singling out Indian tribes as subjects for legislation are expressly provided for in the Constitution and supported by the ensuing history of the Federal Government's relations with the Indians ... [T]he principles reaffirmed in Mancari and Fisher point ... to the conclusion that federal regulation of Indian affairs is not based upon impermissible classifications. Rather, such regulation is rooted in the unique status of Indians as 'a separate people' with their own political institutions. Federal regulation of Indian tribes, therefore, is governance of once-sovereign political communities; it is not to be viewed as legislation of a '"racial" group consisting of "Indians"...' Indeed, respondents were not subjected to federal criminal jurisdiction because they are of the Indian race but because they were enrolled members of the Coeur d'Alene Tribe. We therefore conclude that the federal criminal statutes enforced here are based neither in whole nor in part upon impermissible racial classifications.[592]

To summarise, the Court does not regard legislation in the exercise of the special responsibilities of the United States towards Indian tribes, their members and associates as based on a racial classification, or as requiring strict scrutiny. The equal protection guarantee, of course, continues to apply, but at least with respect to federal legislation[593] it is satisfied by a rational link with the special responsibilities of the United States towards Indian communities and with their special needs. In this respect the position of American Indians under the Constitution is 'unique',[594] and is not affected by the relatively strict scrutiny of benevolent legislation affecting minorities, which may follow from the decision in *Bakke's* case.[595]

137. ***A Test-case: The Indian Child Welfare Act 1978 (USA).*** The implications of this doctrine for legislation recognizing or allowing for special aspects of Indian tradition and culture may be seen from the debate over the constitutionality of the Indian Child Welfare Act 1978 (USA). The Act establishes both a preference for tribal court over state court jurisdiction in the placement of Indian children, and a preference in any forum for the placement of such children in Indian families.[596] While the Indian Child Welfare Bill was before Congress, doubts about its constitutionality were raised by the Department of Justice. The Department doubted whether the Bill's provisions were consistent with equal protection, since they deprived Indians of access to State courts on the basis of a 'racial' classification.[597] However, both the House Report on the Bill,[598] commentators[599] and lower courts have had no trouble in upholding its constitutionality on the basis of *Morton v Mancari*.[600] It is significant that the doubts about equal protection have related not to the placement principle established by the Act, but to the denial of state court jurisdiction. The placement principle is a presumptive, not an absolute, rule. It is a careful response to a proven pattern of unwarranted disruption of Indian families. The Act does not prefer one parent or relative over another on grounds of race (or indeed on any other grounds). What it does is to give a preference to parental, familial or community-based placements of certain Indian children over non-parental, non-familial or institutional placements. For these reasons it is entirely consistent with the constitutional guarantee of the equal protection of the laws.

## The Position in Canada

138. ***The Canadian Bill of Rights 1960.*** In 1960 the Canadian Parliament enacted a short Bill of Rights which included a guarantee of 'equality before the law'.[601] The Canadian Bill of Rights had no constitutional status and could be overriden by an express derogation clause in later legislation. It affected only federal legislation and its administration. It was enacted against the background of the British North America Act

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592 430 US 641, 645-7 (1977) (Burger CJ). The Court reserved its position with respect to the conflicting cases in lower courts: id, 649 n11. See also *Washington v Yakima Indian Nation* 439 US 463 (1979).

593 US Commission on Civil Rights, 32 (and cases there cited).

594 *Morton v Mancari* 417 US 535, 554, 555 (1974). cf RM Klein, '*Morton v Mancari*: Achieving the Landmark Status Denied *De Funis*?' (1974) 2 *Ohio NU L Rev* 371; Polyviou, 366.

595 The position of US Indians was expressly reserved by the Court in Bakke: 438 US 265, 780 n42 (Powell J), 844 (Blackmun J).

596 See para 353-64 for discussion of the Act and its Australian equivalents.

597 See 95th Congress, 2d Session, House of Representatives, *Report together with Dissenting Views to Accompany HR 12533* (1978) 36-40, for the Justice Department's objections.

598 id, 12-17, 19.

599 eg ML Vanderpan, 'In re DLL and CLL Minors: Ruling on the Constitutionality of the Indian Child Welfare Act' (1981) 26 *S Dakota L Rev* 67; MP Guerrero, 'Indian Child Welfare Act of 1978: A Response to the Threat to Indian Culture caused by Foster and Adoptive Placements of Indian Children' (1979) 7 *Am Indian L Rev* 51 74-6; B Davies, 'Implementing the Indian Child Welfare Act' (1982) 16 *Clearinghouse Review* 179, 183-4; LA Marousek, 'The Indian Child Welfare Act of 1978: Provisions and Policy' (1980) 24 *S Dakota L Rev* 98, 105-6. RL Barsh, 'The Indian Child Welfare Act of 1978: A Critical Analysis' (1980) 31 *Hastings LJ* 1237, 1307-8 argues that the Act's definition of 'Indian child' is under-inclusive (although apparently not so seriously as to raise any equal protection issue).

600 417 US 535 (1974) See especially In re DLL and CLL, Minors 291 NW (2d) 278, 281 (1980), noted Vanderpan (1981) 67; *In re Melinda Twobabies*, unreported, Oklahoma District Court, 1979.

601 Canadian Bill of Rights 1960, s 1(b). The Canadian Bill of Rights has been superseded by the Charter of Rights and Freedoms contained in the 1982 Constitution: see para 143.

1867 (as it then was), which gives power to the Canadian Parliament to legislate for 'Indians, and Lands reserved for Indians'.[602] As in the United States, there was a long history of use of this power to enact special 'protective' legislation for Indians. The impact of the Bill of Rights, and in particular of the guarantee of equality before the law, on this special legislation was a significant source of difficulty for the Supreme Court.[603]

139. ***Initial Uncertainties.*** The first such case, and the only one where the Supreme Court held that provisions of the Indian Act were inoperative by virtue of the guarantee of equality before the law, was *R v Drybones*.[604] Section 94(b) of the Indian Act made it an offence for an Indian to be intoxicated off a reserve (whether or not in public). Drybones was found intoxicated in the North West Territory (where there are no reserves). Other Territory legislation made it an offence for anyone to be intoxicated in public, but attached a lesser penalty than s 94(b) did.[605] The Supreme Court held that s 96(b) infringed the Bill of Rights guarantee of 'equality before the law'. Justice Ritchie, for the majority said:

> Without attempting any exhaustive definition of 'equality before the law' I think that s 1(b) means at least that no individual or group of individuals is to be treated more harshly than another under that law, and I am therefore of opinion that an individual is denied equality before the law if it is made an offence punishable at law, on account of his race, for him to do something which his fellow Canadians are free to do without having committed any offence or having been made subject to any penalty.[606]

He added that the same considerations did not 'by any means apply to all the provisions of the Indian Act'.[607] The difficulty with this reasoning lay in its comparison of the s 94(b) with the freedom of other Canadians to be intoxicated in private. As it happened, this freedom in the case of the Northwest Territory was the result of Territory legislation which was, for this purpose, equated to federal legislation. Elsewhere, however, it would be a matter for provincial legislation. Either the effect of the decision had to be confined to inequality within or between a federal law or laws, or the Court had to hold all Indian legislation discriminatory,[608] provincial law. None of these alternatives was acceptable. The first would allow gross forms of inequality to be perpetrated by isolated federal laws. The second would practically deprive the federal Parliament of all legislative power over Indians and Indian lands, which the Bill of Rights clearly did not intend. The third would make uniform federal legislation practically impossible, since it would require federal laws to be tested for equality against varying provincial laws.[609]

140. ***Membership of Indian Bands: Lavell's Case.*** These difficulties became clearer in the case of *Attorney-General of Canada v Lavell* in 1973.[610] Two Indian women who had married non-Indians had thereby, under s 12(l)(b) of the Indian Act, permanently lost their status as band members. An Indian man who married a non-Indian woman would not have lost band membership. One of the women had illegally returned to live on the reserve after her marriage had broken up: the reserve council sought to evict her. Both claimed that s 12(1)(b) infringed their right to equality before the law under the Canadian Bill of Rights in that it discriminated on grounds of sex. The Canadian Supreme Court upheld s 12(1)(b) by a majority of one. Only four of the nine member court up held the legislation on its 'merits', and the decision therefore lacked a clear ratio.[611] The four 'majority' judges upheld s 12(1)(b) on two distinct grounds. The first related to the federal complication partly exposed in *Drybones*. Section 91(24) of the 1867 Act, in their view, positively required discriminatory provisions to be enacted with respect to the use of Indian land and the membership of Indian bands.[612] It followed that the Bill of Rights could not displace the 'constitutional function ... to specify how and by whom Crown lands reserved for Indians are to be used'.[613] Secondly, a narrow, formal view of 'equality' was adopted:

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602 British North America Act (now Constitution Act) 1867, s 91(24).
603 cf WS Tarnopolsky, *The Canadian Bill of Rights*, 2nd rev ed, McLelland and Stewart, Toronto, 1975, 294-308; Polyviou, 134-76.
604 [1970] SCR 282. In one lower court case a provision of the Indian Act was held inoperative under s 1(b): *R v B* (1982) 135 DLR (3d) 285. As in *Drybones*, this was straightforwardly punitive, discriminatory legislation.
605 Liquor Ordinance 1956 (Northwest Territories) s 19(1).
606 [19701 SCR 282, 297.
607 id, 298.
608 As Pigeon J (dissenting) thought: id, 303.
609 The ninth judge (Pigeon J), while adhering to the view he expressed in *Drybones*, agreed 'in the result' with the majority: id, 500-1. cf Tarnopolsky, (1975) 135-43.
610 (1973) 38 DLR (3d) 481.
611 cf Tamopolsky (1975) 148-63.
612 (1973) 38 DLR (3d) 481, 490-2 (Ritchie J) (with whom Fateux CJC, Martland and Judson JJ concurred).
613 id, 500 (Ritchie J).

> equality before the law under the Bill of Rights means equality of treatment in the enforcement and application of the laws of Canada before the law enforcement authorities and the ordinary Courts of the land, and no such inequality is necessarily entailed in the construction and application of s 12(1)(b).[614]

The second ground was straightforwardly rejected by the minority judges, and has been much criticised since.[615] More important for present purposes however was their treatment of the argument from s 91(24). On this point, Justice Laskin (as he then was) said:

> It was urged, in reliance in part on history, that the discrimination embodied in the Indian Act under s 12(1)(b) is based upon a reasonable classification of Indians as a race, that the Indian Act reflects this classification and that the paramount purpose of the Act to preserve and protect the members of the race is promoted by the statutory preference for Indian men ... [But] the Canadian Bill of Rights itself enumerates prohibited classifications which the judiciary is bound to respect ... There is no clear historical basis for the position taken by the appellants, certainly not in relation to Indians in Canada as a whole ... Pre-existing Canadian legislation as well as subsequent Canadian legislation is expressly made subject to the commands of the Canadian Bill of Rights, and those commands, where they are as clear as the one which is relevant here, cannot be diluted by appeals to history ... In my opinion, the appellants' contentions gain no additional force because the Indian Act, including the challenged s 12(1)(b) thereof, is a fruit of the exercise of Parliament's exclusive legislative power in relation to 'Indians, and Lands reserved for the Indians' under s 91(24) of the British North America Act, 1867. Discriminatory treatment on the basis of race or colour or sex does not inhere in that grant of legislative power. The fact that its exercise may be attended by forms of discrimination prohibited by the Canadian Bill of Rights is no more a justification for a breach of the Canadian Bill of Rights than there would be in the case of the exercise of any other head of federal legislative power involving provisions offensive to the Canadian Bill of Rights.[616]

This passage is rather difficult to interpret. On the one hand it rejects the assistance provided by the United States cases, and seems to reject any classification based upon race. Moreover, the United States view that legislation for American Indians does not involve a racial classification, as distinct from a political classification rooted in the history of Indian relations, is dismissed as a mere appeal to 'history'.[617] On the other hand it is said that 'discriminatory treatment on the basis of race ... does not inhere in' the grant of power to legislate for 'Indians and lands reserved for Indians'. It may be that Justice Laskin understood 'discriminatory' to mean only 'adverse' or 'penal', allowing federal legislation for Indians when this is 'benign ' or beneficial. But, apart from the difficulty of determining whether particular legislation is indeed 'benign', and the fact that s 1(b) of the Canadian Bill of Rights requires 'equality before the law' rather than the absence of adverse treatment, it is clearly necessary to define the categories of persons to benefit from Indian status and Indian land. Such legislation is practically certain to distinguish between persons on grounds at least of descent (if not of race). It is true that it is not bound to distinguish on grounds of sex: Lavell objected to s 12(1)(b) not because its discriminated on grounds of her race but because it discriminated on grounds of her sex. But Justice Laskin was, it seems, not simply making this point.

141. ***The Emergence of a Test for Equality.*** In the end, the view that power to legislate for Indians does not entail discriminatory legislation requires the adoption of some form of 'reasonable classification' test, assisted by the argument that a category specifically enumerated as a head of constitutional power and establishing a substantial federal responsibility cannot be, as such, a 'suspect classification'. And it is this view which seems to have emerged in subsequent cases.[618] *Attorney-General for Canada v Canard*[619] involved the impact of equality before the law on provisions of the Indian Act vesting testamentary jurisdiction in respect of Indians resident on reserves, in the Minister of Indian Affairs.[620] Under the Indian Act the invariable practice was to appoint a departmental officer to be administrator of an intestate Indian estate, and regulations made under the Act contemplated, if they did not require, that an officer would be the administrator. Under provincial law and practice, on the other hand, the spouse of a deceased person would normally be appointed as administrator. Canard, the wife of a deceased Indian who died intestate and resident on a reserve, claimed that the law or practice which prevented her appointment as administrator violated s 1(b) of the Canadian Bill of Rights. But by an apparently clear majority the Court (5-2) held that

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614 ibid.

615 eg Tarnopolsky (1975) 158-63, 297-304; PW Hogg, 'The Canadian Bill of Rights — Equality before the Law — *AG Can v Lavell*' (1974) 52 *Can B Rev* 263; Polyviou, 153-60.

616 (1973) 38 DLR (3d) 481, 510-12. Hall, Spence and Abbott JJ agreed with Laskin J.

617 For a defence of the Indian Act provisions see DE Sanders, 'The Bill of Rights and Indian Status' (1972) 7 *UBCL Rev* 81, 96-105. See also SM Weaver, The Status of Indian Women' in JL Elliott (ed) *Two Nations. Many Cultures*, Prentice-Hall, Scarborough, 1983, 56; Sanders, 'The Indian Act and the Bill of Rights' (1974) 6 *Ottawa L Rev* 397, esp 413-4. For more recent developments see para 143-4.

618 cf *Re Fronan* (1973) 33 DLR (3d) 676.

619 (1975) 52 DLR (3d) 548.

620 Indian Act 1970 (Can) s 42-4.

the Act did not violate equality before the law in this respect. As with *Lavell*, analysing the real basis for the decision is difficult. The argument which seems to have attracted the greatest support was that the vesting of testamentary jurisdiction over reservation Indians in the Minister (to be exercised as a quasi-judicial power subject to judicial review) did not as such constitute discrimination.[621] For such vesting to constitute discrimination there would have to be some substantive adverse consequence of the jurisdictional arrangements. But whether the wife's ineligibility for appointment as administrator resulted from law or practice, it was a consequence not of the Indian Act but of the regulations and of Departmental practice under them. The Indian Act itself did not, therefore, discriminate.[622] The argument is, however, incomplete. Even if no adverse consequences flowed from a jurisdictional distinction, that distinction was still, apparently, separate treatment by reference to race, and there fore presumptively inconsistent with 'equality before the law'. This objection was met in several different ways. Justice Ritchie (with whom Justice Martland agreed) held that the provision of a separate jurisdiction was not discriminatory because there was no basis of comparison within federal law.[623] Lacking any such basis, and given the inadmissibility of comparisons with provincial law, these were simply provisions which 'deal[t] only with the legal rights of Indians'.[624] Such provisions, in isolation, were not discriminatory. This is an unsatisfactory solution to the problem of equality of law in a federation. It leaves penal provisions such as that in *Drybones* intact unless there happens to be another federal law potentially applicable. As Justice Beetz pointed out, this 'would allow all sorts of discriminations provided all Indians were being equally discriminated against'.[625] That would be the negation of 'equality before the law'. These difficulties are not overcome by the alternative suggestions of reference to the common law[626] or to some form of 'provincial *jus gentium*'.[627]

142. ***The 'Valid Federal Objective' Test.*** The alternative is to adopt some variant of the 'reasonable classification' test, as Justice Martland did. He said:

> the right to equality before the law guaranteed by s 1(b) of the Bill of Rights [does] not involve the proposition that all federal statutes must apply equally to all individuals in all parts of Canada ... [F]ederal legislation which [applies] to a particular group or class of people, or in a particular area of Canada, [does] not offend against that guarantee if it [is] enacted in order to achieve a valid federal objective ... Section 43 of the Indian Act is legislation relating to the administration of the estates of deceased Indians and (unless the Minister otherwise orders, which he did not do in this ease) relates only to those Indians ordinarily resident on reserves. It enables the Minister to appoint administrators of estates of deceased Indians and to remove them. The Regulations enacted pursuant to s 42 enable the Minister to appoint an officer of the Indian Affairs Branch to be the administrator of estates and to supervise the administration of estates. In my opinion there are legitimate reasons of policy for the enactment of such provisions in relation to the estate assets of deceased Indians ordinarily resident on reserves.[628]

The reference to a 'valid federal objective' cannot be a reference to the constitutional validity of legislation, otherwise the Canadian Bill of Rights would be redundant. It can only be a judgment as to the reasonableness or legitimacy (as distinct from the arbitrariness or unreasonableness) of the classification adopted by the law in the light of its purpose and effect. This view is supported by Justice Martland's reliance upon the 'legitimate reasons of policy' for s 42 and 43.[629] A further gloss on the 'valid federal objective' test was provided by Justice Beetz in his concurring judgment. His Honour explained the decision in *Lavell's* case in the following way:

> I understand *Lavell* to have primarily decided that Parliament must not be deemed to have subjected to the Canadian Bill of Rights the authority vested upon it under s 91(24) of the British North America Act, 1867, exclusively to make laws for 'Indians and Lands reserved for the Indians', in so far as this authority, being of a special nature, could not be effectively exercised without the necessarily implied power to define who is and who is not an Indian and how Indian status is acquired or lost. In so defining Indian status, Parliament could, without producing conflict with the

621 (1975) 52 DLR (3d) 548, 565 (Pigeon J), 577-8 (Beetz J).
622 ibid. And cf Polyviou, 160-8.
623 (1975) 52 DLR (3d) 548, 563.
624 id, 561 (Martland J).
625 id, 579.
626 id, 553 (Laskin CJC) (with whom Spence J agreed).
627 id, 579 (Beetz J).
628 id, 560-1.
629 Similarly Beetz J pointed out that:

> the power bestowed upon the Minister by the Indian Act to appoint administrators of Indian estates, given its nature and history, is a power perfectly capable of being exercised by him in a judicial or quasi judicial manner, under judicial control, in accordance with the process of law and with standards applicable to other Canadians as well as with all the requirements of the Canadian Bill of Rights. (id, 578)

There was, it seems, no evidence that the Minister used these powers to bring about an appropriate recognition of applicable Indian traditions and customs in the administration of estates, as distinct from a form of bureaucratic control.

> Canadian Bill of Rights, establish between various cases of intermarriages, such distinctions as could reasonably be regarded to be inspired by a legitimate legislative purpose in the light for instance of long and uninterrupted history ... The British North America Act, 1867, under the authority of which the Canadian Bill of Rights was enacted, by using the word 'Indians' in s 91(24), creates a racial classification and refers to a racial group for whom it contemplates the possibility of a special treatment. It does not define the expression 'Indian' ... Parliament can do [this] within constitutional limits by using criteria suited to this purpose but among which it would not app ear unreasonable to count marriage and filiation and unavoidably, intermarriages, in the light of either Indian customs and values which, apparently, were not proven in Lavell, or of legislative history of which the Court could and did take cognisance.[630]

In other words, given the existence of s 91(24), the classification 'Indian' cannot be a suspect one under the Canadian Bill of Rights, so far as concerns matters inherent in or reasonably related to the specification of Indian status and its incidents and the protection of that status. In determining the reasonableness of that relationship, it is proper to take into account 'Indian customs and values' (although this has never been directly in issue in the Canadian cases) and the history of legislation for Canadian Indians. Later cases have confirmed the 'valid federal objective' test as the established test in cases involving the Canadian Bill of Rights, although none dealt directly with Indian law.[631] The test operates as a form of 'reasonable classification' requirement, although the Court's consideration of the issues has been more reticent and concealed than that of the United States Supreme Court.[632] What is of interest is that the Canadian Supreme Court seems to have arrived, by a rather different course, at the same general position with respect to federal legislation affecting Indians as the United States Supreme Court. In both jurisdictions, the suspicion that would normally be directed at legislative classifications involving Indians is displaced by the established constitutional mandate, and the related responsibility, to enact 'special laws'. Adverse penal consequences are still carefully scrutinised: otherwise, reasonable legislative judgments of need will not be disturbed, especially where these are supported by an established legislative history, or by consideration of Indian 'customs and values'.

143. ***The Canadian Constitution Act 1982.*** The Canada Act 1982 (UK), passed by the United Kingdom Parliament at the request and consent of the Canadian Parliament (and with the agreement of all the Provinces except Quebec) enacted a new Constitution Act for Canada. This includes the Canadian Charter of Rights and Freedoms, which applies to all Canadian Parliaments. The Constitution provides, in part:

> 15(1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.
>
> (2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.
>
> 25. The guarantee in this Charter of certain rights and freedoms shall not be construed so as to abrogate or derogate from any aboriginal, treaty or other rights or freedoms that pertain to the aboriginal peoples of Canada including:
>
> (a) any rights or freedoms that have been recognised by the Royal Proclamation of October 7, 1763: and
>
> (b) any rights or freedoms that may be acquired by the aboriginal peoples of Canada by way of land claims settlement.
>
> 27. This Charter shall be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians.
>
> 28. Notwithstanding anything in this Charter, the rights and freedoms referred to in it are guaranteed equally to male and female persons.
>
> PART II
>
> RIGHTS OF THE ABORIGINAL PEOPLES OF CANADA

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630 id, 575.

631 eg *Mackay v R* (1980) 114 DLR (3d) 393, noted by ME Gold, 'Canadian Bill of Rights' (1982) 60 *Can B Rev* 137. Other Canadian cases involving equality rights and Indians include *R v Hayden* [1983] 6 WWR 655; *R v Rocher* [1984] AR 387.

632 cf Polyviou, 173-6; ME Gold, 'Equality before the Law in the Supreme Court of Canada: A Case Study' (1980) 18 *Osgoode Hall LJ* 336; Tamopolsky (1975) 302-4, 308, 315; Evans, 68-78.

> 35. (1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.
>
> (2) In this Act, 'aboriginal peoples of Canada' includes the Indian, Inuit and Metis peoples of Canada.
>
> (3) For greater certainty, in subsection (1) 'Treaty Rights' includes rights that now exist by way of land claims, agreements, or may be so acquired.
>
> (4) Notwithstanding any other provision of this Act, the Aboriginal and treaty rights referred to in subsection (I) are guaranteed equally to male and female persons.[633]

144. ***Continuing Constitutional Debate.*** Canadian Indian organisations were very active in the discussions and controversies leading to the adoption of the Constitution,[634] and this process has been continued and formalised by provisions for further consultation at First Minister's conferences at which the Indian organisations are represented, to spell out in more detail the 'existing aboriginal and treaty rights of the aboriginal peoples of Canada' and to deal with other Indian demands. At the first such conference, held in 1983, a number of constitutional amendments were agreed to, some of which have now been implemented.[635]

> In addition an express constitutional 'commitment' is given that amendments to s 25 or Part II of the 1982 Act or to s 91(24) of the Constitution Act 1867[636] will not be made before consultation with 'representatives of the aboriginal peoples of Canada' at a constitutional conference[637] and a schedule of further constitutional conferences to discuss 'constitutional matters that directly affect the aboriginal peoples of Canada' is established.[638] It is too early to tell how the Canadian courts will interpret and apply s 15, which is drafted in deliberately broader terms than s 1(b) of the Canadian Bill of Rights. However, in view of the specific reservation of Indian rights in s 25 and 35, it is clear that the special forms of protection or recognition of Indian claims or traditions envisaged by those sections will not be regarded as infringing equality before the law or equal protection.[639]

## The Position in Other Comparable Jurisdictions

145. ***A Pacific Island Decision.*** Similar arguments have been used by courts in other comparable jurisdictions in upholding laws relating to indigenous minorities or to customary rules or procedures. A good example is the decision of the Cook Islands Court of Appeal in *Clarke v Karika*.[640] The case involved legislation relating to a long-running dispute over customary land in the Cook Islands. In 1908 the Cook Islands Land Titles Court decided that certain customary land disputed between two clans belonged to the respondent's clan (although life interests in the land were awarded to the appellant). However disputes over the land continued and were a significant cause of unrest. Eventually the Cook Islands legislature passed a private Act entitling any person affected to apply to the Lands Division of the Cook Islands High Court to have the matter reheard. The respondents claimed that the private Act violated the principles of non-discrimination and equality before the law as protected by s 64 of the Cook Islands Constitution. The Court of Appeal held unanimously that the Act did not violate these principles. After articulating a concept of equality and non-discrimination by virtue of which discrimination exists where a law 'singles out persons for reasons not consonant with a legitimate and apparent legislative purpose', the Court held that the purpose of the Act was legitimate and that its effect — providing for a rehearing on the merits — was not disproportionate to its purpose. The Court said:

> It is only [particular] lands ... for which Parliament has decided to allow rehearings of questions of title. To widen the possible reheatings to cover other lands might well have been to invite arguments that Parliament was going further than could be justified by the particular problem which evidently led to the legislation. It could even be said that by

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633 Some provisions of the Charter, including s 15, can be overriden by express Parliamentary declaration.

634 See DE Sanders, 'The Indian Lobby' in K Banting and R Simeon, *And No One Cheered. Federalism, Democracy and the Constitutional Act*, Methuen, Toronto, 1983, 301; S McInnes, 'The Inuit and the Constitutional Process: 1978-81' in IAL Getty and AS Lussier, *As Long as the Sun Shines and Water Flows. A Reader in Canadian Native Studies*, University of British Columbia Press, Vancouver, 1983, 317. cf *R v Secretary of State for Foreign and Commonwealth Affairs, ex parte Indian Association of Alberta* [1982] 2 All ER 118, noted (1982) 53 *BYIL* 253.

635 For example, s 35(3) and (4) were inserted in 1985. For background see First Ministers' Conference on Aboriginal Constitutional Affairs, 1983 Constitutional Accord on Aboriginal Rights (Ottawa, 15-16 March 1983). See N Lyons, 'Constitutional Issues in Native Law' in B Morse (ed), *Aboriginal Peoples and the Law: Indian, Metis and Inuit Rights in Canada*, Carleton UP, Ottawa, 1985, 408, 424-8. See also para 191 n 70.

636 Previously British North America Act 1867 (s 91(24) of which gives federal power to legislate for 'Indians and lands reserved for Indians').

637 Draft section 35.1.

638 Draft Part V.1 (section 37.1).

639 See WS Tarnopolsky, 'The Historical and Constitutional Context of the Proposed Canadian Charter of Rights and Freedoms' (1981) 44 *Law and Cont Problems* 169 esp 188-9; DE Sanders, 'Aboriginal Peoples and the Constitution' (1981) 19 *Alberta L Rev* 410.

640 Unreported, 25 February 1983 (Court of Appeal of the Cook Islands (Cooke P, Speight CJ, Keith J)).

> treating similarly people not necessarily in the same position Parliament would deny equality before the law. Moreover, an Act extending to a wider area , such as a whole tribal district, would tend to undermine security of title generally. The Courts would not be justified in interpreting the Constitution as requiring Parliament, if legislating for rehearings, to do so on a wider scale than Parliament thinks necessary. And we do not think that the Constitution could possibly be interpreted as altogether denying Parliament any power to legislate for any reheating. An attempt to pass a series of private Acts providing for reheatings of a series of individual cases not legitimately capable of being regarded as in any special category would raise different issues. It might conceivably be open to successful challenge under the Constitution. But there is no evidence before the Court of any proposal on those lines ... [C]ounsel for the respondent did seek to place some reliance on [the fact] that the owners affected by the Act are a bloodrelated group. Insofar as this is a claim of discrimination or unequal treatment because of family origin, the answer is that the family relationship is inherent in the land tenure system. The terms of the 1980 Act indicate that the essential reason why that group of people is affected is that titles to a particular tract of land are in dispute; it is not their relation to one another. The Court cannot impute to Parliament a hidden intention to legislate against a particular family.[641]

146. ***Decisions in Other Jurisdictions.*** A similar approach was taken, in rather different circumstances, by the Western Samoan Court of Appeal in a case which involved the consistency of the matai system of representation with the principle of 'equal protection under the law'.[642] And analogous forms of the 'reasonable classification' test have been adopted, for example, under the Constitutions of the Republic of India,[643] the Republic of Ireland,[644] and of Singapore.[645]

## The Position in International Law

147. ***The Concept of Discrimination in General International Law.*** Questions of equality and discrimination have been the subject of considerable discussion and reflection in international law, both in the interpretation of 'minorities clauses' and of similar guarantees of non-discrimination for specific groups, and more recently in the interpretation of general human fights instruments. A survey of this material[646] strongly suggests that a general definition of discrimination has emerged in international law, a definition which would give content to any general international law rule on the subject,[647] and which would also be at least presumptively the meaning to be given to the term in international treaties. This test for 'discrimination' involves discovering a distinction based on a prohibited ground which has an invidious or arbitrary effect in preferring or excluding particular classes or persons. The point was strongly made by the European Court of Human Rights in the *Belgian Linguistics Case*[648] which concerned Article 14 of the European Convention of Human Rights, guaranteeing non-discrimination and equality before the law. The Court said:

> It is important ... to look for the criteria which enable a determination to be made as to whether or not a given difference in treatment ... contravenes Art 14. On this question the Court, following the principles which may be extracted from the legal practice of a large number of democratic States, holds that the principle of equality of treatment is violated if the distinction has no objective and reasonable justification. The existence of such a justification must be assessed in relation to the aim and effect of the measure under consideration, regard being had to the principles which normally prevail in democratic societies. A difference of treatment in the exercise of a right laid down in the Convention must not only pursue a legitimate aim: Art 14 is likewise violated when it is clearly established that there is no reasonable relationship of proportionality between the means employed and the aim sought to be realised.[649]

And it concluded that:

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641 *Transcript*, 32-3.

642 *Attorney-General of Western Samoa v Saipa'ia Olomalu* unreported, 26 August 1982 (Cooke P, Mills, Keith JJ)). See BH Arthur, 'The Significance of Twenty Years' (1984) 14 *Vict U Well L Rev* 295.

643 Polyviou, 85-133; AM Katz, 'Benign Preference: An Indian Decision and the Bakke Case' (1977) 25 *AJCL* 611.

644 For a review see FX Beytagh, 'Equality under the Irish and American Constitutions: A Comparative Analysis' [1983] *Irish J* 56.

645 cf *Ong Ah Chuan v Public Prosecutor* [1981] AC 648, 673-4 (PC): 'Provided that the factor which the legislature adopts as constituting the dissimilarity in circumstances is not purely arbitrary but bears as reasonable relation to the social object of the law, there is no inconsistency with [equality before the law under] art 12(1) of the Constitution'. cf *Ross-Spencer v Master of the High Court* (unreported, Swaziland Court of Appeal, 17 April 1972), noted by A Aguda, 'Discriminatory Statutory Provisions and Fundamental Rights Provisions of the Constitutions of Botswana, Lesotho and Swaziland' (1972) 89 S *African LJ* 299.

646 See BG Ramcharan, 'Equality and Non-discrimination', in L Henkin (ed) *The International Bill of Rights. The Covenant on Civil and Political Rights*, New York, Columbia University Press, 1981, 246; WA McKean, 'The Meaning of Discrimination in International and Municipal Law' (1970) 44 *BYIL* 178; WA McKean, *Equality and Discrimination under International Law*, Oxford, Clarendon Press, 1983, 136-52; and see the authorities cited by I Brownlie, *Principles of Public International Law*, 3rd edn, Oxford, Clarendon Press, 1979, 596-8.

647 In the *Barcelona Traction Case (Second Phase)* ICJ Rep 1970 3, 32 the International Court described 'the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination' as obligations which were of universal applicability.

648 ECHR Set A No 6(1968).

649 id, 34.

> Article 14 does not prohibit distinctions in treatment which are founded on an objective assessment of essentially different factual circumstances and which, being based on the public interest strike a fair balance between the protection of the interests of the community and respect for the rights and freedoms safeguarded by the Convention.[650]

Similarly, McKean, in his study on the principle of equality in international law, concludes:

> The principle does not require absolute equality or identity of treatment but recognizes relative equality, ie different treatment proportionate to concrete individual circumstances. In order to be legitimate, different treatment must be reasonable and not arbitrary, and the onus of showing that particular distinctions are justifiable is on those who make them. Distinctions are reasonable if they pursue a legitimate aim and have an objective justification, and a reasonable relationship of proportionality exists between the aim sought to be realized and the means employed. These criteria will usually be satisfied if the particular measures can reasonably be interpreted as being in the public interest as a whole and do not arbitrarily single out individuals or groups for invidious treatment.[651]

148. ***The International Law Definition Applied to Recognition of Minority Practices and Laws.*** In applying these principles to proposals for the recognition of minority practices and laws it is usual to draw a distinction between appropriate forms of recognition of minority practices, and programs of affirmative action which are aimed at the educational or economic advancement of a particular racial or ethnic group.[652] Systems of protection for or recognition of minority cultures have existed for a long time in many parts of the world: although these may make special provision for such groups, they will not be discriminatory if they are a reasonable response to the special circumstances of the minority, are generally accepted by it, and do not deprive individual members of the minority group of basic rights. This distinction was clearly formulated by the United Nations Sub-Commission on Prevention of Discrimination and Protection of Minorities in 1947:

> 1. Prevention of discrimination is the prevention of any action which denies to individuals or groups of people equality of treatment which they may wish.
>
> 2. Protection of minorities is the protection of non-dominant groups which, while wishing in general for equality of treatment with the majority, wish for a measure of differential treatment in order to preserve basic characteristics which they possess and which distinguish them from the majority of the population. The protection applies equally to individuals belonging to such groups and wishing the same protection.[653]

Similarly, in the United Nations Committee on Information from Non-Self-Governing Territories (as it then was), a 'fundamental distinction' was drawn between discriminatory laws on the one hand, and protective measures designed to safeguard the rights of indigenous inhabitants, including 'differential or concessionary laws'.[654]

> By differential or concessionary legislation [the Committee] meant those laws which reflect the different, religious, traditional and cultural aspirations of the different communities and which originate with and are maintained by the will of the particular communities concerned.[655]

This view was accepted and incorporated in General Assembly Resolution 644 (VII), adopted on 10 December 1952, by which the General Assembly:

> *Recognizing* that there is a fundamental distinction between discriminatory laws and practices, on the one hand, and protective measures designed to safeguard the rights of the indigenous inhabitants, on the other hand ...
>
> *Recommends* that where laws are in existence providing particular measures of protection for sections of the population, these laws should frequently be examined in order to ascertain whether their protective aspect is still predominant, and whether provision should be made for exemption from them in particular circumstances ...[656]

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650 id, 44. And cf Polyviou, 740-6.

651 McKean (1983) 286-7. cf McKean (1970) 185-6; I Brownlie, 'The Rights of Peoples in Modern International Law' (1985) 9 *Bull ASLP* 104, 109-13.

652 See for example McKean (1983) 82-7, 91, 95-6; EW Vierdag, *The Concept of Discrimination in International Law*, The Hague, 1973, 156-8 (his situations C and D).

653 UN Doc E/CN 4/52, sec V (1947), cited by F Capotorti, Special Rapporteur, Sub-Commission on Prevention of Discrimination and Protection of Minorities, *Study on the Rights of Persons belonging to Ethnic, Religious and Linguistic Minorities*, UN Doc E/CN 4 Sub2/384/Rev 1 (1979) 40 (Capotorti Report).

654 McKean (1970) 182.

655 ibid.

A similar distinction was accepted by the Permanent Court of International Justice in the *Case concerning Minority Schools in Albania*. Commenting on the inter-war minorities treaties, which combined guarantees of equality with a measure of protection of minority rights, the Court stated:

> The idea underlying the treaties for the protection of minorities is to secure for certain elements incorporated in a State, the population of which differs from them in race, language or religion, the possibility of living peaceably alongside that population and co-operating amicably with it, while at the same time preserving the characteristics which distinguish them from the majority, and satisfying the ensuing special needs. In order to attain this object, two things were regarded as particularly necessary, and have formed the subject of provisions in these treaties. The first is to ensure that nationals belonging to racial, religious or linguistic minorities shall be placed in every respect on a footing of perfect equality with the other nationals of the State. The second is to ensure for the minority elements suitable means for the preservation of their racial peculiarities, their traditions and their national characteristics. These two requirements are indeed closely interlocked, for there would be no true equality between a majority and a minority if the latter were deprived of its own institutions, and were consequently compelled to renounce that which constitutes the very essence of its being as a minority.[657]

In the scholarly literature there is also general agreement that appropriate measures of recognition of minority customs and traditions are not inconsistent with the principles of equality and non-discrimination in international law.[658]

149. ***Discrimination in the Racial Discrimination Convention.*** Articles 1, 2 and 5 of the Racial Discrimination Convention prohibit discrimination on grounds of race, colour, descent or national or ethnic origin. Article 1(1) of the Convention defines 'racial discrimination' as:

> any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life ...

Article 1(4) excludes from the prohibition in Art 1(1) certain 'special measures' which would otherwise constitute racial discrimination as defined:

> Special measures taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals requiring such protection as may be necessary in order to ensure such groups individuals equal enjoyment or exercise of human rights and fundamental freedoms shall not be deemed racial discrimination, provided, however, that such measures do not, as a consequence, lead to the maintenance of separate rights for different racial groups and that they shall not be continued after the objectives for which they were taken have been achieved.

Article 1(4) thus requires continuing scrutiny of 'special measures' to ensure that they are 'not continued after the objectives for which they were taken have been achieved'. It also prohibits the 'maintenance of separate rights for different racial groups', a reference to the discredited 'separate but equal' doctrine.[659] Subject to these two provisos, the Convention freely allows 'special measures' (often called 'reverse discrimination' or 'affirmative action') to be taken.[660] Indeed, Art 2(2) of the Convention goes further and 'requires' certain action to be taken:

> States Parties shall, when the circumstances so warrant, take, in the social, economic, cultural and other fields, special and concrete measures to ensure the adequate development and protection of certain racial groups or individuals belonging to them, for the purpose of guaranteeing them the full and equal enjoyment of human rights and fundamental freedoms. These measures shall in no case entail as a consequence the maintenance of unequal or separate rights for different racial groups after the objectives for which they were taken have been achieved.

150. ***Discrimination and Special Measures: Two Views of the Convention.*** The qualifying phrase 'when the circumstances so warrant' in Art 2(2) significantly reduces its impact as a matter of obligation. Nonetheless, Art 2(2) acknowledges not merely that certain 'special measures' are justified, but that they may be essential

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656 *United Nations Yearbook 1952*, United Nations, New York, 1953, 575-6 (adopted 51-0:1). cf also ILO Convention No 107 concerning the Protection and Integration of Indigenous and other Tribal and Semi-Tribal Populations in Independent Countries, 26 June 1957 (328 UNTS 247), Arts 4(a), 7, 8, 13. See para 173.

657 PCIJ Ser A/B No 64 (1935) 17. See also *South West Africa Cases (Second Phase)* ICJ Rep 1966 6, 307 (Judge Tanaka, diss op).

658 See eg Capotorti, 40-1, 98; Brownlie (1985) 111-13.

659 cf *Plessy v Ferguson* 163 US 537 (1896). It is thus no justification for excluding persons of a certain race from a particular facility (eg schools) that they have access to special facilities of similar standard.

660 Indeed Art 1(4) goes considerably further in this respect than has the Supreme Court under the United States Constitution: there, affirmative action programs are subject to careful scrutiny: see para 133. For criticism of Art 1(4) on these grounds see M Krygier, 'Discrimination and Anti-Discrimination Law. Affirmative Action and Human Rights' (1980) 23 *Quadrant* 4-10, 9-10. See generally C Cohen, 'Affirmative Action and the Rights of the Majority', in C Fried (ed) *Minorities: Community and Identity*, Springer-Verlag, Berlin, 1983, 353.

to ensure the protection of certain groups or individuals. If the definition of 'discrimination' in Art 1(1) is read as incorporating the general international law test based on 'reasonable classifications',[661] then the scope of Art 2(2) would not be limited to 'special measures' under Art 1(4), but would include measures which are not discriminatory, in the Art 1(1) sense, at all. Given the drafting history of the Convention,[662] the pre-existing and widely accepted meaning of discrimination in international law, and the apparent consensus of writers, this may be the better interpretation.[663] But Art 1(1) does not in terms specify a criterion based on reasonable classifications. An alternative view would be that the Convention achieves the same result as the general international law test though the combination of a strict guarantee of formal equality (that is, the absence of any distinction involving any element of race, no matter how 'reasonable' or legitimate) with a broad exception for 'special measures' under Art 1(4) and 2(2) to accommodate the range of special needs. This alternative interpretation does however require that Art 1(4) not be limited to the temporary measures of affirmative action in the strong sense (such as racial quotas in employment or education) with which it is usually associated. A problem with this interpretation is that Art 1(4) seems to envisage measures aimed at achieving a specified 'result' or objective within some more or less definite time. But some at least of the special measures' which are to be taken under Art 2(2) do not have what could be described as an end result in view, and could properly be maintained indefinitely. For example, special provisions for bilingual education for a minority ethnic group are certainly among the measures envisaged by Art 2(2).[664] Such measures should last as long as the linguistic group survives. In such cases the termination of the special measure would indicate, not the 'achievement' of its objectives but its failure. For these reasons the better view seems to be that Art 1(1) of the Convention does incorporate the general test for discrimination based on the reasonableness as opposed to the arbitrariness of particular classifications or distinctions. But, assuming that Art 1(4) is capable of encompassing the different kinds of special measure, there may be little or no practical difference between the two views of the Convention. And subsequent practice, especially that of the Committee on the Elimination of Racial Discrimination established under the Convention, supports the view that special measures recognising cultural or indigenous minority rights may be entirely justified under Art 1, if not indeed required under Art 2(2).[665]

## The Position in Australia

151. ***The Effect of Section 51(26) of the Constitution.*** In *Koowarta v Bjelke-Petersen*, some members of the High Court expressed the view that legislation under s 51(26) of the Australian Constitution, which empowers the Parliament to pass 'special laws' for, amongst others, the people of the Aboriginal race, would necessarily be 'discriminatory' legislation. Justice Wilson said:

> There is a touch of irony in the fact that the Commonwealth seeks to support the validity of an Act to give effect to these principles [of equality and non-discrimination] by relying on a power to enact discriminatory laws, whether for good or ill, for the people of any race ... [I]t is basic to an understanding of the scope of the power to recognise that even when it is used for wholly benevolent and laudable purposes it remains a power to discriminate with respect to such people.[666]

Similarly, Justice Brennan said:

> It is of the essence of a law falling within para (xxvi) that it discriminates between the people of the race for whom the special laws are made and other people, whereas the Act seeks to eliminate racial discrimination.[667]

On the other hand the Chief Justice (with whom Justice Aickin agreed) and Justice Stephen stated only that 'discriminatory or repressive' legislation could be passed under s 51(26), not that legislation under that power would necessarily be discriminatory.[668] Justice Murphy drew from the word 'for' in s 51(26) the conclusion that only beneficial, as distinct from adversely discriminatory, legislation could be passed under

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661 See para 147.

662 N Lemer, *The UN Convention on the Elimination of All Forms of Racial Discrimination*, 2nd edn, Sijthoff & Noordhoff, Alphen van den Rijn, 1980, 25-33, 39.

663 See the works cited in n 93, 94, 95.

664 cf the US caselaw, under which there may be affirmative obligations on the State to provide bilingual education: see *Lam v Nichols* 414 US 563 (1974), and other cases discussed by M Annis, 'Indian Education: Bilingual Education — A Legal Right for Native Americans' (1982) 10 *Am Indian L Rev* 333, 348-53.

665 T Meron, 'The Meaning and Reach of the International Convention on the Elimination of All Forms of Racial Discrimination' (1985) 79 *AJIL* 283, 309-11.

666 (1982) 39 ALR 417, 475.

667 id, 489.

668 id, 428-9 (Gibbs CJ); 447-8 (Stephen J).

that power.[669] The view that 'discriminatory treatment on the basis of race or colour ... does not inhere in' s 51(26)[670] is confirmed by the High Court's decision in *Commonwealth v Tasmania*.[671] It was not suggested that s 8 and 11 of the World Heritage Properties Conservation Act 1983 (Cth), which protected Aboriginal sites in the World Heritage Area in Tasmania, were racially discriminatory. However Justices Wilson and Brennan in *Koowarta's* case were not concerned with the concepts of equality before the law and non-discrimination, which are not protected by the Constitution. Discussion of these concepts, at least in the context of racial discrimination, has occurred only in decisions under the Racial Discrimination Act 1975 (Cth).

152. ***The Racial Discrimination Act 1975 (Cth).*** The Racial Discrimination Act 1975 (Cth) was passed specifically to implement, as part of Australian law, the Racial Discrimination Convention.[672] Part II of the Act, entitled 'Prohibition of Racial Discrimination', provides in part that:

> 8. (1) This Part does not apply to, or in relation to the application of, special measures to which paragraph 4 of Art I of the Convention applies...
>
> 9. (1) It is unlawful for a person to do any act involving a distinction, exclusion, restriction or preference based on race, colour, descent or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of any human fight or fundamental freedom in the political, economic, social, cultural or any other field of public life.
>
> 10. (1) If, by reason of, or of a provision of, a law of the Commonwealth or of a State or Territory, persons of a particular race, colour or national or ethnic origin do not enjoy a fight that is enjoyed by persons of another race, colour or national or ethnic origin, or enjoy a right to a more limited extent than persons of another race, colour or national or ethnic origin, then, notwithstanding anything in that law, persons of the first-mentioned race, colour or national or ethnic origin shall, by force of this section, enjoy that right to the same extent as persons of that other race, colour or national or ethnic origin.

It is clear that s 8(1), by its direct incorporation of Art 1(4) of the Convention, allows 'special measures' in favour of particular racial or ethnic groups, within the limits laid down by Art 1(4). Section 10(1), which according to its sidenote establishes 'rights to equality before the law', must thus be read subject to s 8(1).[673]

153. ***The Racial Discrimination Act 1975 and the High Court: Gerhardy v Brown.*** In *Gerhardy v Brown*,[674] the High Court appears to have accepted the second of the two interpretations of the Convention outlined in para 150. On this view, measures for the recognition of Aboriginal customary laws and traditions will usually, if not necessarily, have to be justified as 'special measures' under Art 1(4) of the Convention (s 8(1) of the Commonwealth Act). The case involved an appeal from a single judge of the South Australian Supreme Court, who had held that s 19 of the Pitjantjatjara Land Rights Act 1981 (SA) was invalid because inconsistent with the Racial Discrimination Act 1975 (Cth).[675] Section 19 of the South Australian Act provides that a person, other than a Pitjantjatjara as defined,[676] may not enter upon Pitjantjatjara land except with the permission of the corporate body representing the Pitjantjatjara people. The defendant, an Aborigine but not a Pitjantjatjara, entered upon the land without such permission, and was prosecuted under the Act.[677] Justice Millhouse held that provisions excluding persons from land on grounds which included grounds of race (because to be a Pitjantjatjara was, amongst other things, to be a member of the Aboriginal race) were racially discriminatory under the Commonwealth Act. The argument that the South Australian Act established distinctions based upon traditional affiliation to land, which were not therefore discriminatory,

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669 id., 473. Mason J did not discuss s 51(26).

670 *Attorney-General of Canada v Lavell* (1973) 38 DLR (3d) 481, 511 (Laskin J, diss); see para 140.

671 (1983) 46 ALR 625.

672 (1982) 39 ALR 417. The validity in principle of the Act under the external affairs power was upheld in *Koowarta v Bjelke-Petersen* (1982) 39 ALR 417.

673 The Act reverses the order of the Convention, under which Art 1(4) is relevant only with respect to measures which do constitute racial discrimination under Art 1(1).

674 (1985) 57 ALR 472. For comment see JA Thomson, 'Human rights Treaties as Legislation: *Gerhardy v Brown*, Reverse Discrimination and the Constitution' [1985] *ACL* AT 16.

675 (1983) 49 ALR 169 (Millhouse J).

676 Under s 4, a 'Pitjantjatjara' is defined as a 'member of the Pitjantjatjara, Yungkatatjara or Ngaanatjara people' who is also 'a traditional owner of the lands, or a part of them', and 'traditional owner' was defined to mean an Aboriginal with 'social, economic and spiritual affiliations with and responsibilities for the land in accordance with Aboriginal tradition'.

677 For some factual background to the case see P Toyne and D Vachon, *Growing up the Countr*y, Penguin, Ringwood, 1984, 148-51.

was rejected.[678] On appeal, a majority of the High Court accepted the view that s 19 of the Act, at least, involved a discrimination 'based on race' contrary to Art 1(1) of the Convention. Thus Art 1(1) was interpreted as guaranteeing formal equality before the law: any legal provision, no matter what its content, which confers or defines rights in the public arena by reference to criteria with some racial or ethnic element, is on this view discriminatory under Art 1(1). This conclusion was most clearly expressed by Justice Brennan:

> Whatever may be the connotation of the term 'discrimination' in international law generally, in the context of the Convention Art 1(4) expresses an exception to what otherwise falls within Art 1(1) ... Section 9(1) picks up the general conception of discrimination in Art 1(1), but not the exception expressed in Art 1(4) ... Section 9(1) therefore prohibits all acts involving a distinction, exclusion, restriction or preference based on race that denies formal equality before the law. And so, an act done in performance of a duty imposed by a State law which involves a distinction based on race that denies formal equality falls within s 9(1). Such an act must be held to be unlawful and the State law that purports to command the doing of the act is invalid unless it satisfies the description of a special measure.[679]

154. ***The 'Reasonable Classification' Doctrine.*** Although some of the justices referred to the 'reasonable classification' doctrine and to the comparative and international law materials, only Justice Wilson thought that doctrine might be consistent with the language of Art 1(1).[680] But, as a corollary of an interpretation of Art 1(1) embodying the notion of formal equality only, the whole Court was prepared to take an expansive view of Art 1(4) and s 8(1) as authorising reasonable measures for the recognition of Aboriginal claims or needs. Thus Art 1(4) was not concerned only with questions of economic, social or educational advancement, but could properly include measures for the recognition and protection of the culture and identity of minority groups. In Justice Brennan's words:

> Human rights and fundamental freedoms may be nullified or impaired by political, economic, social, cultural or religious influences in a society as well as by the formal operation of its laws. Formal equality before the law is an engine of oppression destructive of human dignity if the law entrenches inequalities 'in the political, economic, social, cultural or any other field of public life' ... A legally required distinction, exclusion, restriction or preference based on race nullifies or impairs formal equality in the enjoyment of human rights and fundamental freedoms, but it may advance effective and genuine equality. In that event, it wears the aspect of a special measure calculated to eliminate inequality in fact.[681]

155. ***The Pitjantjatjara Land Rights Act as a Special Measure.*** In applying this conception of the Convention and the Racial Discrimination Act 1975 (Cth) to the State Act, there were, despite the unanimity of result, some important differences in emphasis. The difficulty was that, while s 19 of the State Act dealt only with access rights of non-Pitjantjatjara, that provision was plainly part of a larger statutory scheme involving the control both of rights to land, and control over access to land, upon the Pitjantjatjara people.

- *Traditional Land Rights as a Special Measure*. The Land Rights Act assumed that the only persons who were 'traditional owners' of the lands were Aborigines who were members of the 'Pitjantjatjara, Yungkutatjara or Ngaanatjara people', and that these people, or most of them, were 'traditional owners' of all or part of the land. Neither assumption was strictly necessary to the scheme of the Act, and if either proved to be wrong in any significant way then serious problems of equal protection could arise. In the absence of evidence on either point the Court was prepared to treat both assumptions as broadly correct. On this basis the two justices who expressly discussed the land rights provisions themselves had no difficulty in treating them as a 'special measure'. Thus Justice Deane said:

  > Those central provisions were, plainly enough, special measures taken for the purpose of adjusting the law of South Australia to grant legal recognition and protection of the claims of the Pitjantjatjaras to the traditional homelands on which they live. Until those special measures were enacted, the doctrine that this continent was terrae nullius at the times when British sovereignty was imposed had combined with the narrowness of the notions of ownership and occupation under the imported law to make the Pitjantjatjaras a disadvantaged racial or ethnic group as regards one of the 'human rights' which the Convention specifically identifies, namely, the 'right to own property alone as well as in association with others' (Art 5(d)(v)). That 'right to

678 (1983) 49 ALR 169, 177. Millhouse J held Art 1(4) of the Convention inapplicable because the grant of land rights was not temporary but permanent: id, 178. As he hinted, this reasoning would invalidate not merely the access provisions of the Pitjantjatjara Land Rights Act, but possibly the initial grant of land itself.

679 (1985) 57 ALR 472, 518. To similar effect see id, 479, 481-2 (Gibbs CJ), 494, 496 (Mason J), 499 (Murphy J), 528-9 (Deane J). Dawson J did not deal with the issue (id, 542) and Wilson J left it open (id, 502-3).

680 ibid.

681 id, 516-7. To similar effect id, 497-8 (Mason J), 532 (Deane J).

> own property' extends to what Art 11 of Convention No 107 of the International Labour Organisation identified as the 'right of ownership, collective or individual, of the members of [indigenous and other tribal and semi-tribal populations] over the lands which [those] populations traditionally occupy', It embraces the right to preserve such lands as homelands upon which sacred sites may be safeguarded and traditional customs and ways of life may be pursued in accordance with the ordinary law.[682]

- *Restrictions on Access as a Special Measure*. The restrictions on access under s 19 raised more difficult questions. Except for various exemptions for opal miners and their families, and for law-enforcement and other officials, any non-Pitjantjatjara wishing to enter the lands had to apply in writing for a permit. Anangu Pitjantjatjara, the corporate body established by the Act, was of course bound not to discriminate on the grounds of race in issuing permits, but the effect of the provisions was to set up a corporate licensing authority between the Pitjantjatjara and 'outsiders'. Thus individual Pitjantjatjara could not invite non-Pitjantjatjara to visit them without permission. More seriously, perhaps, a non-Pitjantjatjara married to a Pitjantjatjara who wished to live on the lands would have to obtain a permit to do so.[683] Section 19 could therefore give rise to situations of individual estrangement not unlike that in the *Lavell* case.[684] For these reasons several justices (especially Justice Deane) were critical of the access provisions.[685] Nonetheless the whole Court (Justice Deane reluctantly) was prepared to treat s 19 as a 'special measure', in the context of the Act as a whole. The point was again most clearly made by Justice Brennan:

> By definition all Pitjantjatjaras have a traditional relationship with the lands or with some parts of the lands. It may be inferred that they have no other home. Homelessness is a disadvantage sadly suffered by people of all races, but Aborigines with traditional relationships with their country may reasonably be thought to need protection from an inundation of their culture and identity by those who embrace different values and who constitute a majority in Australian society. That may not be the view of all Australians, but it is a view that the Parliament of South Australia could reasonably hold. It is a view which might reasonably be held by a mature and humane society, desiring to respect the culture and identity of any peaceful minority group and to accord dignity to the members of that group. It is a view that a court could not hold to be unreasonable. The political assessments evidenced by the enactment of the Land Rights Act, being reasonably made, establish the indicia of a special measure.[686]

156. ***The Duration of Special Measures.*** The Court, consistently with this broad view of Art 1(4), rejected the argument that legislative 'special measures' had to be temporary either in nature or in terms (for example through incorporating a 'sunset clause'). As Justice Mason said:

> In the present case the legislative regime has about it an air of permanence. It may need to continue indefinitely if it is to preserve and protect the culture of the Pitjantjatjara peoples. Whether that be so is a question which can only be answered in the fullness of time and in the light of the future development of the Pitjantjatjara peoples and their culture. The fact that it may prove necessary to continue the regime indefinitely does not involve an infringement of the proviso. What it requires is a discontinuance of the special measures after achievement of the objects for which they were taken. It does not insist on discontinuance if discontinuance will bring about a failure of the objects which justify the taking of special measures in the first place.[687]

But the difficulties with the access provisions were such that some justices at least doubted that they could be maintained in force indefinitely, whatever the position with the land rights provisions themselves. There remains therefore a continuing avenue for judicial review of special measures if, in the light of changed circumstances, they no longer meet the requirements of the Convention.

157. ***The Present Australian Law.*** It follows from *Gerhardy v Brown* that laws, especially those enacted with the consent of the Aboriginal people affected, which are intended to 'respect the culture and identity of [an Aboriginal group] and to accord dignity to the members of that group', and which do not deny members of the protected group basic rights, will be held to be 'special measures' in this extended sense and therefore not discriminatory under the Racial Discrimination Act 1975 or the Convention. Such laws need not be temporary: they may be expressed to apply only in the circumstances which justify the law as a special measure, or they may be kept under review by the Parliament (or by a body established by the Parliament) to

682 id. 532-3. Similarly id. 519-27 (Brennan J).
683 Unlike an opal miner or pastoral leaseholder under the Act (s 19(11)).
684 See para 140. See also the *Lovelace* case, discussed in para 176.
685 (1985) 57 ALR 472, 483 (Gibbs CJ), 498 (Mason J), 507, 518-21 (Brennan J), 533-4 (Deane J).
686 id, 527. See also id, 483-4 (Gibbs CJ), 498-8 (Mason J), 500 (Murphy J, by application of a presumption of validity in the absence of adequate evidence), 504 (Wilson J: 'the clear stamp of a special measure'), 530-6 (Deane J), 541-2 (Dawson J: 'no doubt').
687 id, 498. Similarly id, 484-5 (Gibbs CJ), 525 (Brennan J), 536 (Deane J). Murphy, Wilson and Dawson JJ did not deal with the point expressly.

ensure that they continue to qualify as reasonable measures.[688] In the latter case there remains the possibility of further review by the Court, if the measures prove to be no longer necessary or adapted to the needs of the relevant group.[689]

## The Commission's Approach

158. ***The Justification of Special Laws.*** To summarise, Australia's international obligations, under the Racial Discrimination Convention and the Civil and Political Rights Covenant, require that Australian legislation should not discriminate on grounds of 'race, colour, descent, or national or ethnic origin'. But this does not preclude reasonable measures distinguishing particular groups and responding in a proportionate way to their special characteristics, provided that basic rights and freedoms are assured to members of such groups. Nor does it preclude 'special measures', for example for the economic or educational advancement of groups or individuals, so long as these measures are designed for the sole purpose of achieving that advancement, and are not continued after their objectives have been achieved. These principles, reflected in the Racial Discrimination Act 1975 (Cth), constitute the primary measure of the Commission's recommendations in these respects. It is also helpful to compare the application of constitutional guarantees of equality before the law or equal protection in countries with similar backgrounds and problems. Under the Canadian Bill of Rights and the Charter of Rights and Freedoms, legislative distinctions, even if partly based on ethnic or cultural factors, will be valid if they are directed at a 'valid federal objective', and do not penalise persons only on account of their race. These guarantees of equality allow for the special treatment of Canadian Indians, for whom there is a specific constitutional responsibility. In exercising its power with respect to Indian and Indian lands, Parliament can use distinctions based on 'a legitimate legislative purpose in the light ... of long and uninterrupted history',[690] or on 'Indian customs and values', provided that such distinctions do not specially penalise Indians or exclude them from the enjoyment of basic rights and freedoms.[691] The position in the United States, under the 'equal protection' guarantees in the Fifth and Fourteenth Amendments, is similar. Legislation will be consistent with equal protection if there is a rational basis for the legislative classification in the light of its legitimate purpose.[692] Legislation which infringes basic rights (eg in the area of criminal procedure or the right to vote) or which adopts suspect categories as such (especially race or national origin) will be subject to stringent review. But, as in Canada, United States courts have been strongly influenced by the special federal responsibility for Indian tribes. Legislation for Indians and Indian tribes is based not on a suspect racial classification but on a 'political' classification, in view of the long-established special trust responsibility for Indians. Legislation for Indians is not immune from review under the equal protection guarantee. But such legislation will be upheld 'as long as the special treatment can be tied rationally to the fulfilment of Congress' unique obligation towards the Indians'.[693]

159. ***Assessment of Proposals .for Recognition.*** Proposals for the recognition of Aboriginal customary law might be said to involve discrimination against no less than four groups or classes of persons:

- traditional Aborigines themselves:
- other Aborigines:
- other Australians generally:
- non-indigenous groups.

Some comment should be made about each of these.

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688 cf id, 525 (Brennan J).

689 Several other Australian cases have rejected arguments that provisions for the protection of Aboriginal or other groups constituted discrimination under the Act. See esp *R v Sampson, Herbert and Wurrawilya* (1984) 53 ALR 542, arming O'Leary J (1983) 23 NTR 22, where A was suggested that the sentencing discretion then available under the Criminal Law Consolidation Act (NT) s 6A, 6(1C) should be read as limited to 'native custom' rather than as a general discretion, so as to comply with the 'spirit' of the Racial Discrimination Act 1975 (Cth). The Full Court rejected the argument: id, 545-6. See further para 518-522. See also *Lewis v Trebilco* (1984) 53 ALR 581; *Murray Meats (NT) Pty Ltd v Northern Territory Planning Authority* (1982) 18 NTR 13, 34 (Toohey J); *Viskauskas v Niland* (1983) 57 ALJR 414. cf *Australian Telecom Commission v Hart* (1982) 43 ALR 165, 173-4 (Fox J).

690 *Attorney-General for Canada v Canard* (1975) 52 DLR (3d) 548, 575 (Beetz J).

691 See para 138-43.

692 Polyviou, 681.

693 *Morton v Mancari* 417 US 535, 555 (1974). See para 132-7.

160. ***Discrimination Against Traditional Aborigines.*** It is significant that in many of the Canadian and United States cases discussed in this Chapter, the discrimination or inequality complained of was against a member of the so-called 'preferred' group. The only major case in which it was not true was *Morton v Mancari*[694] where the complainants were non-Indian employees of the Bureau of Indian Affairs. This was the only case where what was at issue was a program of 'affirmative action', as distinct from a special regime for Indians. The Commission is aware of no decision holding that appropriate measures of recognition of indigenous customary laws are racially discriminatory, or unequal, even though (as is practically inevitable) the subjects of that law are defined in part by reference to their race or ethnic origin. In its view, such measures will not discriminate against members of the group among which the customary law is applied, provided that they do not deprive individual members of basic rights (including, in particular, access to the general legal system), are no more restrictive than is necessary to ensure fidelity to the customary laws or practices being recognised, and allow for individual members of the group to contest the application of its rules in particular cases. On this basis, the Commission believes that the recommendations made in this Report, so far as Aborigines themselves are concerned, are not discriminatory or unequal, but are fully consistent with the important principles of non-discrimination and equality before the law.[695]

161. ***Discrimination against Other Aborigines.*** A comment frequently made to the Commission during its work on this Reference was that recommendations for the recognition of Aboriginal customary laws have little or no impact on non-traditional Aborigines, especially those living in towns and cities.[696] These comments have not usually been cast in terms of discrimination or inequality, but they might be thought to raise that issue. To the extent that such comments constitute criticisms of proposals (as distinct from descriptions of the differences between 'traditional' and 'non-traditional' Aborigines), they tend in entirely different directions. On the one hand, it is argued that some less-traditional Aborigines, though they may have abandoned some of the more obvious manifestations of traditional Aboriginal culture and law, retain significant elements of traditionality which are equally deserving of recognition. This is particularly so, it is said, with respect to marriage and the family, where traditional law and cultural patterns are resilient and enduring.[697] To restrict recognition to Aborigines living in a relatively traditional, isolated way in separate communities would be seriously under inclusive. On the other hand it is argued that such proposals should be limited to 'tribal' Aborigines, strictly defined, what-ever special problems other Aborigines may have.[698] Different views may be held on the extent to which particular Aboriginal groups retain elements of traditional law and culture in recognisable form. But what is clear is that neither the category of 'urban Aborigine' nor that of 'traditionally oriented Aborigine' is easily definable, or exhaustive. Australian Aborigines, in the exercise of the right recognised in the Commission's Terms of Reference to 'retain their racial identity and traditional life style or, where they so desire, to adopt partially or wholly a European life style', enjoy a spectrum of life styles. This spectrum involves, moreover, several directions and dimensions: it does not follow that movement 'along' the spectrum occurs only in one direction, or in any simple way. These difficulties of classification must be borne in mind in framing any recommendations.[699] It is better to recognise traditional rules or institutions, for particular purposes and in particular con texts, where they exist in fact. For example, Aborigines who retain the structures and practices of traditional marriage may be recognised as married, under the Commission's recommendations, even though in other respects they may have ceased to follow their traditional laws. This meets the argument that some Aborigines living in non-traditional contexts retain elements of traditional custom and law which should be recognised.[700] A second criticism is of a different kind. It is said that to focus on customary laws is to ignore the main problems facing Aborigines in relation to the legal system (and especially the criminal justice system), that is, to deal with subsidiary issues rather than the crucial ones.[701] This is more a complaint about the Terms of Reference than about the Commission's treatment of them. In any event the Commission's recommendations are not framed as being applicable to traditionally oriented Aborigines or some other class of Aborigines. Rather

694 ibid.
695 Particular issues of equal protection or discrimination will be discussed as they arise. See para 249-51, 262-4, 344-5, 365-7, 447-50, 451, 521-2, 562-565, 807, 840, 971-2.
696 See para 86.
697 eg Tasmanian Aboriginal Centre, *Submission 237* (10 April 1981); National Society of Labor Lawyers (D Merryfull), *Submission 322* (5 April 1982) 2, 35-6. See para 35-6 for a brief assessment.
698 cf para 95, 124.
699 See para 32, 95.
700 See para 124-6.
701 D Vachon, 'Customary Law: The ALRC Discussion Paper', (1981) 6 *LSB* 229, 230, quoted with approval by National Society of Labor Lawyers (D Merryfull), *Submission 322* (5 April 1982) 2.

they are directed at the problems the Australian legal system causes for those persons who live in accordance with Aboriginal customary laws and traditions.

162. ***Discrimination against non-Aborigines***. An alternative argument, though one which has not been directed expressly at the Commission's work, is that special measures for the recognition of Aboriginal customary law discriminate in some way against non-Aboriginal members of the Australian community.[702] There are three ways in which that might occur.

- *Beneficial General Reforms*. First, the Commission might recommend reforms which would be beneficial not only for traditional Aborigines but for all members of the community. To the extent that measures implementing such reform were restricted to Aborigines only they might be unequal or discriminatory, unless the need of Aborigines in this situation was significantly greater than that of other persons. The Commission was not asked in its Terms of Reference to act as a general law reform agency for Aborigines, but to investigate the special features of Aboriginal traditions and laws, features which are not shared by the general Australian community. Recommendations reasonably adapted to the recognition of Aboriginal customary laws are therefore based on relevant differences, and are not invidious or discriminatory as against other members of the community. But it may be that the best remedy to a particular problem is not the recognition of customary laws as such, but some more general amendment to Australian law which would accommodate not only that problem but other similar problems encountered within the community generally.[703]

- *Additional Liabilities for Non-Aborigines*. Secondly, recommendations for the recognition of Aboriginal customary laws might withdraw legal protection from members of the general community, or impose extra liabilities on them. This is not necessarily undesirable. For example, a statute imposing penalties for desecration of an Aboriginal sacred site can be regarded as a recognition of Aboriginal customary laws and traditions. It is reasonable to require respect for such sites, in the same way that it is reasonable to require respect for memorials or sites which other members of the community revere. A difficulty may, however, exist in the context of a customary law defence, exonerating a defendant from criminal liability for acts in accordance with customary laws. A partial defence (eg in cases of murder) creates no special problem in the present respect:[704] reducing murder to manslaughter may affect the defendant's culpability and therefore his sentence, but it has no substantial effect on the level of protection afforded the community. But a complete defence might well affect the level of protection afforded to victims. This applies whatever the status or race of the victim. It is doubtful, therefore, whether Aboriginal customary laws could be recognised as a complete defence to serious offences consistently with the standards of equal protection.[705] In fact the Commission does not recommend a general customary law defence, for this and other reasons.[706] Its proposals in the criminal law area are carefully drawn so as to avoid withdrawing protection from Aboriginal people and other Australians.

- *Providing Special Facilities or Resources*. Thirdly, recommendations for the provision of facilities or funds for Aboriginal communities might be regarded as discriminating against members of the general community who are also in need. But the Commission's recommendations involve no program of reverse discrimination of this kind. Their focus is on legislative and other measures for the appropriate recognition of Aboriginal customary laws, rather than on programs in areas such as education, employment and housing. Certain expenditures and certain measures of employment and education may, no doubt, be required, but these will be incidental to the principal recommendations and justified by them, in the way that appropriate expenditure and personnel are required to support any justified governmental action.

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702 This argument is sometimes associated with, but is distinct from, the argument from general public opinion. See para 166-9.

703 eg the problem of social welfare payments for the care of children: para 388.

704 A partial defence recognises the defendant's moral and psychological conflict in the particular case, and goes as much to mitigation of punishment as to substantive liability. It is recognised in the United States that individualisation of punishment through the exercise of discretions creates no equal protection problem: Polyviou, 523.

705 This criticism would not necessarily apply if Aboriginal customary laws were to be taken into account on considerations of 'double jeopardy', to avoid proceedings or liability under the general law. There is a difference between such a case and ordinary instances of liability under the general law where there have been no other proceedings or punishments. This is analogous to forms of diversion or transfer of jurisdiction, which are not precluded by any basic principle of equality in the criminal law. See further ch 20.

706 See para 442-453.

163. ***Discrimination against Cultural Traditions and Practices of Immigrant Groups.*** A more difficult argument, which has been raised on a number of occasions in the course of the Reference,[707] is that to recognise Aboriginal cultural traditions, customary laws and practices might be regarded as discriminating against the cultural traditions, customary laws and practices of some immigrant groups in Australia, to the extent that these are not recognised. Many such groups come from countries (eg European countries) with sufficiently similar social structures and traditions so that Australian law creates no particular problem.[708] But some immigrant groups come from countries with very different backgrounds and customs. For these groups the general Australian legal system may pose special problems for the continuing practice of their traditions and beliefs. The Commission was only asked to investigate the recognition of Aboriginal, as distinct from immigrant, customary laws. Questions of priorities between them, or the desirability of legislating for one to the exclusion of the other, are matters for the Parliament. The Commission should not make recommendations which, if implemented, would create discrimination against other sections of the Australian community.

164. ***Distinctions between Aboriginal and Immigrant Customs.*** But valid distinctions do exist between the recognition of Aboriginal customary laws on one hand and of immigrant customs and traditions on the other, so that it is not arbitrary nor discriminatory to give special recognition to the former in appropriate ways. Migrants came to the Australian community (the community founded by migration and subsequent organisation and settlement after 1788) not as communities but as individuals (or families). They came to a community with its own laws and legal culture. They are entitled to respect for their opinions and practices, and to share in the formulation and amendment of laws and government policies. Their views on the legal system and its impact on them are important. But the position of the members of Aboriginal communities is different. This is their country of origin. In relation to the general community, they exist not merely as individuals but as a prior community (or series of communities) inhabiting territory to which the general community itself migrated (without their agreement and without their having any control over that process). This may not be enough, of itself, to warrant general recognition of Aboriginal customary laws many years after the event. But the Commission concludes that the recognition of Aboriginal customary laws and tradition by 'special laws' is not precluded by any need to maintain equality with non-indigenous minority cultures and practices in the Australian community.[709] This conclusion is reinforced by several further considerations. The impact of non-recognition of their customary laws on traditional Aborigines is demonstrably greater than is the case with immigrant minorities. This impact, and the resulting disadvantages and injustices of non-recognition, were an important reason for the Reference to the Commission of the specific question of recognition of Aboriginal customary laws.[710] The distinction between indigenous and immigrant minorities is acknowledged in comparable countries such as the United States and Canada. In these countries the specific federal responsibility for indigenous Indian peoples, and the long history of the exercise of that responsibility, are regarded as justifying the continuation of special legislation in the face of challenges based on 'equality' or 'equal protection'.[711] A similar distinction is increasingly recognised in the work of the United Nations, where a Working Group on Indigenous Populations has been established, with Australian support, to draft 'a set of international standards to protect the rights of indigenous peoples'.[712] Its work is distinct from the continuing debate over ethnic, religious and cultural minorities generally, in the Subcommission on Prevention of Discrimination and Protection of Minorities. This distinction between Aborigines and migrants is also consistent with the principles established by the Australian Council on Population and Ethnic Affairs. Its Report on Multiculturalism for all Australians asserts that 'multiculturalism does not involve separate and parallel development of, the major institutions — such as education, the law and government — for minority groups. These ... institutions are common to all

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707 Human Rights Commission (PH Bailey) *Submission 346* (20 Sept 1982) 2; Attorney-General's Department, Victoria (G Golden) *Submission 277* (11 May 1981) 1; BM McIntyre, *Submission 242* (23 April 1981) (but accepting the distinction between immigrants and indigenes); Law Society of NSW (DE McLachlan), S*ubmission 358* (16 November 1982); Justice HE Zelling CBE, *Submission 369* (26 January 1983) 1 (though only with respect to 'separate systems of law').

708 One problem common to different groups is that of translation and interpreter services. See para 596-600.

709 To similar effect cf D Partlett, 'Benign Racial Discrimination: Equality and Aborigines' (1979) 10 *Fed L Rev* 238.

710 See para 3-4.

711 See para 132-44.

712 See Commonwealth of Australia, *Part Debs (Senate)* 25 August 1982, 517. For the work of the working group see its First Report (UN Doc E/Cn4/Sub 2/1982/33, 25 August 1982); J Hantke 'The 1982 Session of the UN Sub Commission on Prevention of Discrimination and Protection of Minorities' (1983) 77 4 *AJIL* 651, 656-8.

Australians'.[713] But it consistently recognises the special effects of settlement on the Aboriginal people and the case for 'adaptations of tribal law that may be applicable to some groups of Aboriginals'.[714]

165. ***The Commission's Conclusion.*** The Commission concludes that special measures for the recognition of Aboriginal customary laws will not be racially discriminatory, and will not involve a denial of equality before the law or equal protection as those concepts are understood in comparable jurisdictions, if these measures:

- are reasonable responses to the special needs of those Aboriginal people affected by the proposals:
- are generally accepted by them; and
- do not deprive individual Aborigines of basic human rights, or of access to the general legal system and its institutions.[715]

In particular, such measures should not confer rights on Aborigines as such, as distinct from those Aborigines who, in the particular context, suffer the disadvantages or problems which justify recognition.[716] Pursuant to this basic conclusion, the following guidelines have been applied to the recommendations in this Report:

- Aborigines should, wherever possible, retain rights under the general law (eg, to enter into Marriage Act marriages, to make wills) or should at least be able to contest the application of new rules in particular cases.
- legislation should be no more restrictive than is necessary to ensure fidelity to the customary laws or practices being recognised.
- measures of recognition should not unreasonably withdraw legal protection or support from individuals (whether Aboriginal or non-Aboriginal).
- where the most appropriate remedy to a problem revealed by the Commission's inquiries is not a recognition of customary law but some more general provision, it is necessary to consider whether that provision can legitimately be applied to some class of Aborigines only, or whether the reasons for the provision apply equally to all members of the community.[717] If the latter, the Commission should draw attention to the problem without making recommendations for legislation applicable only to the more limited class.

## Pluralism, Public Opinion and the Recognition of Aboriginal Customary Laws

166. ***Other Related Objections to Recognition***. Although the objections to recognition based on considerations of equality, equal protection and non-discrimination are the most important for the purposes of this Report, other related objections have been made. In particular it is sometimes said that legal pluralism, such as would be involved in the recognition of customary laws, is divisive and violates a principle of the unity of the law (especially in the criminal law). the notion that Australians are, and should be, subject to the 'one law' is another form of the argument. these arguments draw to some degree on the

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713 Australian Institute of Multicultural Affairs, *Multiculturalism for all Australians*, AGPS, Canberra, 1982, 11; cf id, 16.

714 id, 4, 15, 21, 24, 30-1.

715 The same conclusion is reached by JG Starke QC in a memorandum written for the Commission: 'International Law Implications of Reference to Law Reform Commission on Question of Aboriginal Customary Law', *Submission 153* (24 January 1980) 3-6.

716 cf Polyviou 314: 'the fact that many members of a race have "special traits" does not provide an adequate foundation or constitutional justification for discriminatory laws applicable to all members of the race in question ...' One approach which is helpful in meeting this problem is the enactment of presumptions or rights to consideration whose force is attenuated or disappears in the absence of special need: eg the proposed child placement principle (see para 156). On the corresponding vices of irrebuttable presumptions see Polyviou, 650-3. For another view on 'special traits' see Re and Brown (1986).

717 For example in *R v Rocher* (1984) 55 AR 387, it was argued that a non-Indian trapper hunting for food for himself and his dogs in the off-season was discriminated against because he was not allowed the special fishing rights of Indian acid Inuit people living on the land. The Northwest Territories Court of Appeal held that in the circumstances it was a rational distinction to give priority to local Indians and Inuit in relation to a scarce resource, having regard particularly to the special federal responsibility for native people, and that there was accordingly no discrimination: id, 390-1.

values of equality and non-discrimination which have already been discussed in this Chapter. But so far as they apply independently, they need to be separately discussed.

167. ***Legal Pluralism***. 'Legal pluralism' may be described as the situation resulting from the existence of distinct laws or legal systems within a particular country, especially where that situation results from the transfer of introduction of one of the systems as an aspect of an introduced political structure and culture.[718] Legal pluralism can exist in fact without formal recognition by the 'dominant' legal system. this was the case, for example, with Aboriginal customary laws in the period after British settlement of Australia. Or it can exist in a formally recognised way, as is the case in many countries where the legal system recognises indigenous customary law or religious law against the background of a general legal system introduced by colonisation.[719] A major issue for the Commission in its inquiry into the recognition of Aboriginal customary law is the extent to which the Australian legal system should adopt some form of legal pluralism in this second sense. It is sometimes suggested that legal pluralism in this sense is undesirable and to be avoided.[720] The opposite view is also held. According to Hooker:

> despite political and economic pressures, pluralism has shown an amazing vitality as a working system. It may well be that it — and not some imposed unity — should be the proper goal of a national legal system. Indeed, even within developed nations them selves, there are signs that a plurality of law is no longer regarded with quite the abhorrence common a decade ago. This is especially true if one looks at those states which possess indigenous minorities; in the USA, Canada, Australia and New Zealand the courts are dealing with a spate of claims by the native minorities to land rights and for the recognition of their own laws. One must seriously question whether policies aimed at specifying a single source of law are really necessary; perhaps indigenous laws, somewhat modified, are more suitable as expressing unique cultural values.[721]

The argument for pluralism has also been made in the Australian context:

> For settler Australians it will not be adequate to salute 'Aboriginality'. It is both the strength and weakness of ['Aboriginality'] that it specifies so little. It may merely acknowledge another ethnic minority within the multicultural panoply. What we need is a commitment to a stronger and deeper pluralism that can take the measure of settler/Aboriginal difference. Pluralism in legal codes is only one concession out of many that settler society needs to make if Aborigines are really to be given a choice not to assimilate.[722]

Legal pluralism, in the sense of the recognition of multiple laws or obligations, is a description of a variety of legal techniques which have been or can be used to accommodate the fact of diversity, whether in terms of culture, belief or geographical separation. As such, it is neither desirable nor undesirable in the abstract. Where different value systems, cultures or social structures coexist in fact, it will often be desirable for the dominant system to take steps to recognise, adjust to or to allow for that situation. But exactly what steps should be taken must depend on the specific context.[723]

168. ***Legal Pluralism and the Criminal Law***. Although this conclusion would be generally conceded for areas of civil and family law, it is often argued that at least the criminal law in any particular jurisdiction should be unitary, that is to say, uniform is its application to all persons who possess the same characteristics for the purposes of the law in question. In particular the criminal law should not impose special or separate rules on persons by reference to their race, religion or culture. For example the 1960 London Conference on the Future of Law in Africa recommended that 'the general criminal law should be ... uniformly applicable to persons of all communities within a territory having its own separate judicial system'.[724] The same view was expressed in submissions to this Commission:

> There may well be a difference between using a recognized concept such as provocation or duress and applying it differently, and using a concept that is peculiar to Aboriginal Customary Law. One advantage of the former course is

718 See MB Hooker, *Legal Pluralism. An Introduction to Colonial and Neo-colonial Laws*, Clarendon Press, Oxford, 1975 6-54 for an introduction to the concept of legal pluralism.

719 See Hooker for an exhaustive description of different forms of legal pluralism. cf also S Poulter, *Legal Dualism in Lesotho*, Morija, Lesotho, 1979.

720 See the arguments and submissions discussed in para 163-5.

721 Hooker, vii-viii. And cf P Sack, *Submission 109* (29 November 1978).

722 T Rowse, 'Liberalising the Frontier. Aborigines and Australian Pluralism' (1983) 42 *Meanjin* 71, 83.

723 See para 127, 195, 208-9.

724 Cited by E Cotran, 'The Place and Future of Customary Law in East Africa', in *East African Law Today*, British Institute of International and Comparative Law, Commonwealth Law Series No 5, 1966, 19.

that it focuses on the in dividual rather than on any racial group. In that way it is not open to attack on the ground that it introduces two systems of law or that it discriminates against or in favour of one section of the population.[725]

First of all, it is necessary to distinguish a number of measures which do not infringe any principles of equality in the criminal law. These include:

- the establishment of special procedures to take into account relevant cultural or other differences (as is done now in a variety of ways: eg, different forms of oath for different religious beliefs, with the option to affirm).

- the cultural sensitivity of the general criminal law (in the sense that it does not assume or require any particular set of beliefs or cultural background).

- taking into account ethnic origin, religion or culture where these are relevant considerations in the exercise of discretions. This is particularly relevant to the criminal law in the context of sentencing discretions. It was not suggested to the Commission that taking into account customary law elements in sentencing involved any element of 'divisiveness'.[726]

- special rules incumbent upon a person by virtue of his holding a special office or position, or accepted by him as an aspect of his participation in a particular group or organisation. This includes penalties imposed eg on members of the armed forces un der military law,[727] on members of an association under its rules, or on public servants or employees as part of the rules of their employment.

The argument for the unitary character of the criminal law derives support from the basic principles of equality and non-discrimination discussed already in this Chapter. But in the Commission's view it is not, apart from these basic principles, a matter of overriding weight, as distinct from one among several considerations to be taken into account in the framing of the criminal law. The extent to which it is persuasive must depend again on the arguments in each context, and it will accordingly be dealt with as it arises in later chapters of this Report and in particular in Part IV, which deals with the criminal law and sentencing.

169. ***Divisiveness and Public Opinion.*** Another matter which is largely distinct from the principles of equality and non-discrimination is the important argument that the recognition of Aboriginal customary laws would be 'divisive', that it would affront general public opinion and thereby put at risk other important advances already made, or which may be made, by the Aboriginal people. The point has been made in some submissions to the Commission, though it has not been suggested that recognition of Aboriginal customary laws in any form at all would constitute a substantial affront to public opinion.[728] On the other hand, many submissions urged the recognition of Aboriginal customary law, considering that this would be supported by public opinion, or that it should be introduced irrespective of public opinion.[729] At present Australian law and practice recognises Aboriginal customary laws in a variety of ways (no doubt unsystematically) without producing any such affront. It may be that a more systematic recognition of Aboriginal customary laws, in conjunction with other factors such as land rights, would have that effect, though this is speculation. But the impact on public opinion of specific measures of recognition must depend on precisely what those measures are. The Parliament is the principal forum for the assessment of legislative and policy proposals in the light of public opinion. The task of the Commission, in respect of matters referred to it by the Attorney-General, is to give informed advice to the Government and Parliament as to the form and content such proposals should

725 Justice JW Toohey, *Submission 14* (26 May 1977) 3.

726 Thus *Submission 183* of the South Australian Police (July 1980) argued that:

> The use of legislation to infiltrate aspects of customary law should in our opinion be resisted as far as possible, for it provides for divisiveness. However ... we see nothing objectionable in [customary law] issues being raised in mitigation. There appears little need for them to be considered as defences in view of the wide powers of the courts with respect to penalty.

727 cf *Mackay v R* (1980) 114 DLR (3d) 393.

728 Australian Mining Industry Council (GP Phillips), *Submission 15* (17 May 1977) (arguing that it would be 'socially divisive' to have separate laws for Aborigines, while agreeing that special consideration should be given to Aboriginal customary law by the courts in particular cases); NT Police (Mr WJ McLaren), *Submission 34* (15 July 1977) (`one law' for all); WR Withers MLC, *Submissions 182/199* (28 September 1980, 17 February 1981) (1aws should be non-discriminatory: Aboriginal customary law and traditions should be secured through a 'fourth tier' of local government); Energy Resources of Australia (BG Fisk), *Submission 267* (4 May 1981) (special recognition of Aboriginal customary law would lead to divisiveness and racial tension; but some action needed in areas such as marriage, community justice, etc); E Harper, *Submission 256* (21 April 1981) ('one law for all'). See also para 95 n 124 and para 118.

729 Ambassador B Dexter, *Submission 40* (28 September 1977) (urging the Commission not to be deflected in its task by consideration of public opinion).

take. The Commission has consulted widely in its work on this Reference, in particular among Aboriginal communities and organisations but also generally.[730] It is not aware of an upsurge of public opinion against the general idea of recognition of Aboriginal customary laws, or against particular proposals in this Report. There are disagreements, but for the most part these relate to specific issues or arguments. These will be dealt with, and if possible resolved, in that context. The Commission believes that there is support for the appropriate recognition of Aboriginal customary laws in particular contexts.[731] The recommendations in this Report are made on their merits, and in the light of that assessment.

730 See para 9-15 for a description of the Commission's consultative program on the Reference.
731 For discussion of Aboriginal opinion on the issues see para 16-20. See also para 118.

# 10. Ensuring Basic Human Rights

## Introduction

170. ***The Relevance of International Human Rights.*** As the Terms of Reference make clear, any recommendations for the recognition of Aboriginal customary laws must ensure that every Aborigine enjoys basic human rights. In particular the Terms of Reference specify that the Commission should 'give special regard to the need to ensure that no person should be subject to any treatment, conduct or punishment which is cruel or inhumane'. These words reinforce the injunction, in Art 7 of the International Covenant on Civil and Political Rights of 1966, against 'cruel, inhuman or degrading treatment or punishment'. In the absence of a domestic Bill of Rights in Australia, questions involving human rights are increasingly debated by reference to international human rights standards.[732] This emphasis is parallelled by the increasing interest, on the part of Aborigines themselves, in international forums as a way of expressing and furthering their views,[733] and by the cautious development, at the international level, of standards and machinery in response to the demands of minorities, including indigenous minorities.[734] One aspect of this question — the application of the principles of equality and non-discrimination to 'special laws' for Aboriginal people — is basic to the whole reference and was discussed in detail in Chapter 8. But other substantive human rights are also important. On the one hand they may require some degree of recognition of Aboriginal customary law and traditions; on the other, there may be aspects of customary law and traditions which may be said to contravene basic human rights. The consistency of a law or practice with basic human rights must depend on an examination of the particular issue in its context, and cannot be decided in the abstract. But the Commission's general approach to these issues needs to be discussed. In this discussion the question of obligations towards minorities (especially indigenous minorities) should be distinguished from the question of preserving individual human rights (including those of members of minority groups).

## Human Rights and Indigenous Minorities: Collective Guarantees

171. ***Fundamental Guarantees for Minorities.*** Modern international law contains certain basic guarantees for minority groups, in particular, rules prohibiting genocide,[735] apartheid and racial discrimination.[736] The fear is sometimes expressed that the recognition of Aboriginal customary laws would or might lead to a form of apartheid, to the partitioning of the Commonwealth into rigidly exclusive 'bantustans' on racial lines.[737] Both Australian government policy and nearly universal international opinion condemn arrangements in the nature of apartheid.[738] Apartheid is a government policy aimed at the separation and oppression of a

732 This tendency will be confirmed if the Australian Bill of Rights Bill 1985 (Cth), which is based on the ICCPR, is enacted.

733 cf EG Whitlam, 'Australian international obligations on Aborigines' (1981) 53 *Aust Q* 433; E Eggleston, 'Prospects for United Nations protection of the human rights of indigenous minorities' (1970-3) 5 *Aust YBIL* 68, G Nettheim, 'The Relevance of International Law' in P Hanks and B Keon-Cohen (ed) *Aborigines and the Law*, George Allen and Unwin, Sydney, 1984, 50. For analogous developments in Canada see M Davies, 'Aboriginal Rights in International Law: Human Rights' in B Morse (ed) *Aboriginal Peoples and the Law: Indians, Metis and Inuit Rights in Canada*, Carleton UP, Ottawa 1985, 745. The continuing interest of international agencies in the Aboriginal problem is shown in the discussion by the Human Rights Committee of Australia's first report under Article 40 of the ICCPR in October 1982. Eleven of the thirteen experts members of the Committee who raised questions relating to the Australian report referred to the human rights of Aborigines. See UN Press Release HR/1283 (26 October 1982).

734 See eg L Garber & CM O'Connor, 'The 1984 UN Sub-Commission on Prevention of Discrimination and Protection of Minorities' (1985) 79 *AJIL* 168; D Weissbrodt, 'Indigenous Populations' (1985) 13 *ALB* 12. cf para 163.

735 Genocide is the deliberate physical destruction of a 'national, ethnical, racial or religious group, as such': Convention on the Prevention and Punishment of the Crime of Genocide (9 December 1948) 78 *UNTS* 277, Art II (to which Australia is a party). Thus genocide is restricted to forms of physical destruction. It does not include even deliberate acts aimed at the assimilation of a minority group or what is sometimes referred to as 'cultural genocide': cf JB Kelly, 'National Minorities in International Law' (1973) 3 *Denver JILP* 253, 269, pointing out that the Genocide Convention 'has been interpreted as guaranteeing members of minorities the right to exist, and not necessarily as assuring the existence of the group itself (emphasis in original).

736 See para 147-150.

737 DE McLachlan, President, Law Society of NSW, *Submission 358* (16 November 1982):

> If such separate laws are to have a territorial basis ... Australia would be establishing de facto Transkeis in its own brand of Apartheid ... In view of the above, the Society is opposed to the whole concept of any attempt to codify and incorporate into our Australian system any part of Aboriginal customary law.

738 See especially Racial Discrimination Convention 1966, Art 3. This does not specifically define apartheid, but the term is defined in the United Nations Convention on the Suppression and Punishment of the Crime of Apartheid (1974) 13 *ILM* 50 (to which Australia is not a party). Under Article II of that Convention 'the crime of apartheid is defined to include:

(c) Any legislative ... and other measures calculated to prevent a racial group or groups from participation in the political, social, economic and cultural life of the country ...

(d) Any measures, including legislative measures, designed to divide the population along racial lines by the creation of separate reserves and ghettos for the members of a racial group or groups ...

See also para 795-9.

particular racial group. Its essential feature is that it is a coercive form of separation or division denying a racial group the right to participate in public affairs. It is to be distinguished from the conferral of land rights or the establishment of reserves for an indigenous group. These do not constitute a form of apartheid, provided that there is no attempt to deny members of that group their normal civil and political rights, or to 'divide the population along racial lines'. As Justice Brennan expressed it in *Gerhardy v Brown*:

> The difference between land rights and apartheid is the difference between a home and a prison. Land rights are capable of ensuring that a people exercise and enjoy equally with others their human rights and fundamental freedoms: apartheid destroys that possibility.[739]

The basic premise of the Terms of Reference, and of the Commission's recommendations for the recognition of Aboriginal customary law, is 'the right of Aborigines to retain their racial identity and traditional life style or, where they so desire, to adopt partially or wholly a European life style'. The recognition of Aboriginal customary laws will coexist with general civil rights, including the right to participate in public affairs. It will not involve the territorial or geographical restriction of Australian law,[740] nor the creation of 'customary law areas' analogous to bantustans, where the protections of the general law do not apply.[741] It is clear that no issue of apartheid arises in the context of this Reference.

172. ***International Law and Minority Rights***. Apart from these basic protections, the question is whether international law or treaty provisions require national laws to establish some measure of protection for indigenous minorities, extending to the recognition of their customary institutions and rules. In fact the development of international law standards concerning minorities has been slow, faltering and tentative. States have been cautious in supporting special provisions for minorities (as distinct from guarantees of non-discrimination and equality), in part through fear of encouraging separatism and secession. There was some development of minority regimes in the inter-war period, but the position since 1945 has been one of emphasis on general human rights rather than on any special rights of minorities.[742] Neither the United Nations Charter of 1945 nor the Universal Declaration of Human Rights of 1948 contains specific provisions relating to minorities. The first general treaty provision on the subject was Art 27 of the Civil and Political Rights Covenant of 1966. Article 1 of the Covenant also refers to the right of self-determination of peoples. Advocates for ethnic, indigenous or linguistic minorities sometimes rely upon the principle or right of self-determination in international law as a basis for claims to political or legal recognition.[743] So far, however, that principle has been confined in international practice to situations involving separate ('colonial') territories politically and legally subordinate to an administering power.[744] The dominant view is that the principle of self-determination in Art I has no application to indigenous or other minorities.[745]

173. ***ILO Convention 107.*** The International Labour Organisation's Convention No 107 concerning the Protection and Integration of Indigenous and other Tribal and Semi-Tribal Populations in Independent Countries was concluded on 26 June 1957.[746] It is the only multilateral treaty so far to deal specifically with the position of indigenous peoples. Convention No 107 has so far been ratified by 26 States. Australia has not ratified the Convention despite the agreement of all the Australian States to its ratification.[747] Nor has the Convention been ratified by Canada, the United States, the Soviet Union or New Zealand, all developed States with indigenous minorities.[748] The Australian Government's position was stated as follows in 1982:

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739 *Gerhardy v Brown* (1985) 57 ALR 472, 521-2.

740 See para 124.

741 cf Judge Tanaka (dissenting on other grounds), *South West Africa Cases Second Phase* ICJ Rep (1966) 6, 307, 314. See further WA McKean, Equality and Discrimination under International Law, Oxford University Press, Oxford, 1983, 105-15, 258-63.

742 P Thornberry, 'Is there a phoenix in the ashes? International law and minority rights' (1980) 15 *Texas ILJ* 421.

743 eg E Anderson, 'The Indigenous People of Saskatchewan: Their Rights under International Law' (1981) 7 *American Indian Jnl* No 1, 4, 7, 8-11, 17.

744 cf General Assembly Resolution 1541 (XV) (15 Dec 1980), establishing criteria for non-self-governing territories under Chapter XI of the Charter.

745 Capotorti Report, 35: 'The only right of collective bodies is the right of peoples of self-determination. But this is an entirely different matter from the rights of members of minorities ...'; A Cassese, 'The Self-Determination of Peoples' in L Henkin (ed) *The International Bill of Rights. The Covenant on Civil and Political Rights*, Columbia UP, New York, 1981, 92, 95-6. For a rather different emphasis see G Bennett, Aboriginal Rights in International Law, London, Royal Anthropological Institute of Great Britain and Northern Ireland, Occasional Paper 37, 1978, 50-2; RL Barsh, 'Indigenous North America and Contemporary International Law' (1983) 62 *Oregon L Rev* 73; I Brownlie, 'The Rights of Peoples in Modern International Law' (1985) 9 *Bull ASLP* 104, 108.

746 328 *UNTS* 247; Bennett, 70-8.

747 Whitlam, 4.

748 Bennett, 16.

> there are a number of outmoded concepts in Convention No. 107. The Convention's emphasis on 'integration' does not for example accord with the Government's policy of recognising the fundamental right of Aboriginals to retain their identity and traditional life style where desired ... [W]e understand that the ILO is looking at the possible need to redefine the objectives of the Convention, replacing the present emphasis on integration by the principle of respect for the indigenous population's identity and wishes. As things stand, the Government feels that there are other international Conventions to which Australia is already a party, viz the Convention on the Elimination of All Forms of Racial Discrimination, and the Covenants on Civil and Political Rights and on Economic, Social and Cultural Rights, which better serve the interests of Australian Aboriginals.[749]

Nonetheless, the Convention's provisions on recognition of indigenous minority culture and traditions are of interest, and may be considered separately from other provisions of the Convention which may not reflect more recent thinking on the rights of indigenous peoples. The Convention, which applies to 'tribal and semi-tribal populations in independent countries' (Art 1), provides that:

- due account should be taken of the cultural and religious values and of the forms of social control existing among these populations, and of the nature of the problems which face them both as groups and as individuals when they undergo social and economic change (Art 4(a));

- the values and institutions of the said populations should, if possible, not be disrupted unless they can be replaced by appropriate substitutes which the groups concerned are willing to accept (Art 4(b));

- in defining the rights and duties of the populations concerned regard shall be had to their customary laws (Art 7(1));

- these populations shall be allowed to retain their own customs and institutions where there are not incompatible with the national legal system (Art 7(2);

- Subject to 'the interests of the national community and with the national legal system'-

    - the methods of social control practised by the populations concerned shall be used as far as possible for dealing with crimes or offences committed by members of these populations;

    - where use of such methods of social control is not feasible, the customs of these populations in regard to penal matters shall be borne in mind by the authorities and courts dealing with such cases (Art 8);

- Procedures for the transmission of fights of ownership and use of land which are established by the customs of the populations concerned shall be respected, within the framework of national laws and regulations, in so far as they satisfy the needs of these populations and do not hinder their economic and social development (Art 13(1)).

174. ***Criticism of ILO Convention 107.*** The imprecision and lack of guidance provided by these articles has been strongly criticized:

> The Convention ... establishes no specific standards by which the acceptability of different customary institutions can be assessed, nor does it even in a negative way enumerate some of the factors which ought not to be considered reasonable grounds for outlawing traditional codes of behaviour ... [G]overnments have, from time to time and for a variety of reasons, tried to eradicate by law or by force particular aboriginal habits, and it is to be regretted that the Convention has not done more to regulate this practice. It is especially disturbing that the Convention pays not even lip-service to the notion that indigenous communities should so far as possible be allowed to determine for themselves if and how, and at what rate, their customary law should be replaced by national legislation ... The permissive terms in which Article 7(2) is expressed (indigenous populations 'shall be allowed to retain their own customs'), may be another source of difficulty. Are States thereby placed under a positive duty to prohibit any activity, whether public or private, which is likely to undermine those customs or make their continued practice difficult or impossible? ... Must the law recognise the validity of native, polygamous marriages although the dominant religion does not? ... These questions, and a host of others, remain unanswered by Article 7(2).[750]

749 Commonwealth of Australia 95 *Parl Debs (Sen)* (25 August 1982) 517 (Senator FM Chaney).
750 Bennett, 21-2.

The Convention provides at best a general indication of the extent to which recognition of indigenous customary law is consistent with other international standards, especially in the field of human rights. The decision to recognise indigenous customary laws or institutions remains a matter of policy rather than obligation.

175. ***The Civil and Political Rights Covenant***. Article 27 of the Civil and Political Rights Covenant provides that:

> In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of the group. to enjoy their own culture, to profess and practise their own religion, or to use their own language.[751]

Aborigines may be taken to be members of an ethnic minority (or perhaps a number of such minorities): under Art 27 they may not be denied the right 'to enjoy their own culture'.[752] However, it is not clear to what extent Art 27 imposes positive duties, as opposed to mere requirements of abstention, upon States parties. Under the Covenant, members of minority groups, in common with the other citizens, have individual rights to family life, to freedom of religion and association.[753] Art 27 could be interpreted as merely precluding the State from interfering in the exercise of such rights by individuals 'in community with other members of their group'. But this minimal interpretation of Art 27 does not seem satisfactory. It would make Art 27 into a redundant commentary on the other provisions. The view that Art 27 imposes substantive obligations has been adopted by the Human Rights Committee in a decision on a communication from a Canadian Indian under the Optional Protocol to the Covenant.

176. ***The Lovelace Case***.[754] Lovelace, a registered Maliseet Indian, lost her status as an Indian under the Indian Act 1970 (Canada) when she married a non-Indian. An Indian man who married a non-Indian woman would not have lost his status in this way. Subsequently her marriage broke up and she returned to live on the reserve, contrary to the Act.[755] She was only saved from eviction from the reserve by threats made on her behalf against anyone attempting to remove her. She claimed violation of her rights under Art 2 of the Convention (on the basis of the sexually discriminatory rules defining Indian status), and under Art 27 (on the basis that the Indian Act prevented her from enjoying her own culture in common with other members of the tribe). The Human Rights Committee took the view that, at least after she ceased to live with her husband and returned to the reserve, the provisions of the Indian Act violated Art 27.[756] One effect of Art 27, then, is to oblige a State to allow someone who is in fact a member of an ethnic minority group to associate with that group, even on reserve land. At the least, legal impediments must not be placed in the way of the exercise of rights under Art 27, unless these have a 'reasonable and objective justification and [are] consistent with the other provisions of the Covenant'.[757] It is also arguable that the failure to make equivalent legal provision for members of minority groups could contravene Art 27 in particular cases.[758] A second point is that Art 27 protects individual members of minority groups , rather than groups as such.[759] Conversely, because Art 27 does not depend on the legal status of the minority group as such, membership of a particular minority, and consequently rights under Art 27, do not depend on the legal recognition of minority status but are questions of fact. This point was clearly made by the Human Rights Committee:

> At present Sandra Lovelace does not qualify as an Indian under Canadian legislation. However, the Indian Act deals primarily with a number of privileges which ... do not as such come within the scope of the Covenant. Protection under the Indian Act and protection under article 27 of the Covenant therefore have to be distinguished. Persons who are born and brought up on a reserve, who have kept ties with their community and wish to maintain these ties must

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751 Art 5 of the proposed Australian Bill of Rights, which is based on Art 27, would provide that: Persons who belong to an ethnic, religious or linguistic minority have the right, in community with other members of their own group, to enjoy their own culture, to profess and practise their own religion, or to use their own language. See Australian Bill of Rights Bill 1985 (Cth).

752 To the extent that they are also a 'religious' and 'linguistic' minority they are entitled to 'profess and practice their own religion' and to `use their own language'. For the scope of these rights see the Capotorti Report, 38-40, 68-89. For the preparatory work for Art 27, id, 31-4.

753 id, 35-6, 97.

754 Views of the Human Rights Committee under Art 5(4) of the Optional Protocol concerning Communication No R.6/24 (30 July 1981): *Report of the Human Rights Committee*, GAOR 36th Sess, Supp No 40 (A/36/40), Annex XVIII, 166. For comment see AF Bayefsky, 'The Human Rights Committee and the Case of Sandra Lovelace' [1982] *Can YBIL* 244. Under the Optional Protocol, States parties to the Covenant recognise the capacity of individuals subject to their jurisdiction to bring complaints of violations of the Covenant before the Human Rights Committee. Australia has not yet ratified the Optional Protocol.

755 Indian Act 1970 (Can) s 12(1)(b). See para 140.

756 *Lovelace Case*, 173-4. Accordingly the Committee did not have to decide on the application of Art 2. See further para 191.

757 id, 174.

758 cf Capotorti Report, 36-7.

759 Capotorti Report, 35-6.

> normally be considered as belonging to that minority within the meaning of the Covenant. Since Sandra Lovelace is ethnically a Maliseet Indian and has only been absent from her home reserve for a few years during the existence of her marriage, she is, in the opinion of the Committee, entitled to be regarded as 'belonging' to this minority and to claim the benefits of article 27 of the Covenant.[760]

177. ***The Scope of Article 27***. In the general sense there can be no doubt that the practice of customary laws and traditions should be regarded as an aspect of the culture of the relevant group, whether those laws and traditions relate to kinship, marriage or other issues.[761] On the other hand, it has been suggested that the term 'culture' in Art 27 was intended in a narrower sense. The Capotorti Report mentions, under the rubric of 'culture', such matters as publication in and translation of books into the minority language, sponsorship in the arts, libraries and education. But the Report takes a very restrictive view of the effect of Art 27 on aspects of 'legal culture':

> There cannot be any doubt that an effective and full protection of the culture of minorities would require the preservation of their customs and legal traditions which form an integral part of their way of life. However ... there is ample justification for the widely expressed view that the maintenance of juridical institutions among minority groups ought to be conditioned by the State legislative policy.[762]

It is not necessary to resolve this conflict over the scope of Art 27. The Commission's function in this Reference is to advise the Commonwealth Government on precisely this question of 'legislative policy'. The recommendations in this Report involve a degree of recognition of Aboriginal customary laws and traditions within the framework of Australian law. This is certainly consistent with Art 27, and it does not matter that it may go considerably further than the Covenant requires.

178. ***Conclusion: A Duty of Recognition?*** Suggestions have been made for a more comprehensive United Nations Declaration or Covenant on the Rights of Minorities and specifically of Indigenous Peoples, although progress towards this goal has been extremely slow.[763] The present position is that Australia is not precluded by its international obligations from an extensive recognition of Aboriginal customary laws (subject to protection of the 'human rights of individual Aborigines', a matter dealt with later in this Chapter). However the only international obligation with respect to the granting of such recognition at present is Art 27 of the Civil and Political Rights Covenant, which imposes only limited obligations in this context.[764]

## The Recognition of Aboriginal Customary Laws and Human Rights Standards

179. ***Relevant Human Rights Instruments***. Australia is party to a number of international human rights treaties which are relevant for present purposes. Four treaties should be briefly referred to.

180. ***International Covenant on Civil and Political Rights 1966***. Articles 1 and 27 have already been discussed. Other significant provisions of the Covenant include the following:

- the inherent right to life, which shall be protected by law (Art 6(1));

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760 *Lovelace Case*, 173. cf *Question of the Greco-Bulgarian Communities* PCIJ SerB No 17, 22 (1930); Capotorti Report, 35.

761 Anthropologists use the term 'culture' in a broad sense to refer to all socially transmitted rules, values and practices in a particular society. cf MJ Swartz, 'Cultural Sharing and Cultural Theory: Some Findings of a Five-Society Study' (1982) 84 *American Anthropologist* 314. There are however indications of a narrower view in Art 15(1)(a) of the Economic Social and Cultural Rights Covenant. For the Commission's approach see para 101, 208.

762 Capotorti Report, 100. In the literature on Art 27 very different views are expressed. On the one hand Modeen comments that Art 27 'merely states the obvious', and is 'no real advance' on the Universal Declaration: T Modeen, T*he International Protection of National Minorities in Europe*, Acta Academiae Aboensis, SerA, Vo137, No 1, 1969, 108. LC Green regards it as 'purely negative' and limited in character: 'Human. Rights and Canada's Indians' (1971) 1 *Israel YB on Human Rights* 156, 188. LB Sohn seems to agree: 'The Rights of Minorities', in Henkin (1981) 270, 287. Bennett states that it is 'a useful adjunct to the right of self-determination', although its 'emphasis on individual rather than collective rights ... is inappropriate to aboriginal peoples whose lives are organised almost exclusively on a communal basis': Bennett (1978) 43. On the other hand it has been described as a decisive turning-point in the work of the United Nations in this field: Y de Montigny, 'L'ONU et la protection internationale des minorites depuis 1945' (1978) 13 *RJT* 389, 433-6; and see Kelly, 266; Y Dinstein 'Collective Human Rights of People and Minorities' (1976) 25 *ICLQ* 102, 118. cf Thornberry, 450.

763 cf Sohn, 287-9; F Capotorti, 'I Diritti dei Membri di Minoranze: verso una Dichiarazione delle Nazione Unite?' (1981) 64 *Rivista di Diritto Internazionate* 30.

764 JG Starke QC reached essentially the same conclusion, although he suggests that the concept of 'culture' includes kinship rules and may therefore oblige Australia to give effect to Aboriginal customary law rules of kinship: *Submission 153* (24 January 1980) 7. If so, the Commission's recommendations comply with Art 27 in this respect.

- the right not to be subjected to torture, or to cruel, inhuman or degrading treatment or punishment (Art 7);

- the right to be treated equally before courts and tribunals, including the right to a fair and public hearing by a competent, independent and impartial tribunal established by law (Art 14(1));

- the right of a defendant to a criminal charge to certain minimum guarantees, viz:

    - to be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him

    - to be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it

    - to have the free assistance of an interpreter if he cannot understand or speak the language used in court

    - not to be compelled to testify against himself or to confess guilt (Art 14(3)(a), (b), (f), (g));

- the right not to be tried or punished twice for an offence (Art 14(7));

- the right of men and women of marriageable age to marry and to found a family (Art 23(2));

- the right not to marry without free and full consent (Art 23(3));

- the right of children, without discrimination, to such measures of protection as are required on the part of his family, society and the State (Art 24);

- the right to equality before the law to the equal protection of the law (Art 26).

With respect to the rights enumerated in the Covenant, each State party undertakes:

> to respect and to ensure to all individuals within its territories and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property birth or other status.

and in particular:

> in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such legislative and other measures as may be necessary to give effect to the rights recognised in the present Covenant. (Art 2(2)).

Under Art 4(1) a State may temporarily derogate from some of the Covenant rights to the extent required by a proclaimed public emergency. However, no derogation is permitted from Art 6, 7, 8(1) (slavery) and (2) (servitude), 11, 15 (imprisonment for debt), 16 or 18 (freedom of thought, conscience and religion). This emphasises the primacy of the rights protected by those articles.[765]

181. ***International Covenant on Economic, Social and Cultural Rights 1966.*** This is a counterpart Covenant to the Civil and Political Rights Covenant, to which Australia is also a party.[766] It contains various fights of an economic, social or cultural character, which are at least as important as individual civil and political rights, but which are less precise and mostly capable of achievement only gradually. The important provisions of the Covenant for present purposes are those which recognise:

- the right to social security (Art 9);

765 cf R Higgins, 'Derogations from Human Rights Treaties' (1976-7) 48 *BYIL* 281.
766 Australian Treaty Series (1976) No 5.

- the need to accord the widest possible protection and assistance to the family, which is the natural and fundamental group unit of society. Marriage must be entered into with the free consent of the intending spouses (Art 10(1));

- the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing and to the continuous improvement of living conditions (Art 11(1));

- the right of everyone to take part in cultural life (Art 15(1)(a)).

There is no equivalent to Art 27 of the Civil and Political Rights Covenant. But Art 1 ('self-determination') is common to both.

182. ***Other International Instruments.*** Among other international instruments two are particularly relevant:

- *International Convention on the Elimination of all Forms of Racial Discrimination, 1966*. The Racial Discrimination Convention is the most-widely ratified human rights convention. Its operation, and in particular the definition of prohibited discrimination that it adopts, were discussed in the previous Chapter.[767]

- *United Nations Convention on the Elimination of All Forms of Discrimination against Women, 1980*. This Convention, now ratified and in force for Australia,[768] seeks to guarantee the principle of equality of and non-discrimination against women. In particular it requires States to take 'all appropriate measures, including legislation, to modify or abolish existing ... customs and practices which constitute discrimination against women' (Art 2(f)). The Convention also provides that:

  > The betrothal and the marriage of a child shall have no legal effect, and all necessary action, including legislation, shall be taken to specify a minimum age for marriage and to make the registration of marriages in an official register compulsory (Art 1 6(2)).

  The Convention has been implemented as part of Australian law by the Sex Discrimination Act 1984 (Cth) s 9(10). However, unlike the Racial Discrimination Act 1975 (Cth), the 1984 Act uses a range of other Commonwealth powers as a basis for prohibiting discrimination on grounds of sex in various fields, and its definition of discrimination differs substantially from the definition in the 1980 Convention.[769] In particular the 1984 Act prohibits all formal discrimination on grounds of sex in the fields covered by its substantive provisions,[770] but omits the 'special measures' provision of the Convention (Art 4), the equivalent of Art 1(4) of the Racial Discrimination Convention 1966 which, the High Court held in *Gerhardy v Brown*,[771] plays a key role in that Convention. Instead, exemptions from the prohibitions on discrimination as defined in the Act are provided for in a series of specific provisions, and through a power vested in the Human Rights Commission to grant further exemptions on application.[772] The extended definition of discrimination in the 1984 Act is capable of creating difficulties with restrictions on access to information or land by members of one sex, even though these restrictions may be based on Aboriginal customary laws or traditions and have the general support of the Aborigines concerned. These issues will be discussed in Part V of this Report, in the context of specific proposals which may involve conflict with the Act.[773]

183. ***General Human Rights Standards and Indigenous Minority Traditions.*** A view sometimes expressed is that international human rights are a Western artefact, lacking validity for peoples of distinct cultures and traditions:

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767 See para 149-50, 152-7.
768 For text see (1980) 19 *ILM* 33; Sex Discrimination Act 1984 (Cth), Schedule. Australia ratified the Convention (with certain reservations not relevant for present purposes) on 28 July 1983.
769 For the Convention definition (which applies only to discrimination against women) see Art 1, 4. For the Act's definition (which applies to discrimination on grounds of sex, marital status or pregnancy) see s 5-7.
770 See s 14-29.
771 (1985) 57 ALR 42. See para 153-7. s 33 of the 1984 Act covers some, but by no means all, of the ground covered by Art 4 of the Convention.
772 See s 30-43, 44 respectively.
773 See para 595, 656.

> [H]uman rights as a twentieth-century concept and as embedded in the United Nations can be traced to the particular experiences of England, France and the United States ... Thus to argue that human rights has a standing which is universal in character is to contradict historical reality. What ought to be admitted by those who argue universality is that human rights as a Western concept based on natural right should become the standard upon which all nations ought to agree, recognizing, however, that this is only our particular value system.[774]

In fact the human rights treaties were concluded within the United Nations and elsewhere, in forums in which 'Western' states were in a minority. Participation in these treaties is of a universal, not a regional, character. Such participation results from the ratification or accession by States as an expression of their own national policy.[775] Nor is the content of the Covenants merely an uncritical reflection of Western values. In important respects, non-Western countries influenced the terms of the Civil and Political Rights Covenant, in ways with which Western countries disagreed.[776] What is true is that the Civil and Political Rights Covenant has to be interpreted and applied on a universal basis, in a wide variety of contexts and cultures. Its provisions are not to be interpreted in the light of just one of these cultures, however influential. But that is itself a function of the universality of the Covenant.

184. ***Article 27 and Specific Human Rights***. One aspect of this problem of interpretation, not expressly addressed in the Civil and Political Rights Covenant, is the possibility of conflicting cultural responses to particular situations. For example, some aspects of the initiation of Aboriginal men might appear to an outsider to be harsh or cruel treatments: traditional Aborigines would regard them as an inevitable and necessary element of becoming a man, essential to the maintenance of their traditional life. By the same token, some punishments under the general criminal law (eg life imprisonment) would appear to many traditional Aborigines to be extremely cruel. They would, in many cases, agree that:

> punishments ... such as prolonged imprisonment especially among alien strangers and away from their own country [are] markedly more 'inhumane and inconscionable' than a spear through the thigh — usually voluntarily accepted as part of a consensus settlement.[777]

One possible approach to these difficulties might be to treat Art 27 as qualifying the specific rights guaranteed elsewhere in the Covenant. Thus minority practices which are an essential aspect of 'culture' or 'religion' could be preserved, notwithstanding that they involved (for example) child-marriage or servitude. It is clear that such conflicts cannot be resolved in this way, by giving priority to Art 27. In the first place, some of the articles of the Covenant (but not Art 27) are fundamental and non-derogable even in times of national emergency. It is most unlikely that a less fundamental provision could prevail over a more fundamental one in the event of conflict between them. Secondly, the rights protected to minorities by Art 27 ('to enjoy their own culture, to profess and practise their own religion') are phrased in general, imprecise terms. They are clearly intended to operate against the background of specific protections granted elsewhere in the Covenant (eg the right to life). It is a generally accepted principle of interpretation that vague and non-specific provisions do not prevail over specific and limited ones. Thirdly, Art 27 protects the individual rights of members of minorities rather than conferring rights on minority groups as such.[778] It follows that individual members of the group must be allowed freedom of choice between minority practices or culture and the protections of the general law, in matters where their own human rights as defined by the Covenant are at stake. The cultural practices protected by Article 27 cannot be used to preclude this choice.[779] Finally and most fundamentally, the potential for conflict between established cultural practices or traditions and general human rights, and the need to take into account differing perceptions of terms, such as 'cruel' or 'degrading' punishment, which may be culturally relative, are not confined to the situation of minorities. The practices, traditions or perceptions may be those of an entire community which is a State party. It would be strange if the Convention addressed this problem only in the context of Art 27.

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774 A Pollis & P Schwab, 'Human Rights: A Western Construct of Limited Applicability', in A Pollis & P Schwab (ed) *Human Rights. Cultural and Ideological Perspectives*, Praeger, New York, 1980, 1, 4.

775 For example in December 1983, there were 77 parties to the Civil and Political Rights Covenant, 49 of them 'third-world' countries: UN, *Multilateral Treaties Deposited with the Secretary-General. Status as at 31 December 1982*, ST/LEG/SER.E/2 (1983) 120 & Suppl (Add 1, 1984).

776 The view that the Covenant is not merely a Western artefact was frequently emphasised, and in strong terms, in submissions to this Commission. See esp JG Starke QC, 'Further Memorandum on International Law Implications of Reference to Law Reform Commission of Question of Aboriginal Customary Law', *Submission 300* (5 May 1981); N Singh, *Submission 292* (29 May 1981); DHN Johnson, *Submission 281* (15 May 1981). cf L Henkin, 'Introduction' in Henkin (1981) 1-2.

777 HC Coombs, *Submission 262* (29 April 1981) 2.

778 See para 172, 175-7.

779 cf Capotorti Report, 97.

185. ***The Problem of Relativity of Standards.*** Although Art 27 cannot be used to derogate from or override the individual protections or rights guaranteed by other provisions of the Covenant, its presence draws attention to the possibility that evaluative terms used in the Covenant may have to be applied with some caution, taking into account the wide variety of views and cultural responses to particular conduct or treatment, in differing societies and traditions. Because the International Covenant is a universal document not based on the culture, philosophy or tradition of one part only of the world, so care is needed in interpreting it, to avoid introducing sectional values. On the other hand, it could be argued that a universal instrument of such a kind requires strict interpretation as establishing a categorical minimum standard of general application, and that even a modified form of relativity excluded. This conflict of views is relevant in assessing the impact of international human rights standards on proposals to the recognition of Aboriginal customary laws.

186. ***Practice under the European Convention on Human Rights***. The European Convention on Human Rights of 1950, the substantive articles of which are in many cases similar to or the same as those of the International Covenant, provides an interesting study in this respect. Two preliminary points should be made. First , the European Convention, like the Universal Declaration of Human Rights, contains no specific provision for minority rights equivalent to Art 27 of the International Covenant. This omission was deliberate, despite the existence of a number of important ethnic, linguistic and religious minorities in European countries.[780] On the other hand, there is provision in Art 63 for the Convention to be extended to overseas territories for whose international relations a State Party is responsible (eg colonies). When the Convention is so extended, its provisions are to apply to such territories 'with due regard, however, to local requirements'.[781] Presumably these requirements might include indigenous practices or institutions not fully consistent with the Convention's standards. The converse argument might equally hold: in all other cases, 'local requirements' should not be allowed to affect the application of the Convention.

187. ***The Tyrer Case.*** The problem arose in the *Tyrer* Case,[782] concerning the legality of corporal punishment ('birching') on the Isle of Man, under Art 3 of the European Convention. Art 3 prohibits 'inhuman or degrading treatment or punishment'.[783] The Court held that birching as a judicial punishment did violate Article 3. It said, in part:

> The Attorney-General for the Isle of Man argued that the judicial corporal punishment at issue in this case was not in breach of the Convention since it did not outrage public opinion in the Island. However, even assuming that local public opinion can have an incidence on the interpretation of the concept of 'degrading punishment' ... the Court does not regard it as established that judicial corporal punishment is not considered degrading by those members of the Manx population who favour its retention: it might well be that one of the reasons why they view the penalty as an effective deterrent is precisely the element of degradation which it involves ... Above all, as the Court must emphasise, it is never permissible to have recourse to punishments which are contrary to Art 3, whatever their deterrent effect may be. The Court must also recall that the Convention is a living instrument which, as the Commission rightly stressed, must be interpreted in the light of present day conditions ... [T]he Court can not but be influenced by the developments and commonly accepted standards in the penal policy of the member States of the Council of Europe in this field.[784]

A peculiarity of the case was that the Isle of Man, as a consequence of its unusual constitutional status vis-a-vis the United Kingdom, had been treated under Art 63 as a territory 'for whose international relations' the United Kingdom was responsible, rather than as part of the United Kingdom. The Court thus had to decide whether 'local requirements' on the Isle of Man qualified its conclusion as to Art 3. The Attorney-General for the Isle of Man argued that birching was a well-established form of punishment there, endorsed by public opinion and recently reaffirmed by the local legislature. The principal delegate of the European Commission (which had brought the case before the Court) argued that 'local requirements' could rarely, if ever, justify a violation of Art 3, in view of its fundamental character; local opinion favouring birching was not, as such, a 'local requirement', and there were no significant social or cultural differences between the Isle of Man and the United Kingdom to warrant treating the Isle of Man in any special way under Art 63(3). The Court agreed:

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780 cf AH Robertson. *Human Rights in Europe*, Manchester UP, Manchester, 2nd edn, 1977, 281: Council of Europe, *Collected Edition of the 'Travaux Preparatoires'*, Martinus Nijhoff, The Hague, 1975, 1, 54, 68, 180, 200, 220-2; id (1979) V, 30, 40, 60, 242, 278.

781 European Convention, Art 63(3).

782 ECHR SerA Vol 26 (1978).

783 Art 3 is in similar terms to ICCPR Art 7, which however also prohibits 'cruel' treatment or punishment.

784 ECHR SerA Vol 26 (1978) 15-17. Judge Fitzmaurice dissented on the ground that corporal punishment of juveniles was not inherently degrading but was a long-established and accepted form -of punishment: id, 27.

> The undoubtedly sincere beliefs on the part of members of the local population afford some indication that judicial corporal punishment is considered necessary in the Isle of Man as a deterrent and to maintain law and order. However, for the application of Art 63 para 3, more would be needed: there would have to be positive and conclusive proof of a requirement and the Court could not regard beliefs and local public opinion on their own as constituting such proof ... The Isle of Man not only enjoys long established and highly-developed political, social and cultural traditions but is an up-to-date society. Historically, geographically and culturally, the Island has always been included in the European family of nations and must be regarded as sharing fully that 'common heritage of political traditions, ideals, freedom and the rule of law' to which the Preamble to the Convention refers ... [T]he system established by Art 63 was primarily designed to meet the fact that, when the Convention was drafted, there were still certain colonial territories whose state of civilisation did not, it was thought, permit the full application of the Convention ... [A]bove all, even if law and order in the Isle of Man could not be maintained without recourse to judicial corporal punishment, this would not render its use compatible with the Convention ... [T]he prohibition contained in Art 3 is absolute and, under Art 15 para 2, the Contracting States may not derogate from Art 3 even in the event of war or other public emergency threatening the life of the nation. Likewise, in the Court's view, no local requirement relative to the maintenance of law and order would entitle any of those States, under Art 63, to make use of a punishment contrary to Art 3.[785]

188. ***The Dudgeon Case.*** The question arose again, in a different context, in the *Dudgeon Case*.[786] Homosexuality between consenting adults remains a crime in Northern Ireland, although it has been decriminalized elsewhere in the United Kingdom (and, with some exceptions, in Europe generally). Dudgeon complained that the Northern Ireland legislation contravened Art 8 of the Convention, requiring respect for his 'private and family life'.[787] In fact the United Kingdom Government had proposed to decriminalize private homosexuality between consenting adults, but had been dissuaded from doing so by opposition from Northern Ireland religious groups. The question for the Court was whether the restrictions imposed by the law on Dudgeon's 'private and family life' were, given the state of opinion in Northern Ireland, 'necessary in a democratic society ... for the protection of ... morals' under Art 8(2). On this point the Court said:

> [I]n assessing the requirements of the protection of morals in Northern Ireland, the contested measures must be seen in the context of Northern Irish society. The fact that similar measures are not considered necessary in other parts of the United Kingdom or in other member States of the Council of Europe does not mean that they cannot be necessary in Northern Ireland ... Where there are disparate cultural communities residing within the same State, it may well be that different requirements, both moral and social, will face the governing authorities ... There is. the Court accepts, a strong body of opposition stemming from a genuine and sincere conviction shared by a large number of responsible members of the Northern Irish community that a change in the law would be seriously damaging to the moral fabric of society ... Whether this point of view be right or wrong, and although it may be out of line with current attitudes in other communities, its existence among an important sector of Northern Irish society is certainly relevant for the purposes of Art 8(2).[788]

The Court nonetheless held, by 15 votes to 4, that there had been a breach of Art 8. In the circumstances, it concluded that local public opinion did not justify intrusion into 'an essentially private manifestation of the human personality'. In particular , the Court referred to:

> the marked changes which have occurred in this regard in the domestic law of the member States ... [T]he moral attitudes towards male homosexuality in Northern Ireland and the concern that any relaxation in the law would tend to erode existing moral standards cannot, without more, warrant interfering with the applicant's private life to such an extent. 'Decriminalisation' does not imply approval, and a fear that some sectors of the population might draw misguided conclusions in this respect from reform of the legislation does not afford a good ground for maintaining it in force with all its unjustifiable features.[789]

189. ***The Campbell and Cosans Case***. These cases may be contrasted with the more recent decision in the *Campbell and Cosans Case*,[790] which involved corporal punishment in Scottish schools. Corporal punishment was not in fact administered on either of the boys in question, but it would have been performed by a strap ('tawse') to the hand. The European Court held unanimously that the threat of corporal punishments in such circumstances was not degrading treatment under Art 3. The Court distinguished the *Tyrer* case in the following way:

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785 id, 18-19.
786 ECHR SerA Vol 48 (1981).
787 There is no exact equivalent in the ICCPR. Art 17 protects 'arbitrary or unlawful interference' with, amongst other things, privacy. Art 23 protects the family, but in terms which might be regarded as restricting it to heterosexual families.
788 ECHR SerA Vol 48 (1981) para 56-7.
789 id, para 60-1. Judge Zekia, dissenting, pointed out the difficulties the decision would create for countries such as Cyprus where the prohibition of homosexuality was firmly established in public opinion and religious teaching: id, 22. Judge Walsh also dissented on Art 8: id, 37-8.
790 ECHR SerA Vol 59 (1982).

> Corporal chastisement is traditional in Scottish schools and, indeed, appears to be favoured by a large majority of parents. Of itself, this is not conclusive of the issue before the Court for the threat of a particular measure is not excluded from the category of 'degrading', within the meaning of Art 3, simply because the measure has been in use of a long time or even meets with general approval. However, particularly in view of the above-mentioned circumstances obtaining in Scotland, it is not established that pupils at a school where such punishment is used are, solely by reason of the risk of being subjected thereto, humiliated or debased in the eyes of others to the requisite degree or at all.[791]

It is true that the Court was concerned only with the threat of corporal punishment rather than its infliction, but it is clear that the Court was not prepared to hold corporal punishment degrading as such. It was necessary to look at all the circumstances: in particular, it was relevant that the punishment was generally accepted by Scottish parents and was 'traditional' in Scottish schools.

190. ***Conclusion.*** To summarise, the European Convention contains no specific guarantee of minority rights. In cases such as *Tyrer*, *Dudgeon* and *Campbell and Cosans*, the European Court has acknowledged the relevance of local community attitudes and beliefs in the application of the Convention. 'Absolute uniformity' is not required,[792] but at the same time a fairly strict view has been taken of the requirements of the Convention, notwithstanding local values in matters such as illegitimacy of children,[793] contempt of court,[794] corporal punishment,[795] and adult homosexuality.[796] The room for local or national judgments or standards (the so-called 'margin of appreciation') may be wider in cases involving morals than in other areas such as the protection of physical integrity or freedom of speech.[797] However the Court has been prepared to impose its own view of European standards even in situations where there are 'disparate cultural communities residing within the same State'. The Court appears to adopt a more rigorous standard than a court or committee with world-wide competence in the present stage of development of international human rights would do. The appeal to European developments and standards, to the progressive practices adopted in the member States of the Council of Europe, is explicit.[798]

191. ***The Position under the Universal Human Rights Treaties***. The position that would be taken under the Civil and Political Rights Covenant is by no means clear. However the problem did arise in the *Lovelace* case. Although the Human Rights Committee avoided pronouncing on the issue, certain inferences can be drawn from its views. It will be recalled that the Committee was able to decide the matter on the basis of Art 27 alone.[799] After the breakdown of the marriage and Lovelace's illegal return to the reserve, both Art 27 and Art 2 (non-discrimination) supported the conclusion that the section of the Indian Act excluding her from the reserve contravened the Covenant.[800] The matter may have been different if Lovelace had remained married to her husband but wished to continue to 'enjoy' her 'culture' as a status Indian. In such circumstances, it is arguable that Art 2 and 27 may have been in conflict, since the Indian tribe was concerned both at the loss of assets to persons leaving the band, and also to avoid a situation of substantial numbers of non-Indian spouses within their community.[801] The point was made by the Canadian Government in its submission to the Committee:

> Traditionally, patrilineal family relationships were taken into account for determining legal claims. Since, additionally, in the farming societies of the nineteenth century, reserve land was felt to be more threatened by non-Indian men than by non-Indian women, legal enactments as from 1869 provided that an Indian woman who married a non-Indian man would lose her status as an Indian. These reasons are still valid. A change in the law could only be sought in consultation with the Indians themselves who, however, were divided on the issue of equal rights. The Indian community should not be endangered by legislative changes. Therefore, although the Government was in

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791 id, para 28-30.
792 *Sunday Times Case* ECHR SerA Vol 30 (1979) 37.
793 *Marckx Case* ECHR SerA Vol 31 (1979).
794 *Sunday Times Case*.
795 *Tyrer Case*.
796 *Dudgeon Case*.
797 cf *Handyside Case* ECHR SerA Vol 24 (1976) 26-7.
798 eg the reference to the Isle of Man as 'historically, geographically and culturally ... included in the European family of nations': *Tyrer Case*, 19.
799 See para 176.
800 ibid.
801 Various Canadian Indian organisations supported the validity of s 12(1)(b) both in this case and in the *Lavell* case. One grievance was the financial consequences for the bands of members leaving and returning. But there was an underlying fear that white husbands of Indian women, if allowed to reside on band territory, would take over control. On the other hand Lovelace disputed the view 'that legal relationships within Indian families were traditionally patrilineal in nature': Lovelace Case, 167. The Committee did not resolve the anthropological dispute. See also para 140.

> principle committed to amending section 12(l)(b) of the Indian Act, no quick and immediate legislative action could be expected.[802]

On this point the Committee stated:

> [T]he Committee is of the view that statutory restrictions affecting the right to residence on a reserve of persons belonging to the minority concerned, must have both a reasonable and objective justification and be consistent with the other provisions of the Covenant, read as a whole ... It is not necessary, however, to determine in any general manner which restrictions may be justified under the Covenant, in particular as a result of marriage, because the circumstances are special in the present case ... Whatever may be the merits of the Indian Act in other respects, it does not seem to the Committee that to deny Sandra Lovelace the right to reside on the reserve is reasonable, or necessary to preserve the identity of the tribe.[803]

It is very likely that the Committee would have found the Indian Act provisions to be sexually discriminatory, had the matter arisen for decision. Automatic exclusion of women marrying outside the tribe was by no means the only way of regulating group membership.[804] But the decision is of interest in demonstrating the caution with which the Committee is likely to approach such issues.

192. ***General Conclusions***. The materials referred in this Chapter suggest the following conclusions:

- The provisions of the Civil and Political Rights Covenant should be 'read as a whole' so as to be consistent with each other rather than to conflict.

- In this process of interpretation, clear and specific provisions of the Covenant prevail over general and vaguer provisions. For example the provisions of Art 6 with respect to the right to life and the death penalty are precise and specific. The toleration of tribal killing is inconsistent with Art 6, however much such killings may be, or have been, an aspect of the 'culture' of an ethnic minority.[805]

- On the other hand, the Covenant was intended to apply to a wide range of economic, social and cultural environments. It is an attempt to establish minimum standards, not uniformity of treatment. It is not to be interpreted by reference to the standards and practices of one part only of the international community. Decisions of regional courts or bodies — such as the European Court of Human Rights — even on similarly worded provisions, cannot simply be assumed to apply to the Covenant.

- In particular, terms in the Covenant which imply a measure of cultural relativity may have to be applied by reference to the cultural community within which the case arose (including, by virtue of Art 27, a minority ethnic or cultural group.[806] A good example is the notion of 'degrading' treatment (Art 7). What would be degrading in one community or culture might not be degrading, indeed, might be fully accepted in another. This is not to say that such terms lack meaning, or that the Convention establishes no standards at all.[807] Some terms and concepts (eg the death penalty: Art 6) contain no element of relativity at all. Others enact, or imply, a world-wide standard of protection inherent in the individual person as such: for example, the prohibition of torture or slavery. But not all the Covenant's provisions are of this kind. It is a mistake, for example, to assume that the protection given by Art 23 to 'the family' extends only to the nuclear family upon which Western society is supposedly founded.[808] In communities where different family structures exist, it is those structures which Art 23 protects.

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802 *Lovelace Case*, 167.

803 id, 173-4.

804 cf id, 170. One member of the Committee (Mr Bouziri) dissented: not only Art 27 but Arts 2(1), 3, 23(1 & 4) and 26 were violated 'by the adverse discriminatory effects of the Act in matters other than that covered by Art 2T: id, 175. See the case note in [1982] *LCJ Rev* 41-3. The Indian Act 1970 has been amended, with the agreement of the relevant Indian organizations, to remove the discriminatory provisions. See Indian Amendment Act, C-47, 1984.

805 cf Y Dinstein, 'The Right to Life, Physical Integrity and Liberty', in Henkin (1981) 114, 119-20 (though with qualifications). For the Commission's rejection of a 'customary law defence' in such cases see para 447.

806 This is at least formally true of the European Court of Human Rights, despite the European Convention's emphasis on uniform European values. cf its comment, in the Dudgeon case, that there may be different moral and social requirements where there are 'disparate cultural communities within the same State' (para 188).

807 cf Dinstein, 116, 118, pointing out that the concept of 'serious crimes' in Art 6 was recognised to be variable in content, but not devoid of meaning.

808 The assumption is made by Pollis and Schwab, 9.

- For these reasons, and others, each case must be considered in its own context and in relation to the most precise or 'directly applicable' Covenant provision.[809] Whether the Covenant has been violated depends not merely on the terms of the local law but on the method and circumstances in which it has been applied.

193. ***Ensuring Basic Human Rights: The Aboriginal Customary Law Reference***. It follows that the impact of human rights standards on proposals for the recognition of Aboriginal customary laws depends on the particular proposal and cannot be discussed in the abstract, Detailed treatment of human rights issues is therefore left to particular chapters of this Report.[810] On the basis of the survey of relevant human rights instruments in this chapter, and of its conclusions on those more detailed issues, the Commission believes that the recommendations in this Report do not involve violations of basic human rights for Aborigines or for other Australians. On the contrary, those recommendations are fully consistent with basic human rights. If implemented they would help to ensure those rights, as the Commission's Terms of Reference require. This is particularly so in that in a number of respects present Australian law or its administration fail to respect fully the rights of Aboriginal people. Thus the non-recognition of Aboriginal marriages, and the excessive intervention by child welfare agencies in Aboriginal families that has been a feature of welfare practice in Australia, constitute a failure to respect Aboriginal family life.[811] Aspects of police interrogation and court procedure have sometimes led in effect to Aboriginal defendants being compelled to confess guilt.[812] The need to respect the human rights and cultural identity of Aboriginal people supports the case for appropriate forms of recognition of Aboriginal customary laws.

809 cf *Lovelace Case*, 173.
810 Specific issues where human rights may be relevant are discussed at para 248-53, 256-7, 260-64, 268, 365, 447-53, 562, 565, 595, 600, 656, 805, 807, 818.
811 cf ICCPR Art 23(1). See para 256-7, 365.
812 cf ICCPR Art 14(3)(g). See para 565-6, 597-600.

# 11. The Commission's Approach

## A Case for Recognition

194. ***The Need to Recognise Aboriginal Customary Laws.*** The Commission concludes that the arguments in favour of recognition establish a case for the appropriate recognition of Aboriginal customary laws by the general legal system. Non-recognition of Aboriginal laws and traditions in the past has been a significant source of injustice to Aboriginal people, and recognition is still desirable to avoid injustice and to acknowledge the reality of Aboriginal traditions and ways of life. The Commission believes that recognition in appropriate ways is fully consistent both with fundamental values of non-discrimination and equality for all Australians, and with ensuring basic human rights.[813] Far from contravening basic human rights, appropriate forms of recognition would be an expression of the need to recognise the human rights and cultural identity of Aboriginal people.[814] Special measures for recognition of Aboriginal customary laws will not be racially discriminatory, nor will they involve a denial of equality before the law, or equal protection, provided certain principles are followed.[815] Other more general arguments against recognition are not persuasive.[816] More often than not they are objections to particular forms of recognition than to any form of recognition at all. However, arguments about recognition do impact on the Commission's approach, on the ways in which its proposals are framed, and on the legal forms acknowledgement of Aboriginal customary laws should take. These questions are dealt with in this Chapter.

## Framework of the Report

195. ***The Continued Application of the General Law***. The general arguments outlined in this Part lead to the conclusion that any recognition of Aboriginal customary laws must occur against the background and within the framework of the general law. Indeed, the contrary has not really been argued before the Commission. As one submission put it:

> We [the Aboriginal people] live in a white world so its laws should be there to protect us, as our world is most times far away.[817]

The National Aboriginal Conference proposed the following resolution to the World Council of Indigenous People in 1981:

> That the World Council of Indigenous People and its member organisations support the Aboriginal Australians in their efforts to have customary laws and cultural practices recognised by the Anglo-Australian legal system and adjunct institutions, and in their efforts to have their laws integrated into the white system.[818]

Many submissions pointed out the need for Aborigines to have access to, and assistance from, the general law,[819] including the civil law,[820] and the correlative need for better understanding and participation by Aborigines involved in the general legal system.[821] A submission from the President of the Council of the Peppimenarti Community was representative:

> ... in all cases, we want the OPTION to send an offender through the white man's system of law.[822]

D Vachon wrote in similar terms:

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813 See para 127.
814 See para 193.
815 See para 165.
816 See para 113-26.
817 G Blitner, *Submission 137* (3 July 1979) 8. Mr Blitner went on to emphasise the need for communication and negotiation on both sides and for measures such as recognition of traditional marriage.
818 National Aboriginal Conference, 'The Australian Aboriginal Position, Paper on Indigenous Ideology and Philosophy', Paper presented to the World Council of Indigenous Peoples, Third General Assembly, Canberra, May 1981, in RJ Moore, *A Report on the Organisation of the 3rd General Assembly WCIP*, Canberra, National Aboriginal Conference, 1981, 46-7.
819 D Hope, *Submission 164* (30 April 1981). Similar views were expressed during the public hearings eg W Anbuma, *Transcript of Public Hearings*, Yirrkala (10 November 1981) 2829; WH Edwards, *Transcript*, Adelaide (17 March 1981) 31; A Tigan *Transcript*, One Arm Point (28 March 1981) 637; J Gurrwanngu *Transcript*, Darwin (3 April 1981) 928; J Mungudja, *Transcript*, Maningrida (7 April 1981) 1040-2, 1061-2. And see para 106, 108.
820 C Tatz, *Submission 146* (3 September 1979).
821 S Murray *Submission 289* (27 May 1981).
822 Peppimenarti Community (H Wilson) *Submission 150* (6 April 1981) 2.

> The Aboriginal people of the Western Desert have a perception of the social world where two laws operate. Many regard the role of Australian law as helping to protect communities and people from disruptive influence, thereby ensuring the continuance of their own beliefs and practices. In other words, those aspects of Australian law which can help provide social control are regarded as no threat to Customary law. It would appear that anangu have no interest in turning their backs on new technologies and ideas but consider these changes on the basis of their effect on their kin and cultural beliefs and practices.[823]

Professor Stanner firmly identified the source of the problems with the criminal law in its insensitive and inappropriate administration:

> In my opinion, if a remedy could be found for the shortfall or miscarriage of justice which now affects Aborigines, either because of their incomprehension of their situation when under charge, or because of the misprisal by our functionaries of Aboriginal viewpoints and motives and sense of responsibility, there would be little difficulty in the criminal law area. Actually, there is already a fair understanding and toleration of the way in which Australian criminal law operates, even though few if any Aborigines have more than a glimmering of the rationale, the phases and the functionaries, or of what precisely is happening at any time, or of what a person under charge can or should do in his own defence. There is probably not an Aboriginal person in Australia who does not appreciate that to kill, to assault, to steal, etc will lead inexorably to police action, possible arrest, court action and to one of two further consequences. It is my impression that amongst Aborigines I know well the certainty and relentlessness of the process of the criminal law are not resented. What is resented deeply is the arbitrariness, the use of violence, the impatience, and the boorish neglect of Aboriginal rules of privacy, decent conduct and respect for persons and authorities so often shown by the process of our criminal law.[824]

196. ***Avoidance of Separate Formal Systems***. The view that Aboriginal customary laws should be recognised within the framework of the general law, rather than through the creation of separate formal systems, was also strongly supported:

> On the question of institutional arrangements, I fully agree with the general tenor of [ALRC DP 17] that existing courts should be made more accessible to, and more responsive towards, Aborigines: rather than that 'neo-traditional' agencies should be established or recognised. Very much could be achieved ... by making magistrates more mobile, by giving them a greater grasp of traditional values and by giving them a general authority to recognise and apply Aboriginal customary law. Where traditional agencies are to be recognised, this must inevitably take place on an ad hoc basis, and depend on local conditions and demands.[825]

As far as possible, Aboriginal customary laws should be recognized by existing judicial and administrative authorities, avoiding the creation of new and separate legal structures unless the need for these is clearly demonstrated.[826]

197. ***Federal/State Constraints***. The Commission's Terms of Reference relate to some areas which are at present primarily or exclusively matters of State or Territory administrative responsibility. These include:

- policing of Aboriginal communities:
- the court system (both at Magistrates Court and Supreme Court level);
- the child welfare and juvenile justice systems;
- the general criminal law:
- hunting, fishing and foraging rights on land, rivers etc.

Since 1967, the Commonwealth has had legislative power to enact 'special laws' for Aboriginal people, including laws dealing with these areas. The decision of the High Court in *Commonwealth v Tasmania*[827] supports the view that the Commonwealth's power to legislate for members of the Aboriginal race under s 51(26) of the Constitution is an extensive one. Even on the narrowest interpretation of the decision, any recommendations for 'special laws' that the Commission may wish to make would be within power,

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823 D Vachon, *Submission 266* (1 May 1981) 20-1; cf H Middleton, *Submission 105* (8 November 1978).
824 WEH Stanner, *Submission 6* (20 February 1977) 5-6.
825 S Roberts, *Submission 233* (6 April 1981) 2 (referring to the African experience). To similar effect Justice TV Tuivaga (Fiji) *Submission 70* (20 April 1979) 2 (referring to the Fijian experience).
826 See further ch 31 for discussion of this principle in the context of local justice mechanisms in Aboriginal communities.
827 (1983) 46 ALR 625.

provided that there was no conflict with other constitutional provisions.[828] More significant than questions of constitutional power are the administrative and political constraints imposed by the federal system. These will be referred to in later chapters of this Report and especially in Chapter 38. There can be practical difficulties in the Commonwealth enacting special legislation for Aborigines in an area occupied generally by State or Territory. legislation and administrative agencies. On the other hand there are obvious practical constraints on the setting up of special federal agencies in such areas based only on special legislation under section 51(26). These difficulties are real. But they should not obscure the basic issues presented by the Reference, which exist independently of the federal system with its legal and administrative complications. This Report therefore proceeds on the basis of asking what ought to be done, as if Australia had a unitary system of government. Only when general conclusions have been reached will the Report then examine the limitations presented by the federal structure as they affect the Commission's conclusions. These limitations may mean that implementation of the Commission's recommendations is more properly a matter for the States or the Northern Territory than for the Commonwealth (although Commonwealth assistance and encouragement may well be desirable). But that is clearly a different matter from the basic question: what ought to be done?

## The Approach to Recognition

198. ***The Commission's Approach***. What approach then, should be taken to the recognition of Aboriginal customary laws as defined in Chapter 7? What forms should the acknowledgement of the existence of Aboriginal customary laws take? There are several distinct ways in which the general leg al system may 'recognise' the laws and traditions of Aboriginal people. These are dealt with in turn.

199. ***Recognition as Acknowledgement***. Aboriginal customary laws and traditions have significance in the lives of Aboriginals, especially traditionally oriented Aborigines. The recognition of Aboriginal customary laws can be supported as a form of support for those Aborigines. This does not me an that the general community can or should determine that Aboriginal customary laws are to be maintained. But the general community and its laws should be careful to allow scope for Aborigines who wish to do so to follow their traditions, and the question is how, consistently with other basic principles, this can be done. The acknowledgement of the existence of Aboriginal customary laws, combined with the determination to allow Aborigines a meaningful opportunity 'to retain their ... identity and traditional life style', may lead to legislative and administrative policies of various kinds. These could be of a very general character: for example, guarantees of religious freedom or of the freedom of parents to bring up their children without undue interference.[829] But the differences between Aboriginal customary laws and the general law, and between the assumptions implicit in the social life of Aboriginal communities compared with the general community, suggest that specific measures of recognition may also be necessary. In terms of their support for Aboriginal customary laws such specific measures may be direct or indirect. Indirect means may include, for example, the recognition of traditional associations to land and the consequent vesting of property or access rights, or the conferral of local autonomy, over a range of matters impinging on Aboriginal customary laws. There may also be more obvious or direct forms of recognition. But even here, 'recognition' may encompass a number of distinct forms or approaches.

200. ***Recognition as Incorporation***. The general law might specifically or generally incorporate, and thus enforce, Aboriginal customary laws, and this could be done in different ways. For example, a code of customary law rules might be drawn up in statutory form (eg the Native Code of Natal[830]) with the courts required to apply the customary law as set out in the code. Alternatively, legislation might incorporate Aboriginal customary laws by reference, without stating their content specifically. For example, legislation which protects sacred sites from unauthorised intruders while permitting entry 'in accordance with Aboriginal tradition', incorporates into the general law a rule of Aboriginal customary laws relating to access

828 Other general powers (eg s 51(21) 'marriage') may also be relevant. See Chapter 38 for further discussion.

829 For an example of recognition of Aboriginal community values within the framework of the general law see *R v Liquor Commission of the Northern Territory, ex parte Pitjanyayara Council Inc* (1984) 31 NTR 13 (where an administrative body at first instance failed to recognise these values).

830 On the Native Code of Natal (issued in 1891, revised in 1932) see AN Allott, 'The Judicial Ascertainment of Customary Laws in British Africa' (1957) 20 *Mod L Rev* 244, 261. The value of this model was emphasized by Professor C Tatz, Australian Law Reform Commission — Australian Institute of Aboriginal Studies, *Report of a Working Seminar on the Aboriginal Customary Law Reference* Sydney, 1983, 47.

to sites.[831] Similarly, legislation which allows Aborigines to use or occupy land in accordance with tradition could be regarded as incorporating an equivalent rule of Aboriginal customary law.[832] These are examples of the specific incorporation of customary law rules. Specific incorporation of this kind seeks to embody the rule (whether expressed in words, as in a code, or incorporated by reference) as part of the general law. Incorporation by reference (as opposed to textual incorporation or codification) is a particularly valuable technique, if it is sought to achieve the maximum degree of correspondence between the general law and the customary law rule. It avoids the possibility of the customary law being misstated, or its content changing while the incorporated rule, being codified, does not change. For example, s 71(1) of the Aboriginal Land Rights (Northern Territory) Act 1976 (Cth) does not specify who may traditionally enter upon, use or occupy Aboriginal land under Aboriginal tradition, or for what purpose or under what conditions.[833] In each case, it would have to be shown (eg, as a defence to a prosecution for entering Aboriginal land under s 70, or to a civil action for trespass) that the relevant Aboriginal tradition allowed the defendant to enter upon or use or occupy the land as he did. One consequence of this technique may be uncertainty as to the exact content of the law: for this reason, it may sometimes be necessary to qualify the incorporated rule in a way which does not correspond with customary law. For example, it is a defence to prosecution under s 69 of the 1976 Act (entering upon a sacred site on Aboriginal land) that the defendant did not know the site was a sacred site and had taken reasonable steps to find out where such sites were located.[834] It would not usually be an excuse under Aboriginal customary laws that the violation of a sacred site occurred 'innocently'.

201. ***General Incorporation of Customary Laws***. It is much more difficult to find examples of the general incorporation of customary laws in Australia. But the Papua New Guinea Law Reform Commission's Report No 7 on customary law proposed such an approach. That Commission proposed the enactment of an Underlying Law Act, s 4 of which would provide as follows:

> (1) Customary law is adopted and shall be applied, either directly or by analogy as the underlying law unless-
>
> (a) it is substantially inconsistent with any written law relevant to the subject matter; or
>
> (b) its application would be contrary to the National Goals and Directive Principles, Basic Rights and Basic Social Obligations under the Constitution.
>
> (2) Nothing in this section shall permit the application of a law other than customary law to customary land.
>
> (3) Where the court considers that part of the rule of customary law to be applied as the underlying law does not comply with the provisions of paragraph (a) or (b) of Subsection (1) the court may, in so far as is practicable to do so, modify that part of the rule in such a way as to make it comply with the provisions of this section.[835]

This provision, if enacted, would apparently give effect to the entire body of customary law, subject to the conditions in s 4(1). But given the breadth of these conditions, the effect in practice would be to confer a substantial discretion on the courts as to the content of the 'underlying law'. It is therefore difficult to predict how successful a provision such as s 4 would be in its incorporation of customary law, or indeed, what effect it would have at all.[836] Given these uncertainties, more specific forms of incorporation of customary laws are to be preferred, at least in the Australian context.

202. ***Incorporation and Autonomy***. This conclusion is reinforced by a further feature of incorporation as a form of recognition which, although perhaps not a difficulty in Papua New Guinea with an indigenous majority, could be a distinct problem in Australia. If the ordinary courts were empowered to apply customary law and to become primary agencies for their application, there would be a very real danger that traditional Aborigines, whose access to and comprehension of the proceedings of ordinary courts may be very limited,

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831 eg Aboriginal Land Rights (Northern Territory) Act 1976 (Cth) s 69(1) and (2). See para 77-8. It can be argued that such provisions are too restrictive, in that it may be entirely consistent with Aboriginal tradition in particular cases for non-Aborigines to visit such sites.

832 eg id, s 71(1). See para 77. For an example of incorporation by reference of the Malay customs of residents of the Cocos (Keeling) Islands see Cocos (Keeling) Islands Act 1955 (Cth) s 18, which provides that:
The institutions, customs and usages of the Malay residents of the Territory shall, subject to any law in force in the Territory from time to time, be permitted to continue in existence.
It is doubtful whether s 18 has had any specific operation.

833 See para 77.

834 s 69(3) and (4).

835 PNGLRC, Report No 7, *The Role of Customary Law in the Legal System* (November 1977) 19. Customary law is defined in general terms in s 1(1): id, 17. See also para 406-7 for discussion of existing constitutional and statutory provisions in PNG for the recognition of custom.

836 See para 407.

would lose control over their own law. Western lawyers think of law in terms of rules and principles, which can be defined and applied in a general way. But Aboriginal customary laws are as much a process for the resolution of conflict as a system or set of rules.[837] This characteristic makes the danger of distortion, where customary laws are applied by outside agencies, even more significant. Aborigines themselves are very aware of this danger. In the Commission's experience, they are particularly concerned at the idea that the Reference is aimed at making the 'two laws' come together as 'one'.[838] This, they perceive, could result in their having as little control over the incorporated customary law as they have now over the general law. Only in particular contexts do they seek direct reinforcement of their own law by way of its incorporation in the general law. This tends to be in areas where they seek the protection of their institutions or knowledge from outside invasion or appropriation: for example, the protection of sacred sites, secret information and their cultural heritage generally.[839] These issues can only be resolved by careful and specific inquiry, not by any general formula. Such considerations rule out any form of incorporation by codification. An example of this approach is the Native Code of Natal, which attempted to produce a series of ideal rules of customary law to be applied by the courts.[840] This creates difficulties based on the variations between Aboriginal groups and their customs and traditions, and the immense practical difficulties in the way of recording them.[841] But the cardinal objection to codification is that it takes the question of the interpretation and content of their customary laws and traditions out of the hands of the Aboriginal people concerned.

203. ***Recognition as Exclusion***. An alternative technique of recognition, which is in a sense the reverse of 'incorporation', is to exclude certain matters from the general law, allowing them to be regulated directly by customary law which occupies the 'space' so created. A clear example is the position of United States Indian tribes.[842] Initially, the area of Indian reserves was treated as excluded from State and most federal law (including the Bill of Rights). Within the excluded area the tribes were left free to regulate their affairs by virtue of their original sovereignty over that land. They were thus free to practice their traditional law ways, whether informally or through the making of tribal laws and the establishment of tribal courts. This freedom has been progressively restricted by measures such as the Major Crimes Act 1885 and the Indian Civil Rights Act 1968.[843] Within the residual areas, however, the 'original sovereignty' of Indian tribes remains the basis of American Indian law. For various reasons, this system of 'exclusion' has not been very successful in securing the recognition of Indian customary law and tradition in the United States.[844] Australia has a very different history of dealing with these issues, and it has not been suggested that the recognition of Aboriginal customary laws requires, or justifies, excluding Aborigines from the protection of the general law, or creating enclaves where the general law does not apply.[845] However specific exclusions or limitations in the application of the general law to Aboriginal traditions may be justified in particular cases.[846] There may also be a need to recognize Aboriginal autonomy in particular matters, with consequent modifications to the general law.[847]

204. ***Recognition as Translation***. One of the significant difficulties in any application of 'foreign' law by a legal system is the initial problem of equating the rules or institutions of one system with the (more or less different) rules or institutions of the other, for the purpose of recognising the former. In this sense, 'recognition' means giving equivalent effect. The problem is well-known to conflicts lawyers under the title of 'characterization'. For example, a foreign marriage or adoption may not be able to be recognised as a valid marriage or adoption under local law unless it can first be characterised as such — that is, unless it has

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837 See para 99-100.

838 cf K Maddock, 'Two laws in one community' in RM Berndt (ed) *Aborigines and Change*, Australia in the '70s, AIAS, Canberra, 1977, 13, 22-3.

839 See Chapter 19 for further discussion.

840 See MB Hooker, *Legal Pluralism*, Clarendon Press, Oxford, 1975, 305-6; JS Read, 'Customary Law under Colonial Rule' in MF Morris and JS Read, *Indirect Rule and the Search for Justice*, Clarendon Press, Oxford, 1972, 166, 194-6.

841 These difficulties were stressed, for example, by K Maddock, *Submission 11* (31 October 1977).

842 Historically it is more accurate to say that United States law was (for the most part) not extended to Indian land rather than that Indian land was withdrawn or excluded from the operation of that law. The effect was, however, much the same.

843 For a brief description see United States Commission on Civil Rights, *Indian Tribes. A Continuing Quest for Survival*, Washington, US Government Printing Office, 1981, 15-28. For a more detailed analysis see *FS Cohen's Handbook of Federal Indian Law*, 1982 edn, Michie, Charlottesville, chs 1-4. And see para 784-6.

844 Nor is there any guarantee that respect will be paid, or 'full faith and credit' accorded, to acts of, tribal sovereignty (whether or not these reflect or embody Indian customs or traditions), on the part of state or federal courts. C Small (ed) *Justice in Indian Country*, American Indian Training Program. Oakland, 1980, 54, 58-9.

845 See para 165, 193, 442-50, 817-9.

846 For customary law as a 'defence' to particular offences see para 446. For special customary rights to hunt, fish or forage see para 909, 913, 917, 921-3, 927, 929, 950, 953, 954, 956.

847 See Chapter 39 for further discussion.

the basic characteristics which the local law regards as necessary to 'marriage' or 'adoption'.[848] The more the law or institution claiming recognition differs from the system within which recognition is sought, the more difficult this process of characterisation is, and the more adjustment may be necessary in making the translation. When what is involved is the recognition of indigenous customary laws, the task is in a real sense one of translation into a foreign legal language with an entirely different structure and 'grammar'.[849] This problem does not arise with 'incorporative' forms of recognition. There the customary law rule is introduced on its own terms into the general law. It does not matter much that the general law had no analogy to the introduced rule (apart from any unfamiliarity with the rule which officials of the general legal system may consequently have). For example, it does not matter that the general law may have had no equivalent to the right of traditional use of land recognised by s 71 of the Aboriginal Land Rights (Northern Territory) Act 1976 (Cth).[850] That provision can be applied on its own terms.

205. ***'Translating' Aboriginal Customary Laws***. Some of the most significant problems of recognition of Aboriginal customary law for the purposes of the present Reference are problems of translation in this sense. This is true for example of the recognition of traditional marriage.[851] A characteristic feature of this form of recognition is that it attributes consequences to the institution being recognised which it may not have had originally. There is, for example, no concept of spousal non-compellability in Aboriginal customary laws. But if traditional marriage is sufficiently similar to marriage under the general law for this purpose, it can be argued that this justifies equating it as 'marriage'.[852] A good example of 'recognition' in this sense is the partial equation of 'traditional Aboriginal owner s' with beneficial owners under the Aboriginal Land Rights (Northern Territory) Act 1976 (Cth). As a consequence, the beneficial owners may acquire rights (eg to mining royalties) which had no exact equivalents under Aboriginal customary laws. This new consequence of 'traditional ownership' has placed considerable stress on the definition of 'traditional owner', and the way in which it has been applied by the Aboriginal Land Commissioner has changed and developed as a result.[853] Recognition as 'incorporation' and as 'translation' are not mutually exclusive. For example, it would be possible to incorporate Aboriginal marriage rules (eg relating to the enforcement of promises of marriage, or punishment for adultery) as a part of the general law while also attaching new legal consequences to traditional marriage as 'marriage'. Alternatively the definition of traditional marriage may operate by incorporating Aboriginal customary law rules defining marriage,[854] without other forms of 'incorporation'.

206. ***Recognition as Adjustment or Accommodation***. Recognition can also be given to Aboriginal customary laws by adjustments to the law or its administration which, without specifically incorporating aspects of customary laws or translating them into the general law, allow for or accommodate them in practice. Many cases of the recognition of Aboriginal customary laws now are of this kind. Examples include:

- taking Aboriginal customary law or practices into account in sentencing Aboriginal defendants;[855]
- declining to prosecute for certain offences against the general law where the Aborigine concerned was acting pursuant to Aboriginal customary law;[856]
- the use of procedural powers to protect secrecy of certain information or to prevent it from being published to unauthorized persons.[857]

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848 cf JHC Morris, *Dicey and Morris on the Conflict of Laws*, London, Stevens, 1980, vol 1, 31-44.

849 cf para 100. This was one of the difficulties that confronted Blackburn J when asked to equate the customary land holding arrangements in Eastern Arnhem Land with some 'recognisable proprietary interest'. He concluded:
In my opinion there is so little resemblance between property as our law ... understands that term, and the claims of the plaintiffs for their claims, that I must hold that these claims are not in the nature of proprietary interests.
(1971) 17 FLR 141, 273; cf *Amodu Tjani v Secretary*. Southern Nigeria [1921] 2 AC 399, 402-3.

850 cf para 200.

851 See ch 13.

852 See para 256-7.

853 cf K Maddock 'Aboriginal Land Rights Traditionally and in Legislation: A Case Study', in MC Howard (ed) *Aboriginal Power in Australian Society*, University of Queensland Press, St Lucia, 1982, 55; K Maddock, 'Owners, Managers and the Choice of Statutory Traditional Owners by Anthropologists and Lawyers', in N Peterson & M Langton (ed) *Aborigines, Land and Land Rights*, AIAS, Canberra, 1983, 211; HW Schefer, 'Rites and Rights' (1984) 2 *Aust Ab Studies* 40.

854 See para 200.

855 See para 71.

856 See para 472.

857 See para 649-656.

Where the general law now allows for Aboriginal customary laws to be taken into account (eg in applying the law of provocation[858] or assessing damages for personal injury[859]), or where a discretion exists which can be used, it may be that no more formal recognition is needed. Indeed, it has been said that this is true for the criminal law and policing aspects of the Reference as a whole: 'the difficulty arises not in the law itself but in its administration'[860] and can therefore be resolved by administrative changes and 'guidelines'. But this more flexible form of recognition can also be brought about through legislation. A law which expressly conferred a discretion on courts to take into account Aboriginal customary laws in sentencing would be a form of 'accommodation', since those customary laws would not be incorporated by such a provision: a judge in exercising the discretion would be applying the general law, and would have a considerable measure of discretion in doing so.[861] Even a statutory provision which made no express reference to Aboriginal customary laws might be a form of recognition in this sense, if it was a response to the particular characteristics of traditionally oriented Aborigines. For example the enactment in statutory form of the Anunga rules[862] would involve a recognition that traditionally oriented Aborigines may often not comprehend the nature of police interrogation or their right to remain silent, in part because of different perceptions of authority resulting from Aboriginal tradition. Such a statute would be an adjustment of the general law to take into account certain characteristics of traditionally oriented Aborigines resulting from their own traditions and laws, and, therefore, a form of 'recognition' of the latter.[863]

207. ***Accommodation by Statute or Otherwise?*** An advantage of non-statutory methods of adjustment or accommodation is that they remain flexible and can thus cope with different circumstances. But there can also be disadvantages. Administrative discretions may be applied in a spasmodic or inconsistent way. Not all law-enforcement officials are equally aware of or sympathetic to the needs of Aboriginal people. Aborigines involved in such situations are, in the absence of clear guidelines, much less able to challenge adverse decisions: they have no right to recognition. Inconsistency in the exercise of discretions can exist not only between different communities or localities at the same time but in a particular locality at different times, as a result of changes in personnel or policy. If a clear case for recognition can be made out, there is a good argument for that recognition to be incorporated in official form (whether as legislation or as some form of binding guidelines) rather than leaving it to be applied as a matter of discretion. Legislation or guidelines of this kind may still preserve flexibility, but they will enable persons affected to call for their cases to be properly considered on their merits.

208. ***Preferred Forms of Recognition***. Recognition may thus take different forms including:

- codification or specific enforcement of customary laws;
- specific or general forms of 'incorporation' by reference;
- the exclusion of the general law in areas to be covered by customary laws;
- the translation of institutions or rules for the purposes of giving them equivalent effect (eg marriage or adoption);
- accommodation of traditional or customary ways through protections in the general legal system.

The Commission does not believe that the first of these is an appropriate form of recognition of Aboriginal customary laws.[864] Nor, at the present time and except in limited circumstances, is the third.[865] For the reasons already given the Commission prefers specific, particular forms of recognition to general ones. It also prefers forms of recognition which avoid the need for precise definitions of Aboriginal customary laws, a notion which is to be understood broadly rather than narrowly. But these conclusions assume that the precise form of recognition may vary with the context and with the problems being addressed. This is in fact

858 See para 72.
859 See para 73.
860 South Australian Police, *Submission 183* (6 August 1980) 2.
861 See further para 504-15.
862 See para 75.
863 See para 543, 562.
864 See para 202, 460-2, 623.
865 See para 203.

the case. The approach to be adopted must be flexible rather than categorical. and must pay particular regard to the practicalities of the situation.

## Conclusion

209. ***Adjusting the General Law to Accommodate Aboriginal Customary Laws***. The complexity of the question of 'recognition', when approached in a categorical way as a single issue, may be one reason for the reaction expressed to the Commission that problems of recognition are 'too overwhelmingly difficult',[866] that 'the framers of the reference expected answers when we are all unsure of the question'.[867] While the difficulties and uncertainties are not avoided by approaching the Reference in a functional way, issue by issue, they are made clearer and more manageable. A functional approach best accords with other important principles. It allows Aboriginal people to maintain control over their customary laws. It involves minimum interference with the way Aborigines choose to live their lives, and it leaves the way open for further change and adjustment when necessary. It also reduces the problems of translation, which are particularly acute given the conceptual differences that exist between the general law and Aboriginal customary laws. It enables use to be made of informal methods of adjustment and accommodation, while at the same time allowing for specific incorporation where this is appropriate. Problems of definition of customary laws and practices are for most part reduced to more manageable problems of evidence in particular cases. The differing experiences of Aborigines in different areas of Australia can thus be catered for. By contrast, no form of categorical recognition could be expected to deal with the wide range of legal and social questions raised by the Reference. The inherent inflexibility of such forms of recognition would tend to prevent the most just and appropriate solution being found for each case. Moreover, categorical forms of recognition emphasise, rather than minimising, the difficulties inherent in recognition. These include:

- the difficulties in, and the inappropriateness of, embarking on a search for any one all-purpose definition of 'customary laws and practices';[868]
- the ambiguity of 'recognition' itself: to propose 'recognition' of Aboriginal customary laws is to begin, not to conclude, the inquiry;[869]
- the need to secure to all Aborigines basic human rights, including the right to participate in the life of the general Australian community;[870]
- the difficulties inevitably presented by the transitions which Aboriginal communities are experiencing and the long history of externally-caused disruptions;[871]
- the need to avoid, as far as possible, setting up separate, possibly conflicting, systems with resulting inefficiencies and inequities.[872]

However, functional forms of recognition have been criticised[873] on the ground that they do not involve any genuine recognition. The general legal system is in effect dictating the extent to which it is prepared to accommodate Aboriginal customary laws, rather than allowing for full recognition. In one sense this is a criticism that could be made of any form of recognition within the framework of the general law. The Commission's rejection of categorical forms of recognition results not from a reluctant or grudging acknowledgement of Aboriginal customary laws, but in response to the genuine difficulties involved, not the least of which is the danger of loss of control over Aboriginal customary laws, to the detriment of Aboriginal

866 MS Bain, *Submission 58* (18 February 1978); WEH Stanner, *Submission 6* (20 February 1977).
867 TI Pauling SM, *Submission 27* (June 1977) 6. Another correspondent added: 'The right questions cannot be answered, we have to learn to live with them'. P Sack, *Submission 110* (12 December 1978).
868 See para 98-101.
869 See para 191-208.
870 See para 184-7, 193.
871 See para 29-36, 84.
872 See para 125, 196, 197.
873 N Rees, 'What do we Expect?' (1983) 8 *ALB* 10.

people.[874] Consistently with this approach, Parts III-VII of this Report will examine the various areas in which recognition may be called for, and the ways in which this can best be achieved.

## Scope of the Report

210. ***Issues of Criminal and Civil Law***. The Terms of Reference emphasise the relevance of Aboriginal customary laws in criminal proceedings, both in the application of customary laws by the existing criminal courts, and in relation to the possibility that Aboriginal people should be empowered to apply their customary laws in the 'punishment and rehabilitation of Aborigines'. But the Terms of Reference are not restricted to criminal law issues.[875] Conflicts between Aboriginal customary law and the general law are not limited to the criminal law. The point was strongly made by Professor WEH Stanner:

> It is freely assumed, for example, that the area of greatest concern is that covered by English Australian criminal law. This is only arguably the case, and there are some grounds for believing that not only will the area of civil law become the more important but that the adaptation of the criminal law to people in the Aboriginal social situation, or the reconciliation of Aborigines to the criminal law as it affects all citizens, might be the easier if a satisfactory solution were found of their civil rights, duties, liabilities and immunities.[876]

The Commission has not limited its inquiries to the criminal law but has dealt with such matters as marriage, custody of children, and distribution of property,[877] evidence and procedure,[878] and hunting, fishing and foraging rights.[879] The question of local justice mechanisms to apply Aboriginal customary laws — the second specific question in the Terms of Reference — is of course also dealt with.[880]

211. ***Delimiting the Scope of Inquiry***. A broad approach to the Reference means that a correspondingly wide range of issues is, at least potentially, raised by the Commission's inquiry. But the need to focus on issues within its own competence as a Law Reform Commission, and on issues which are manageable with a single inquiry into the impact of the general law on traditionally oriented Aborigines, has required that certain matters be dealt with in this Report to the exclusion of others. In determining the scope of this Report the Commission has had particular regard to the need to avoid overlap with or repetition of work being done by other bodies. A number of earlier inquiries and reports relate to the subject of this Reference.[881] During the course of the Commission's work a number of Reports of the House of Representatives Standing Committee on Aboriginal Affairs dealt with issues relevant to the Reference. These include in particular:

- the Final Report on *Alcohol Problems of Aboriginals*;[882]
- the Report on *Aboriginal Legal Aid*;[883]
- the Report on *Strategies to Help Overcome the Problems of Aboriginal Town Camps*.[884]

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874 To similar effect, see eg Office of the Commissioner for Community Relations, (L Lippmann) *Submission 13* (12 May 1977); JR Huelin, WA Aboriginal Legal Service, *Submission 120* (7 March 1979); H Marshall, British Institute of International and Comparative Law, *Submission 270* (5 May 1981). Two submissions from the mining industry supported some form of this functional approach, while rejecting 'recognition' generally: see Australian Mining Industry Council (GP Phillips), *Submission 15* (17 May 1977) 2 (no 'separate laws' for Aborigines, but 'in dealing with Aboriginals [under the general law] special consideration should be given to Aboriginal, customary law where it is applicable to Aboriginals living in tribal circumstances'); Energy Resources of Australia (BG Fisk), *Submission 267* (4 May 1981) 3-4 ('This Company is opposed to the recognition of Aboriginal Customary Laws within the Australian Legal System', but 'There are some specific areas where Aboriginal Customary Law for Traditional Aborigines could be recognised provided there would be no detriment to the operation of the Australian Law', instancing name tabus, tribal marriage, dying declarations and community justice schemes).

875 cf P Wilson, *Black Death. White Hands*, George Allen and Unwin, Sydney, 1982, 106:
One weakness in the Commission's frame of reference relates to its over-emphasis on criminal law matters to the exclusion of 'personal law' areas. Questions relating to marriage, dissolution of marriage, child custody, title to property and a host of related matters are critically important in Aboriginal social organisation, which differ markedly from white organisation.
This was written before the publication of ALRC DP 18, dealing with marriage, children and the distribution of property. See para 12.

876 *Submission 6* (20 February 1977) 3. See also C Tatz, *Aborigines and Uranium and Other Essays*, Heinemann, Richmond, 1982, 83; C Tatz, 'Aborigines and Civil Law' in P Hanks & B Keon-Cohen (ed) *Aborigines and the Law*, George Allen & Unwin, Sydney, 1984, 103.

877 See Part III of this Report.

878 See Part V.

879 See Part VII.

880 See Part VI.

881 See para 4, 50, 56, 683-5.

882 AGPS, Canberra, 1978.

883 AGPS, Canberra, 1980.

In addition, a number of other inquiries into related questions have been conducted in recent years. Shortly after the Commission received its reference, the Western Australian government commissioned Mr Terry Syddall SM MBE to conduct an inquiry into Aboriginal tribal law and to recommend ways of improving the understanding of the general law by Aboriginal communities. As a result of recommendations made by Mr Syddall, the Aboriginal Communities Act 1979 (WA) was passed establishing local justice schemes in certain communities in the Kimberleys.[885] In South Australia a Committee on Aboriginal Customary Law was appointed by the South Australian Attorney-General in 1978. The Committee has produced a number of Reports on particular questions,[886] and its work is continuing. There has also been an Inquiry into Aboriginal legal aid by Mr JP Harkins, initiated in 1983, which in addition to the funding and role of Aboriginal legal services examined issues such as community legal education, the role of the legal services in presenting local community opinion and a range of related questions. The Commission has been careful to take into account the work of these parallel inquiries and to avoid overlap with them. In particular the nature and detailed character of work being done in two specific areas has been such as to make it undesirable for the Commission to cover the same ground. These are:

- the recognition of Aboriginal land rights and claims;

- the protection of Aboriginal art and heritage.

212. ***Aboriginal Land Rights and Claims***. The history of the initial non-recognition, and the recent partial recognition of Aboriginal land claims has already been referred to.[887] The level of activity at both the State and Federal level, while both sporadic and contentious, has brought about significant developments in the last 10 years.[888]

- The Aboriginal Land Rights (Northern Territory) Act 1976 (Cth) was the first major piece of land rights legislation. It provided for title to existing reserves to be transferred, and established machinery to deal with traditional claims to other land (being vacant Crown land, or land held by or for Aborigines). In the case of a successful claim, a Land Trust is set up to hold the land, which is then managed by the appropriate Land Council taking into account the wishes of the traditional owners and other Aborigines with interests in the land. Claims have been lodged to virtually all the vacant Crown land in the Northern Territory. So far more than 20 claims have been successful. In all, Aboriginal freehold title now accounts for 34.02% of the Northern Territory (or some 458,100 square kilometres).[889]

- South Australia was the first State to provides in the Pitjantjatjara Land Rights Act 1981, inalienable Aboriginal freehold title over 100 000 square kilometres in the north-west of that State.[890] The Maralinga Tjarutja Land Rights Act 1984 (SA) which contains broadly similar provisions confers inalienable freehold title to some 50 000 square kilometres.

- The Aboriginal Land Rights Act 1983 (NSW) provides for claims to certain Crown Land on a variety of grounds.[891]

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884 AGPS, Canberra, 1982. See also the Report of the Senate Standing Committee on Constitutional and Legal Affairs on the feasibility of a compact, or 'Makarrata' between the Commonwealth and Aboriginal people: *Two Hundred Years Later ... Report on the Feasibility of a Compact or 'Makarrata' between the Commonwealth and Aboriginal People*, AGPS, Canberra, 1983.

885 See para 743-4.

886 Aboriginal Customary Law Committee, *Preliminary Report* (Chairman, Judge JM Lewis), Adelaide, September 1979; id, *Children and Authority in the North-West*, Adelaide, August 1984.

887 See para 23, 61, 67, 77.

888 For an account of Aboriginal land rights in Australia see N Peterson, *Aboriginal Land Rights: A Handbook*, ALAS, Canberra, 1981; N Peterson & M Langton, *Aborigines, Land and Land Rights*, AIAS, Canberra, 1983; K Maddock, *Your Land is Our Land*, Penguin, Ringwood, 1983; JC Altman, *Aborigines and Mining Royalties in the Northern Territory*, AIAS, Canberra, 1983; B Keon-Cohen & B Morse, 'Indigenous Land Rights in Australia and Canada' in Hanks and Keon-Cohen (1984) 74; M Charlesworth, *The Aboriginal Land Rights Movement*, 2nd edn, Hodja Educational Resources Cooperative, Richmond 1984; Justice AE Woodward, 'Land Rights and Land Use: A View from the Sidelines' (1985) 59 *ALJ* 413; M Gumbert, *Neither Justice Nor Reason*, University of Queensland Press, St Lucia, 1984.

889 The 1976 Act was reviewed in 1983-4, with only relatively minor recommendations for change being made. See Justice J Toohey, *Seven Years On. Report to the Minister for Aboriginal Affairs on the Aboriginal Land Rights* (Northern Territory) Act 1976 and Related Matters, AGPS, Canberra, 1984.

890 See P Toyne & D Vachon, *Growing Up the Country*, Penguin, Ringwood, 1984.

891 For background to the Act see NSW, Select Committee of the Legislative Assembly upon Aborigines, First Report, *Aboriginal Land Rights and Sacred and Significant Sites* (Chairman: MF Keane MP) Sydney, 1980. For discussion of the Act see M Wilkie, *Aboriginal Land Rights in New South Wales*, APCOL, Sydney 1985. See also (1983) 7 *ALB* 1; (1983) 8 *ALB* 8, 11; (1983) 9 *ALB* 9.

- In other States, the grant of land to Aboriginal people so far has been less significant, but in all States but Tasmania either legislation has been enacted or proposals for legislation made by the State Government in question.[892]

- The Commonwealth has made proposals for national land rights legislation which would reinforce and supplement provisions for land rights at State level.[893] The future of these proposals is uncertain.

In many respects the recognition of land rights and the recognition of Aboriginal customary laws are one aspect of the same endeavour, that is, to respect the right of Aborigines to retain their own ways of life and traditional values. The link with land must never be forgotten in seeking to understand the structure and operation of Aboriginal customary laws. However in view of the detailed work being done by other bodies, and by the Commonwealth Government itself, the Commission has treated the question of customary rights to land as outside the scope of its inquiry. This does not mean that land rights issues have been ignored in the formulation of the proposals in this Report. For example, local justice mechanisms may well be based in Aboriginal communi ties established in a particular area. Where this is Aboriginal land, it may be that the necessary internal cohesion and support for some form of justice mechanism will be more readily forthcoming.[894] This Report also examines aspects of the use of land by way of traditional hunting, fishing and foraging rights.[895]

213. ***Protection of Aboriginal Art and Heritage***.[896] The sale of sacred objects and Aboriginal paintings and artefacts can sometimes create difficulties. Selling (or giving away) such items may be a breach of Aboriginal customary laws. In particular, questions have arisen as to whether there should be any special protection for Aboriginal artwork or designs, and as to what form of protection might be created to prevent the use of sacred/secret material contrary to customary laws. Further questions relate to the destruction or debasement of items of folklore, their export, and the use of such items for commercial gain without remuneration to traditional owners. These matters have been the subject of an extensive study by a Commonwealth Government Working Party.[897] The Commission notes the recommendations of this Working Party, and the referral of the matter by the Minister for Aboriginal Affairs to a Portfolio Sub-Committee for special study. After consultations with these organisations the Commission believes that no purpose would be served by it undertaking a separate investigation of these matters under its Terms of Reference. The Commission was influenced by the fact that it has had virtually no submissions, formal or informal, on the matter. Similarly, the questions of protection of Aboriginal sacred or significant sites or objects, which are the subject of the Aboriginal and Torres Strait Islanders Heritage (Interim Protection) Act 1984 (Cth) and of State and Territory legislation on those topics, have been extensively dealt with in other forums. These questions have also been treated as outside the scope of this Report.

## Consequential Matters

214. ***Aboriginal/Police Relations***. In addition to the questions identified in this Chapter as raised by the Terms of Reference, a number of consequential issues arise. For example, there is no doubt that liaison between Aboriginal communities and the police (whether based locally or at a distance) is of vital importance to the proper administration of the law and the maintenance of order in those communities.[898] The general question of Aboriginal-police relations is not directly within the Commission's Terms of Reference. However a number of specific problems of policing are relevant (eg the use of Aboriginal police, police aides, and issues of police intervention in traditional communities) and on these and related issues a

892 For Queensland see Land Act (Aboriginal and Islander Land Grants) Amendment Act 1982. In Victoria an Aboriginal Land Claims Bill 1983 was introduced into Parliament but deferred pending further discussions. In WA following a report of the Aboriginal Land Inquiry (Aboriginal Land Inquiry, Report (Chairman: P Seaman QC) Perth, 1984), legislation was introduced into the State Parliament but was defeated by the Upper House: Aboriginal Land Bill 1985. See (1985) 12 *ALB* 6.

893 For a description of the current proposals see (1985) 140 *Aboriginal Newsletter* 1-6.

894 See Chapter 31.

895 See Part VII of this Report.

896 See R Edwards (ed) *The Preservation of Australia's Aboriginal Heritage*, AIAS, Canberra, 1975.

897 Department of Home Affairs, Working Party on the Protection of Aboriginal Folklore and the Control and Protection of Cultural Property, *Report* (4 December 1981).

898 Assistant Commissioner A Grant, Northern Territory Police, *Submission 116* (19 February 1981) 9.

good deal of information and comment has been placed before the Commission. These issues will be dealt with as they arise in particular contexts.[899]

215. ***Education***. Many submissions have stressed the need for improved education at various levels. The police need practical instruction in the problems of interaction and communication with traditional communities (and with Aborigines generally), including instruction on Aboriginal customary laws and traditions. Work has already been done in some police forces along these lines: Aborigines themselves need appropriate forms of community legal education about the law, its procedures and requirements. Other law enforcers and officials involved with Aboriginal communities need programs of education and training with respect to their areas of responsibility, or at least access to relevant information and assistance. Again these matters are referred to as they arise in this Report.[900]

216. ***Resources***. The recognition of Aboriginal customary laws is to be distinguished from programs of affirmative action in areas such as housing, education or employment.[901] The present Reference is concerned with the relations between the general law and Aboriginal customary laws, rather than with questions of the resources available for Aboriginal community development programs. The use of existing authorities, rather than the creation of new ones, will help to minimise the expense entailed by the Commission's proposals. But some resources will be required both in implementing particular recommendations and in informing communities of the options available to them under the Commission's proposals. There may also be some costs associated with specific proposals — for example the proposals for changes in the Social Security Act and its administration, although the Department's own estimate is that these will be relatively small.[902]

## A Provisional Report

217. ***Oversight, Implementation and the Future***. Part VIII of this Report deals with the implementation of the Commission's proposals. Some of the recommendations will require legislative implementation, while others will require the expenditure of resources or administrative changes. But in all cases the process of implementation will require consultation with Aboriginal people affected, and their organisations. The Commission has already made it clear that its recommendations are presented as advice from an Australian Government instrumentality to the Government and Parliament of Australia. This advice in no way commits Aboriginal people. The Commission has been cautious in making judgements about Aboriginal opinion, although these have sometimes been necessary in the course of arriving at conclusions.[903] With the completion and tabling of the Report it becomes a matter for the Government to determine which agencies and organisations should speak for the Aboriginal people in this context. It is for the Government to take steps to satisfy itself that any recommendations are supported by the Aboriginal people who will be affected by them. Proposals to this effect will be made in Part VIII of this Report.[904]

218. ***The Need for Evaluation and Review***. A second point is equally important. All this Report can do is to recommend what the Commission believes to be appropriate and workable proposals at the present time. This Report is not presented — and should not be regarded — as the final and authoritative word on recognition of Aboriginal customary laws. It is overwhelmingly likely that in the future some further examination of the question will be required. Individual issues will continue to arise, and will need to be dealt with on their merits. Given appropriate consultation and access to information, the Commission believes this can be an effective way of proceeding. Indeed, it is not merely inevitable but the right approach to the wide range of problems Aboriginal people face with the legal system. Across the spectrum of Aboriginal affairs such an approach is likely to be more 'fruitful' than any 'more ambitious strategy of devising a national settlement' or of 'attempting to resolve all problems once and for all'.[905] In a similar way the Aboriginal Land Commissioner, Justice Woodward, saw the aim of the recognition of land rights as 'to find a just solution for our time and leave future generations to do the same'.[906] He recommended that:

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899 See esp para 844-879.
900 See esp para 252-3, 312, 368, 370, 391, 463, 489, 528, 599-600, 848, 857, 868-879, 839-842, 994-8.
901 See para 133.
902 See para 310-2, 391.
903 See para 19-20.
904 See esp ch 39.
905 J Long, Commissioner for Community Relations, *Human Rights* No 6 (Canberra, October/November 1983) 7.
906 Aboriginal Land Rights Commission, *Second Report*, AGPS, Canberra, 1974, para 52.

> Any scheme for recognition of Aboriginal rights to land must be sufficiently flexible to allow for changing ideas and changing needs amongst Aboriginal people over a period of years. This is so for a number of reasons. Surrounding circumstances may change — for example, local employment opportunities: or the needs and aspirations of a community may alter as the result of increasing contacts with the outside world. Further, certain widely held expectations about, for example, the ease of reaching a consensus on certain matters, may prove false. For all these reasons, future generations should not be committed by this generation's ideas any more than is necessary. A step-by-step approach which allows for Aboriginal planning over time is much to be preferred. A final 'settlement' would mean the surrendering of certain claims in return for the recognition of others. This type of agreement cannot be said to have worked well in North America. It is particularly inappropriate in Australia because of the spiritual relationship between Aborigines and their land.[907]

The same approach should be adopted in this Reference. The problems cannot be resolved through any single program of legislative or administrative reform. Nor can the resolution of these issues take place without adequate consultation with and the agreement of Aboriginal people affected.

219. ***A 'Sunset Clause'?*** This general approach does not mean that legislation for the recognition of Aboriginal customary laws should contain an express termination or 'sunset' clause. Such a clause might be appropriate with certain special measures of 'affirmative action', but this Reference is not concerned with issues of this kind.[908] Review of the operation of such legislation is not dependent upon such a clause. The principal difficulty with such a clause is the apparent assumption that, at some fixed time in the (comparatively near) future, Aboriginal customary laws will cease to exist in recognisable form, or will cease to be worthy of recognition. Traditionally oriented Aborigines would no doubt regard such an assumption as insulting. In any event, as has been pointed out already, the Commission has no material before it which would enable it to make any such prediction or assessment.[909] Careful drafting of legislation can ensure that Aboriginal customary laws can continue to be recognised where (and only where) it is relevant to the case in hand.

220. ***Structure of the Report***. Consistent with the Commission's approach outlined in this Chapter, the remaining Parts of this Report discuss the various areas in which it can be argued that the general law should recognise Aboriginal customary laws. These include questions of marriage, custody and adoption of children, the distribution of property, the criminal law, sentencing, evidence and procedure and proof of customary laws, and traditional hunting, fishing and foraging rights. The various ways in which Aboriginal communities may be empowered to deal with law and order questions — the second of the two sub-questions contained in the Reference — are also dealt with, in Part VI. In Part VIII of the Report, attention is given to constitutional and administrative questions, consultation with respect to and implementation of the Commission's proposals, and the further review of the issues raised by the Terms of Reference.

## Summary

221. ***Conclusions in Parts I & II***. The Commission's general conclusions, as set out in Parts I and II of this Report, may be summarised as follows:

*Scope for Recognition under the Existing Law*

- The scope for recognition of Aboriginal customary laws through common law rules for the recognition of local custom or communal native title is very limited (para 62, 63), and is inadequate to deal with the questions raised by the Commission's Terms of Reference (para 63).

- The same conclusion applies to arguments for the recognition of Aboriginal customary laws through the re-examination of the status of Australia as a 'settled colony'. A reclassification of Australia as a 'conquered colony', were it to occur, would not as such bring about appropriate forms of recognition of Aboriginal customary laws and traditions as these exist now (para 68).

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907 id, para 50-1.

908 There may of course be other reasons for sunset clauses, eg in legislation of a temporary character enacted pending some longer term solution. See eg Aboriginal and Torres Strait Islander Heritage (Interim Protection) Act 1984 (Cth).

909 See para 122.

- Although Aboriginal customary laws and traditions have been recognised in some cases and for some purposes by courts (para 70-5) and in legislation (para 76-84), this recognition has, on the whole, been exceptional, uncoordinated and incomplete (para 85 ).

*Definitional Questions*

- It is not necessary, constitutionally or otherwise, to spell out a detailed definition of who is an 'Aborigine'. This question, so far as necessary, can be worked out as a case-by-case basis, in accordance with the broad approach so far taken in legislation and administrative practice and by the High Court (para 90-5).

- Nor is it necessary to frame a definition of 'traditional Aborigine' for the purposes of the recognition of Aboriginal customary laws. The application of any recommendations for recognition in appropriate cases is to be achieved by the substantive requirements of the provision in question (para 95).

- Torres Strait Islanders are a distinct group from Aborigines, and the recognition of their customary laws requires separate examination. However some at least of the recommendations in the Report are or may be appropriately applied to Torres Strait Islanders as well as to Aborigines (para 96).

- The Commission's Terms of Reference do not extend to South Sea Islanders (para 97).

- There existed, in traditional Aboriginal societies, a body of rules, values and traditions which were accepted as establishing standards or procedures to be followed and upheld. Despite numerous changes, such rules, values and traditions continue to exist in various forms (para 99).

- These rules, values and traditions can properly be described as 'Aboriginal customary laws' (para 100-1).

- Narrow legalistic definitions of Aboriginal customary laws are unnecessary and inappropriate (para 101). It will usually be sufficient to identify Aboriginal customary laws in general terms where these are recognised for particular purposes. But the form of definition will depend upon the kind of recognition, and its purpose (para 101).

*General Considerations and Arguments about Recognition*

- Various objections to the recognition of Aboriginal customary laws have been made, including:

    - the problem of unacceptable rules and punishments (para 114):

    - secret aspects of Aboriginal customary laws (para 115):

    - loss of Aboriginal control over their laws (para 116):

    - the need to protect Aboriginal women (para 117);

    - the community divisiveness that recognition could cause (para 118);

    - the fact that Aboriginal customary laws have changed in many respects and no longer exist in their pristine form (para 119-121);

    - the declining importance and limited scope of Aboriginal customary laws (para 122, 124):

    - law and order problems in Aboriginal communities (para 123):

    - the difficulties of definition (para 126).

These are either not objections to recognition as such (as distinct from considerations in framing proposals for recognition), or are not persuasive (para 217).

- On the contrary there are good arguments for recognising Aboriginal customary laws, including in particular:
    - the need to acknowledge the relevance and validity of Aboriginal customary laws for many Aborigines (para 103-5);
    - their desire for the recognition of their laws in appropriate ways (para 106);
    - their right, recognised in the Commonwealth Government's policy on Aboriginal affairs and in the Commission's Terms of Reference, to choose to live in accordance with their customs and traditions, which implies that the general law will not impose unnecessary restrictions or disabilities upon the exercise of that right (para 107);
    - the injustice inherent in non-recognition in a number of situations (para 110-11, 127).

*Discrimination, Equality and Pluralism*

- A particularly important argument against the recognition of Aboriginal customary laws is that it would be discriminatory or unequal, and would violate the principle of equality before the law (para 128). But special measures for the recognition of Aboriginal customary laws will not be racially discriminatory, nor will they involve a denial of equality before the law or equal protection as those concepts are understood in comparable jurisdictions, if these measures:
    - are reasonable responses to the special needs of those Aboriginal people affected by the proposals;
    - are generally accepted by them; and
    - do not deprive individual Aborigines of basic human rights, or of access to the general legal system and its institutions (para 158-165).
- In particular, to avoid problems of inequality or potential discrimination arising, measures for recognition should comply with certain guidelines:
    - They should, as special laws, only confer rights on those Aborigines who, in the particular context, experience the disadvantages or problems which are the reasons for the provisions in question.
    - Aborigines should, wherever possible, retain rights under the general law (eg, to enter into Marriage Act marriages, to make wills).
    - Any legislation should be no more restrictive of rights under the general law than is necessary to ensure fidelity to the customary laws or practices being recognised.
    - Measures of recognition should not unreasonably withdraw legal protection or support from individuals (Aboriginal or non-Aboriginal) (para 165).
- Where the most appropriate remedy to a problem is not a recognition of customary law as such but some more general provision, it is necessary to consider whether that provision can legitimately be applied to some class of Aborigines only, or whether the reasons for the provision apply equally to all members of the community. If the latter, the Commission should draw attention to the problem, without making recommendations for legislation applicable only to the more limited class (para 165).

- These principles will also avoid or allay concerns at the recognition of Aboriginal customary laws based on arguments about the undesirability of legal pluralism or the diversity of laws (para 166-8).

- There is some risk nonetheless that proposals for the recognition of Aboriginal customary laws could be seen to be divisive or could be an affront to public opinion, either in isolation or if associated with other measures. Assessment of this risk, and of its relevance to the range of proposals for legislation, is primarily a matter for the Parliament and the people's representatives (para 169).

*Ensuring other Basic Rights*

- Australia is neither required to recognise Aboriginal customary laws in any general way, nor is it prohibited from doing so, by any international obligations on minority or indigenous rights (para 171-8). However, such recognition, provided it preserves basic individual rights, is consistent with the spirit of the International Covenant on Civil and Political Rights, and especially with Article 27 of the Covenant concerning the rights of ethnic, linguistic and cultural minorities (para 175-8).

- In securing basic human rights (including those specified in the Covenant), terms and ideas which imply a measure of cultural relativity may have to be applied by reference to the cultural community within which the case arose (including, by virtue of Art 27, a minority ethnic or cultural group). But minority values, cannot as such justify the violation of basic human rights, any more than can majority values (para 184-92).

- The impact of human rights standards on proposals for the recognition of Aboriginal customary laws depends on the particular proposal, and cannot be discussed in the abstract. The Commission believes that the recommendations in this Report do not involve violations of basic human rights for Aborigines or for other Australians. On the contrary, the need to respect the human rights and cultural identity of Aboriginal people supports the case for appropriate forms of recognition of Aboriginal customary laws (para 192-3).

*The Commission's Approach*

- Aboriginal customary laws should be recognised, in appropriate ways, by the Australian legal system (para 194).

- The recognition of Aboriginal customary laws must occur against the background and within the framework of the general law (para 195).

- As far as possible, Aboriginal customary laws should be recognised by existing judicial and administrative authorities, avoiding the creation of new and separate legal structures, unless the need for these is clearly demonstrated (para 196).

- The issues of the extent and method of recognising Aboriginal customary laws need to be considered separately from any arguments about the federal system (para 197).

- Recognition of Aboriginal customary laws may take different forms, including:

    - codification or specific enforcement of customary laws;

    - specific or general forms of 'incorporation' by reference;

    - the exclusion of the general law in areas to be covered by customary laws;

    - the translation of institutions or rules for the purposes of giving them equivalent effect (eg marriage or adoption):

    - accommodation of traditional or customary ways through protections in the general legal system (para 199-207).

- The Commission does not believe that, as a general principle, codification or direct enforcement are appropriate forms of recognition of Aboriginal customary laws (para 200-2). Nor, at the present time and except in limited circumstances, is the exclusion of the general law (para 203). Specific, particular forms of recognition are to be preferred to general ones. So are forms of recognition which avoid the need for precise definitions of Aboriginal customary laws, a notion which is to be understood broadly rather than narrowly (para 208).

*Scope of the Report*

- Consistently with this approach, Parts III-VII of this Report examine the various areas in which recognition may be called for, and the ways in which this can best be achieved (para 209, 220). These areas include issues both of civil law and criminal law, of substantive law and of evidence and procedure (para 210), as well as consequential matters (para 214-16).

- However in view of the detailed work being done by other bodies, and by the Commonwealth Government itself, the Commission has treated the question of customary rights to land as outside the scope of its inquiry (para 212). For similar reasons no separate investigation of the legal protection of Aboriginal artworks and the Aboriginal heritage is undertaken in the Report (para 213).

*Review of Implementation*

- In all cases the implementation of the Commission's recommendations will require consultation with Aboriginal people affected. It is for the Government to take steps to satisfy itself that any legislation based on these recommendations is supported by the Aboriginal people who will be affected by it (para 217).

- The impact of any such legislation will require evaluation and review on a continuing basis, in consultation with the Aboriginal people concerned (para 218). But such review does not require a 'sunset clause' for the legislation, and such a 'sunset clause' would be undesirable (para 219).

# PART III:

# ABORIGINAL CUSTOMARY LAWS: MARRIAGE, CHILDREN AND FAMILY PROPERTY

# 12. Aboriginal Marriages and Family Structures

## Introduction

222. ***The Terms of Reference***. The Commission's Terms of Reference emphasise the problems caused by conflicts between Aboriginal customary laws and the criminal law. But these are not the only cases of conflicts between Aboriginal customary laws and the general Australian law. Nor are the Commission's Terms of Reference restricted to the criminal law.[910] The Commission is asked generally about the recognition of Aboriginal customary laws. This includes the problems that arise in the areas of civil and family law, problems which can be just as important as those that arise with the criminal law. To a considerable extent these problems arise from the fact that Australian law is based on a different, and in some respects narrower, understanding of the family than is the case in Aboriginal societies. Often, Australian law has not taken account of the differences between the 'nuclear family' on which it is based and the differently structured 'extended Aboriginal family'. The notion of marriage itself is regarded very differently in Aboriginal societies. Aboriginal words translated as 'husband', 'wife' or 'married to' do not correspond absolutely with their English equivalents, nor is it possible readily to translate English terms such as 'custom', 'tradition' and 'marriage' into Aboriginal languages.[911] This Chapter briefly outlines some traditions and customs relating to marriage and the family in Aboriginal societies, as a basis for the examination in this Part of the ways in which the law might be changed to recognise those traditions and customs.

## Marriage in Traditional Aboriginal Societies

223. ***Traditional Marriage Arrangements***.[912] According to Dr Bell, certain elements underpin traditional marriages:

> there is the potential of marriage between certain categories of persons which is further refined by reference to actual kin, country, ritual and historical relations. Such a union is hedged in by certain taboos, including in-law avoidance. It is enmeshed in a complex web of kin obligations and responsibilities. It is underwritten by exchanges which both pre- and post-date any individual marriage. Violations or deviance from the marriage contract attract attention from different categories of person or persons.[913]

Professor Berndt has defined four key elements as follows:

1. The couple should be eligible to marry according to local rules defining 'ideal preferences and accepted authorities'.

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910 cf P Wilson, *Black Death White Hands*, George Allen & Unwin, Sydney, 1982, 106. See para 210.

911 Sutton, 'Aboriginal Customary Marriage — Determination and Definition' (1985) 12 *ALB* 13.

912 Generally on Aboriginal marriage see LR Hiatt, *Kinship and Conflict*, ANU Press, Canberra, 1965; LR Hiatt, 'Authority and Reciprocity in Australian Aboriginal Marriage Arrangements' (1967) 6 *Mankind* 468; D Bell & P Ditton, *Law: The Old and the New*, 2nd edn, Aboriginal History, Canberra, 1984, 90-94, 96-8; HK Fry, 'Australian Marriage Rules' (1933) 25 *Sociological Rev* 3; R Piddington, 'Irregular Marriages in Australia' (1970) 40 *Oceania* 329; A Hamilton, 'The role of women in Aboriginal marriage arrangements', in F Gale (ed) *Women's Role in Aboriginal Society*, 3rd edn, AIAS, Canberra, 1978, 29; JC Goodale, 'Marriage Contracts among the Tiwi' (1962) 1 *Ethnology* 452; PM Kaberry, *Aboriginal Women, Sacred and Profane*, Rutledge & Sons, London, 1939; W Shapiro, 'Local Exogamy and the Wife's Mother in Aboriginal Australia', in RM Berndt, *Australian Aboriginal Anthropology*, University of Western Australia Press, Perth, 1970, 51; J Long, 'Polygyny, Acculturation and Contact: Aspects of Aboriginal Marriage in Central Australia', id, 292; F Rose, 'The Australian Aboriginal Family: Some Theoretical Considerations', in *Forschen and Wirken, Festschrift zur 150-Jahr-Fier der Humboldt Universitat zu Berlin*, vol 3, Dr Verlag der Wissenschaften (in Komm), Berlin, 1960, 415; MJ Meggitt, 'Marriage Among the Walbiri of Central Australia: A Statistical Examination', in RM Berndt & CH Berndt (eds) *Aboriginal Man in Australia. Essays in Honour of AP Elkin*, Angus & Robertson, Sydney, 1975, 146; W Shapiro, *Social Organization in Aboriginal Australia*, St Martin's Press, New York, 1979, esp 83-8; RM Berndt & CH Berndt, *The World of the First Australians*, 4th rev edn, Rigby, Adelaide, 1985, 188-208; Sutton (1985).

913 D Bell, 'Re Charlie Jackamarra Limbiari. Report to the Court', in *R v Charlie Limbiari Jagamara*, unreported, NT Supreme Court, May 1984, 13, 14.

2. Appropriate betrothal arrangements should have been made between the two kin groups concerned. An exchange of gifts ratifies the contract.

3. Actual marriage may be distinguished from the betrothal when the parties cohabit publicly and take on 'marital responsibilities including sexual relations'.

4. The union is considered to be strengthened by the birth of the first child.[914]

Marriage was a central feature of traditional Aboriginal societies.[915] The need to maintain populations and thereby to ensure that there was always someone to attend sites and keep up traditions was matched by the desire to ensure that children were produced according to the right family groups and the correct affiliations.[916] For these purposes freedom of marriage was restricted by the prohibitions against the marriage of certain close relatives and by the rule of exogamy, that is, marrying outside one's group.[917] An important factor in determining the parties to a marriage was the balancing of kinship obligations, including reciprocal obligations between individuals, families or larger groups. The interests of the parties, and their attraction or affection for each other, were considered subsidiary to these obligations.[918] The creation of marriage alliances and the obligations that this involved were closely linked with relationships to the land. Spiritual affiliation with land included a series of ritual obligations and duties often acquired through inheritance in either the male or female line, or both. And marriage was a primary means for maintaining attachment to land.[919] According to Dr Bell

> Perhaps the most important difference between Aboriginal marriage patterns and those of white Australia is that the marriage is not seen as a contract between individuals but rather as one which implicates both kin and country men of the parties involved. If we explore the web of relations which surround an arranged marriage entered into at the time of initiation of a young male, we find that at least three generations are implicated.[920]

224. ***Arranging Marriages***. One important way in which marriages were arranged was infant betrothal.[921] Usually this was between a young girl and an older man. A man's first marriage would not necessarily fall into this category: his first wife might well be an older widow. A girl could be betrothed either as a potential mother-in-law[922] or as a wife. Indeed it was possible for a girl to be betrothed before she was born and to grow up knowing who her future husband was likely to be. The promised relationship created a series of lifelong responsibilities and obligations between the young man and his promised wife's relations. For example, the young man might be required to provide food for his future mother-in-law.[923] While the girl was growing up she would normally have regular contact with her promised husband, so that when the marriage eventually took place he was no stranger to her. However, the fact that negotiations had taken place and promises made was no guarantee that a marriage would take place, or that a girl would consider herself obligated to remain married to her promised husband. Refusal to marry, or to perform obligations to family associated with marriage arrangements, would usually give rise to arguments, but if the prospective husband or wife persisted in refusal, renegotiation was possible. This might involve arranging a substitute or agreeing to compensate the aggrieved person in some way.

225. ***Patterns of Marriage and Remarriage***. The age of marriage was very different for men and women, and differed also as between various parts of Australia. Usually, a girl would marry at or about the age of puberty;[924] a man not until later (in his late twenties or even later).[925] Among some Aboriginal groups, at

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914 RM Berndt, 'Tribal Marriage in a Changing Social Order' (1961) 5 *UWAL Rev* 326, 338-9, and cf Sutton (1985) 13. None of these criteria may be considered absolute. The implications of this flexibility are examined in paragraph 229.

915 Berndt and Berndt suggest that unmarried women were very rare, but there are occasionally unmarried men: Berndt & Berndt (1985) 196-7. Both are, however, more common today: Bell & Ditton, 91; A Hamilton, 'Gender and Power in Aboriginal Australia', in N Grieve & P Grimshaw (ed) *Australian Women*, Oxford University Press, Melbourne, 1981, 76.

916 See CH Berndt & RM Berndt, *Pioneers and Settlers*, Pitman Australia, Carlton, 1978, 51.

917 See Bell & Ditton, 91-2.

918 AP Elkin, *The Australian Aborigines*, rev edn, Angus and Robertson, Sydney, 1979, 155.

919 cf K Palmer, *Grey Earth and Clean Sand, Western Desert Project*, Flinders University of South Australia, Adelaide, 1982, 11.

920 Bell, 'Re Charlie Jackamarra Limbiari' (1984) 4.

921 Some anthropologists use the word 'bestowal' in preference to 'betrothal', eg Maddock, Hiatt. This carries implications about the nature of promised marriage. The word 'betrothal' is used here without any intention of entering into the anthropological debate.

922 D Bell, *Daughters of the Dreaming*, McPhee Gribble, Melbourne, 1983, 205-28.

923 ibid; *Transcript of Women's Meeting*s Kowanyama (28 April 1981) 174-5; J Biendurry, *Transcript of Public Hearing*s Derby (27 March 1981) 583.

924 This could have been as high as 16-18 years. The problem with couching questions in terms of age is that it draws distinctions which have not been deemed relevant to people in the past. Also as the age of sexual maturity is falling answers in terms of age are more likely to

least, marriages were often polygynous (with a husband having two or more wives): a wife, on the other hand, would have only one husband at a time, although usually she would be married to several husbands in succession, as the former husband died or the marriage broke up.[926] There was, in most groups, no single marriage ceremony, although particular acts or events (eg sharing a campfire) would result in the recognition of the marriage by the community.[927] Divorce could occur by mutual consent or unilaterally, again, in most cases, without any particular formality: divorce involved, and was signified by, the termination of cohabitation.[928] However, if a wife eloped or otherwise left a husband without his consent, he might try to bring her back by force, seek to punish her or her lover, or seek compensation. In each of these respects he might be assisted by his kin. Similarly if a husband became involved with another woman his wife might be required by customary law to ritually and publicly fight the other woman.[929]

## Marriages in Aboriginal Societies Today

226. ***Pressures for Change***. Pressures have been placed on Aboriginal marriage practices both by government policy and the activities of missionaries. Increasing social contact has exposed Aborigines to new values which formed no part of indigenous culture. Speaking of the 1930s, AP Elkin commented that:

> The custom of old men marrying young girls is changing in those parts of Northern Australia occupied by whites. Many young men are now seen with young wives though seldom with any children. Polygamy is also being dropped. Such changes are apparently the direct or indirect result of white influence.[930]

The education system has brought young girls and boys together in a way which would not have occurred in traditional societies.

> Promised marriages are no doubt dwindling away ... You get a lot of these young kids who have been to school, they have been educated, and they have tasted alcohol, they know what is money, they drive fast cars ... As far as tribal marriages are concerned it is not for them. A lot of them will marry the wrong way, or in other words not their right skin group, and once they do that a lot of them will leave their community, their tribe. It is really a matter of principle go away for a while, for any length of time until everything is forgotten, and they go back.[931]

227. ***Promised Marriages Today***. The exchanging of marriage promises continues in many traditionally oriented Aboriginal communities, although some changes have taken place.[932] For example, it appears that age differences between spouses have narrowed and a girl will not marry her promised husband until after leaving school. It is also increasingly likely that a promised marriage will not occur at all (especially if there is a large age disparity between the parties).[933] A consequence of the failure of 'promises'[934] is that it is becoming less common for marriage arrangements to be made. In some communities the practice of exchanging promises has practically disappeared. In others it has been modified.[935] It is much more likely that a girl, even if living in a traditionally oriented community, will be able to choose her own marriage

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mislead than clarify the situation: ACL Field Report 7, *Central Australia* (1982) 18. Comments along these lines, made by Tennant Creek women to Professor Tay and Dr Bell, seem generally applicable. The women also expressed concern at people marrying younger: ibid.

925 K Maddock, *The Australian Aborigines*, rev edn, Penguin, Ringwood, 1982, 67-70 analyses the literature with respect to age of marriage.

926 Berndt & Berndt (1985) 197.

927 id, 199-200. However in a number of groups there were formal ceremonies at different stages in the process of transition from unmarried to married status. Goodale, 460 identifies a form of marriage ceremony among the Tiwi. Palmer, 13-14 refers to 'a single short ritual ... known as *kuri pikatja* ... which signifies the commencement of a marriage' among the Yalata Pitjantatjara.

928 id, 15 ('Divorce is recognised when a couple no longer live together and the parents of both husband and wife have agreed to accept the divorced status of the couple'). See also J Bucknall, *Transcript* Strelley (24 March 1981) 352-3.

929 See eg *Police v Isobel Phillips*, unreported, NT Court of Summary Jurisdiction, 19 September 1983 (JM Murphy SM). See para 648.

930 Elkin (1979) 159 n 10.

931 F Chulung, *Transcript* Fitzroy Crossing (31 March 1981) 768.

932 See J Whitbourn, *Transcript* Alice Springs (13 April 1981) 1302-3; K McKelson, *Transcript* La Grange (26 March 1981) 557; G Gleave, *Transcript* Willowra (21 April 1981) 1578; *Transcript of Women's Meetings*, Alice Springs (13 April 1981) 33-36, Fitzroy Crossing (31 March 1981); J Bucknall, *Transcript* Strelley (24 March 1981) 401; A Nelson Napururla & B Naburula, *Submission 497* (7 October 1985) 3; and see Bell & Ditton (1984) 28, 90-2.

933 Hamilton (1978) 29. cf also Bell & Ditton (1984) 91; Hamilton (1981) 76.

934 For the failure of promised marriage arrangements in Darwin town camps cf B Sansom, *The Camp at Wallaby Cross*, AIAS, Canberra, 1980, 258.

935 For the influence of contact (and in particular schooling) on promised marriages see J Watson, *Transcript* Derby (27 March 1981) 570-1; P Roe, *Transcript* Broome (25 March 1981) 475-6; T Gardiner, *Transcript* Broome (25 March 1981) 488; W Edwards, *Transcript* Adelaide (17 March 1981) 26; W Clarke, *Transcript* Adelaide (17 March 1981) 43; G Hiskey, *Transcript* Adelaide (17 March 1981) 118; N Brumby, *Transcript* Kowanyama (27 April 1981) 1833; J Whitbourn, *Transcript* Alice Springs (13 April 1981) 1301; M Whaco, *Transcript* Alice Springs (13 April 1981) 1316; J Tregenza, *Transcript* Alice Springs (13 April 1981) 1413; S Martin Jambajimba, *Transcript* Willowra (21 April 1981) 1507; F Yunkaporta & J Koowarta, *Transcript* Aurukun (30 April 1981) 2014; D Yibaruk, *Transcript* Maningrida (7-8 April 1981) 1039-42, 1102; L Joshua, *Transcript* Nhulunbuy (9 April 1981) 1152; A Nelson Napururla & B Naburula, *Submission 497* (7 October 1981) 4.

partner despite the fact that she may have been promised at birth. And it is more common for a girl to air her grievances over a prospective marriage. Resistance to promised marriages has come both from young men and young women.[936] Resentment may be directed at parents as the persons responsible for the promise. A consequence is that parents may deny their own, or assert the others, responsibility for making the promise.[937] On the other hand, Professor Hamilton observes that while opposition to promised marriages comes from some whites and also from younger Aboriginal people who seek freedom of choice, as they grow older Aboriginal men may still take second and third betrothed wives. She comments that only the concerted opposition of the young seems likely to modify the system, especially in areas such as Arnhem Land.[938] This view accords with the views expressed to the Commission during its public hearings.[939]

228. ***Traditional Marriages Today.*** While Aboriginal marriage rules and customs have been maintained, especially in more remote communities, despite external pressures,[940] amongst most urban and fringe-dwelling Aborigines formal marriage rules and institutions have diminished in importance.[941] Polygyny has also declined, certainly in communities where mission influences were strong, but also, it seems, more generally, under the impetus of economic change.[942] Dr Sutton states that:

> Polygynous marriages are often said to have disappeared from communities where missionary influence is strong, but it is not uncommon for second and third marriages to be concealed from authorities where these authorities disapprove of polygyny ... At present one must assume that polygyny will be around for an indefinite future, even if it continues to decline in gross terms.[943]

This view was reaffirmed during the Commission's public hearings, where the continued existence of polygyny in the more traditional communities was asserted, although its decline was also generally acknowledged.[944] Even with the decline in polygyny, other aspects of traditional marriage are still followed and maintained. Among the Tiwi the 'breakdown of polygamy did not materially change the position with [marriage] contracts'.[945] Admitting the decline of traditional marriage rules (including polygyny) in particular areas does not mean that its disappearance is desired or accepted.[946] A number of communities in submissions to the Commission specifically sought recognition of their marriage rules by the general law.[947]

229. ***Flexibility of Traditional Marriage Rules***. Rules regarding 'correct' or 'straight' marriages, and rules relating to betrothals and marriage, are important.[948] But the apparent rigidity of these rules is tempered in various ways. 'Alternative' or 'irregular' marriages with other persons were possible, provided that the basic incest rules were not broken. It seems that these possibilities are greater now, under the pressure of contact

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936 See H Boxer, *Transcript* Fitzroy Crossing (31 March 1981) 703-6; G Gleave *Transcript* Willowra (21 April 1981) 1579.

937 Hamilton (1978) 31.

938 Hamilton (1981) 76.

939 See n 23, 26.

940 On the other hand the number of traditionally married persons resident in urban areas would be very small.

941 F Gale, 'The Impact of Urbanization on Aboriginal Marriage Patterns', in RM Berndt (ed) *Australian Aboriginal Anthropology*, University of Western Australia Press, Perth, 1970, 305, 314; M Resy, 'Aboriginal and White Australian Family Structure: An Enquiry into Assimilation Trends', in M Resy (ed) *Aborigines Now: New Perspectives in the Study of Aboriginal Communities*, Angus & Robertson, Sydney, 1964, 19. For an example of the situation in town camps see Sansom (1981) 242-58.

942 Maddock (1982) 62-3; Palmer (1982) 13, 26-7. But in 1970 Long commented that at Yuendumu, 'thirty years of contact seems to have had some, but not much, effect on polygamy rules': Long (1970) 303. He added that 'the incidence of polygyny is any community is ... an unreliable index of the relative degree of acculturation of that community': ibid.

943 Sutton (1985) 14.

944 J Biendurry, *Transcript* Derby (27 March 1981) 584-5, K McKelson, *Transcript* La Grange (26 March 1981) 558; W Clarke, *Transcript* Adelaide (17 March 1981) 43; S Martin Jambajimba, *Transcript* Willowra (21 April 1981) 1543; G Gleave, *Transcript* Willowra (21 April 1981) 1580; T Lewis, *Transcript* Darwin (3 April 1981) 895; J Adams, *Transcript* Aurukun (1 May 1981) 2093; *Transcript* of Women's Meetings Kowanyama (28 April 1981) 179, La Grange (26 March 1981) 211-2, Bayulu (1 April 1981) 140-1.

945 Goodale (1962) 455.

946 National Aboriginal Conference, Submission (14 Dec 1978) to Joint Select Committee on the Family Law Act: *Submissions*, vol 1, 739-44.

947 eg Resolutions presented by the Tribal Elders of Roper River, *Transcript* Roper River (3 April 1981) 901; Peppimenarti Community, Submission 250 (6 April 1981). See also *Transcript* Peppimenarti (6 April 1981); Resolutions of the Lajamanu Community, *Transcript* Alice Springs (13 April 1981) 1283-90.

948 J Roberts *Transcript* Darwin (3 April 1981) 895; J Adams, *Transcript* Aurukun (1 April 1981) 2082; J Gurrwanngu, *Transcript* Darwin (3 April 1981) 925; J Whitboum, *Transcript* Alice Springs (13 April 1981) 1301-3; J Tregenza, *Transcript* Alice Springs (14 April 1981) 1413. See generally G Coulthard, *Transcript* Adelaide (18 March 1981) 184; P Memmott, *Transcript* Mornington Island (24 April 1981) 1736; A Hockey, *Transcript* Doomadgee (23 April 1981) 1669; S Martin Jambajimba, *Transcript* Willowra (21 April 1981) 1508-9; T Lewis *Transcript* Darwin (3 April 1981) 895; C Yirrwala, *Transcript* Maningrida (7 April 1981) 1042; L Joshua, *Transcript* Nhuluubuy (9 April 1981) 1152; F Davey & M Lennard, *Transcript* One Arm Point (28 March 1981) 629-30; *Transcript* of Women's Meetings Amata, 48-51, Aurukun, 73, Kowanyama, 175.

with the wider society.[949] Dr Bell, for example, refers to an increased 'willingness to stretch the scope of correctness' at Warrabri.[950] But the possibilities have always existed. According to Piddington:

> while acculturation has weakened the objection to many marriages (as it has weakened the observance of other traditional rules), alternative marriages have always been an accepted feature of Australian kinship organisation ... an essential part of Aboriginal social life.[951]

Dr Bell comments that:

> Marriages between persons other than those stated as correct ... tend to be fragile, attract disapproval and censure from families and home communities, and create enormous confusion should there be any children of the union. These children must go through life with an ambiguous social classification and are very often the brunt of family disputes.[952]

Secondly, there may be degrees of marriage.[953] Childless spouses may be considered less firmly married than couples who have children. Casual liaisons may develop into relationships that are considered as marriages by the community concerned. Thus it may be that a relationship is considered transitional at a given time, being more than a casual liaison yet not yet regarded as a full marriage. Similarly there may be situations in which a couple may not be fully considered as divorced. The flexibility of marriage laws, and the fact that there may be degrees of marriage, have implications for the recognition and proof of traditional marriages.[954] But they do not mean that traditional marriages cannot be defined or ascertained. Bell and Ditton comment that they 'never heard women in doubt as to whether a couple were just "living together"'.[955] Sutton argues that in establishing whether there is a traditional marriage:

> the only really important 'test' is that the couple and their families agree that they are in an Aboriginal marriage (often expressed as 'properly married blackfella-way').[956]

Thus in *Police v Ralph* Campbell the question whether a witness was traditionally married was resolved by seeking the views of the witness and her parents.[957] There may be situations in which the spouse, the relevant families and the kin may disagree as to whether the parties are properly married.[958] Disagreement does not necessarily mean that there is no marriage, but the views of all those whose opinions matter must be taken into account, in determining whether there is a marriage.[959]

## Aboriginal Family and Child Care Arrangements

230. ***Bringing up Children in Aboriginal Communities***. Aboriginal child-rearing practices are generally very different to those of the wider Australian community and contrasting assumptions underly them. According to Hamilton:

> Aboriginal child-training practices are on almost all points "permissive" ... [A]uthoritarian practices are entirely absent. No demands are made for unquestioning obedience or externally regulated development: adults expect little of children, while child ren can demand all from adults, at least up to a certain age. The father is not chastising and demanding but is more likely to protect an unruly child from a mother's exasperation.[960]

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949 W Edwards, *Transcript* Adelaide (17 March 1981) 25-6.

950 D Bell, 'Desert Politics: Choices in the "Marriage Market", in M Etienne & E Leacock (ed) *Women and Colonization. Anthropological Perspectives*, Praeger, New York, 1980, 239, 249.

951 Piddington (1970) 316, 341. cf Meggitt (1965) 164 who classified 617 unions among the Walbiri in 1953-5 as comprising preferred unions (91.6%) alternative unions (4.2%) and prohibited unions (4.2%). cf Palmer's more recent analysis of 200 marriages at Yalata: Palmer (1982) 19, 26-27.

952 Bell, 'Re Charlie Jackamarra Limbiari' (1984) 6. See also J Adams, *Transcript* Aurukun (1 May 1981) 2093. See further K Maddock, 'Aboriginal Customary Law' in P Hanks & B Keon-Cohen (ed) *Aborigines and the Law*, George Allen & Unwin, Sydney 1984, 221-3.

953 Sutton (1985) 13-14.

954 cf Bell & Ditton (1984) 92, and see para 236.

955 Bell & Ditton (1984) 92, J Bucknall, *Transcript* Strelley (24 March 1981) 421.

956 Sutton (1985) 15.

957 *Police v Ralph Campbell*, unreported, NT Court of Summary Jurisdiction, 8 June 1982 (Mr J Muphy SM). See para 625 for a description of the evidence and decision.

958 See generally Bell, 'Re Charlie Jackamarra Limbiari' (1984) 3-14.

959 See further para 644-5.

960 A Hamilton, *Nature and Nurture: Aboriginal Child-Rearing in North-Central Arnhem Land*, AIAS, Canberra, 1981, 149-50, and see CH Berndt & RM Berndt, 'Aborigines', in FJ Hunt (ed) *Socialisation in Australia*, Australia International Press and Publications, Melbourne, 1978, 126, 126-9; HC Coombs, MM Brandl, WC Snowdon, *A Certain Heritage*, CRES, Canberra, 1983, 42-50.

The differences between Aboriginal and non-Aboriginal Australian society are apparent not only in the structure of responsibility for child care, but also in the way children are in fact brought up. Compared to the general Australian community, Aborigines place less value on material comfort, discipline and training for their children: rather the emphasis is on values such as the expression of warmth, affection and acceptance.[961] It is quite common for Aboriginal children within Aboriginal communities to be fed and to sleep at the house or camp of a number of different people. It may be that for periods of time often extending over a number of years primary responsibility for a child's upbringing may rest with an aunt or grandmother. Members of the extended family may have particular roles in child rearing prescribed under the kinship system. Persons other than the parents will play, and be expected to play, an important part in 'growing-up children'.

> Among Nyungar [Aborigines in the south-west of Western Australia] and in the Darwin region the business of 'watching for' and 'worry for all them kids' is the business of groupings of 'close up' people. This is to say that care for kids and expression of concern for their respective destinies falls with a weight of obligation on a set of people and adults of the extended family made up not merely of nominal kinfolk, but of those who are recognised as effective kin because the placement of children and the allocation of responsibilities for guardianship are things that ordinarily belong within the ambit of 'close up' kinship, special problems are encountered when a grouping of 'close up' kin fail to accommodate and care for a child.[962]

231. ***Arrangements for 'Substitute Care' of Children***. Long term substitute care of Aboriginal children with different relatives in different homes is common.[963] Sansom and Baines describe the consequences of such intervention for Aborigines in and around Darwin in the following terms:

> Following any act of taking a child, the issue of future prime guardianship remains to be determined. Delinquent guardians may in the end be given 'nother chance'. However, if the child has been taken on the grounds of hunger this is unlikely. Delinquent family members will either have to modify spendthrift ways or, if without sufficient money, will have to find new sources of income. After an act of taking there is an interim, a period of uncertainty when the child is in temporary care. This period comes to an end when, with communal approval, the child is 'given' to a new prime guardian who is accredited as such by mob members. Furthermore, such allocations are subject to discussion among the population of Countrymen. Before the act of giving is accomplished in a mob, sufficient time must pass for those of the child's close up kin who are in other mobs to be appraised ... The procedures by which allocation of blame is made, status determined and disputes settled ... allow bids for guardianship to be made.[964]

Sansom and Baines distinguish the dynamics of substitute care arrangements practiced by the Nyungar of South-Western Australia. They have clearly defined rules as to who should bring up children, as to the correct way in which this should be done and as to who should take over the child care function if there is a failure to care for the child in the right way.[965] The quality of the care a child receives is subject to strict scrutiny by those who have a watching brief. In cases of neglect the child is given to specified members of the mother's extended family. Thus the paternal side has the primary responsibility for the watching brief and the mothers extended family has the primary child rearing function.[966] There is relatively little formality, by European standards, to Aboriginal child care arrangements and it is rare for Aboriginal persons to seek to regularise the relationship with children by legal means such as adoption or legal guardianship. Problems have arisen where welfare officers, operating with their own perceptions of child care, remove children from communities on the basis that these were 'neglected' because they were not in the care of their own parents.[967] This can lead to a direct conflict between opposing notions of child-rearing, and op posing views of what constitutes the best interests of the child.

## Conclusion

232. ***Matters for Consideration***. It is against this background of continuing, and changing, traditions and practices relating to Aboriginal family life and marriages that the question of recognition needs to be considered. In particular, it is necessary to consider

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961 Hamilton (1981), and cf E Sommerlad 'Aboriginal Children Belong in the Aboriginal Community: Changing Practices in Adoption' (1977) 12 *Aust J Soc Issues* 167, 172.

962 B Sansom & P Baines, 'Aboriginal Child Placement in the Urban Context' in Commission on Folk Law and Legal Pluralism, *Papers of the Symposium on Folk Law and Legal Pluralism, XIth International Congress of Anthropological and Ethnological Sciences. Vancouver, Canada, August 19-13*, 1983, Ottawa, 1983, vol 2, 1083, 1086. See also Bell & Ditton (1984) 96-7.

963 See generally para 383.

964 Sansom & Baines (1983) 1091.

965 id, 1092.

966 ibid.

967 See further para 344-5.

- whether and for what purposes Aboriginal traditional marriages should be recognized in Australian law (Chapters 13-14);

- whether any variations in the general law relating to the distribution of property are desirable to take into account Aboriginal family and kinship responsibilities (Chapter 15); and

- whether any specific recognition or protection should be given to Aboriginal traditions of child-care (Chapter 16).

# 13. The Recognition of Traditional Marriages: General Approach

## Introduction

233. ***The Present Position***. At present, Aboriginal traditional marriages are given little or no recognition in Australian law.[968] Both social and legal problems can arise from the failure to accord legal status to established, socially recognized unions between Aborigines.[969] No accurate statistics are available, but it has been estimated that at least 90 per cent of marriages amongst traditional Aborigines are not contracted under the Marriage Act 1961 (Cth).[970] In the Northern Territory the proportion may be higher. The Aboriginal Population Records kept by the Department of Aboriginal Affairs indicate that there are 4,889 'tribal unions' but only 151 'legal marriages' among Northern Territory Aborigines.[971] These are estimates rather than exact figures (and they may include relationships which are not considered as traditional marriages) but it seems clear that there are a considerable number of traditional marriages in the Northern Territory, South Australia, Western Australia and (to a lesser extent) in Queensland. A consequence of the non-recognition of these traditional marriages is that the parties lack many of the protections and benefits accorded by the general law to legally married persons.[972] Their children are illegitimate.[973] A surviving spouse may not qualify for benefits, for example workers' compensation or insurance payments on the death of his or her partner. The consequences of non-recognition of traditional marriage for child custody, adoption and guardianship can be important: for example, a traditionally married couple would not usually be eligible to adopt a child under State law. Despite a tendency toward the assimilation of marriages and established de facto relationships in some States, the general law attaches consequences to marital status in a variety of areas, some central to marriage, others incidental or peripheral'.[974]

234. ***Anglo-Australian Concept of Marriage***. In analysing recognition of traditional marriage, as of other institutions existing across cultural boundaries, a significant problem of translation arises. In English and Australian law marriage came to be defined in accordance with the Christian ideal of monogamous lifelong union.[975] Legal provisions for maintenance and divorce, influenced by such a conception, were not likely to be appropriate to less formal unions, unions which may be actually or potentially polygamous. The point was made in *Hyde v Hyde* itself: what Sir James Wilde regarded as a potentially polygamous Mormon marriage was not, in the English sense, properly speaking a 'marriage' at all, and so could not be recognised for the purpose of granting matrimonial relief.[976] Similarly the South African Supreme Court refused to equate a marriage in accordance with native law and custom recognised by South African law as a 'marriage in accordance with our common law', so that the widow could not claim compensation from a motor vehicle insurer for death of her 'husband'.[977]

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968 For the exceptions to non-recognition (especially in the NT) see para 239.

969 This has been noted by a number of Commonwealth inquiries in the family law field, although in each case the issues were left to this Reference: see Australia, Royal Commission on Human Relationships, *Final Report*, AGPS, Canberra, 1977, vol 4, 125-6; vol 5, 80, 142-4; Commonwealth, Parliamentary Joint Select Committee on the Family Law Act, *Family Law in Australia*, AGPS, Canberra, 1980, vol 1, 9; vol 2, 85-7.

970 H Dagmar, *Aborigines and Poverty. A study of interethnic relations and culture conflict in a WA town*, Katholicke Universiteit, Nijmegen, 1978, 101. At a central Australian community where mission influence had been and remained strong, it was reported in 1983 that there had been only one church marriage in five years, and that less than 20% of the local people were church married: ACL Field Report 7, *Central Australia* (1982) 41.

971 These figures exclude 'persons of Aboriginal descent living in the normal urban environment': LG Wilson, *Submission 321* (15 March 1982). Figures of the NT Registrar of Births, Deaths and Marriages indicate that traditional marriages account for around 90 per cent of Aboriginal nuptial births in the Territory: Department of Aboriginal Affairs (JPM Long), *Submission 315* (21 January 1982).

972 W Morgan-Payler, *Transcript of Public Hearings* Melbourne (20 May 1981) 2756-7.

973 It is true that many of the consequences of illegitimacy, especially in relation to inheritance and property, have now been virtually eliminated by State and Territory legislation. But the status of illegitimacy remains, and can still have legal consequences, eg with respect to custody and adoption.

974 See para 324.

975 *Hyde v Hyde* (1866) 1 LR P & D 130, 133 (Sir J Wilde). This was also true in other countries where the Christian concept of marriage was influential.

976 id, 134: 'if the relation there existing [sc in some foreign countries] between men and women is not the relation which in Christendom we recognize and intend by the words "husband" or "wife" ... the use of a common term to express these two separate relations will not make them one and the same, though it may tend to confuse them to a superficial observer'.

977 *Suid-Afrikaanse Nasionale Trust en Assuransie Mawskappy Bpk v Fondo* 1960 (2) SALR 467 (AD). This injustice was remedied by statute: Bantu Laws Amendment Act 1963 (SAf). cf HR Hahlo, 'The Matrimonial Regimes of South Africa', in JND Anderson (ed) *Family Law in Asia and Africa*, Allen and Unwin, London, 1968, 143, 146-8. See also N Rubin, 'Customary Family Law in Southern Africa: Its Place and Scope', id, 255.

235. ***Changing Ideas and Rules***. The arguments for and against recognising established Aboriginal unions under customary law as 'marriages' need to be considered in the light of changing conceptions of marriage in the wider society, and corresponding changes in Australian law. There is a greater acceptance of relationships which do not involve legal marriage. Marriage is fairly freely terminable, on a single ground of marital breakdown evidenced by a year's separation, under the Family Law Act 1975 (Cth). The actual decision in *Hyde v Hyde* is not law in Australia:[978] under the Act foreign polygamous marriages are recognised in Australia for the purposes of granting matrimonial relief, a result towards which the common law is also moving.[979] The equation, for certain purposes, of stable de facto relationships with marriage under the general law is already presenting the courts with situations similar in some respects to Aboriginal traditional marriages.

236. ***Aboriginal Ideas of Marriage***. Aborigines themselves unhesitatingly describe their traditional unions as marriages, and distinguish between marriage and other (ie de facto) unions.[980] Australian legislation, federal and State, makes the same equation.[981] Nor has the point been doubted by anthropologists. In RM Berndt's words:

> 'Tribal' marriage or 'customary' marriage must still be regarded as marriage in the sense of a socially sanctioned and ratified agreement with an expectation of relative permanency ...[982]

The question is to what extent and (if not generally) for what purposes should traditional marriage be equated to marriage under the general law.

## Existing Recognition of Traditional Marriages under Australian Law

237. ***The Position at Common Law***. Initially, colonial courts faced with questions of recognition of Aboriginal marriages adopted a rather reserved and equivocal attitude, consistent with their doubts about recognition of Aboriginal traditions and customary law generally.[983] Thus in *R v Neddy Monkey*, Justice Barry stated that the Court could not 'without evidence of their [the Aborigines'] marriage ceremonies, assume the fact of marriage'.[984] This suggested that recognition might be possible if appropriate evidence was available. But attitudes soon hardened, and general non-recognition became the rule, in this context as elsewhere. In *R v Cobby* Chief Justice Martin stated:

> We may recognise a marriage in a civilized country but we can hardly do the same in the case of the marriages of these Aborigines, who have no laws of which we can take cognisance. We cannot recognise the customs of these Aborigines so as to aid us in the determination as to whether the relationship exists of husband and wife.[985]

A decision which had first been framed in evidentiary terms thus became an uncompromising assertion of law. With few exceptions, later courts took a similar view,[986] although in one case involving custody of Aboriginal children, the presumption of marriage from long cohabitation was applied in favour of a traditional marriage of 19 years standing, despite the absence of any evidence that the statutory formalities had been complied with.[987] In other cases the presumption has not been applied,[988] and it will rarely be helpful. Other possibilities of 'common law' marriage, although they may have been relevant to early colonial Australia, are excluded by the exhaustive language of the Marriage Act 1961 (Cth).[989] It is still possible that a court might recognise a customary marriage for specific purposes, if only as a fact relevant to

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978 However, the definition of marriage underlying *Hyde v Hyde* remains important both in the Marriage Act 1961 (Cth) s 46(1) and the Family Law Act 1975 (Cth) s 43(a).

979 Family Law Act 1975 (Cth), s 6. For analogous English developments see *Lee v Lau* [1967] P14; *Aljahi Mohamed v Knott* [1969] 1 QB 1; TC Hartley, 'Polygamy and Social Policy' (1969) 32 *Mod L Rev* 155; UK Law Commission Report No 42, *Polygamous Marriages*, London, HMSO, 1971. cf *Haque v Haque* (1962) 108 CLR 230. For the Marriage Amendment Act 1985 (Cth) see para 259 n 76.

980 *Transcript* Broome (25 March 1981) 464. cf para 229.

981 See para 239.

982 RM Berndt, 'Tribal Marriage in a Changing Social Order' (1961) 5 *UWAL Rev* 326, 341. And see para 223-7.

983 See para 45.

984 (1861) 1 W & W (L) 40, 41.

985 (1883) 4 LR (NSW) 355, 356.

986 In *R v Tuckiar* (see para 51) the trial judge was strongly critical of the Crown's decision not to call the defendant's wives to give evidence against him: see RM Berndt & CH Berndt, *Arnhem Land Its History and Its People*, Cheshire, Melbourne, 1954, 143.

987 *R v Pilimapitjimiri, ex parte Gananggu* (1965) NTJ 776, 785 (Bridge 1).

988 *R v Neddy Monkey* (1861) 1 W & W (L) 40; *R v Byrne* (1867) 6 SCR (NSW) 302. cf *R v Fuzil Deen* (1896) 6 QLJR 302. The presumption is not applicable to polygamous marriages, although a marriage will be presumed not be polygamous: *Ng Ping On v Ny Choy Fung Kum* (1963) 63 SR (NSW) 782.

989 Marriage Act 1961 (Cth), s 41, 48.

the proceedings.[990] But any more general recognition is most unlikely, given the terms of the Marriage Act 1961 (Cth).

238. ***Traditional Marriages as 'De Facto Relationships'***. Under State Law. A traditional marriage may qualify as a de facto relationship under the law of some States. For example a traditional marriage after five years or the birth of a child would entitle a party to status as a 'putative spouse' under South Australian legislation.[991] What is recognised here, however, is not marriage but cohabitation, a recognition which would be extended equally to a de facto relationship without any traditional elements.

239. ***Recognition of Traditional Marriage under Australian Legislation***. More directly relevant are some instances of recognition of traditional marriages as such. Traditional marriages are recognised for particular purposes by one Commonwealth Act and a number of Northern Territory Acts, and there is legislation in Victoria to recognise traditional Aboriginal marriage for the purposes of adoption. Until 1979 traditional Aboriginal marriages were also recognised in Queensland.

- *Commonwealth*. Under the Compensation (Commonwealth Government Employees) Act 1971 (Cth) compensation on the death of a Commonwealth employee is payable to dependants, including spouses. 'spouse' is defined by s 3 to include:

  > in relation to an aboriginal native, or a deceased aboriginal native, of Australia or of an external Territory ... a person who is or was recognized as the husband or wife of that aboriginal native by the custom prevailing in the tribe or group of aboriginal natives of Australia or of such a Territory to which that aboriginal native belongs or belonged.

- *Northern Territory*. The most significant legislation in this field is that of the Northern Territory, where a number of Acts have extended recognition to traditional marriages for various purposes. The Adoption of Children Act (NT), which was amended in 1984 to include traditionally married Aborigines, is illustrative:

  > ... an Aboriginal who has entered into a relationship with another Aboriginal that is recognised as a traditional marriage by the community or group to which either Aboriginal belongs is married to that other Aboriginal and all other relationships shall be determined accordingly.[992]

- *Queensland*. Until 1979 Queensland legislation extended the privilege of non-compellability to female Aborigines or Islanders living with a defendant Aborigine 'as man and wife otherwise than in lawful marriage',[993] deemed the children of such unions to be legitimate and provided that the surviving spouse of such a union would be entitled to all damages or benefits as if the union were a lawful marriage.[994] These provisions were repealed in 1979.[995]

- *Victoria*. The Adoption Act 1984 (Vic) s 11(1)(b) provides that an adoption order may be made in favour of 'a man and woman ... whose relationship is recognised as a traditional marriage by an Aboriginal community or an Aboriginal group to which they belong and has been so recognised for not less than two years'. The Children (Guardianship and Custody) Act 1984 (Vic) s 12(12) defines 'spouse' for the purposes of eligibility for an order of custody or guardianship under the Act to include a 'traditional spouse', defined in a similar way as in the Adoption Act 1984 (Vic) but without the two year qualification.[996]

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990 See the unreported decision of Forster CJ on an adoption application, discussed in para 74.

991 See para 241.

992 For similar recognition provisions see Status of Children Act (NT) s 3, Family Provision Act (NT) s 7(1 A), Administration and Probate Act (NT) s 6(4), (inserted 1979), Workmens Compensation Act (NT) s 17, Motor Accidents (Compensation) Act (NT) s 4, definition of 'spouse', para (e), Compensation (Fatal Injuries) Act (NT) s 4(3), Crimes Compensation Act (NT) s 4(2), Criminal Code (NT) s 1.

993 Aborigines Act 1971 (Qld) s 48. For the predecessor provision see Aborigines and Torres Strait Islanders' Affairs Act 1965 (Qld) s 41 (under which the privilege was extended only to 'assisted' Aborigines, and did not apply to proceedings in Aboriginal or Islander courts: s 41(2)).

994 Aborigines Act 1971 (Qld) s 49. There were no equivalent provisions in the Torres Strait Islanders Act 1971 (Qld). See para 313-6.

995 Aborigines and Islanders Acts Amendment Act 1979 (Qld) s 13.

996 See para 361.

There is as yet no other Australian legislation in force of this kind.[997]

240. ***Recognition of Traditional Marriages in Overseas Countries***. In overseas countries there has been quite extensive experience with the recognition of customary marriage, including, for example, Indian marriages in the United States.[998] In Singapore the Women's Charter 1961 withdrew earlier recognition of Chinese customary marriage (which was in a sense polygynous), imposing monogamy and judicial divorce and providing for women's property rights arising out of marriage.[999] In Singapore (before 1961) and elsewhere, external judicial and legislative attempts at recognition have often produced an artificial construct with limited resemblance to the original.[1000] There is no Canadian legislation specifically on Indian customary marriage, though it has been argued that the form of some provincial marriage legislation would al low the courts to recognise actually monogamous customary unions as common law marriages.[1001] In the analogous area of adoption, customary adoptions have been recognised as such in Canada,[1002] but it is doubtful whether the same view would be taken of customary marriages.[1003] In Papua New Guinea the written law recognises both customary and non-customary marriages, but most marriages are customary marriages. The Marriage Act 1963 s 55(2) and the Local Courts Act 1963 s 17 require courts to recognise customary marriage and customary divorce, and the Customs Recognition Act requires customs to be taken into account in matters relating to marriage and divorce, custody, guardianship and adoption. The Constitution of Papua New Guinea also requires custom to be taken into account as part of the underlying law.[1004] The courts when called upon to deal with disputes relating to customary marriages have been somewhat uneven in their application of custom, at times ignoring it or, while apparently taking custom into account, effectively applying Western standards.[1005]

## Alternative Forms of Recognition of Aboriginal Traditional Marriages

241. ***Four Different Approaches***. There are, broadly, four ways in which Australian law could recognise traditional marriages[1006]

- recognition as de facto relationships;
- enforcement of customary marriage rules;
- categorical recognition as 'marriage'; or
- functional recognition.

These, which might be cumulative or alternative, will be dealt with in turn.

## Recognition of Traditional Marriages as De Facto Relationships

242. ***The Present Law***. For some purposes, the present law extends the benefits or protections of marital status to persons living in de facto relationships (ie as 'husband and wife' 'although not legally married').[1007]

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997 An earlier example of legislation dealing with Aboriginal marriages was s 42 of the Aborigines Act 1905 (WA), which gave power to prohibit marriages 'in contravention of tribal custom' (another ground was 'gross disparity in the ages of the parties'). s 42 was repealed in 1954.

998 See GW Bartholemew, 'Recognition of Polygamous Marriages in America' (1964) 13 *ICLQ* 1022, 1033-68.

999 See M Freedman 'Chinese Family Law in Singapore: The Rout of Custom', in Anderson (1968) 49.

1000 id, 55; cf JC Bekker, 'Grounds of divorce in African customary marriages in Natal' (1976) 9 *CILSA* 346. See also L Carroll, 'Muslim Law in South Asia: The Right to Avoid an Arranged Marriage Contract During Minority' (1981) 23 *Journal of the Indian Law Institute* 149.

1001 D Sanders, *Family Law and Native People*, Canadian LRC, Background Paper, 1975, 19-45, 133-4. In *R v Nan-e-quis-a-ka* (1889) 1 Terr LR 211 the Court held that the first, but not the second, wife of an Indian, married according to Indian custom, was married to him so as not to be compellable (nor, under the law at the time, competent) to give evidence against him. The judgment could be explained either as recognition of common law or customary marriage, but if the latter it is a rather eclectic form of recognition, accepting the custom of marriage, rejecting that of polygamy.

1002 *Re Deborah; Kitchooalik and Enooyak v Tucktoo* [1972] 3 WWR 194; [1972] 5 WWR 203 (North-West Territories Court of Appeal). See also para 384.

1003 Sanders (1975) 133-4.

1004 See para 406-7.

1005 H McRae, 'Reform of Family Law in Papua New Guinea' in D Weisbrot, A Paliwala and A Sawyer (ed) *Law and Social Change in Papua New Guinea*, Butterworths, Sydney, 1982, 127, 132; O Jessep, 'Customary Family Law, The Courts and the Constitution in Papua New Guinea' (1984) 3 *Lawasia (NS)* 1.

1006 For different meanings of 'recognition' generally see para 199-206.

To the extent that traditionally married Aborigines satisfy the varying statutory criteria for a de facto relationship, their marriage might be said to be indirectly recognised by the law — recognised in the sense that similar legal consequences will attach to the relationship as attach to marriages.

243. ***Advantages of this Form of Recognition***. There may be advantages in this form of 'recognition'. No specific legislation would be required (as distinct from a general review of legislation to ensure that de facto relationships are adequately and consistently dealt with.[1008]) Distinguishing traditional marriages, recognised by the relevant Aboriginal community, from temporary or de facto relationships, not so recognised, can be difficult, at least in marginal cases. The difficulty has been increased by changes in Aboriginal ways of life, but it was always present, since marriages could come to be accepted not by a single act or at a single moment but gradually. The process might be characterised by exchanges of gifts before and after cohabitation commenced but in some cases full acceptance was suspended until a child was born to the union.[1009] The problems of definition are not insurmountable, but they are real.

244. ***Disadvantages of Recognition as De Facto Relationships***. But there would be significant disadvantages in this form of 'recognition'. As the New South Wales Law Reform Commission has emphasised, the State and Territory legislation dealing with de facto relationships is uneven in coverage, and arbitrary in its selection of relationships to which it applies.[1010] Qualification periods range from one year to five, in different States and for different purposes. In some of the areas of greatest concern for present purposes (eg child custody and adoption) coverage by State and Territory law is the least satisfactory. This uneven, partial treatment is likely to continue. It cannot be assumed that all States will extend the benefits and protections of marriages to de facto relationships in the reasonably near future or at all. Apart from practical difficulties, differing views are held as to the desirability of such a development.[1011] The New South Wales Law Reform Commission recommended against equating de facto relationships to marriages. Instead it proposed that the law be changed to remedy injustices in certain areas.[1012] These issues are not directly ones for this Commission, but they are relevant in assessing the suitability of one method of dealing with traditional marriage. For the foreseeable future, State legislation on de facto relationships will provide no generally applicable remedy. Even if this difficulty could be overcome, however, it would not follow that legislation on de facto relationships would be suitable or adapted to dealing with traditional marriages. Existing legislation in this field is designed to deal with informal relationships between members of the general community. For example, the South Australian legislation makes provision for sharing benefits (eg workers' compensation) between competing Marriage Act and de facto spouses, or for resolving similar problems of competition.[1013] It is an unresolved question whether these provisions (with their reference to 'cohabiting ... as ... husband and wife') apply to competition between plural de facto wives, ie to situations of de facto polygyny.[1014] It cannot be assumed that State legislation framed with distinct situations in mind would be suitable to traditional marriages.

245. ***The Need for Special Recognition***. There is more fundamental objection. To treat a traditional marriage as a de facto relationship is to deny recognition of what it purports to be. It is true that Aborigines enter into de facto relationships. But some Aborigines enter into traditional marriages, recognised by themselves and others as distinctive, socially-sanctioned arrangements. If possible, these should be specifically recognised, thus maintaining rather than eroding a distinction Aborigines themselves are concerned to maintain.

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1007 It is unnecessary to describe in detail the varying State and Commonwealth legislation in this field. See NSWLRC 36, *Report on De Facto Relationships*, Government Printer, Sydney, 1983. See also RJ Bailey, 'Legal Recognition of De Facto Relationships' (1978) 52 *ALJ* 174; E Evatt, R Watson & D McKenzie, 'The Legal and Social Aspects of Cohabitation and the Reconstituted Family as a Social Problem', in JM Eekelaar & SN Katz (ed) *Marriage and Cohabitation in Contemporary Societies*, Butterworths, Toronto, 1980, 398.

1008 This is, of course, a matter outside the Commission's Terms of Reference. For existing federal legislation extending benefits, etc to de facto spouses see NSWLRC 36, 81-4.

1009 RM Berndt & CH Berndt, *The World of the First Australians*, 4th rev edn, Rigby, Adelaide, 1985, 200, 207. See para 228-9.

1010 NSWLRC 36, ch 4. cf *Lesiw v Commissioner of Succession Duties* (1979) 20 SASR 481.

1011 cf R Deech, 'The Case against Legal Recognition of Cohabitation', in Eekelaar and Katz, 300; SM Cretney, 'The Law relating to 'Unmarried Partners from the Perspective of a Law Reform Agency', id, 357. The Royal Commission on Human Relationships made the crucial point: 'If parties refrain from marrying because they do not want to incur the legal and financial obligations of marriage then the law should be slow to impose those obligations on them': Report, vol 4, 73. The objection has less force in the context of traditional marriage (at least so far as concerns recognition of marriage for purposes consistent with the relevant marriage traditions), the parties to which do intend to be married according to those traditions.

1012 NSWLRC 36, 97-117.

1013 Administration and Probate Act 1919 (SA) s 72h. The problem exists also under the Family Law Act 1975 (Cth): cf *In the Marriage of Lutzke* (1979) FLC 690-714; In the *Marriage of Ostrofski* (1979) FLC 690-714.

1014 The point was left open by Jacobs J in *In re Fagan* (1980) 23 SASR 454, 465, although the tenor of his judgment is that there could be two de facto putative wives: see id, 464.

Recognition of traditional marriage should be approached through an examination of the specific legal and social problems involved, rather than through the use of general, and residual, categories. Only if there is no sufficient case for the recognition of traditional marriages as such should the problems be left to be resolved by the general law on de facto relationships.

## Enforcement of Traditional Marriage Rules

246. ***Enforcement by the General Law of Aboriginal Customary Marriage Rules***. One form of legal recognition of traditional marriages could involve the enforcement under the general law of the norms and practices accepted by the Aboriginal community in question as their marriage rules. This approach might seem to avoid the difficulty of 'translating' traditional marriages into the terms of the general law. It would also demonstrate a direct form of support for, or underwriting of, Aboriginal marriages and domestic institutions. There are however serious difficulties with any such proposal. Direct underwriting of Aboriginal marriage rules would change the location of authority over domestic relations from the Aboriginal community or group to courts or other agencies. At present, within certain limits, the general law allows Aboriginal communities to maintain distinctive forms of marriage and sharing based on kin structures without overt interference. Direct recognition of this kind would involve much more intervention by outside authorities in Aboriginal domestic affairs. Moreover, both traditionally and in modem times, Aboriginal marriage rules were not enforceable in any of the limited ways which would be available under the general law. The point is made by LR Hiatt with respect to the Gidjingali:

> No formal judicial agency existed to enforce such [marriage] rules ... but public opinion operated as a controlling factor ... and helped to secure a high degree of conformity.[1015]

A closely related point is that these rules were flexible and subject to negotiation. There was usually provision for relaxing the rules, or compromising disputes, to meet particular situations. Direct enforcement would lead to a crucial loss of flexibility, quite apart from the problem of changing Aboriginal rules and practices. The Commission has been repeatedly warned of the dangers of underwriting or codifying, and thereby 'freezing', rules whose survival or adaptation is properly a matter for Aboriginal communities themselves.[1016]

247. ***Aboriginal Requests***. A number of submissions called for an increased degree of Aboriginal authority over marriage. For example the Tribal Elders of Roper River, in Resolutions forwarded to the Commission, stated:

> MARRIAGE
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> If a person steals someone who is promised to another person in marriage, or if a person goes with a person of a different skin group, they should also be punished in our traditional way by the elders, and if necessary by physical punishment. We would also like traditional marriages to be recognised under European law and for wives and husbands to have the rights and obligations which come from this recognition of traditional marriages. If at any time this recognition of traditional marriages, under European law, creates conflict to our traditional culture, then these conflicts must be resolved by a meeting of our elders.[1017]

Similarly, some Aborigines living in traditional communities suggested that the Commission should support the system of promised marriages.[1018] They regard it as wrong for a person to have access to the police and the general law in order to avoid a marriage, because this undermines Aboriginal law. Other views expressed to the Commission show a degree of acceptance of young people being able to choose their own marriage partners. In some communities this has been specifically allowed provided it is a 'right skin' marriage.[1019]

248. ***Conflicts over Marriages***. Enforcement by the general law of traditional marriage rules could involve the enforcement of promises to marry. This is a matter of particular concern to many Aborigines. The

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1015 LR Hiatt, *Kinship and Conflict*, ANU Press, Canberra, 1965, 83.

1016 See para 200-202 for general discussion of these problems. See further para 461-5, 512-15.

1017 J Roberts, *Transcript* Darwin (3 April 1981) 884-90, 901-15, 961-76 986-90. See also L Roughsey and others, *Transcript* Mornington Island (24 April 1981) 1720-87; M Luther, *Transcript* Alice Springs (13 April, 1982) 1281-1300; J Whitbourn (on behalf of Warrabri Community), *Submission 269* (5 May 1981); T Edgar, *Transcript* Broome (2,1 March 1981) 464; H Wilson (on behalf of Peppimenarti Community), *Submission 250* (6 April 1981).

1018 H Boxer, *Transcript* Fitzroy Crossing (30 March 1981) 703.

1019 See para 228-9.

conflicts aroused by promised marriages are demonstrated by a number of well publicised incidents in recent years.[1020] These raise complex and difficult questions, including:

- the girl's age and the question of her consent to the marriage;
- the opportunity to opt out of the marriage;
- the enforceability of any promises made by the parents;
- the nature and extent of any traditional sanctions imposed;
- the transformation of relationships between Aboriginal men and women:
- the consequences for a girl who seeks outside assistance.[1021]

249. ***Basic Standards***. The present law, which makes coercion to marry unlawful and promises to marry unenforceable, is an articulation of a standard based on the need for freedom of choice of intending partners, whether to marriage or to other marriage-like relationships. The law does not sanction contracts or arrangements for the marriage or cohabitation of persons made by third parties (including kin or family members). In this respect, parents and others may have informal influence only in the formation of marriage or similar relationships. The ideal of freedom of choice is carried even further: the parties themselves are free not to marry despite an earlier promise to do so.[1022] Their freedom not to marry, or to choose another marriage partner, is in this sense inalienable, a basic human right.[1023]

250. ***Aboriginal Perspectives***. In Aboriginal tradition the stability of relationships has tended to be seen as a consequence of social solidarity rather than individual choice. The emphasis is on marriage as an aspect of more general social relations between families. There is no necessary conflict between this view of marriage (which has been adopted, to varying degrees, by many cultures at different times) and the law. The freedom the law allows includes freedom to adopt marriage arrangements of different kinds, provided the parties are of the age of consent and do consent. Questions of enforcement arise only when these conditions are not met: in practice, the issue is one of enforcement against a reluctant or unwilling marriage partner. The issue is therefore not simply one of the imposition of an alien standard on Aboriginal communities; it is whether the general law should continue to underwrite the freedom of individual Aborigines to choose their marriage partners, despite traditional arrangements and practices to the contrary, or whether it should allow the enforcement by Aboriginal communities of those arrangements and practices (or should enforce them itself) against Aboriginal men or women who do not, at the time, accept them.

251. ***The Commission's Approach***. In practice Aboriginal communities may not be able to resolve problems relating to promised marriage without outside involvement.[1024] Communities are not isolated or self-contained; there is regular contact with other Aboriginal communities and nearby town s. If a girl decides to leave her community rather than enter into a promised marriage and refuses to return, members of the community who resort to physical coercion will commit criminal offences, of greater or lesser seriousness. Such an incident is no longer internal to the Aboriginal community. In any event the law cannot countenance physical coercion on any person to enter into, or remain in, a marriage or similar relationship. The resolution of disputes over promised marriage should not occur through the use of physical force. More generally, for

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1020 These included cases involving a 19 year old Gurindji girl from Wattie Creek (NT): the Age, 18 February 1982, *NT News*, 8 February 19 2, *Sydney Morning Herald*, 9 February 1982, *The Australian*, 9 February 1982, *Darwin Sun*, 10 February 1982, *NT Parliamentary Record*, 11 March 1982, 9-42; a 15 year old Warlpiri girl from Yuendumu (NT): *The Australian*, 28 January 1982, *Sydney Morning Herald*, 21 January 1982 & 8 February 1982; and a 13 year old girl from La Grange (WA): *West Australian*, 13 February 1982.

1021 Promises to marry are mutual: it is not only the girl who may seek to avoid or renegotiate a promise. But in practice it is likely to be easier for the man involved (who may be considerably older) to do so.

1022 On the unenforceability of contracts to marry by minors, see *Coxhead v Mullis* (1878) 3 CPD 439; *Ditcham v Worrell* (1880) 5 CPD 410; *Watson v Campbell* (No 2 ) [1920] VLR 347. But such contracts are now generally unenforceable: Marriage Act 1961 (Cth) s IIIA. cf also Marriage Act 1961 (Cth) s 23(1)(d)(i) which declares marriages void where there is no real consent (eg duress).

1023 See para 180, 182, 192-3. This is nonetheless so in that, as Ms P Ditton pointed out, 'arranged marriage is still the norm in many societies around the world', including some groups with substantial populations in Australia: *Submission 465* (1 January 1985) 2.

1024 H Boxer, *Transcript* Fitzroy Crossing (31 March 1981) 703-6; G Gleave, *Transcript* Willowra (21 April 1981) 1579.

the reasons already given, the Commission does not believe that the law should be used as a means of enforcing Aboriginal marriage rules, including promises to marry.[1025]

252. ***Problems of Policing***. The general law presently gives no status to promises to marry and provides no legal excuse for persons who use force to ensure that promised marriages take place. If someone is assaulted or otherwise physically threatened, legal protections are available . It has been argued that while this is true in theory, in practice Aboriginal girls and women have great difficulty getting such assistance.[1026] This results both from their isolation and lack of access to communications but also, it is said, from a police policy of non-intervention in Aboriginal domestic disputes.[1027] In such cases the police may be in a very difficult position. It is well known that the police are reluctant to intervene in domestic disputes, whether the persons involved are Aboriginal or non-Aboriginal.[1028] There can be a fine line between invasions of privacy resulting from unnecessary intervention, on the one hand, and the proper protection of persons on the other. Domestic disputes often lead to emotions becoming aroused or confused, alcohol may be involved, and persons may react irrationally. The police in attempting to deal with such difficult situations may inflame the problem rather than resolving it.[1029] But people are entitled to protection against violence, including domestic violence.

253. ***Support for Aboriginal Communities***. In this context it is important that support be given to Aboriginal communities in resolving disputes over domestic relations. The National Aboriginal Conference's submission to the Joint Select Committee on the Family Law Act included a proposal that a committee be established to hear divorce disputes, and to provide counselling.[1030] Similar suggestions have been made to the Commission. It is difficult however to see how a body with jurisdiction extending beyond particular communities or regions could be made to work. This matter will be dealt with in the general context of local justice mechanisms in Part VI of this Report.[1031]

## Recognition of Traditional Marriage

254. ***Which Approach?*** So far this Chapter has considered and rejected two different approaches to the recognition of traditional marriages: equating them to de facto relationships, and enforcing Aboriginal customary marriage rules under the general law. It is necessary to consider two further approaches. The first is the general or categorical recognition of traditional marriage as 'marriage' for all purposes of Australian law. This would equate traditional marriages with marriages solemnised in accordance with the Marriage Act 1961 (Cth). The second approach involves equating traditional marriages with 'marriage' under the general law for particular purposes only.

255. ***Categorical Recognition***. This form of general recognition has a number of advantages, in particular simplicity of drafting, and coverage of the many legal areas in which' marital status has an impact. It would also be a direct recognition by the general legal system of the validity of an important aspect of Aboriginal customs and traditions. The strength of these arguments must, however, be weighed against the disadvantages which may flow from categorical recognition. It cannot be assumed that the legal consequences of marriage under the general law can be applied to traditional marriages without distortion. For example, as soon as traditional marriage is regarded as 'lawful' marriage, the parties become subject to the prohibitions on polygamy in s 23(1)(a) and 94(1) and (4) of the Marriage Act 1961 (Cth), which do not presently apply.[1032] Recognition of traditional marriage for all purposes would thus entail the prohibition, with a criminal sanction, of an established, presently lawful, practice. That is certainly not 'recognition' of

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1025 See para 246, and cf para 447-50 for the rejection of a general customary law defence in criminal cases.

1026 In some communities domestic violence may be regarded as something to be dealt with by the parties concerned and not a matter for the police: Transcript of Women's Meeting Aurukun (28 April 1981) 70-1.

1027 Ms Dawn Lawrie, Independent Member of the NT Legislative Assembly, received widespread publicity when she raised these issues for debate in the NT Legislative Assembly: NT Parliamentary Record, 11 March 1982, 9-17.

1028 On problems of domestic violence see ALRC ACTLR4, *Domestic Violence in the ACT*, AGPS, Canberra, 1984; ALRC 30, *Domestic Violence*, AGPS, Canberra, 1986; JA Scutt, *Even in the Best of Homes: Violence in the Family*, Penguin, Melbourne, 1983; C O'Donnell and J Craney (ed) *Family Violence in Australia*, Longman Cheshire, Melbourne, 1982. See also the Crimes (Domestic Violence) Amendment Act 1983 (NSW).

1029 See para 844-77 for further discussion of policing issues.

1030 NCA Submission to Joint Select Committee on the Family Law Act, *Submissions*, vol 1, 740.

1031 See para 833-4. See also para 321.

1032 Sub-s 94(1) and (4) prohibit persons from going through a 'form or ceremony of marriage' being already married or to a person who is already married, and s 23(1)(a) invalidates plural marriages where a party is already 'lawfully married to some other person'. These provisions do not apply to traditional Aboriginal marriages, or to de facto relationships.

traditional marriage. Similar questions would arise in respect of marriageable age, divorce, maintenance and property distribution and the registration of marriages. It may of course be possible to qualify general recognition by excluding those aspects of Marriage Act marriage which are inconsistent with established Aboriginal traditional marriage rules and practices, or by refusing to recognise traditional marriages in a range of cases where conflicts with the general law may occur. But this would then not be categorical or general recognition.

256. ***Functional Recognition***. The alternative approach is a functional one: it requires a more detailed examination of areas in which marital status is relevant, to determine whether the recognition of traditional marriage is appropriate in each area.[1033] Advantages of this approach are that an assessment can be made of whether traditional marriages should be equated with Marriage Act marriage for particular purposes, and that it helps to minimise, if not avoid, the danger of foisting upon the parties to traditional marriages consequences that have no traditional equivalent and which may be disruptive or counterproductive. Responses to the Commission's Discussion Paper 18, which tentatively recommended functional recognition of traditional marriages,[1034] varied, but there was, on the whole, broad support for this approach.[1035] Responses included:

- *Family Law Council*. The Council supported the proposals of the Commission for functional recognition of traditional marriages, including the recognition of plural marriages for specific purposes.[1036]

- *Department of Aboriginal Affairs (Commonwealth)*. The Department supported the Commission's tentative proposals, commenting that functional recognition would not require the enactment or codification of marriage rules, thus leaving communities freedom to modify their rules to cope with new situations.[1037]

- *Dr Diane Bell* expressed the view that functional recognition avoided the relatively crass forms of social engineering sometimes implied in discussions of marriage and domestic relations, while giving appropriate recognition and support to Aboriginal institutions.[1038]

257. ***The Commission's Conclusion***. The Commission concludes that the functional approach is the best and least intrusive way of recognising Aboriginal traditional marriages. It does not require the codification or enactment of traditional marriage rules, and it thus provides freedom to develop rules to cope with new situations. It is an extension of an existing legislative approach,[1039] as well as a fulfilment of Commonwealth responsibility for Aboriginal people. It is a recognition, even if indirect, of important aspects of the Aboriginal social fabric and of customary laws, and it makes provision for Aboriginal spouses which ought to be made. This approach does not involve the enforcement of any aspects of traditional marriages which are contrary to basic individual rights.[1040] Before examining the various areas for recognition, however, certain difficulties with the recognition of traditional marriage must be faced. These would be relevant whichever approach to recognition is adopted, but they are largely overcome by the functional approach.

## Difficulties of Recognition

258. ***Polygynous Aboriginal Marriages***. To the extent that traditional marriage is polygynous (as it is in a minority of cases), recognition might be seen by some as an affront to the established view of marriage in Australian society. One solution would be to recognise only monogamous marriages (and perhaps, where a

1033 See further para 204-8 for general arguments in favour of the functional approach to recognition.
1034 ALRC DP 18, para 13.
1035 A number of submissions expressed initial concern with the Commission's approach. However, after discussions it appeared that these concerns related to specific problems, and did not involve the rejection of this form of recognition: eg Federation of Aboriginal Women, *Submission 368*, (10 January 1983); Human Rights Commission (PH Bailey) *Submission 346*, (September 1982); Law Society of NSW, *Submission 358*, (16 November 1982).
1036 Family Law Council (Justice Fogarty) *Submission 393* (28 November 1983) 2.
1037 Department of Aboriginal Affairs (JC Taylor) *Submission 370* (2 February 1983) 3.
1038 D Bell, *Submission 338* (July 1982). See also Commissioner for Community Relations (Hon AJ Grassby) *Submission 344* (21 September 1982) 2: D Collins MLA (NT), *Submission 351* (1 October 1982) 1.
1039 See para 239.
1040 See para 192-3, and cf para 2 8-263.

marriage is polygynous, only the first wife as a spouse).[1041] But such selectivity, in the context of functional recognition of marriage, is both arbitrary and self-defeating. The Commission's approach is to recognise the consequences of marriage for particular purposes. To the extent that these consequences involve drawing upon the husband's property or rights, it is arbitrary and unfair to exclude a second wife. To the extent that they involve extra claims upon the State or third parties (eg social security benefits) the position may be different, but there is no reason to exclude benefits to second or later wives altogether.[1042] Certain other contexts involve no conflicting or competing claims. For example, the extension of a right of non-compellability in the law of evidence to a second wife does not compete with its application to the first wife. Here the only question is whether respect for an established Aboriginal social practice, which is in relevant respects like marriage un der the general law, supports the extension of the privilege to more than one wife. In principle, there is no reason why it should not do so.

259. ***Polygamy and Australian Family Law***. This conclusion is supported by other social and legal developments in Australia. The Family Court has jurisdiction with respect to void Australian marriages, including marriages void as polygamous under s 23(1)(a).[1043] Problems of competition between wives already occur, under the Family Law Act between former and subsequent or de facto wives, and under State legislation on de facto relationships between legal and de facto wives and, arguably, between several de facto wives.[1044] There is no prohibition in Australian law on a man cohabiting with more than one woman (and vice versa): the courts may well be called on to deal with resulting conflicts over assets or the custody of any children of the relationships.

260. ***Recognition of Polygyny***. The Commission concludes that the continuation of polygyny is a matter for Aborigines themselves to decide. Functional recognition of traditional marriage should entail recognition of polygyny where it exists. Problems of competition between wives, or bet ween wives and husbands, should be considered in context as they arise (as is already the case under existing legislation on de facto relationships).

261. ***The Question of Marriageable Age***. A more difficult issue is the recognition of marriages of spouses (invariably, girls) below 'marriageable age' in Australian law.[1045] Marriages of girls below the legally permitted age still occur in some Aboriginal communities, although the age at which girls marry seems to be increasing. Recognition of a marriage where a girl is below the age of 14 or 16 might be thought to violate the principle behind the legal restriction — that young people should in their own interests be prevented from marrying below a certain age.[1046] Three approaches might be taken. The first, which is that taken in the Workmen's Compensation Act (NT), is to recognise as marriages only those marriages where the spouses are above marriageable age. Spouses below that age would not qualify for the relevant protection or benefit (unless under some other category such as 'dependant'). A second possibility is simply to recognise the marriage as it exists, irrespective of the age of the parties, in conformity with the relevant customary rules and practices. This approach is taken in most of the other existing legislation in this field. Thirdly, it would be possible not to recognise traditional marriages where a partner was below marriageable age, but in recognising marriages where marriageable age had been reached to take into account the previous relationship of the parties. This is the approach adopted. in the case of 'foreign' marriages, by the Marriage Amendment Act 1985 (Cth).[1047] If the first approach is thought to be correct, this is a desirable refinement.

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1041 As in some of the Canadian cases: cf *R v Nan-e-quis-a-ka* (1889) Terr LR 211; *R v Bear's Skin Bone* (1899) 4 Terr LR 173 (second marriage polygamous under Criminal Code). The latter decision need not have relied on the validity of the first marriage, as the Code provision prohibited de facto polygamy of all kinds.

1042 These situations are discussed in more detail in Ch 14.

1043 Family Law Act 1975 (Cth) s 6, 60, 71. See JH Wade, 'Void and De Facto Marriages' (1981) 9 *Sydney L Rev* 356. The Family Court's jurisdiction is independent of questions of the validity of foreign polygamous marriages, a matter now governed by Marriage Act 1961 (Cth) Part VA (inserted 1985), which, however, preserves the common law (except on one point): s 88E(1).

1044 As Jacobs J pointed out in In re Fagan (1980) 23 SASR 454, 464 the Family Relationships Act 1975 (SA) 'clearly contemplates the co-existence of a putative spouse and a lawful spouse'. There was no reason, therefore, to consider the word 'wife' as requiring a monogamous relationship. In some contexts justice will positively require that the singular 'wife' include the plural: cf *Din v National Assistance Board* [1967] 2 QB 213; *Coleman v Shang* [1961] AC 481. cf *Seidler v Schallhofer* [1982] 2 NSWLR 80.

1045 Under the Marriage Act 1961 (Cth) s 11 a girl may marry at 16 with the consent of her parents. In exceptional circumstances, judicial permission to marry at 14 may be obtained: s 12. The ages for boys are 18 and 16 respectively. A marriage entered into below the relevant age is void: Marriage Act 1961 (Cth) s 23(1)(e); Family Law Act 1975 (Cth) s 51(2)(e). For the purposes of custody of children and maintenance and property distribution under the Family Law Act 1975 (Cth) s 60, 70 a marriage includes a void marriage.

1046 There is also concern in many Aboriginal communities at underage marriages by young girls: see eg ACL Field Report 7, 14, 18, 24.

1047 The Marriage Act 1961 (Cth) (as amended in 1985) provides (s 88C (3)):
Where neither of the parties to a marriage to which this Part applies was, at the time of the marriage, domiciled in Australia, the marriage shall not be recognized as valid in accordance with sub-section (1) at any time when the female party is under the age of 14 years or the male party is under the age of 16 years.

However in the context of functional recognition a majority of the Commission believes that the second approach is preferable. In each context, what is recognised is the actual, existing relationship between the parties. To deny to the parties protection or benefits based on a different view of preparedness for marriage is a distortion rather than a recognition of Aboriginal customary laws, and it does nothing to advance the values being asserted. In the Commission's view there is no inconsistency between this conclusion and the provisions of Art 23 and 24 of the Civil and Political Rights Covenant dealing with marriageable age. Although some traditional marriages are entered into below 'marriageable age' in Australian law (presently 14 in the case of girls) the effect of the Commission's proposals would not be to confer a legal status of marriage, but to confer benefits and protections on traditional spouses, irrespective of age, to the same extent as persons married under the Marriage Act.[1048] However, one member of the Commission (Professor JR Crawford) believes that the third approach should be taken, as it is in s 88D(3) of the Marriage Act 1961 (Cth). This would avoid attaching direct legal effects to underage marriages and seek to prevent marriages at too young an age, an approach supported by some members of Aboriginal communities.

262. ***Consent to Marriage***. A different question is whether recognition should be extended to a traditional marriage in the exceptional case where the relationship is regarded as a traditional marriage by the relevant Aboriginal community, but one party may be resisting the marriage.[1049] The consent of the parties to a traditional marriage may be regarded as necessary to its survival, but not essential to its classification as a marriage.[1050] It can be argued that the functional approach to recognition avoids the difficulty, since no status of marriage is created or imposed, but protections equivalent to those attaching to Marriage Act marriage are conferred. These protections are essentially non-coercive in character.[1051] However the principle that a relationship should not be recognised or sanctioned as a marriage by the law if one party has not consented to the relationship is a basic one, strongly reinforced in international human rights instruments.[1052] Accordingly a relationship should not be recognised for legal purposes as a traditional marriage under the proposed legislation if one of the parties has never (ie at the time when the issue of recognition arises or at an,,' previous time) consented to the relationship.[1053] This limitation will rarely need to be applied, but it is important to affirm the principle of consent to domestic relationships as a basic principle of the law.

263. ***Sexual discrimination***. Underlying the problems discussed above is the argument that recognition, even indirect. of traditional marriage might appear to involve an endorsement of practices which are sexually discriminatory. It is true that such marriages may involve plural wives . but not plural husbands,[1054] and that girls often marry at or around the age of puberty, while boys rarely do. Aborigines would probably perceive these as differences rather than inequalities or discrimination. Recent anthropological writing emphasises the traditional balances in Aboriginal practices between the sexes: in food-gathering, in ritual and in other respects.[1055] In any event the relevance of this argument to proposals for functional recognition is far from clear. The benefits and protections of functional recognition are as likely (in practice, more likely) to apply to Aboriginal wives as husbands. Refusing to accord those benefits and protections is not justified. Recognising traditional marriages for specific purposes does not involve establishing a status of marriage from which the

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s 88D (2) provides a stricter rule in line with the policy underlying the Marriage Act 1961 (Cth) for marriages solemnised abroad where one party was domiciled in Australia at that time: such a marriage 'shall not be recognized in Australia as valid if, at the time of the marriage, either party to the marriage was not of marriageable age within the meaning of Part II'. Recognition under s 88C(3) is recognition of a status, not functional recognition (for particular purposes) as proposed for traditional marriage. Indeed that distinction is drawn in the Marriage Act 1961 itself. s 88E(4) (inserted in (985) provides that:

This Part shall not be taken to limit or exclude the operation of a provision of any other law of the Commonwealth, or of a law of a State or Territory, that deems a union in the nature of a marriage to be a marriage for the purposes of the law in which the provision is included.

1048 Art 16(2) of the UN Convention on the Prevention of all Forms of Discrimination against Women of 1980 (see para 182) requires that 'the marriage of a child shall have no legal effect'. But it is not clear that Art 16(2) is concerned with 'legal effects' attributed to relationships by way of functional protection (as with existing laws on de facto relationships and traditional marriage, none of which contain any provision relating to marriageable age) or whether it is concerned only with marriage as a status. Since the broader interpretation would actually involve withdrawing protection from underage partners, the narrower view should be preferred. This view is impliedly accepted by the Marriage Act 1961 (Cth) s 88E(2) and (4) (as inserted in 1985), which provides that the non-recognition of certain marriages entered into by persons below marriageable age does not exclude the operation of Australian laws treating a union as a marriage for particular purposes. Seen 80.

1049 eg in the context of promised marriage see para 848-51.

1050 See para 227, 229-30.

1051 See para 315, 318, 319.

1052 See para 180 (ICCPR Art 23(3)), 182 (Women's Discrimination Convention Art 16(1)(b)). See also Australian Bill of Rights. Bill 1985 Art 13(b). No specific requirement of consent to the relationship is stipulated in existing provisions recognising traditional marriage: para 239.

1053 Thus a distinction is drawn between consent to the relationship (a matter exclusively for the parties) and its classification as a traditional marriage in accordance with the customary laws of the relevant community, a matter as to which the views of the parties will be relevant but not necessarily conclusive.

1054 Dr D Bell suggests that in rate instances plural husbands did exist among some Aboriginal groups: *Submission 338* (July 1982).

1055 See para 37, 117.

parties can not withdraw, or enforcing Aboriginal marriage rules against unwilling spouses,[1056] or withdrawing legal protection from Aboriginal spouses in other ways.[1057] Nothing in the Commission's proposals for recognition of traditional marriage involves any discrimination against Aboriginal women, within the meaning of the Sex Discrimination Act 1984 (Cth), or the Convention on the Elimination of all Forms of Discrimination against Women of 1980, on which it is in part based.[1058]

264. ***Mixed Marriage***. One problem which might occur, at least in theory, is that of marriage between two persons one of whom was not an Aborigine according to the broad definition already discussed,[1059] but which one or both of the parties claim as a 'traditional marriage'. Since traditional marriages are to be distinguished from de facto relationships, the only situation in which such a claim could be made would be where the non-Aboriginal spouse had in effect been incorporated within the relevant Aboriginal community (eg by initiation, the allocation of a sub-section classification, or long residence in the group), and the relationship in question had other characteristics of a traditional marriage within that group. Although this situation will arise only very rarely, there is no good reason to exclude it from recognition, in particular since to do so would be to exclude the Aboriginal partner (in practice, often the wife) from the protections of the proposed law.[1060]

## Traditional Marriage: Definition and Proof

265. ***Problems of Definition***. The difficulty of defining traditional marriage was raised in a number of submissions to the Commission.[1061] If what is meant is an exhaustive definition setting out in terms Aboriginal marriage rules, this is true. But to codify Aboriginal customary law in this way would be most undesirable, even if it were possible, and the existing Australian legislation on traditional marriage makes no such attempt.[1062] For example s 3(b) of the Status of Children Act (NT) defines marriage to include 'a relationship bet ween an Aboriginal man and woman that is recognised as a traditional marriage by the community or group to which they belong'. Whether a marriage exists in any particular case under this Act will depend, in case of dispute, on whether it can be shown that by the rules and practices of the relevant group the marriage is recognised as valid. Evidence may have to be adduced in various ways to show this. In practice — if the Northern Territory experience so far is any guide — disputes are likely to be rare.[1063] The following points should also be noted about definitions of marriage such as that in s 3(b) of the Status of Children Act (NT).

- *Polygyny*. The definition is not restricted to monogamous marriages. It is sufficient that the relationship is shown to exist in the particular case, irrespective of whether it exists also in another case or cases.

- *Marriageable age*. There is no specific requirement of a minimum age.

- *Divorce*. No direct provision is made for divorce, for example in situations where one party regards the marriage as terminated but the other party (and, perhaps, the group to which he or she belongs) does not. The legislation does not adopt any formal divorce machinery, but relies on the existence of a marriage relationship. Once the relationship has terminated the marriage would be taken to have ceased.

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1056 See para 251 for rejection of recognition by way of enforcement of Aboriginal marriage rules, and para 262 for the requirement of consent.

1057 It is not proposed to recognise traditional marriages as 'marriage' for the purposes of rape is marriage laws: see para 318. A general customary law defence is also rejected: see para 442-50.

1058 See para 182, 193. In two specific respects the Women's Discrimination Convention does present difficulties: these are discussed in para 261, 268.

1059 See para 88-95.

1060 This result can be achieved by the legislation referring to the spouses as 'members of an Aboriginal community' rather than as 'Aborigines'.

1061 MJ Wilson MSC, *Submission 334* (25 May 1982) cautioning against subsuming Aboriginal marriages under the category of 'marriage' in a western legal sense and warning that definition will be more than a matter of finding the right words; Department of Social Security (PJ Marrs), *Submission 342* (26 August 1982); Human Rights Commission (PH Bailey), *Submission 346* (September 1982); Commissioner for Community Relations (Hon AJ Grassby), *Submission 344* (6 September 1982).

1062 See para 239.

1063 In two NT cases the existence of a traditional marriage had to be judicially determined: see para 276 n 21 (decision of Forster CJ in an unreported adoption case), para 625 (*Police v Ralph Campbell*). In the latter case the traditional marriage was in dispute. Murphy SM held after hearing evidence that the marriage was proved. The Northern Territory experience was described by Department of the Chief Minister (EG Quinn), *Submission 329*, (12 May 1982, 17 May 1982); NT Department of Law (JG Flynn), *Submission 324* (16 April 1982). For more detailed discussion of questions of proof see ch 24-26.

- *Residential links*. The definition does not require the parties to reside in an Aboriginal community, but they must at the relevant time 'belong to' such a community or group. Temporary residence away from the group would not necessarily prevent them from 'belonging' in this sense. But if they did cease to 'belong', presumably they would cease to be traditionally married under the definition.[1064]

- *Inter-group marriage*. It can happen that a marriage is recognised by the community or group of one of the spouses but not by the other's. Normally the relevant group would be that 'to which they belong' as a family unit. However it should be sufficient that the marriage is recognized by at least one community to which one or both spouses belong. The marriage would of course have to be shown to be 'a traditional marriage' in other respects.

266. ***The Commission's View***. The problems of definition can be resolved by this form of definition.[1065] It should be sufficient that the spouses, or one of them, belongs to an Aboriginal community and that (subject to the consent requirement recommended in para 262) the relationship between them is recognized as a marriage in accordance with the customary laws of that community. Residual problems of definition may be able to be resolved through two ancillary provisions:

- a presumption of continuance of marriage (para 267);

- an optional registration facility (para 268).

267. ***The Continuance of Traditional Marriage***. It might be thought a difficulty with the proposed definition that the spouses could find themselves 'unmarried' if they ceased to 'belong' to their community, eg by taking up permanent residence in a city. It is undesirable that status should be lost in this way while the marriage relationship continues essentially unaffected, As provided in the Status of Children Act (NT) it should be sufficient for recognition that the relationship was recognised as a marriage by the Aboriginal community to which the spouses belonged when the marriage was entered into, where the relationship has continued even after the spouses ceased to reside in that community.

268. ***An Optional Registration Facility?*** The Royal Commission on Human Relationships in its brief discussion of Aboriginal traditional marriage referred to the problems of proof. and suggested that:

> The problem of recognition might be simplified if there were provision for recording a tribal marriage by a local register on the declaration of both parties. At the least such a record could give rise to a presumption of validity of the marriage. It may be preferable to restrict recognition to cases where the parties apply to record the marriage.[1066]

The Chairman of the Royal Commission has subsequently confirmed in correspondence with this Commission that it was not intended that 'registration should be the exclusive basis of recognition' of traditional marriage.[1067] An obvious difficulty with registration is the logistical one of providing the machinery for registration to widely dispersed, often remote communities. It is likely that few Aborigines would trouble to register their marriage, unless some issue or problem had arisen which suggested that registration was desirable. The probative value of registration under such circumstances would be reduced. With one exception, Australian legislation, whether on traditional marriage specifically or on de facto relationships more generally, provides for no machinery of registration or recording of status. The exception is the provision, in the Family Relationships Act 1975 (SA), for obtaining a declaration that a person is a 'putative spouse'. This rather cumbersome machinery has limited the value which the South Australian reforms relating to de facto relationships would otherwise have had. Unless registration was made dependent upon some inquiry as to the validity or acceptance of the traditional marriage, it could not be conclusive, as distinct from presumptive, evidence of marriage. On any view it would be necessary to inquire into the existence of traditional marriage where no registration had been applied for. It may be doubtful, therefore, whether the probative advantages of registration would out weigh the difficulties involved in introducing it and making it effective. However, it would be a useful expression of Aboriginal community attitudes towards marriage to treat registration in a local registry to be established at the option of the local community as presumptive evidence of the existence of traditional marriage. Views expressed to the Commission tended

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1064 See para 267.
1065 See further Sutton (1985), a paper originally written to assist the NT Insurance Office in handling claims involving traditional marriages.
1066 Royal Commission on Human Relationships, *Final Report* (1977) vol 5, 142-3.
1067 Justice Elizabeth Evatt, *Submission 318* (8 March 1982).

to support this view,[1068] which gains support also from Art 16(2) of the Convention on the Elimination of all forms of Discrimination against Women (1980), which requires 'all necessary action including legislation ... to make the registration of marriages in an official register compulsory.' This provision is not directly applicable, given that the Commission's approach to the recognition of traditional marriage is not to equate such marriages to marriages under the Marriage Act 1961 (Cth) but to attach consequences to them for particular purposes.[1069] Nonetheless Art 16(2) supports the view that a system of optional registration of traditional marriages should be available to assist in establishing the fact of the marriage. Aboriginal communities, acting through their councils or otherwise, should be given assistance to set up and maintain such a register.

269. ***Other Questions of Application***. Two further issues of application should be mentioned:

- *Retrospectivity*. It would not be appropriate for the proposed legislation to apply with fully retrospective effect, that is, to transactions or claims already dealt with or resolved. But it is undesirable not to apply the legislation with prospective effect to existing traditional marriages. The legislation should apply only to claims to recognition arising in respect of transactions, claims or events after it comes into force. This form of qualified retrospectivity meets, as far as possible, the legal and social needs of persons already traditionally married. In addition it is an appropriate indication that traditional marriages, as an aspect of Aboriginal customary laws, are being acknowledged, not enacted.[1070]

- *Co-existence of State and Territory laws*. On the assumption that the proposed legislation were to be enacted by the Commonwealth Parliament,[1071] State or Territory laws recognising traditional marriages for particular purposes and which are capable of coexisting with the Commission's recommendations for recognition should not be excluded.

1068 eg ALRC, *Minutes of Meeting to Discuss Family Law and Related Issues in Aboriginal Customary Law Reference* (AIAS Canberra 10 December 1982) para 6.4; W Clifford, *Submission 356* (12 October 1982); Justice Zelling, *Submission 265* (26 January 1983); Dr J Howard, *Minutes of Regional Consultants Meeting* (Perth, 20 May 1983) 16.

1069 cf para 261-3.

1070 In relation to the legitimacy of children of a traditional marriage (as to which see para 271) the Act should legitimise such children whenever born, but without affecting anything done before the commencement of the Act.

1071 See ch 38 for questions of constitutionality and Federal/State responsibility for the recommendations in this Report.

# 14. Aboriginal Traditional Marriage: Areas for Recognition

## Functional Recognition of Traditional Marriage

270. ***Guiding Principles***. The Commission believes that the recognition of traditional marriages, in accordance with the approach outlined in Chapter 13, is desirable. But that approach does not involve conferring the status of Marriage Act marriage on traditional spouses, as distinct from equating traditional marriage with Marriage Act marriage for a range of purposes. In terms of their consequences, and the way in which they are viewed for various purposes, traditional marriages are sufficiently similar to marriage under the general law to warrant treating them in the same or similar way. It is necessary therefore to consider the particular areas and legal contexts in which the question of recognition of traditional marriages arises. In deciding on the areas for functional recognition, two principles have guided the Commission:

- whether treating traditional marriage as marriage under the general law would conflict with Aboriginal traditions, practices or perceptions;

- whether there is evidence of a need or demand for recognition in the relevant respect.

There may at times be conflicts between these two principles.[1072] Where this is so greater weight should be given to the needs or wishes of the parties, as expressed for example by making the claim in question, on the basis that Aboriginal people are entitled to determine their own priorities and that they should not, unless they are compelling reasons to the contrary, be deprived of access to benefits generally available under the law. In this Chapter a number of specific areas in which questions of recognition arise are considered, together with the question of how other, residual, areas should be dealt with.

## Legitimacy of Children, Adoption and Related Issues

271. ***Status of Children***. A direct and obvious consequence of non-recognition of traditional marriages by the general law is that the children of such marriages are considered 'illegitimate' or 'ex-nuptial'. Until recently the status of illegitimacy carried with it, apart from a certain social stigma, significant legal disabilities especially in areas of custody and property.[1073] This is still the case in the Australian Capital Territory, which as yet has no status of children legislation. In all the States and the Northern Territory , the position of ex-nuptial children (as they are now called) has been markedly improved: for many purposes, in particular so far as property is concerned, there is now no legal difference between nuptial and ex-nuptial children.[1074] However the status of children legislation does not abolish the concept of 'legitimacy' but renders it irrelevant for many purposes. It remains relevant in a number of ways such as for the purposes of consent to adoption,[1075] or the registration of names. There is evidence that this causes resentment.[1076] The recognition of traditional marriage for the purposes of legitimacy of children born of that marriage is a minimum consequence of the legal recognition of traditional marriage for any purpose at all. Not only does legitimacy continue to entail residual legal consequences which can be important, but the concept of legitimacy has important overtones of value and acceptance. A legitimate child is proclaimed to belong to its parents, to the family union of which it is a product, in a way that an illegitimate or ex-nuptial child is not. At present (except in the Northern Territory) this status is withheld from many Aboriginal parents and children. In the Northern Territory, the children of a traditional Aboriginal marriage are specifically treated as the children of a 'marriage', and are thus legitimate.[1077] No difficulties have arisen from this position. The

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1072 For example, granting benefits such as family provision which have no counterpart in customary laws (cf para 294). This stems in part from difficulties inherent in the use of analogies to attempt to bridge two different cultures and legal systems: D Bell, *Submission 491* (20 September 1985) 4.

1073 R Sackville & A Lanteri, 'The Disabilities of Illegitimate Children in Australia: A Preliminary Analysis' (1970) 44 *ALJ* 5.

1074 For the legislation see Children (Equality of Status) Act 1976 (NSW); Status of Children Act 1978 (NT); Status of Children Act 1978 (Qld); Family Relationships Act 1975 (SA); Status of Children Act 1974 (Tas); Status of Children Act 1974 (Vic). There is no single Act in Western Australia. Instead specific amendments have been made abolishing the distinction of legitimacy for particular purposes: eg Inheritance (Family and Dependants Provision) Act 1972 (WA), s 4(1) definition of 'child'. On the consequences of status of children legislation cf *Douglas v Longano* (1981) 55 *ALJR* 352. Generally, see H Gamble, *The Law relating to Parents and Children*, Law Book Co, Sydney, 1981, 223-51.

1075 MA Neave, 'The Position of Ex-nuptial Children in Victoria' (1976) 10 *Melb UL Rev* 330, 347. For the present position see para 273.

1076 eg J Bucknall, *Transcript of Public Hearings* Strelley (23 March 1981) 315-6. On questions of naming see also HC Coombs, MM Brandl, WE Snowdon, *A Certain Heritage. Programs for and by Aboriginal Families in Australia*, CRES, ANU, Canberra, 1983, 314.

1077 Status of Children Act (NT) s 3 definition of 'marriage', s 5(1) & (3). For transitional questions see para 269.

children of a traditional marriage should be recognised as legitimate or nuptial children for all purposes of Australian law.

272. ***Adoption and Fostering of Children***. The non-recognition of traditional marriage and of the characteristics of Aboriginal family structures in State and Territory adoption and child welfare legislation has had, and to a degree continues to have, a severe effect on the integrity of Aboriginal communities. In the words of one authority 'current adoption law and practice is ... contributing to the disintegration of Aboriginal culture since it fails to take account of Aboriginal family law'.[1078] The point is also made in the Policy Guidelines on Aboriginal Adoption and Fostering, prepared by the Department of Aboriginal Affairs but deriving from the proceedings of the First Australian Conference on Adoption (1976). The Guidelines state that:

> The disproportionately high incidence of Aboriginal Children in non-parental care or custody is probably related to the social, economic and environmental disadvantages suffered by Aboriginal families and their typical isolation from community and legal services; nevertheless it is viewed with concern. There is no reason to believe that Aboriginal children will necessarily benefit from being removed from parents despite unsatisfactory living conditions; they could be ultimately penalised by such removal. Measures to support the Aboriginal child in the family/community environment will necessarily include:
>
> - recognition for Aboriginal customs, marriage laws and community structure, particularly as these affect the payment of benefits and the legal rights of children: and
>
> - a review of existing welfare practices and services to ensure that they complement and reinforce (rather than ignore and thereby frustrate) 'self-help' fostering practices in traditional Aboriginal society.[1079]

For present purposes it is necessary to discuss a number of specific problems which arise from the non-recognition of traditional marriages in legislation on adoption and related matters of child custody. The general issues dealt with by the Guidelines will be discussed in Chapter 16.

273. ***Parental Consent to Adoption: The Present Law***. State and Territory legislation providing for parental consent to the adoption of children falls into several different categories. In Queensland, Tasmania and Western Australia a father's consent to the adoption of his child is not required if the father was not married to the mother when the child was born and has not subsequently married her, unless the father happens also to be the 'guardian' of the child.[1080] In the Australian Capital Territory (where there is no status of children legislation) a similar result is achieved by use of the old term 'illegitimate': in the case of an illegitimate child only the consent of 'every mother or guardian of the child' is required.[1081] In South Australia and the Northern Territory the law is more consistent with the policy underlying the status of children legislation, in that (in the case of adoption of an ex-nuptial child) the consent of a father whose paternity has been formally acknowledged under that legislation is also required.[1082] This is also the case in Victoria, with the addition of certain other situations where the father has custody or responsibility for the child's maintenance.[1083] New South Wales has taken a rather different approach: with one exception, the father of an ex-nuptial child has no right to consent to the child's adoption, but the proponents of the adoption are under a duty to inform the father that adoption proceedings are pending, thus giving him the opportunity to apply for custody of the child (or apply to adopt).[1084] In addition the father of a child who lived with the mother 'after the child's birth

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1078 E Sommerlad, 'Homes for Blacks: Aboriginal Community and Adoption', in C Picton (ed) *Proceedings of the First Australian Conference on Adoption*, Committee of the First Australian Conference on Adoption, Clayton, Victoria, 1976, 160.

1079 Department of Aboriginal Affairs, Doc B 10.3 (January 1980) 1-2. For discussion of the current position under State and Territory child welfare and adoption legislation see para 352.

1080 Adoption of Children Act 1964 (Qld) s 19(2) & (3); Adoption of Children Act 1968 (Tas) s 21(2); Adoption of Children Act 1896 (WA) s 4A(2) & (3). The term 'guardian' is defined in each Act to include a custodian of a child by order of a court and a person deemed to be guardian of a child under Commonwealth, State or Territory law. It is not clear whether a father of an ex-nuptial child with de facto custody and care of a child would be regarded as a 'guardian' for these purposes. See generally *W v H* [1978] VR 1, where the position of a putative father in adoption proceedings is thoroughly discussed.

1081 Adoption of Children Ordinance 1965 (ACT) s 24(2) & (3).

1082 Adoption of Children Act (NT) s 21(2). Provision is made for staying the adoption proceedings pending the father's application for a declaration of paternity: s 21(3). The equivalent South Australian provisions are Adoption of Children Act 1966 (SA) s 21(2) & (3).

1083 Adoption Act 1984 (Vic) s 33(3). The Act recognises traditional marriages for the purposes of eligibility to adopt (see para 277) but not consent to adoption.

1084 Adoption of Children Act 1965 (NSW) s 26(2), (3) & (3A) (consent to adoption), 31A-E (notice to putative fathers, etc).

as husband and wife on a bona fide domestic basis in a household of which the child formed part' must consent to the child's adoption.[1085]

274. ***Implications for Traditionally Married Persons***. Except in the Northern Territory it seems clear that traditionally married persons would not be regarded as 'married' for the purposes of this legislation.[1086] It follows that, unless a traditional husband and father was also a 'guardian' of the child with in the meaning of the legislation, or was qualified as a de facto or a putative spouse in those States where this is relevant, his consent to the adoption of the child would not be required (and, except in New South Wales, the adoption proceedings might be concluded without any attempt to give him notice or an opportunity to participate). Of course, recognizing traditional marriage for this purpose would not give the father a right of veto over the adoption. In all States and Territories, the relevant court or tribunal may dispense with any consent required for adoption, in appropriate cases. But, in general, courts are reluctant to dispense with consent in the absence of 'serious parental misconduct or other serious inadequacy of that parent'.[1087] Recognition of traditional marriage for this purpose would therefore give the husband a say in the adoption which the law in most States presently denies him.

275. ***Recognition of Traditional Marriage for this Purpose***. Reference has already been made to the view that adoption of Aboriginal children outside Aboriginal families or communities is destructive of the integrity of those families and communities. The extension of the right to consent to adoption to Aboriginal fathers of children born within a traditional marriage will not necessarily remedy this problem. An Aboriginal father may consent to adoption or, if he has shown no direct interest or concern for the child, his consent may be waived. But to extend the right to consent to adoption to Aboriginal fathers with respect to children born as a result of a traditional marriage will make the adoption of Aboriginal children more difficult, in situations where there is justified opposition from one of the parents of the child. It will thus indirectly contribute to remedying the problems referred to in para 272. In the absence of special factors, traditional marriages ought to be treated no less favourably than marriage under the general law, for the purposes of status and the right to custody of children born of such a marriage. To treat Aboriginal children as 'ex-nuptial' (and consequently to diminish parental rights) is to treat such children as not belonging in any full or real way to the family unit, and thus to deny the legitimacy of Aboriginal marriage. No countervailing factors exist here. Fathers of children born as a result of a traditional marriage should have the same right as a father of a child born as a result of marriage under the general law, to consent to the adoption of the child. The consent of both parents should be required to the adoption of a child of a traditional marriage.

276. ***Qualification to Adopt***. Probably a more significant problem is the fact that most State legislation disqualifies Aborigines who are traditionally married from adopting a child except in 'exceptional circumstances'. Even where there is an Aboriginal family, able and willing to adopt an Aboriginal child and meeting all other criteria for adoption, that family may not be qualified to do so. The result may be that the child is placed outside its own community, or in institutional care, The problem has been documented both in the literature and in the evidence to the Commission. According to Sommerlad:

> Finding homes for full-blood children with full-blood families is complicated by the requirement that adoptive parents be legally married.[1088]

Similarly, the Commission was told in evidence that:

> Traditional marriage is not legally acceptable yet ... That comes up with us with adoption.[1089]

> [Aboriginal parents] go through all the normal adoption procedure: they apply and are assessed and a placement is made — all the same steps but it is never formalised because they are not married according to Australian law.

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1085 id, s 26(3)(b) inserted by the Adoption of Children (De Facto) Relationships Amendment Act 1984 (NSW). See NSWLRC 36, *Report on De Facto Relationships*, Sydney, 1983, 286-9.

1086 The Adoption of Children Amendment Act 1984 (NT) inserted a new provision in s 6 to recognize traditional marriage for the purposes of the Act. See para 277.

1087 *K v H* (1967) 11 *FLR* 34, 35 (Blackburn J).

1088 Sommerlad, 160. cf also EA Sommerlad, 'Aboriginal Children belong in the Aboriginal Community: Changing Practices in Adoption' (1977) 12 *Aust J Soc Issues* 167, 171-2.

1089 C Adams, *Transcript* Nhulunbuy (10 April 1981) 1273.

> Aboriginal people find that very hard to understand because they think they are married. Why can't their adoption be processed by the court?[1090]

The reason for these difficulties is the qualification provisions in most Australian adoption legislation. For example the Adoption of Children Act 1896 (WA) s 4 provides:

> (1) Except as provided by this section, an order of adoption shall not be made otherwise than in favour of a husband and wife jointly.
>
> (2) Subject to subsection (3) of this section, where a Judge is satisfied that in the particular circumstances of the case it is desirable to do so, the Judge may make an order of adoption in favour of one person.
>
> (3) A Judge shall not make an order of adoption in favour of one person if that person is married and not living separately and apart from his or her spouse unless that person's spouse consents in writing to the application for the order of adoption.[1091]

Although the Northern Territory Supreme Court has held to the contrary,[1092] the view that is taken by adoption courts and authorities is that traditionally married persons do not count as married persons (or 'husband and wife') for the purposes of such pro visions. In consequence, a traditionally married husband and wife cannot jointly adopt a child in any circumstances. De facto partners cannot jointly adopt a child, even where one partner is the natural parent of the child.[1093] Further, the making of an or der in favour of one person requires 'exceptional circumstances.'

277. ***Recent Developments***. In the Commission's Discussion Paper 18 it was suggested that traditional marriages should be recognised for the purpose of qualification to adopt children.[1094] This tentative view received general support.[1095] Subsequently, legislation was passed in the Northern Territory and Victoria to bring about the recommended result.

- Adoption of Children Amendment Act 1984(NT) s 6(3):

> For the purposes of this Act, an Aboriginal who has entered into a relationship with another Aboriginal that is recognised as a traditional marriage by the community or group to which either Aboriginal belongs is married to that other Aboriginal and all other relationships shall be determined accordingly.

- Adoption Act 1984 (Vic) s 11(1)(b):

> An adoption order may be made in favour of a man and woman -

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1090 W Neil, *Transcript* Nhulunbuy (10 April 1981) 1274.

1091 s 6 adds:
Except by husband and wife, as herein before mentioned, no child shall be adopted by more than one person.
Equivalent provisions are: Adoption of Children Ordinance 1965 (ACT) s 17(1)-(3); Adoption of Children Act 1965 (NSW) s 19(1)-(3); Adoption of Children Act 1966 (SA) s 11(1)-(3), (6); Adoption of Children Act 1968 (Tas) s 13(1)-(3).

1092 In an unreported decision of 10 September 1981, Forster CJ made an order for the adoption of an Aboriginal child jointly by two traditionally married Aborigines. His Honour declined to make an order in favour of the wife only, holding instead that the reference to 'husband and wife jointly' in the Adoption of Children Act 1964 (NT) s 12 included with respect to full blood Aboriginal persons living a traditional life and seeking to adopt a full blood Aboriginal child, persons who are married according to tribal custom and who feel themselves bound by that custom. His Honour was, on the evidence, satisfied that the other criteria for the making of an order were fulfilled. Hon Sir William Forster CJ, *Submission 313* (7 April 1982).

1093 Except in NSW where the partners to a de facto relationship may be eligible to adopt: Adoption of Children Act 1965 (NSW) s 19(1A)(1B) (inserted 1984).

1094 ACL DP 18, para 16.

1095 The South Australian Minister for Community Welfare (The Hon J Burdett MLC) wrote:
I support the Commission's view that Aboriginal couples who are recognised as being tribally married should be eligible to jointly adopt a child. I understand that tribally married couples are easily identifiable within their own local communities or the communities from which they originate. It may be advisable to negotiate with these communities on the kind of evidence they could provide which would make the couples recognisable as being tribally married. In the matter of consent for the adoption of an Aboriginal child born to a tribally married woman I believe not only the consent of the woman concerned and her husband but also the consent of the appropriate tribal elders should be given.
*Submission 335* (27 May 1982). To similar effect, NT Minister for Community Development (Hon J Robertson MLA), *Submission 331* (18 May 1982). See also Commissioner for Community Relations (Hon AJ Grassby), *Submission 344* (6 September 1982) 2; Minister for Community Welfare Services (Vic) (Hon P Toner) *Submission 347* (10 September 1982) 1; Department of Capital Territory (AS Blunn) *Submission 348* (24 September 1982) 1.

> whose relationship is recognized as a traditional marriage by an Aboriginal community or an Aboriginal group to which they belong and has been so recognized for not less than two years ...[1096]

The position in the other States remains unchanged.[1097]

278. ***The Commission's Recommendation***. As the Royal Commission on Human Relationships pointed out,[1098] the practical disqualification of traditional Aborigines from adopting Aboriginal children, effected by the prerequisite of Marriage Act marriage and the prohibition of any other form of joint adoption, cannot be justified. Of course, the decision to make an adoption order in favour of particular parents requires a variety of matters to be taken into account. But the point is that, if these rules apply, the adoption court or authority cannot, in ordinary circumstances, even consider traditionally married Aborigines as qualified to adopt. Thus the policy, already adopted by some State and Territory welfare authorities, 'to place Aboriginal children with Aboriginal families' where possible,[1099] is frustrated by the 'constraint of legal marriage'.[1100] Persons who are traditionally married should be qualified, in the same way as persons married under the Marriage Act 1961 (Cth), to adopt children under State and Territory law.

279. ***Fostering and other Child Custody Arrangements***. To the extent that State and Territory legislation imposes similar qualifications for child custody or fostering, based on marriage under the general law, or differentiates a traditional husband and father's rights from those of a Marriage Act husband and father,[1101] the same recommendation applies.[1102]

## Questions of Maintenance and Property Distribution

280. ***Maintenance and Property Rights during the Relationship***. If traditional marriage is to be recognised for various purposes the question arises whether there should be legal obligations of maintenance. whether between the spouses or between the spouses and their children. A related matter is the problem of determining the property rights of the parties. Persons who marry under the Marriage Act 1961 (Cth) incur a duty, within certain limits, to maintain each other a duty which does not normally apply, for example, to persons living in a de facto relationship. In both situations, there is an obligation to maintain any children of the relationship. The principles for determining the property rights of parties during a relationship also vary depending on whether there is a marriage or a de facto relationship.[1103]

281. ***Maintenance Obligations of Marriage***. The rights and obligations regarding maintenance between parties to a marriage are imposed by s 72 of the Family Law Act 1975 (Cth).

> A party to a marriage is liable to maintain the other party, to the extent that the first mentioned party is reasonably able to do so, if, and only if, that other party is unable to support herself or himself adequately. whether-
>
> (a) by reason of having the care and control of a child of the marriage who has not attained the age of 18 years;
>
> (b) by reason of age or physical or mental incapacity for appropriate gainful employment: or
>
> (c) for any other adequate reason.
>
> having regard to any relevant matter referred to in sub-section 75(2).

A further obligation with respect to any children of the marriage is imposed by s 73.

> The parties to a marriage are liable. according to their respective financial resources. to maintain the children of the marriage who have not attained the age of 18 years.

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1096 For the recognition of traditional marriage under the Children (Guardianship and Custody) Act 1984 (Vic) s 12(12) see para 283.

1097 Though traditional spouses may qualify under the NSW de facto provision: see para 276 n 22.

1098 *Report*, AGPS, Canberra, 1975 vol 4, 126. Although reserving generally the question of recognition of traditional marriage for this Commission, the Royal Commission felt strongly enough on this issue to recommend specific reform.

1099 See para 359-64.

1100 Sommerlad, 160.

1101 eg Children's Services Act 1965 (Qld) s 105.

1102 This is already the case in Victoria under the Children (Guardianship and Custody) Act 1984, s 12(1), which allow guardianship and custody orders to be made in favour of certain relatives including 'spouses', defined under s 12(12) to include: a person whose relationship with the parent or relative is recognised as a traditional marriage by an Aboriginal community or an Aboriginal group to which they belong.

1103 See generally NSWLRC 36, ch 7 & 8.

Proceedings with respect to maintenance may be brought at any time under the Family Law Act. whether during the course of a marriage or in situations of marriage breakdown or divorce. The Court may make such order for maintenance as it thinks fit (s74) but in making such an order it must take into account various matters specified in s 75(2) (in respect of spouses) and s 76 (in respect of children).[1104]

282. ***Maintenance Obligations of De Facto Relationships***. New South Wales and Tasmania are the only jurisdictions which impose obligations of maintenance in de facto relationships, and then only in limited circumstances. The Maintenance Act 1967 (Tas) s 16, enables a woman who has cohabited with a man for at least 12 months to obtain a maintenance order if the man, without just cause or excuse, leaves her or any child of theirs without adequate means of support, deserts her, or is guilty of such cruelty or misconduct as to render it unreasonable to expect her to continue to live with him.[1105] The De Facto Relationships Act 1984 (NSW) s 27 gives a court the power to order maintenance for a de facto partner who is unable to support himself or herself adequately by reason of having the care and control of a child of the de facto partners or a child of the respondent, provided the child is under 12 years (or if physically or mentally handicapped, under 16 years). A maintenance order may also be made where a de facto partner is unable to support himself or herself adequately because the applicant's earning power has been adversely affected by the circumstances of the relationship, and the order would enable a course or programme of training or education to be undertaken. In no other State is there a legal obligation on one de facto spouse to support or maintain the other. This is so regardless of the financial position of the parties or the duration of the relationship.[1106] However, maintenance obligations do arise with respect to the children of a de facto relationship. Each State has legislation which imposes obligations with respect to maintenance[1107] and child welfare.[1108] Child welfare legislation throughout Australia declares a child to be neglected or in need of care and protection if it is not adequately supported by its parents. These Acts are primarily concerned with ensuring a minimum standard of maintenance for a child. In addition to child welfare legislation there is maintenance legislation in each State which provides a right of action for maintenance in limited circumstances. In some States there is legislation which allows a maintenance order to be made ancillary to another application.[1109]

283. ***Property Rights During a Relationship***. There is legislation in each State, based on the Married Womens' Property Act 1882 (UK), which may be the basis for an action to determine property disputes between married couples.[1110] The Family Court also has power to deal with certain property disputes between married persons.[1111] State courts are reluctant to exercise their own jurisdiction if there is a likelihood of an order for property distribution being sought under the Family Law Act 1975 (Cth). This is principally because of the widely differing powers to alter property rights in the different jurisdictions. The powers of the Family Court pursuant to the Family Law Act 1975 (Cth) allow property rights to be altered, whereas State courts' powers, except in Victoria and New South Wales, are restricted to declaring existing rights. The basic principles to be applied by State courts when considering a property dispute of this kind between a husband and wife were laid down by the High Court in *Wirth v Wirth*.[1112] There are in such cases no special principles to determine property rights based on the marriage relationship; the ordinary principles of law and equity apply. Thus the respective rights of the parties are determined by rules of law and not judicial discretion. The fact that the parties are married is, as such, irrelevant.[1113] Except in Victoria[1114] and

1104 See HA Finlay, *Family Law in Australia*, 3rd edn, Butterworths, Sydney, 1983, ch 7.

1105 On this exceptional provision (which dates from 1837) see WM Craig & MFC Scott, 'The Maintenance of Concubines' (1962) 1 *U Tasm L Rev* 685.

1106 See NSWLRC 36, ch 9 & 10.

1107 Maintenance Act 1964 (NSW); Maintenance Act 1965 (Vic); Maintenance Act 1967 (Tas); Community Welfare Act 1972 (SA); Family Court Act 1975 (WA) Maintenance Act 1965 (Qld); Maintenance Act 1971 (NT); Maintenance Ordinance 1968 (ACT).

1108 Child Welfare Act 1939(NSW); Community Welfare Services Act 1970 (Vic); Child Welfare Act 1960 (Tas); Community Welfare Act 1972 (SA); Child Welfare Act 1947 (WA); Children's Services Act 1965 (Qld); Community Welfare Act 1983 (NT); Child Welfare Ordinance 1957 (ACT).

1109 eg Infants' Custody and Settlements Act 1899 (NSW) s 5(3).

1110 Married Persons (Property and Torts) Act 1901 (NSW) s 22; Married Women's Property Acts 1890 (Qld) s 21; Married Women's Property Act 1892 (WA) s 17; Law of Property Act 1936 (SA) s 105; Married Women's Property Act 1935 (Tas) s 8; Marriage Act 1958 (Vic) Part VIII; Married Women's Property Act 1883 (SA) as in force in the NT.

1111 Family Law Act 1975 (Cth) s 4(1)(ca)(i) (inserted 1983) defines matrimonial cause to include 'proceedings between the parties to a marriage with respect to the property of the parties to the marriage or either of them, being proceedings arising out of the marital relationship'. See generally Finlay, ch 8.

1112 (1956) 98 CLR 229.

1113 See also *Hepworth v Hepworth* (1959) 110 CLR 309; *Martin v Martin* (1964) 116 CLR 297.

1114 Marriage Act 1958 (Vic) s 161.

New South Wales,[1115] the only way in which a spouse can obtain a proprietary interest to which he or she is not entitled under the general law is under the Family Law Act 1975 (Cth).

284. ***Maintenance and Property Rights and Aboriginal Traditional Marriage***. Since Aboriginal traditional marriages are not recognised as marriages for any of these purposes, such unions are treated as de facto relationships for the purposes of Australian property and maintenance law. The question is whether this is appropriate. Should an Aboriginal traditional marriage be equated with a Marriage Act marriage for the purposes of maintenance between the spouses? Should a traditional marriage be regarded as a marriage for the purposes of the maintenance provisions of the Married Women's Property Acts? Are the children of traditional marriages adequately protected under the present law? Will Aborigines be disadvantaged if for the purposes of maintenance and property rights their traditional unions are treated as de facto relationships rather than marriage? Or is it preferable to special rules to be developed in this area?

285. ***Maintenance***. Under the existing law (except in New South Wales and Tasmania), only parties to a Marriage Act marriage incur maintenance obligations to each other. Thus the parties to a traditional marriage have no legally enforceable duty to maintain each other. On the other hand, the children of a traditional marriage are entitled to maintenance in each State and Territory. Under existing State legislation a maintenance order could be made against an Aborigine who is a party to a traditional marriage with respect to children of the marriage. The question is whether the law should be changed to impose on Aboriginal spouses obligations of mutual maintenance, and additional obligations to maintain their children, during their relationship. There are several reasons why no such changes to the law should be made.

- *No apparent need for change*. First, most disputes in relation to maintenance arise following the breakdown of the marriage or de facto relationship. An order for maintenance while a relationship is still subsisting is less common: this does not seem a major area of difficulty. Children of traditional marriages may be the subject of maintenance orders under existing State legislation. It does not appear that traditional spouses are being disadvantaged because of the non-existence of a legal duty to maintain each other. The Commission has had no submissions suggesting problems in this area, nor is any other evidence available to support such a change.

- *Change would not be effective*. It is very doubtful whether new maintenance legislation for traditional marriage would significantly increase the economic security of Aboriginal spouses, or the stability of such marriages. Maintenance obligations under the present law are notoriously difficult to enforce;[1116] this would probably be at least equally the case with an extended maintenance obligation for traditional marriage. Indeed, the effect might be negative, in that social security benefits may be less accessible through the existence of an (in practice unenforceable) claim to maintenance.[1117]

- *No correspondence with Aboriginal traditions or perceptions*. Thirdly, the extension of maintenance obligations to traditional spouses would not reflect Aboriginal perceptions of the role of husbands and wives in maintaining the domestic economy. Traditionally each party to a marriage has been regarded as an independent contributor of food and services to the family (although the kinds of food and services varied between husbands and wives).[1118]

For these reasons, there is on balance no sufficient justification for imposing a new maintenance regime on the parties to traditional marriages. Whatever the social and economic needs of the parties, they are unlikely to be improved by imposing a new legal obligation to pay maintenance.

286. ***Property***. As with the laws relating to maintenance, and for the same reasons, there is no demonstrated problem requiring a special right of action to enable parties to traditional marriages to have their property rights determined. It is not appropriate to make special provision for an action with respect to property rights as between traditional spouses, under the Married Women's Property Acts or otherwise.

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1115 De Facto Relationships Act 1984 (NSW) s 14-20. For discussion see NSWLRC 36, ch 7, 9.

1116 D Kovaks, 'Maintenance in the Magistrates' Courts: How Fares the Forum?' (1973) 47 *ALJ* 725; D Kovaks, 'Getting Blood out of Stones: Problems in the Enforcement of Maintenance Orders from Magistrates' Courts' (1974) 1 *Mon L Rev* 67; Attorney-General's Department, *A Maintenance Agency for Australia, Report of the National Maintenance Inquiry*, Canberra, 1984, esp 10-14.

1117 cf Social Security Act 1947 (Cth) s 62. See para 312.

1118 See para 225, 230, and see generally ch 33.

287. ***Maintenance and Property Distribution on Divorce***. As with maintenance and property rights during a relationship, the law with respect to maintenance and property distribution where a relationship breaks up or is dissolved varies depending on whether there is a de facto relationship or a Marriage Act marriage. Briefly, the position with respect to marriage is as follows:

- *Maintenance.* The provisions in the Family Law Act 1975 (Cth) with respect to maintenance orders apply equally to maintenance orders sought during the relationship and on its termination, though the latter is the more usual. Application for a maintenance order must be made within 12 months of a decree being granted unless the Court grants special leave.[1119]

- *Property*. The Family Law Act 1975 (Cth) s 79 confers extensive powers with respect to the property rights of parties to a marriage. As well as declaring existing rights the Court has broad discretionary powers to alter the rights of the parties in property owned by them. In making an order the Court is required to take into account a number of factors (set out in s 79(4)). These include the financial contributions of the parties to the acquisition, conservation or improvement of the property: contributions in the capacity of homemaker or parent: and the effect of the order on the earning capacity of either party.

288. ***Maintenance and Property Distribution on the Termination of De Facto Relationships***. As noted already, a maintenance claim by a party to a de facto relationship can be made only in Tasmania and New South Wales. However, all States and the Territories have provision for maintenance claims with respect to a child of a de facto relationship.[1120] There is, equally, little legislation on the property rights of former parties to de facto relationships. Property disputes in such cases are determined under the general law of property. The basic principle applied by the court is that beneficial interests in disputed property are allocated according to the formal title to the property. If the two parties make financial contributions towards the purchase of property the beneficial interest may be held to be in proportion to the contributions, even if title is in the name of one person.[1121] However, if for example, a woman's contribution has been made through maintaining the family home and caring for children she may well have no claim.[1122] Except in New South Wales,[1123] the future needs of a person are of no relevance.

289. ***Maintenance and Property Distribution on the Termination of Aboriginal Traditional Marriage***. In Aboriginal societies it was usual for a person to be married a number of times over a lifetime, and it was uncommon to find unmarried widows, widowers or 'divorcees'.[1124] Under the kinship system there was always a second or third alternative partner available. In addition, the extended family system provided a strong network of support so that if, for example, a woman with a number of children was unable to support herself and family, assistance was readily available. This feature of Aboriginal society remains strong today. The introduction of the cash economy and increasing contact with the wider Australian society have of course had significant effects on Aboriginal society.[1125] Relatively few traditionally oriented Aborigines own substantial amounts of tangible property as individuals, or earn sufficient income to justify a maintenance order being sought or made against them. Issues of property distribution and maintenance on the breakdown of a traditional marriage rarely arise. Any problems that do occur seem to be resolved informally without the need for external legal intervention. For these reasons, as well as for those given already with respect to maintenance and property rights during traditional marriage, it is doubtful whether there are, even in embryonic or developing form, Aboriginal customs or traditions which can usefully be built on or developed for the present purpose. Certainly there is nothing which can be simply 'recognised' as solving the problems of the economic security of former traditional spouses. The reality is that economic security (to the extent that it exists) has to be re-established in each case by remarriage. sharing within the extended family, employment (where available) or reliance on the social security system, or some combination of these.

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1119 s 44(3). See Finlay, 267-308.
1120 See para 282.
1121 eg *Gissing v Gissing* [1971] AC 886.
1122 See *Allen v Snyder* [1977] 2 NSWLR 685 which sets out general principles. For further discussion see NSWLRC 36, ch 7. And cf *Murray v Heggs* (1980) 6 Fam LR 781 for judicial comment on the hardships which can arise.
1123 See para 283 n 44.
1124 See para 226.
1125 See eg JC Altman & J Nieuwenhuysen *The Economic Status of Australian Aborigines*, Cambridge UP, Cambridge, 1979; Coombs Brandl & Snowden 237-265, 304-316; JC Altman, *Aborigines and Mining Royalties in the Northern Territory*, AIAS, Canberra 1983; Australian Institute of Aboriginal Studies, *Aborigines and Uranium, Consolidated Report to the Minister of Aboriginal Affairs on the Social Impact of Uranium Mining on the Aborigines of the Northern Territory*, AGPS, Canberra, 1984, 133-177.

Imposing an obligation on former traditional spouses with respect to property and maintenance would involve at least a partial shifting of responsibility from these forms of support to former Aboriginal spouses. Not only is it very doubtful whether this could be made to work, but it seems the wrong direction for the law, concerned as it is with providing effective economic security for persons in need, to be moving. This is particularly so given that there is no indication that such a change would be an expression, or development, of existing Aboriginal norms, traditions or demands.

290. ***The Commission's View***. The Commission concludes that it is not desirable to equate traditional marriages with Marriage Act marriage for the purpose of maintenance and property distribution after the termination of the relationship.[1126] The matter should be left to the general la w, including the law on de facto relationships where this applies. No change to existing laws is recommended. However the matter may need to be reviewed in due course,[1127] especially so far as property distribution is concerned. If, through royalties in respect of mining on Aboriginal land or in other ways, substantial amounts of property come to be held by particular persons, questions of distribution on dissolution of traditional marriages may arise with greater frequency. Aboriginal views about what constitutes a fair distribution of assets, having regard to traditional responsibilities to kin and family, may change, and a clearer demand for some legal recognition of these responsibilities in such cases may emerge. But no specific recommendation is warranted at this time.

291. ***Property Distribution on Death***. Each State and Territory has legislation dealing with distribution of a person's property after death. This legislation falls into three categories: (1) the law relating to wills, (2) intestacy, and (3) family provision (or testator's family maintenance). It is primarily the latter two which are of concern in considering the recognition of Aboriginal traditional marriages. In the (so far, relatively rare) case where an Aboriginal spouse makes a will no problem of recognition of the marriage is likely to arise.[1128] However, if the will makes no provision for a traditional spouse the question may arise whether a traditional spouse should be eligible to apply for family provision. The matter is further complicated because under customary law a traditional spouse may not be entitled to a share of the estate: instead, her family would be expected to provide for her. If there is no will and the rules of intestacy are applied, should an Aboriginal traditional marriage be taken into account, and if so, in what ways? To some extent these questions go beyond the recognition of traditional marriages, and in this respect they will be dealt with in Chapter 15. Only the narrower issue, of recognition of traditional marriage, is dealt with here.

292. ***Distribution on Intestacy: The Present Law***. The general principle in the legislation of each State and Territory is that if a spouse dies without leaving a will, the surviving spouse becomes entitled to a substantial share, and in some circumstances all, of the deceased's estate. In South Australia there is specific provision for a de facto spouse to participate in a distribution on intestacy.[1129] If there is a de facto spouse and no married spouse, the putative spouse may take all of the spouse's share. If there is both a de facto spouse and a married spouse they share the entitlements equally. In no other Australian jurisdiction is there specific provision for a surviving de facto spouse to participate in the distribution of the deceased's estate[1130] although in New South Wales the De Facto Relationships Act 1984 enables an order adjusting properly interests to be made after the death of a de facto partner and to be enforced against the deceased estate (s 24, 25).[1131] There is now provision in a number of jurisdictions for a surviving de facto partner to apply for family provision. The Northern Territory alone recognises traditionally married persons as married for the purposes of intestate distribution. The Administration and Probate Act (NT) provides that:

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1126 This conclusion was supported in a number of submissions to the Commission: Family Law Council (Justice Fogarty) *Submission 285* (28 November 1983); Department of Aboriginal Affairs (JC Taylor) *Submission 263* (2 February 1983). See also ACL Field Report 7, *Central Australia* (October 1982) 4, 8, 21.

1127 As the Family Law Council pointed out: *Submission 393* (28 November 1983).

1128 For questions of construction of wills in this context, see para 336. Under the general law, marriage revokes a will previously made. In the absence of any traditional analogy to this situation, and given the infrequency with which Aborigines make wills and the definitional problems that might occur, traditional marriage should not be recognized as marriage for this purpose. See also para 333-5.

1129 Administration and Probate Act 1919 (SA) s 72. The claimant must first be declared a 'putative spouse' pursuant to the Family Relationships Act 1975 (SA). The consequence of such a declaration is, for the most part, to place a surviving putative spouse in the same position as a surviving married spouse. See eg Wrongs Act 1936 (SA) s 19, 20; Inheritance (Family Provision) Act 1972 (SA) s 4; Succession Duties Act 1929 (SA) s 4(1); Administration and Probate Act 1919 (SA) s 72h(2); Superannuation Act 1974 (SA) s 121(1).

1130 Children whether or not ex-nuptial, would be entitled to a share, to the exclusion of the de facto spouse.

1131 See NSWLRC 36, ch 12.

> an Aboriginal who has entered into a relationship with another Aboriginal that is recognised as a traditional marriage by the community or group to which either Aboriginal belongs is married to the other Aboriginal and, all relationships shall be determined accordingly.[1132]

As a consequence of allowing a traditional spouse to claim on a deceased estate, s 67A of the Act provides for cases of polygyny:

> Where an intestate Aboriginal is survived by more than one spouse, the whole or that part of the intestate estate, as the case may be, passing to the spouse of the intestate by force of s 66(1) and the value of the personal chattels of the intestate passing to the spouse by force of s 67 shall be divided into a number of parts equal to the number of spouses of that intestate and each spouse of the intestate is entitled to one of those parts of the estate and chattels.

The Northern Territory legislation is a useful model. It recognises Aboriginal traditional marriages, and also makes provision for traditional distribution of property on the death of an intestate Aborigine.[1133]

293. ***Family Provision (Testator's Family Maintenance)***. In all States and Territories there is legislation enabling a claim to be made for further provision out of the deceased's estate, if the will makes inadequate provision for the proper maintenance and support of dependants. Application may also be made if the rules of intestacy fail to make adequate provision.[1134] The legislation in each jurisdiction specifies the persons who are eligible to apply: these include a surviving spouse and (with some exceptions) a surviving former spouse.[1135] Application may also be made by children (including ex-nuptial children) of the deceased regardless of age. Surviving de facto partners are eligible to apply in New South Wales, Queensland, South Australia and the Northern Territory.[1136] In Western Australia eligibility is limited to a de facto widow.[1137]

294. ***Recognition of Traditional Marriage for this Purpose***. As with its intestacy legislation, the Northern Territory specifically recognises traditional marriage for the purposes of family provision. Section 7(1A) of the Family Provision Act (NT) extends entitlement to apply for family provision to traditional spouses in the same way as persons married under the Marriage Act 1961 (Cth):

> For the purpose of determining whether a person is entitled to make an application under subsection (i), an Aboriginal who has entered into a relationship with another Aboriginal that is recognised as a traditional marriage by the community or group to which either Aboriginal belongs is married to the other Aboriginal, and all relationships shall be determined accordingly.

There does not appear to be any good reason for excluding a surviving traditional spouse from making a claim for family provision. Admittedly there seems to have been no traditional analogue of family provision on the death of a spouse; property tended to be destroyed or distributed to members of the family of the deceased, excluding the surviving spouse, and (as with 'divorce') security for the surviving spouse was achieved in other ways.[1138] But (unlike the situation after the end of a traditional marriage by 'divorce') recognising traditional marriage for this purpose may enhance the security of a surviving spouse, at least in some cases. Similar considerations apply to property distribution on intestacy: traditional marriages should be recognised as 'marriage' for both purposes.[1139] On this basis it might also be argued that the law relating to family provision should be extended to include other members of Aboriginal extended families. On the other hand, there is the prospect of conflicts between a testator's freedom to dispose of his property and the traditions and norms of the group or community to which he belonged. These issues will be discussed in the next Chapter.

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1132 Administration and Probate Act (NT) s 6(4).

1133 Administration and Probate Act (NT) s 71B. See para 339-43.

1134 eg Inheritance (Family Provision) Act 1972 (SA) s 4.

1135 In some jurisdictions a former wife must be in receipt of, or entitled to receive, maintenance.

1136 Family Provision Act 1982 (NSW) s 6; Sucession Act 1981 (Qld) s 40-1; Inheritance (Family Provision) Act 1972 (SA) s 4; Family Provision Act 1970 (NT) s 4, 7(2).

1137 Inheritance (Family and Dependants Provision) Act 1972 (WA) s 7(1)(f). There is as yet no similar provision in Tasmania: see Tas LRC, *Report on Obligations Arising from De Facto Relationships*, Government Printer, Hobart, 1977.

1138 cf para 285, and see para 331.

1139 Where the relevant State or Territory legislation makes no provision dividing entitlements due to spouses under family provision legislation or intestacy, it should be provided that those amounts should be equally shared between them (subject to any order for family provision, or to the exercise of a discretion to apportion on grounds of need).

## Compensation for Injury or Death

295. ***Relevant Areas***. Compensation for injury on death arises in a number of different areas of the law, including worker's compensation, motor vehicle accidents legislation and criminal injuries compensation.[1140] Entitlement to superannuation benefits (although not 'compensation') will also be considered under this heading. Compensation benefits in these areas are generally payable to the surviving spouse and children. In recent years this basic principle has been extended in some States and Territories to include a surviving de facto spouse and other persons who were dependent on the injured or deceased person. Only in the Northern Territory is a traditional marriage specifically recognised for the purposes of determining entitlement to compensation. It is necessary to deal separately with each category.

296. ***Workers' Compensation***. The Workmen's Compensation Act (NT) provides for compensation to be paid to relations 'by blood, traditional marriage or custom', and there is specific provision for additional dependent traditional wives aged 16 or more. Dependent traditional wives aged less that 16 are only eligible as 'dependent children'.[1141] In all other Australian jurisdictions a traditionally married spouse would only be able to rely on the rights given to de facto spouses (eg widows) pursuant to workers' compensation legislation, generally by the use of a broad definition of 'dependant'. For example the Workers Compensation Act 1926 (NSW), s 6(1) defines 'dependant' as:

> such of the worker's family as were wholly or in part dependent for support upon the worker at the time of his death ... and includes ... a person so dependent who although not legally married to the worker lived with the worker as the worker's husband or wife on a permanent or bona fide domestic basis.

In some jurisdictions a de facto relationship will only be recognised if the parties have lived together for a specified period of time[1142] or if there are children of the relationship. These provisions are no doubt capable of benefitting traditionally married spouses who otherwise qualify under the statutory criteria of dependency, although it is not clear whether they would allow compensation to be paid to more than one wife.[1143]

297. ***Recognition of Traditional Marriage in Workers Compensation Legislation***. It is very hard to justify excluding traditionally married dependants from entitlements to worker's compensation benefits. These benefits are an important form of protection to employees and their dependants. To deny compensation to Aboriginal dependants because they practice different family traditions would be to deny to Aboriginal employees an important aspect of their employment rights, and to shift the burden of dependency from the employer to the State (through the social security system). It would be even less justified in that Australian worker's compensation Acts pay little regard to the forms or categories, as distinct from the fact, of dependency. Traditional marriage should be recognised as 'marriage' for all worker's compensation purposes. Specific provision for traditional spouses, as in the Northern Territory, is a better way of ensuring that this recommendation is implemented in practice. Existing provisions entitling putative or de facto spouses to worker's compensation vary significantly between the States. Unnecessary time limits are imposed and the position of plural wives (between whom compensation rights on death should be shared) is not clearly dealt with. In most jurisdictions the legislation relating to dependants appears wide enough to include situations of polygyny (even though it may not have been envisaged by the drafters of the legislation) but specific provision for this situation should be made.

298. ***Accident Compensation***. As with workers compensation legislation, traditional Aboriginal marriage is given only limited recognition in accident compensation legislation.

- *Northern Territory*. The Motor Accidents (Compensation) Act (NT) specifically provides for benefits to be payable both to a de facto spouse and an Aboriginal traditional spouse. 'spouse' is defined in s 4 to include:

  > (d) a person who was not legally married to the person but who, for a continuous period of not less than three years immediately preceding the relevant time, had ordinarily lived with the person as the person's husband

1140 See NSWLRC 36, ch 13.
1141 Workmen's Compensation Act (NT) s 6, 7, Second Schedule, especially para(1A)(b)(i), D, E. There has been no Northern Territory experience of claims by traditional wives under the Act: President, Workmen's Compensation Tribunal, *Submission 326* (29 April 1982).
1142 The period is three years in WA and Queensland, five years in SA.
1143 cf *In re Fagan* (1980) 23 SASR 454, 464-5 (Jacobs J).

> or wife, as the case may be, on a permanent and bona fide domestic basis, and who, in the opinion of the Board, was wholly or substantially dependent upon the person at the time: and
>
> (e) where that person is an aboriginal native of Australia — a person referred to in (a), (b), (c) or (d) or who is, according to the customs of the group or tribe of aboriginal natives of Australia to which he belongs, married to him.

A traditionally married person is in a better position under paragraph (e) than he or she would be if forced to rely on the de facto relationship qualifications in paragraph (d).[1144] The Compensation (Fatal Injuries) Act 1974 (NT) has similar recognition provisions for de facto relationships and traditional marriage. Section 4(3)(e)(ii) provides that

> a person who –
>
> being an Aboriginal, has entered into a relationship with another Aboriginal that is recognized as a traditional marriage by the community or group to which either Aboriginal belongs
>
> shall be treated as the wife or husband, as the case may be of the deceased person.

- *Commonwealth Legislation*. A similar approach is taken in the Compensation (Commonwealth Government Employees) Act 1971 (Cth), which provides for compensation to dependants on the death of a Commonwealth employee. 'Dependant' is defined to include a lawful spouse, and

  > a woman who, throughout the period of three years immediately before the date of the death of the employee, although not legally married to him, lived with him as his wife on a permanent and bona fide domestic basis.

  In addition an Aboriginal traditional spouse is specifically provided for:

  > 'spouse' in relation to an aboriginal native, or a deceased aboriginal native, of Australia or of an external Territory, includes a person who is or was recognized as the husband or wife of that aboriginal native by the custom prevailing in the tribe or group of aboriginal natives of Australia or of such a Territory to which that aboriginal native belongs or belonged.[1145]

  The point of this provision was explained by the Commonwealth Commissioner for Employees' Compensation:

  > a special provision was required to cover such cases because unless a tribal wife or wife by native custom could fulfil the requirements that a de facto wife had to meet, eg, cohabitation throughout a period of three years, then an incapacitated employee with a tribal wife or wife by native custom would, probably, be ineligible for the additional weekly compensation in respect of such a wife. Moreover, in the case of a compensable death of an Aboriginal employee, the wife or husband would, probably, not have been eligible for compensation although she or he was, in fact, a dependent spouse.[1146]

In other Australian jurisdictions traditionally married spouses would only be entitled to accident compensation benefits if they came within the provisions covering de facto relationships or a qualification based on dependency.[1147] For example in South Australia the Wrongs Act 1936 enables a 'putative spouse' to bring an action in respect of the death of a deceased spouse if caused by the 'act, neglect or default' of another person. This legislation is unique in that it also specifically provides for an apportionment of benefits (in such manner as the court thinks fit) if the deceased is survived by both a lawful spouse and a de facto spouse.[1148] There is a five year qualification requirement for a 'putative spouse' under the South Australian Act. In Victoria the Motor Accidents Act 1973 (Vic) established a system of no fault compensation for persons injured in road accidents. A 'dependent spouse' is defined (s 3(1)) to include a woman living with a

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1144 According to the Northern Territory Insurance Office, in the first three years of the operation of the Act there had been no claims involving Aboriginal traditional wives: *Submission 330* (13 May 1982).

1145 s 5, definition of 'spouse'. The ALRC has been informed by the Commissioner for Employees Compensation that 'no problems have been encountered in relation to Aborigines under the Act': Commissioner for Employees Compensation (BJ Dwyer) *Submission 327* (3 May 1982). This position had not changed as at 29 October 1985.

1146 Commissioner for Employees Compensation (BJ Dwyer) *Submission 327* (3 May 1982).

1147 Not all States recognize de facto spouses. Western Australia does not despite a recommendation of the WALRC to include de facto spouses: WALRC, *Report on Fatal Accidents*, Perth, 1978, para 3.32.

1148 Wrongs Act 1936 (SA) s 3a (definitions of 'spouse' and 'putative spouse'), 20(4) and (7) (action for wrongful death), 23b (action by spouse for solatium). The apportionment provisions are s 20(3), 23b(2) & (3). Under the Compensation (Commonwealth Government Employees) Act 1971 (Cth) apportionment would be the responsibility of the Commissioner under s 45(3) & (4).

man immediately prior to his death on a permanent and bona fide domestic basis, and wholly or mainly dependent on him for economic support. No time qualification is specified for a de facto spouse.

299. ***Recognition of Traditional Marriage for the Purpose of Accident Compensation***. The parties to a traditional marriage should be able to claim compensation for death or injury independently of whether they come within the definition of a de facto relationship. The House of Representatives Standing Committee on Aboriginal Affairs in its report on *The Effects of Asbestos Mining on the Baryulgil Community (1984)* recommended

> that priority be given to legislation under the Commonwealth marriage power, according recognition to Aboriginal marriages, at least for the purposes of actions for damages for lost support by surviving dependants in cases of death caused by personal injury.[1149]

The arguments outlined in para 297 dealing with workers compensation apply here also. Where there is more than one spouse (whether a traditional spouse or a Marriage Act spouse) eligible to receive compensation the compensation should be apportioned between them at the discretion of the court or authority with responsibility for paying the compensation.[1150]

300. ***Criminal Injuries Compensation***. Only the Northern Territory specifically provides for the parties to a traditional marriage in its Crimes Compensation Act (NT) s 4(2). Thus a traditionally married Aborigine would only be able to claim a benefit under provisions for de facto relationships or general dependency provisions in State law (where these apply).[1151] For similar reasons, traditional Aboriginal marriages should be specifically recognized for the purposes of criminal injuries compensation.

301. ***Superannuation***. Variations in superannuation schemes throughout Australia make it difficult to give a definitive account of the position of spouses or de facto spouses,[1152] still less of the parties to Aboriginal traditional marriages. In general terms the number of Aborigines who are traditionally married and contributors to superannuation schemes is relatively small. But this position may change and the argument for recognition in principle remains.[1153] A number of approaches are taken in both government and private superannuation to surviving de facto spouses. Some schemes specifically provide for the surviving de facto spouse of a contributor to make a claim. Other schemes give the administrator a discretion to make payments. It is more common for benefits to be payable to a de facto widow than a de facto widower. Some schemes allow apportionment where there are competing claims between a de facto spouse and a Marriage Act spouse, although it is more usual for a Marriage Act spouse to be paid benefits to the exclusion of a de facto spouse. Most superannuation schemes involve a contractual relationship for example, between an employee and an employer or between an individual and an insurance company. Schemes which are regulated by legislation[1154] require amendment, so that specific recognition may be given to traditional marriages. The actuarial consequences of such an extension are likely to be minimal, so that there is no reason not to apply the amendments to existing contributors to statutory superannuation schemes.[1155] With private schemes traditional marriages should also be recognised, at least with respect to schemes established in the future.

## Entitlement to Social Security

302. ***Social Security Benefits***. Social security benefits are of major importance to many Aboriginal families and communities. But not all social security entitlements are equally adapted to Aboriginal patterns of life, nor do the criteria for eligibility or the methods of payment always accord with Aboriginal perceptions or needs. These problems exist quite apart from the administrative difficulties in the delivery of social services

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1149 House of Representatives, Standing Committees on Aboriginal Affairs, *Report. The Effects of Asbestos Mining on the Baryulgil Community*, AGPS, Canberra, 1984, 120.

1150 Similar considerations apply to repatriation: see Repatriation Act 1920 (Cth); Repatriation (Far East Strategic Reserve) Act 1956 (Cth); Repatriation (Special Overseas Service) Act 1962 (Cth); Repatriation (Torres Strait Islanders) Act 1972 (Cth).

1151 For example Criminal Injuries Compensation Act 1967 (NSW); Criminal Injuries Compensation Act 1977 (SA); Criminal Injuries Compensation Act 1982 (WA); Criminal Injuries Compensation Act 1983 (Vic) s 3.

1152 See NSWLRC 36, 91-2, 302 for a brief account.

1153 In the Northern Territory over 900 Aborigines are employed by the NT Public Service and contribute to the superannuation fund. JD Gallacher, Office of Aboriginal Liaison (NT) *Submission 339* (30 July 1982).

1154 eg the scheme for Commonwealth public servants: Superannuation Act 1976 (Cth) s 6 of which defines 'spouse' to include de facto spouse in most cases.

1155 That is, with respect to entitlements accruing after the proposed legislation comes into force. cf para 269.

to remote communities. Frequent complaints were made during the Commission's Public Hearings not only about these administrative difficulties but also about the inappropriateness of some of the assumptions behind the Social Security Act 1947 (Cth).[1156] These problems are not confined to the recognition of traditional marriages. They exist in a variety of other contexts, for example, payments in respect of child care in Aboriginal extended families.[1157] There is also evidence of conflict between individual social security entitlements and the demands of Aboriginal communities, for example in cases of unemployment benefits or supporting parents benefit.[1158] These matters are not all within the Commission's Terms of Reference. For present purposes it is necessary to discuss the recognition of traditional marriage for the purposes of the Social Security Act 1947 ( Cth), and related problems of implementation and administration.[1159]

303. ***Aboriginal Traditional Marriage under the Social Security Act 1947 (Cth)***. Under the Social Security Act 1947 (Cth) marriage is relevant to entitlement to pensions or benefits in a variety of ways. For example, the wife of an age or invalid pensioner living with her husband is entitled to a wife's pension.[1160] The Act now equates de facto relationships with marriage. For the purposes of wives' pensions, a 'wife' includes a 'female de facto spouse', and a 'de facto spouse' is defined to mean:

> a person who is living with another person of the opposite sex as the spouse of that other person on a bona fide domestic basis although not legally married to that other person.[1161]

Conversely, a wife not living with her husband is not (with certain exceptions not presently relevant) entitled to a wife's pension but may be entitled to a widow's pension.[1162] In general the Act uses terms such as 'wife' and 'widow' not to describe legal or social categories, but in a special way, as a vehicle for the provision of benefits. But there are still some situations in which the legal status of marriage may be relevant to entitlement to benefits under the Act. These mostly relate to entitlement to widows' pensions. For example, a woman 'whose marriage has been dissolved and who has not remarried' is entitled to a widow's pension provided she otherwise qualifies: a former de facto wife is, it seems, not so entitled.[1163] More importantly, a wife whose husband dies (and who otherwise qualifies) is entitled to a widows' pension irrespective of the length of the marriage and irrespective of whether she was financially dependent on her husband, or was living with him at the time of his death. In the case of an unmarried woman, all three extra factors are material, since to be a 'widow' for this purpose a 'dependent female' must satisfy the definition (more stringent than in respect of wives' pensions) in s 59(1) of the Act:

> 'dependent female' means a woman who, for not less than 3 years immediately prior to the death of a man ... was wholly or mainly maintained by him and, although not legally married to him. lived with him as his wife on a permanent and bona fide domestic basis.[1164]

In these cases, at least, a wife is in a better position than a de facto spouse for the purposes of entitlement to widow's pensions. For most other purposes of the Act it does not matter whether the claimant is legally married or not. The lack of entitlement under the Act does not necessarily mean that no pension or benefit will be payable. It is possible that the Department would, as a matter of discretion, allow the claim in such

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1156 It was, for example, suggested that the qualifying age for an age pension be lowered in the case of Aborigines because of their lower life expectancy: C Adams and W Neil, *Transcript* Nhulunbuy, (10 April 1981) 1271-3. See also S Wenman, *Transcript* Maningrida (8 April 1981) 1095-1101; E Bruen, *Transcript* Perth (20 March 1981) 274; C Adams, *Transcript* Nhulunbuy (10 April 1981) 1271-3; K Major, *Transcript* Kowanyama (27 April 1981) 1835-6. The Department of Social Security itself acknowledges that assumptions behind the Act do not fit with Aboriginal concepts: Director-General of Social Security (AJ Ayers) *Submission 305* (19 June 1981). For general discussion of this issue see Coombs, Brandl & Snowdon, esp 302-17.

1157 See para 387-91. Also G Gleave, *Transcript* Willowra (21 April 1981) 1564-5.

1158 Director-General of Social Security (AJ Ayers) *Submission 305*, (19 June 1981):
The Social Services Act clearly does not recognize the peculiar features of traditional Aboriginal laws and customs. For example, supporting parents benefit conflicts with the tribal concepts of kinship support since it presupposes the situation of alone parent living without support. The introduction of personalized income security payments such as unemployment benefit and supporting parents benefit into a communal system based on kinship networks and sharing of resources could be seen as contributing to the breakdown of the social fabric of traditional Aboriginal life.
cf also S Martin Jambajimba *Transcript* Willowra (21 April 1981) 1544; H Wilson, *Transcript* Peppimenarti (6 April 1981) 1025.

1159 The Department of Social Security has itself conducted a review of many of these questions: Aboriginal Access to Departmental Programs and Services, Canberra, October 1983 (hereafter DSS Report). This was an internal Report, presented to and approved by the Minister. Implementation of the recommendations in the Report is under consideration.

1160 Social Security Act 1947 (Cth) s 31 (hereafter SSA).

1161 SSA s 6(1) (inserted 1984). There is a similar definition of 'husband'.

1162 SSA s 59, definitions of 'deserted wife' and 'widow'.

1163 SSA s 59, definition of widow, para(c). The term 'wife', with its extended meaning under s 6(1), is not used in para(c). s 6(1) contains a definition of 'married person' which includes a de facto spouse, but no definition of 'marriage' or 'dissolved'.

1164 The definition of 'widow' in s 59(1) is inclusive only and is not expressed to include the 'ordinary' case of the female survivor of a Marriage Act marriage. As a result there is no term in s 59 for the extended definitions of 'wife' etc in s 6(1) to act on.

cases. This would not necessarily be classified as a 'special benefit' under s 124 of the Act: it might simply be treated as an exercise of discretion in respect of one of the other categories of pension or benefit.

304. ***Entitlement or Discretion?*** This kind of administrative flexibility is a feature of Departmental practice in the case of Aboriginal claimants and communities. On one view it makes formal recognition of entitlement (based for example, on being a wife or widow under Aboriginal customary laws) irrelevant. There are several answers to this argument. First, the failure of the Act to recognise traditional marriage does have important implications where there is more than one wife, and perhaps in some other cases also. By no means all of these situations are overcome in practice by exercises of Departmental discretion. Secondly, since discretion has to be exercised, various costs are incurred in terms of inconsistency and uncertainty (with consequent correspondence and delay) which would not occur if the entitlement was clear and distinct. Thirdly, it is not desirable to force Aboriginal claimants into the category of 'special benefits' through the failure of the Act to recognise their traditional family laws and structures. Aborigines, like all other Australians, are eligible to apply for pensions or benefits under the Act, and it is undesirable that payment of pensions or benefits should be, in their case, specially dependent upon discretion through the failure of the Act to accommodate their distinctive traditional ways of life. Welfare dependency is no less debilitating through being a result of discretion rather than entitlement. These problems were referred to in the Department's submission to the Commission:

> It is evident that the basic philosophy of the Australian income security program differs markedly to that which influences traditional Aboriginal lifestyles ... Access to income security arid other program areas of the Department is made difficult for Aboriginals because of the different cultural assumptions on which such programs are based. The challenge for the Department is to ensure that it meets the needs of Aboriginals living a traditional lifestyle.[1165]

At present the Department's policy is, in general, to treat traditional spouses as wives rather than 'dependent females'. Thus in the situations identified above, a traditional wife would be treated as qualifying for a widows' pension where a 'dependent female' might not qualify. As the Department stated in a letter clarifying its policy with respect to traditional marriage:

> The policy practice has been to accept [that] the first traditional marriage is the same as a legal marriage for social security purposes.[1166]

305. ***Plural Wives***. Although the Department's present policy favours the recognition of monogamous traditional marriages as such for the purposes of the Act, their policy in the case of polygynous marriages is more complex.[1167] It was explained by the Department in the following terms:

> The Social Services Act does not define what is a marriage. It is apparent that the Act is formulated on the basis that by law and custom people have only one husband or one wife at any one time. Accordingly, it is silent on the treatment of any situation where a person has more than one spouse at any time. In these circumstances, it has been necessary to make policy decisions as to the treatment of Aboriginals who have engaged in tribal marriages according to their custom. The policy practice has been to accept -
>
> - the first tribal marriage is the same as a legal marriage for social security purposes:
> - the Social Services Act envisages that a person will have only one wife.
>
> The underlying assumption that a person has only one spouse at any time is reflected in other fundamental aspects of the Act such as the application of the income test to a married couple. The Act requires, in the assessment of pension, that in the general married situation the income of a husband or a wife shall be deemed to be half the total income of both. In a similar vein in the assessment of unemployment or sickness benefit the requirement is that the income of a person includes the income of that person's spouse. Such procedures would obviously be inappropriate where a marriage consists of more than two parties.[1168]

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1165 Director-General of Social Security (AJ Ayers) *Submission 305* (19 June 1981) 3.

1166 Department of Social Security, *Submission 333* (20 May 1982) Attachment. For other submissions on DSS policy see Minister for Social Security (Hon FM Chaney) *Submission 361* (15 November 1982); Department of Social Security (JT O'Connor & D Hall) *Submission 340* (4 & 17 August 1982); Department of Social Security (PJ Marrs) *Submission 341* (26 August 1982).

1167 The DSS Report (1983) recommended, among other things, recognition of traditional marriages for all benefit and pension purposes: para 3.10.1. It does not appear that this change to Departmental policy has yet been made, and certainly no amendments to the SSA have yet been proposed.

1168 Department of Social Security, *Submission 333* (20 May 1982), Attachment.

306. ***Application of the Act to Plural Relationships***. No doubt the provisions dealing with computation of income, to which the Department's submission refers,[1169] were drafted on the assumption that there would be only one 'husband' and 'wife' in any case (although they are by no means incapable of operating with plural relationships). But the basic provisions entitling persons to wives' or widows' pensions are not necessarily restricted to de facto monogamous relationships. Legislation which provides for the co-existence of a legal wife and a de facto wife ( even if the legal wife is separated or 'deserted') cannot be said to be dealing with monogamous relationships. For example, a wife, deserted by her husband (an age or invalid pensioner) for another woman with whom the husband lives, is still the 'wife of an age pensioner or an invalid pensioner' within the meaning of s 31(1), but the de facto wife of the pensioner is also his 'wife'. The pensioner thus has two wives at one time. The reasons why one (the deserted wife) is not entitled to a wives' pension is not because the term 'wife' is singular, but because a wife living separately from her husband may not be paid a wife's pension (s 31(2)).[1170] If, three years later, without having obtained a divorce from his first wife or left his de facto wife, the pensioner died leaving both wives aged at least fifty, both women ought, it seems, to be regarded as widows for the purposes of widows' pensions. Indeed this possibility seems to be clear from the inclusive definition of 'widow' in 59(1). A widow, as defined in s 59(1), who meets the other criteria in s 60 is entitled to a widows' pension. There is nothing in Part IV of the Act which indicates that only one person at a time is entitled to a widow's pension in respect of any one deceased husband. Indeed, the Department does not itself contend that a person cannot have more than one 'wife' under the Act. The point arises in the context of disqualification from benefits, under the so-called 'cohabitation principle'.[1171] The Department treats a second wife as 'living with a man as his wife on a *bona fide* domestic basis' for the purposes of disqualification from widows' or supporting parents benefit, but not as being or having been his wife for the purpose of qualification for wives' or widows' pensions. The bas is of the Department's position is not so much the meaning of 'wife', as an appeal to an unexpressed inference from the Act, that 'the legislature would have envisaged that each man would have only one wife'. Given the ordinary legal meaning of 'wife' this may be so, although Australian law in other respects contemplates that a man may have more than one wife.[1172] But given the special definition of 'wife' in the Act it is by no means clear that the legislature contemplated that there would be only one 'wife'. And, whatever the legislature may have thought, it is difficult to find a basis for this view in the words of the Act.

307. ***Critique of the Present Position***. In the absence of authoritative interpretation of the relevant provisions by the courts or the Administrative Appeals Tribunal, it is not clear that the Department's policy in dealing with polygynous traditional marriages would be sustained. However the question for the Commission is whether it is desirable to recommend express recognition of traditional marriages (including polygynous marriages) for the purposes of the Act. There are several reasons for doing so:

- *Inconsistency*. It is repugnant to treat a second traditional wife as living with her husband 'as his wife' so as to disqualify her from benefits under the Act, but as not doing so for the purpose of qualifying her for benefits.

- *Non-Recognition of Traditional Status*. Even if the practical consequences of non-recognition as a wife are avoided (as they often are) through payment of unemployment benefit or special benefit, the Department is put in the position of saying to a second wife, in effect, that she is not her husband's wife.

- *Arbitrariness in Selection of 'First' Wife*. In order to apply its policy the Department treats the 'first' wife at the relevant time as the wife for benefit purposes. The 'first' wife is the one who has been married the longest to the husband. Apart from occasional mistakes in administration (leading to benefit being paid to the second wife, not the first[1173]) this is arbitrary. At the time when eligibility comes to be determined, it may well be that the 'second' wife has come to be the focal wife in the

1169 The most important of these provisions (formerly s 29) is now SSA s 6(3) (inserted 1984).

1170 After six months, the wife, though not divorced, might become entitled to a widows' pension (59(1)). The husband would then have, at the same time, a 'wife' and a 'widow'.

1171 Entitlement to a widows' or supporting parents' benefit is lost by a woman 'who is living with a man as his wife on a bona fide domestic basis although not legally married to him': SSA s 59(1), 83AAA(1). See A Jordan, *As His Wife. Social Security Law and Policy on De Facto Marriage*, DSS Research Paper 18, Canberra, 1981; MJ Mossman & R Sackville, 'Cohabitation and Social Security Entitlement', in *Essays on Law and Poverty: Bail and Social Security*, AGPS, Canberra, 1977, 80.

1172 Family Law Act 1975 (Cth) s 6. In several respects (eg the provision for 'deserted wives') the SSA does not accord with developments in family law in the Family Law Act 1975.

1173 eg L Fishpool, *Transcript* Willowra (21 April 1981) 1557.

household, with the first wife occupying a subsidiary role.[1174] To treat the older wife as the 'first' or only eligible one may conflict with Aboriginal perceptions of the marriage. On the other hand if the husband chose to marry the second wife under the Marriage Act 1961 (Cth) she would, apparently, supplant the 'first' wife for the purposes of the Act[1175] although in other respects the Act gives no preference to Marriage Act wives over de facto wives.[1176]

- *Denial of the Most Appropriate Status to Persons in Need*. In general, the Department pursues the policy of classifying a claimant in need in the most appropriate way (where several categories of benefit are relevant). But in this context, this policy is not applied. If the argument for recognition of a traditional wife as a 'wife' for this purpose is accepted, then to treat a second wife as eligible only for special benefits or unemployment benefits is to deny her the most appropriate status under the Act.

308. ***The Aggregation of Payments***. One objection to the recognition of polygynous marriages relates to the possible aggregation of payments it might cause. The point was made by the Department in the following way:

> If tribal marriage were recognised for Social Security purposes it would mean that ... a man would receive at the same time additional unemployment or sickness benefit for a number of wives eg a man with say three wives each of whom had three children would be able to receive benefit of $312.20 a week ... In the situation referred to ... the man's income would be significantly in excess of present Average Weekly Earnings ... There might also be problems in ensuring that the wives received the benefit of the payments made in respect of them. This could be overcome, however, by making direct payments to the wives. Moreover, there would still remain a problem in that the total benefit would, under the law as it now stands, be taxable income in the hands of the husband.[1177]

There are several answers to this argument. In the first place, it should be provided that any payment made in respect of a second or subsequent wife (or of children in her 'custody and control') should be made directly to her and be regarded as her income. This is the position now in respect of wives' and widows' pensions paid to 'first wives', and it should be extended to unemployment benefit. Actually the present position involves perhaps a greater risk of aggregation to the disadvantage of dependants, since in the example given by the Department, while the second and third wives would get nothing the husband would be regarded as having custody of all nine children and would be paid accordingly.[1178] There can be real problems in ensuring that the children receive the benefit of the payments made in respect of them. These problems would be significantly reduced by paying benefit to the custodial wives. Secondly, while the 'family unit' would, in the Department's example, receive an income in excess of the average weekly wage, the family in question consists of thirteen persons, and the needs are correspondingly greater. But if aggregation of payments in a particular family is thought to be a problem it can be dealt with under the Department's existing powers. Even when a claimant is entitled to benefit, the rate of benefit is that 'in each case ... determined by the Director-General as being reasonable and sufficient, having regard to all the circumstances of the case' up to the maximum rate for that benefit.[1179] The Department could, under this power, determine an appropriate rate having regard to family income and other circumstances.[1180] Thirdly, as the Department itself concedes, in practice less appropriate benefits (unemployment benefit or special benefit) are currently being paid to many second or additional wives:

> There could be cost implications if tribal marriages were recognised for the purposes of the ... Act. However, these could be offset in full or in part by expenditure on other benefits to which wives. after the first, at present qualify in

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1174 As Dr D Bell pointed out: *Submission 491* (16 September 1985) 5.

1175 Department of Social Security, *Submission 333* (20 May 1982). The Department commented that 'Marriage under the Marriage Act indicates that Tribal Laws have been abandoned. Therefore [the] second (legal) wife would be entitled to wife's pension'. It is not clear whether this situation has arisen in practice.

1176 In respect of wives' pensions, a de facto 'dependent female' of one month's standing is preferred to a 'deserted' wife of twenty years: SSA s 6(1), definition of 'wife', 31(1) & (2).

1177 Director-General of Social Security (AJ Ayers) *Submission 305* (19 June 1981).

1178 If the children were children of a second wife's earlier marriage, the husband woud not usually have 'custody, care and control' of them: s 112(5)(a). See para 387-90. Unless he was making 'regular contributions towards [their] maintenance' (s 112(5)(b)) he would not be entitled to extra money in respect of the children. On that basis, no-one would be so entitled.

1179 SSA s 28(1), 32(1), 63, 83AAE.

1180 Apparently this power is rarely used. In the UK the practice with respect to non-contributory pension schemes is to pay a second wife in a household 'the difference between the scale rate for a married couple and that for a single householder': D Pearl, 'social Security and the Ethnic Minorities' (1973) 1 *Soc Welfare L* 24, 34. All Commonwealth pensions are non-contributory in this sense.

their own right eg unemployment benefit, sickness benefit etc. Overall cost implications may' not therefore be significant.[1181]

Recognition of traditional marriage under the Act would also simplify its administration and avoid costs in claims and correspondence.

309. ***Application of Section 6(3) of the Act***. One final problem relates to the application of provisions such as s 6(3) to plural marriages. Under s 6(3)(b) 'the ... income of a married person shall be taken to be 50% of the sum of the income of that person and of the person's spouse' for the purpose of determining the level of benefits payable. The Department bases its argument about the inapplicability of the Act to plural marriages on these 'fundamental aspects' of it. On the interpretation of the Act suggested, it is not clear why s 6(3) should not be read simply as applying to the husband and each wife as between themselves, nor would it be inequitable to read it in this way.[1182] The problem, if it is one, could be dealt with under the Department's existing powers,[1183] or a power to deal with the consequences of payments to multiple wives by regulation could be conferred, along the lines suggested by the English Law Commission in its *Report on Polygamous Marriages*.[1184] Although it may not be strictly necessary, the Commission recommends that such a regulation-making power be conferred.

310. ***Conclusion***. For these reasons, traditional marriages should be recognised as marriage for all the purposes of the Social Security Act 1947 (Cth).[1185] This recognition should extend both to 'first' marriages. in accordance with the Department's present policy, and to polygynous marriages where these exist. It is necessary to put this recommendation into perspective. A small minority of traditional marriages are actually polygynous. No exact figures are available. but the evidence suggests that about 10% of traditional marriages in the Northern Territory, involve more than one wife,[1186] and that this number may be gradually declining. Elsewhere in Australia the proportion is even less. On the other hand, the practice is a reflection of Aboriginal customary laws, and it is not so uncommon or infrequent that it is unnecessary to deal with it. The Social Security Act 1947 (Cth) should be amended by the insertion of a provision that the term 'wife' includes an Aboriginal woman whose relationship with an Aboriginal man is regarded as a marriage according to the customary laws of the group to which she or they belong. One consequence of this recommendation is that traditional marriage will disqualify a traditional wife from the receipt of supporting parents' benefit or widow s' pension (in respect of a previous marriage). This is consistent with the Act as presently' administered. Where a new marriage relationship has been formed eligibility to pension or benefit is to be determined by reference to that relationship. not an earlier one.

311. ***Some Problems of Administration***. Finally, brief reference should be made to some related problems of administration of the Act in the context of traditional marriage.

- *Separate Payments*. During the Commission's Public Hearings, the comment was quite frequently made that, when unemployment benefit was paid to the husband at the married rate, it was often regarded as 'his' money, and the wife was expected to subsist (and often care for children) on 'her' money, child endowment.[1187] This seems, at least in part, a result of the perceived separateness of husband and wife in traditional society. It is certainly more consistent with this tradition, as well as more effective in terms of delivering support to those in need, to provide for separate payment of pensions or benefits to husband and wife. Something has already been done in this direction by the Department: for example, split cheques can now be paid by computer in some States and in the Northern Territory, rather than having to be processed manually. Steps should be taken to allow for

1181 Department of Social Security (AJ Ayers) *Submission 305* (19 June 1981).

1182 The definition of 'de facto spouse' under s 6(1) refers to a 'person of the opposite sex'. Accordingly these would be no question of aggregating income of, say, two wives under s 6(3).

1183 See para 308.

1184 UK, Law Commission No 42, *Report on Polygamous Marriages*, London, 1971, 41-4, recommending that polygamously married claimants 'should qualify for the benefit except where regulations otherwise provide'.

1185 As recommended by the DSS Report (1983) para 3.10.1.

1186 According to the Department of Aboriginal Affairs' Aboriginal Population Records, there are approximately 4,889 'tribal unions' in the Northern Territory: LG Wilson, *Submission 321* (15/27 March 1982). Of these, approximately 665 marriages were polygynous; 525 with two wives, 102 with three, 25 with four, and 13 with five or more. See also para 227-8.

1187 C Adams, *Transcript* Nhulunbuy (10 April 1981) 1271-2; ALRC Field Trip No 7 *Central Australia*, October 1982, 10, 21, 32, 36; Dr Lane & Ms McCann, *Transcript* Alice Springs (11 October 1982) 2992. cf D Bell & P Ditton, *Law: The Old and the New. Aboriginal Women in Central Australia Speak Out*, 2nd edn, Aboriginal History, Canberra, 1984, 94-6.

separate payments of benefit to husband and wife as of right. In the case of traditionally married claimants. the presumption should be in favour of separate payments in all cases.[1188]

- *Payments to Spouses on Account of Children*. Similarly, payments to spouses on account of children should, where split cheques are paid, be paid as nearly as possible to the person with actual care and control of the children, rather than automatically being aggregated in the name of the husband.[1189]

- *Information and Liaison*. The identification of traditional marriages for benefit purposes adds to the problem which presently exists of delivery of social security benefits to Aboriginal communities. Because of the Department of Social Security's present policy on traditional marriages this function of identification is already being carried out in the Northern Territory much of this investigative and liaison work is carried out by the Aboriginal Liaison Unit within the Department, with Aboriginal field officers travelling regularly to communities. The Liaison Unit is a significant factor in assisting the Department's work with Aboriginal communities, and should be supported and developed accordingly. There is also room for the appointment. especially in remote communities, of part-time agents who can assist claimants in filling out forms, providing evidence for their claims, etc. Such agents could help in explaining the social welfare system and in providing help and education to beneficiaries in handling their money, a matter for which there is both the need and the demand. A pilot scheme along these lines has been conducted in Queensland. The Department is also working on simplifying its claim forms and other forms, something which is a prerequisite for more effective community education in the social welfare system.[1190]

312. ***Relationship between Maintenance and Social Security***. The conclusion that traditional marriage should be recognised for the purpose of the Social Security Act 1947 (Cth) might be thought to rest uneasily alongside the conclusion in para 278 and 290 that traditional marriage not be recognised for the purposes of maintenance or property distribution. However, as pointed out in para 289, there is no basis in Aboriginal customary laws or traditions for imposing maintenance obligations on the termination of a relationship, and no good reason to single out traditional marriage for this purpose.[1191] There is thus no justification for seeking to deprive traditional spouses of social security payments[1192] because of what are legally (and practically) unenforceable claims to maintenance.

## Spousal Compellability in the Law of Evidence

313. ***The Present Law***. At common law a spouse of an accused person was, with certain exceptions (eg crimes of violence against the spouse) incompetent to give evidence for or against the accused, and was in any event not compellable as a witness even when competent.[1193] This position has been changed by legislation in various respects throughout Australia, though the law is far from uniform.[1194] In general, spouses are competent witnesses both for the defence and the prosecution, but are not compellable for the prosecution except in respect of a limited range of offences. For example in New South Wales, the Crimes Act 1900 s 407AA[1195] makes a married person a compellable witness for the prosecution where the spouse is charged with an offence involving domestic violence. A compellable witness may, however, apply to the court to be excused from giving evidence. In Victoria a spouse is generally compellable against an accused, subject to a discretion given to the court to exempt the spouse. The factors to be taken into account in exercising this discretion are spelt out: they include the nature of the relationship, the likely effect on it of

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1188 The DSS Report (1983) para 3.16.1, recommended that the Department should:
- inform Aboriginal clients of the option of using split payment arrangements
- amend existing claim forms to enable applications for split payment to be made at the time of lodgement
- examine the feasibility of having the split payment method applied to benefit categories other than unemployment benefit
- evaluate the effectiveness of making payments using the split payments and warrantee scheme methods.

See also para 308.

1189 See further para 387-91.

1190 See DSS Report (1983) ch 7. Cultural factors have also figured in the administration of the Act in other ways: eg the 'isolation' test for eligibility for backdated payments under SSA s 102(1)(a): see *Re Corbett* (1984) ASSC 92-019; *Johns v Director-General of Social Security* (1985) ASSC 92-054.

1191 For the recognition of de facto relationships generally for this purpose see para 282, 288.

1192 Pursuant to SSA s 62. See para 285.

1193 cf *Hoskyn v Commissioner of Police for the Metropolis* [1978] 2 All ER 136 (HL). A witness who is not 'competent' may not give evidence at all. A witness who is competent but not compellable may give evidence, but cannot be required to do so without his or her consent.

1194 See JA Gobbo, D Byrne, JD Heydon (ed) *Cross on Evidence*, 2nd Australian edn, 1979, 162-4, 169-77.

1195 As amended by Crimes (Domestic Violence) Amendment Act 1982 (NSW).

compelling the spouse to testify and the importance of the facts in issue.[1196] It has generally been held by Australian courts that an Aboriginal woman remains, a competent and compellable witness even though she might 'say that, by the laws of the aborigines, she is the prisoner's wife'.[1197] There is at present no statutory provision in Australia dealing with traditional marriages for this purpose.[1198] Traditionally married Aborigines are thus compellable witnesses against each other unless they can rely on relevant legislation covering de facto relationships.

314. ***Reform of the General Law***. The retention of inter-spousal non-compellability in the law of evidence has been extensively investigated by law reform agencies in Australia, including this Commission.[1199] Though there has been no unanimity on any specific proposal, there is no support for the abolition of the privilege altogether. The extension of non-compellability to persons in marriage-like relationships has however tended to be treated very cautiously. The Mitchell Committee in South Australia, after referring to the evidence that few Aborigines benefit from the rule because of their informal domestic relationships, rejected its extension to de facto relationships on the ground that 'it is not desirable to extend the situations in which the prosecution of persons accused of crime may be impeded because witnesses cannot be compelled to give evidence'.[1200] The Committee did not specifically consider the problems of traditional marriages. The New South Wales Law Reform Commission Report on *De Facto Relationships* declined to make a firm recommendation in this regard, preferring to wait on this Commission's Evidence Report.[1201] In its Interim Report, this Commission proposed a discretion similar to that in Victoria, to exclude a spouse (including a de facto spouse) from giving evidence. The question of recognizing traditional marriage for this purpose was left to the present Report.[1202]

315. ***Recognition of Traditional Marriage for this Purpose***. The strength of the law enforcement argument which prevailed with the Mitchell Committee depends to a degree on the specific proposal. The enforcement of the law is certainly a consideration in exercising any discretion to excuse a spouse from testifying. If the rule is merely an anomaly, defining it as narrowly as possible, for example, so as to exclude traditionally married persons, might be justified. But it cannot be said that inter-spousal non-compellability is a mere anomaly. It is a concession to the social, emotional and economic stability of marriage, which in some form or other is very likely to survive. Failure to extend the rule to traditional spouses gives the impression that the law cares only about the stability of Marriage Act marriage, de spite the continuing importance of traditional marriage in many Aboriginal communities. As Justice Muirhead pointed out in a case in 1978, the public policy applicable to the non-compellability of a spouse in a legally recognized marriage applies equally to a traditional marriage.[1203] It is undesirable that Aboriginal traditional marriages should continue not to benefit from the rule.[1204] Traditionally married persons should be compellable to give evidence for and against each other in criminal cases only to the same extent as persons married under the general law.[1205]

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1196 Crimes Act 1958 (Vic) s 400.

1197 *R v Cobby* (1883) 4 LR (NSW) 355, 356 (Windeyer J); *R v Neddy Monkey* (1861) 1 *W and W (L)* 40; cf MC Kriewaldt, 'The Application of the Criminal Law to the Aborigines of the Northern Territory of Australia' (1960) 5 *UWAL Rev* 1, 20. For a recent example of a traditional spouse compelled against her will (and without any result) to give evidence against her husband see *Police v Campbell*, unreported, NT Court of Summary Jurisdiction, Mr J Murphy SM (8 June 1982), discussed at para 625.

1198 There was a statutory modification to this rule in Queensland from 1965 to 1979, but it was limited to the non-compellability of female Aborigines. Aborigines' and Torres Strait Islanders' Affairs Act 1965 (Qld) s 41; Aborigines Act 1971 (Qld) s 48. See para 239. cf Aboriginals Ordinance (No 2) 1937 (NT) extending the privilege of non-compellability to 'any Aboriginal living as consort husband or wife of any aboriginal charged with a summary or indictable offence'. This provision was repealed in 1953: Welfare Ordinance 1953 (NT) s 4.

1199 NSWLRC 36, 298-9; ALRC 26, *Evidence* (Interim) AGPS, Canberra, 1985, vol 1, para 196-7, 251-6, 529; vol 2, App C, para 9.

1200 SA Criminal Law and Penal Methods Reform Committee, *Third Report* (1975) para 11.5.

1201 NSWLRC 36, para 16.9.

1202 ALRC 26, vol 1 para 531, 536.

1203 Unreported decision, 1978, referred to by G Neate, *Dying Declarations and Customary Marriages of Australian Aborigines and Rules of Criminal Evidence*, ANU, LLB Honours dissertation, 1979, 118-9. A similar view was expressed by Mr J Murphy SM in *Police v Campbell* (n 126).

1204 cf Justice RA Blackburn, *Submission 320* (5 January 1982) supporting the extension of inter-spousal non-compellability to traditional marriage (but not to de facto relationships generally).

1205 There being no problem of competition between spouses, the privilege should extend to each traditional wife with respect to her husband. No proposal is made to create a new non-compellability rule for traditional wives as between themselves, or for other relationships where there may be constraints under Aboriginal customary laws about one person giving evidence against another. Dr D Bell pointed out that the emphasis given to spousal compellability and marital communications reflects a certain view of marriage which may not be shared in Aboriginal communities: 'it may be more important not to compel a mother-in-law to give evidence about her son-in-law'. *Submission 491* (16 September 1985) 4-5. But to create general and indeterminate categories of non-compellable persons would constitute too great a derogation from the general principle of compellability. Some protection may be given in such cases by the rule about confidential communications under Aboriginal customary laws, proposed in ch 25. See para 656-661.

316. ***Marital Communications***. A related problem is the extension of the evidentiary privilege relating to marital communications to traditional married persons. This privilege does not exist at common law[1206] or under the Family Law Act 1975 (Cth),[1207] but is a statutory creation of varying ambit throughout Australia.[1208] There is no evidence as to the impact of non-recognition of the privilege on traditional marriage, but it would be artificial to distinguish it from inter-spousal non-compellability, as an evidentiary rule protecting similar interests and values. The privilege relating to marital communications should extend equally to traditionally married persons.

## The Criminal Law

317. ***Bigamy***. Issues of the recognition of traditional marriage in relation to the criminal law arise in a number of ways. The first is the question of bigamy. Sub-section 94(1) of the Marriage Act 1961 (Cth) prohibits persons from going through a 'form or ceremony of marriage' being already married. Sub-section 91(4) prohibits persons from going through a 'form or ceremony of marriage' to a person who is already married. The 'form or ceremony of marriage' to which s 94 refers is a form or ceremony of marriage under the Act, so that a traditional Aboriginal marriage would not infringe the prohibition. In any event the term 'married' in the Act refers to marriage under Australian law: either marriage under the Act itself, or a foreign marriage recognised in Australia as a valid marriage. The Commission is not proposing recognition of traditional marriage in this way. There is no attempt in Australian legislation to outlaw plural relationships which are not 'marriage' in either of these senses.[1209] It has not been suggested to the Commission that the offence of bigamy be extended to polygynous Aboriginal marriages, and there is no case for doing so. The retention of polygyny in Aboriginal communities may be an issue, but it is not one to be resolved by the imposition of criminal sanctions (particularly as such sanctions do not apply to informal plural relationships in the general community).

318. ***Rape***. At common law a husband could not be convicted of raping his wife. Marriage was taken to be a perpetual consent to sexual intercourse. Excessive force could (though it rarely did) lead to a charge of assault, but rape itself was excluded. The rule is an anachronism which is out of line with modern views of marriage. It has been modified by case-law, and modified or abolished by statute in some jurisdictions.[1210] It would not be right to extend the rule to Aboriginal traditional marriages. It does not, it seems, reflect any similar rule of Aboriginal customary laws. In Aboriginal communities, violence by a husband against his wife could lead to the intervention of the wife's family to protect her, and to recrimination and conflict with the husband. However, there is evidence of the break-down of some of these traditional restraints in Aboriginal communities, with the consequence that violence against family members is now relatively common.[1211] The degree of legal protection to Aboriginal women against personal violence should not be diminished, whatever the difficulties of policing in isolated communities, or indeed in the context of domestic disputes generally.[1212] The rule that a husband cannot be convicted of raping his wife should not apply to traditional Aboriginal marriages.

319. ***Unlawful Carnal Knowledge***. In each State and Territory it is an offence to have sexual intercourse ('unlawful carnal knowledge') with a girl who is 'underage' (in most jurisdictions, 16 years of age), even with her consent. With certain minor exceptions, it does not matter that the defendant did not know that the

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1206 *Rumping v DPP* [1964] AC 814.

1207 Family Law Act 1975 (Cth) s 100(2).

1208 See Cross, 271-3: ALRC 26, vol 1 para 462, 895-8.

1209 cf *R v Bear's Shin Bone* (1899) 3 Terr 329, where the bigamy offence apparently extended to all forms of plural cohabitation.

1210 Vic: Crimes Act 1958, s 45, s 62(2) (and see Crimes (Amendment) Bill 1985 s 10 which would abolish the rule); SA: Criminal Law Consolidation Act 1935, s 48; NSW: Crimes Act 1900, s 61A. The Criminal Code (NT) s 5 removes the operation of the common law so that a husband may be charged with sexual offences within the Criminal Code. For discussion of the general issue see SA, *Criminal Law and Penal Methods Reform Committee, Special Report: Rape and Other Sexual Offences*, Adelaide, 1976, 13-15; JA Scutt, 'Consent in Rape: The Problem of the Marriage Contract' (1979) 3 *Monash UL Rev* 255; D O'Connor, 'Rape Law Reform — The Australian Experience' (1977) 1 *Crim L Rev* 305; P Matthews, 'Marital Rape' (1980) 10 *Family L* 221; IG Cunliffe, 'Consent and Sexual Offences Law Reform in New South Wales' (1984) 8 *Crim LJ* 271. cf *R v McMinn* (1981) 38 ALR 565, 567 (Starke ACJ), 571 (Crockett J).

1211 A study by criminologist Dr Paul Wilson presented in evidence in *R v Alwyn Peter*, unreported, Qld Supreme Court, Sept 1981 showed that, of 82 cases of violent crime on Queensland Aboriginal reserves in recent years, only 2 involved a stranger or outsider. In 55% of cases the offender and victims were married or cohabiting. See P Wilson, *Black Death White Hands*, George Allen & Unwin, Sydney, 1982, 10-21. See also para 394, 398-400, 497-8.

1212 cf para 249-53, 321.

girl was underage.[1213] At present, therefore, what Aborigines would regard as marital intercourse between a traditional husband and wife is, in the case of girls less than the age of consent, a criminal offence. In practice, prosecutions for the offence are rare even outside situations of socially recognised 'marriage'. In Aboriginal communities, prosecutions are even rarer. The Commission is not aware of any recorded cases in which a traditional husband has been convicted for the offence in respect of consensual intercourse with his underage traditional wife.[1214] An exception to the unlawful carnal knowledge rule is the case of intercourse within a marriage that the law recognises. Generally a girl cannot marry under the Marriage Act 1961 (Cth) unless she is 16 years old, but a 14 year old girl can marry if she obtains judicial consent to do so.[1215] Intercourse with a 14 year old wife would not be 'unlawful' for the purposes of the offence.[1216] In *Aljahi Mohamed v Knott*,[1217] a Nigerian Muslim aged 26 married a girl aged 13 in Nigeria. The couple came to England and cohabited there until the girl was taken into custody on the grounds that she was 'exposed to moral danger' under the Children and Young Persons Act 1963 (UK). The Divisional Court ordered that she be released. Since the marriage, valid by Nigerian law, was recognised in England. it could not be said that the girl was exposed to moral danger merely because she lived with her husband. Similarly, marital intercourse could not, between persons recognised in England as husband and wife, be 'unlawful sexual intercourse' under s 6(1) or 19(1) of the Sexual Offences Act 1956 (UK).[1218] However the question arises whether some minimum age should be set to the recognition of foreign marriages for this purpose.[1219] Recent amendments to the Marriage Act 1961 (Cth) designed to implement a Hague Convention on recognition of foreign marriages do not extend recognition under the Convention rules to a foreign marriage while the husband and wife are, respectively, under the ages of 16 and 14.[1220] As a result a situation arising in Australia such as that in *Aljahi Mohamed v Knott* would now result in the husband's conviction.

320. ***The Commission's View***. The question of marriageable age for the purposes of recognition of Aboriginal traditional marriages was discussed in chapter 13.[1221] The approach taken by a majority of the Commission is that functional recognition does not justify or require imposing a minimum age, since the effect is to deprive the parties to the marriage of the protection which is the point of recognition. The context here is slightly different, since the point of unlawful carnal knowledge laws is to protect young girls from exploitation. There is a movement to defer marriage among those groups where marriage traditionally occurred at an early age.[1222] With one qualification, a majority of the Commission agrees with the position taken in the Criminal Code (NT), which recognises traditional marriages for this purpose without specifying an age limit.[1223] However recognition should only be extended to traditional marriage for the purpose of the defence in the case of sexual intercourse which takes place with the consent of both parties: the defendant should accordingly be required to prove, on the balance of probabilities, that the relationship with the girl in question was a traditional marriage and that he honestly believed that she consented to the act.[1224]

321. ***Domestic Violence***. Reference has already been made to the problems of domestic violence in Aboriginal communities.[1225] These problems are not confined to persons who are 'married' either under the Marriage Act 1961 (Cth) or under Aboriginal customary laws. Indeed some of the traditional restraints on violence against a spouse are likely to be absent in a de facto or casual relationship compared with a

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1213 Crimes Act 1900 (as it applies in the ACT) s 67-75; Crimes Act 1900 (NSW) s 67-75; Criminal Code (Qld) s 212-6; Criminal Law Consolidation Act 1935 (SA) s 49, 50-55 (17 years); Criminal Code (Tas) s 124, 128, 129 (18 years); Crimes Act 1958.(Vic) s 46-50; Criminal Code (WA) s 183-7; Criminal Code (NT) s 129.

1214 However H Parker comments that police and missionaries did use the threat of prosecution against traditional husbands in earlier years: *Transcript* Strelley (23 March 1981) 315; and see D Bell, *Submission 491* (16 September 1985). A case pending in the NT Supreme Court involves charges against a Lajamamu man of abduction and unlawful carnal knowledge of a girl said to be a promised wife: P Ditton, *Submission 465* (1 January 1985) 2.

1215 Marriage Act 1961 (Cth) s 11, 12(1).

1216 cf Criminal Law Consolidation Act 1935 (SA) s 49(8); Criminal Code (NT) s 126.

1217 [1969] 1 *QB* 1 (Div Ct).

1218 id, 16-17 citing *R v Chapman* [1959] 1 QB 100. cf also *NM Advocate v Watson* (1885) 13 SC(J)6. See IGF Karsten, 'Child Marriages' (1969) 32 *Mod L Rev* 212; FO Shyllon, 'Immigration and the Criminal Courts' (1971) 34 *Mod L Rev* 135, 136-8; A Samuels, 'Legal Recognition and Protection of Minority Customs in a Plural Society in England' (1981) 10 *Anglo-Am L Rev* 241, 251.

1219 eg Karsten (age of puberty); Shyllon (13 years old).

1220 Marriage Act 1961 (Cth) s 88C(3), inserted by Marriage Amendment Act 1985 (Cth).

1221 See para 261.

1222 See para 226-8, 261. There is some doubt about the age at which marital cohabitation begins in traditional communities. It has been suggested that the age has dropped recently with a drop in the age of puberty: D Bell, *Daughters of the Dreaming*, McPhee Gribble, Melbourne, 1983) 151; and see Bell and Ditton (1984) 93.

1223 Criminal Code (NT) s 1 (definition of 'husband' and 'wife') 126 (definition of 'unlawful') 129.

1224 For the reasons stated in para 261, Professor Crawford dissents on this point. A minimum age for recognition equivalent to the lowest age at which persons of the particular sex may marry with consent (currently 16 for boys, 14 for girls) should apply here as elsewhere.

1225 See para 318 n 140.

traditional marriage. Providing protection to spouses, or de facto spouses, against domestic violence requires measures of various kinds, including but not limited to more effective legal remedies. Questions of policing in such cases, and of access to telephones in order to call police, are of great importance.[1226] In some communities[1227] women's resource centres have been established to provide communal support for women who are faced with domestic violence and other problems. Proposals have also been made for shelters to be set aside as agreed areas where victims or potential victims of domestic violence can go. So far as legal remedies are concerned, the tendency in more recent legislation, especially legislation providing for injunctions or orders against apprehended domestic violence or harassment. has been to apply it to all relationships irrespective of their legal status.[1228] Greater reliance is thus placed on State and Territory legislation to deal with domestic violence than the more limited Commonwealth legislation. For constitutional reasons the Family Court's injunctive jurisdiction, which is at present also exercised by State and Territory magistrates, under the Family Law Act 1975 (Cth) s 114(1) and 114AA, only applies to Marriage Act marriages. But the Act makes it clear that equivalent State and Territory remedies are not excluded, and it prevents persons who have made applications under such legislation from making subsequent applications to the Family Court in respect of the same matter.[1229] There are weaknesses in the Family Law Act in this area, the principal ones being the procedures required to be followed to get relief and the difficulties of enforcing any orders made.[1230] It is unusual for a person to seek to use the injunctive powers under the Family Law Act unless principal relief (ie a divorce) is also sought. The fact that domestic violence has occurred does not necessarily mean that a relationship has come to an end. A further difficulty that has become apparent is the reluctance of State police officers to become involved in matters which are regarded as within the domain of the Family Court.[1231] The question is whether traditional marriages should be recognised as marriage for the purposes of the Family Court's injunctive jurisdiction under s 114 and 114AA of the Act. A significant practical problem is that those persons who would be eligible to seek relief if traditional marriages were so recognised, live in remote areas where access to the Family Court or a magistrate exercising jurisdiction under the Family Law Act would be difficult. Orders may be needed at short notice, and the practical consequence might be that no applications are made. More fundamentally, however for the reasons given in para 323, the Commission does not recommend extending Family Court concurrent jurisdiction to traditional marriages. These reasons apply equally here.[1232] Difficulties may arise if an Aboriginal spouse has to first prove traditional marriage in order to establish the court's jurisdiction to order relief, particularly since the application is likely to be made *ex parte* in circumstances of urgency. Given the trend for greater reliance to be placed on State and Territory legislation to cover domestic violence, and the weaknesses in the Family Law Act, it is preferable not to extend the Family Court's jurisdiction to cover traditional Aboriginal marriages. For these reasons no specific recommendation for the recognition of traditional marriages for the purposes of domestic violence legislation is made. In reaching this conclusion, the Commission acknowledges and supports the need for reform of domestic violence legislation, particularly in Queensland and the Northern Territory, along the lines recommended for the Australian Capital Territory in its Report on Domestic Violence.[1233]

## Other Related Issues

322. ***Taxation***. The Income Tax Assessment Act 1936 (Cth) is a complex piece of legislation, and many of the difficulties of interpretation and application discussed in relation to the Social Security Act 1947 (Cth) are also relevant to the taxation legislation. The quest ion which arose with the Social Security Act also arises with the Income Tax Act: is it necessary or appropriate to recognise traditional marriages for the purposes of the Act? Marital status can have important consequences in the Income Tax Act. In particular the tax liability of a taxpayer is affected by whether he is able to claim any of the personal rebates (eg spouse, housekeeper, dependant, sole parent, concessional expenditure) provided for in the Act. Until recently, the term 'spouse' was not defined for the purposes of such rebates, and it was held not to include a de facto husband or wife,[1234] However from 1984/85 the term 'spouse' includes a de facto spouse (of the opposite

1226 See para 252-3, 844-8.
1227 eg at Yirrkala.Family Law Act 1975 (Cth) s 114AB.
1228 eg Crimes (Domestic Violence) Amendment Act 1983 (NSW); De Facto Relationships Act 1984 (NSW) s 53-5. See NSWLRC 36, ch 14; ALRC 30, *Domestic Violence*, AGPS, Canberra, 1986. There is, however, no domestic violence legislation in the Northern Territory.
1229 Family Law Act 1975 (Cth) s 114AB.
1230 For discussion of these difficulties see ALRC DP 24, *Contempt and Family Law*, Sydney, 1985, esp para 74-85.
1231 id, para 74.
1232 See also para 382.
1233 ALRC 30, *Domestic Violence*, AGPS, Canberra, 1986.
1234 Case P24 (1982) ATC 105. However a housekeeper rebate could be claimed for a de facto spouse with care of a child.

sex) for the purposes of the dependant rebate. There is also now a special rebate entitlement for a taxpayer who contributes to the maintenance of more than one 'spouse'.[1235] This would include for example a taxpayer who maintained a legal spouse and a de facto spouse, two de facto spouses or two legal spouses in the case of a foreign polygamous marriage recognised in Australia. It would thus include a polygamous traditional Aboriginal marriage, where the parties were able to be classified as de facto spouses under these new provisions. In the case of more than one spouse the general rule is that only one dependant spouse rebate is available, but the Commissioner has a discretion to allow a higher rebate if there are special circumstances. A rebate will generally not be available where the income of one spouse is high enough to completely extinguish the rebate, although again a rebate, up to the maximum for one spouse, may be allowed by the Commissioner. The Commission recommends that specific recognition should be given in the Income Tax Assessment Act 1936 (Cth) to traditional marriages.[1236] Such an amendment would not mean that additional dependant rebates would be available to Aborigines, as the new provisions summarized here would apply. But Aboriginal spouses would be regarded as legal spouses rather than de facto spouses for the purposes of the Act.

323. ***Jurisdiction of Courts***. A number of submissions to the Commission suggested that the Family Court of Australia be given jurisdiction over traditional marriages.[1237] The Commission does not, with one exception, recommend the recognition of traditional marriage in any of the areas (divorce, maintenance and property distribution pending or upon divorce, domestic violence) in which the Family Court presently has jurisdiction. The exception is the custody of children who would, under the recommendation on the status of children,[1238] become legitimate and therefore, in a sense, children of a marriage. The question of custody jurisdiction with respect to such children is complicated by the divisions which presently exist between the different Australian custody jurisdictions. These will be discussed in more detail in Chapter 16, where recommendations on this question are made.[1239] In other respects, recommendations in this Chapter support the recognition of traditional marriage in areas (eg adoption, worker's compensation) where there are already established courts or tribunals with exclusive jurisdiction, or in areas (eg status of children, inter-spousal non-compellability) where the matter can arise generally in any court. No specific recommendations as to jurisdiction are called for in these areas.

324. ***Other Implications of Marriage***. Although the issues in this Chapter are the most important ones in which marriage has legal consequences or implications, and the only ones in which there is any evidence before the Commission suggesting a need for reform, they by no means exhaust the range of references to marriage in the statutes of the Commonwealth, the States and Territories. Many of these references have incidental legal consequences if the marriage is recognized as valid. It would be a difficult task to locate each of these references in Australian laws. The New South Wales Anti-Discrimination Board in a Report in 1978 listed no fewer than 44 New South Wales Acts which, in its view, discriminated on grounds of marital status.[1240] It is likely that a similar list could be compiled for each of the remaining Australian jurisdictions.[1241] On balance the Commission does not believe that traditional marriages should be recognized for all of these diverse purposes, purposes which in most cases would be likely to be perceived by traditional Aborigines as irrelevant, and some at least of which will conflict with Aboriginal perceptions and traditions of marriage. An alternative would be to allow the Governor General by regulation to specify additional laws or classes of laws to the list of laws in the proposed legislation for which traditional marriage is to be recognised. But this would be in effect a delegated power to vary the operation of State or Territory legislation. In the absence of any clear indication of need, it may be difficult to justify an extensive power of this kind. If problems arise with non-recognition of traditional marriages in any of these miscellaneous areas, the legislation in question can be amended, or a new class of matters can be added to the proposed provision for recognition of traditional marriages by amendment. New laws should also be kept under review to ensure that traditional marriages are considered for separate recognition (alongside Marriage Act marriages and de

1235 Income Tax Assessment Act 1936 (Cth) s 159H(3), s 159J (5A).

1236 The Hon C Holding, Minister for Aboriginal Affairs, stated that the recognition of traditional marriages for the purposes of dependent spouse rebates required attention: Australian Law Reform Commission — Australian Institute of Aboriginal Studies, *Report of a Working Seminar on the Aboriginal Customary Law Reference*. Sydney, 1983, 3.

1237 Family Law Council (Justice Fogarty) *Submission 285* (28 November 1983) suggested concurrent jurisdiction.

1238 See para 271.

1239 See para 377-82.

1240 Anti-Discrimination Board, *Report on Discrimination in Legislation*, Government Printer, Sydney, 1978.

1241 There are, for example, over 900 references to the terms 'marriage', 'spouse', 'husband' and 'wife' in the Acts of the Commonwealth Parliament.

facto relationships) where this is appropriate. For these reasons, no 'residual' recognition provision is recommended.

325. ***The Form of Legislation recognising Traditional Marriage***. In this chapter, the Commission recommends the recognition of traditional marriages for a variety of purposes. In the case of certain Commonwealth Acts covering a specified field where consequential difficulties arise (specifically the Social Security Act 1947 (Cth), and the Income Tax Assessment Act 1936 (Cth)) this should be done by specific amendment to those Acts. In the case of recognition for purposes of the common law or other legislation, if such recognition is to be conferred by federal law,[1242] then separate provision needs to be made. This should take the form of a clause describing those laws in generic terms, and conferring equivalent rights, powers, duties or immunities on persons traditionally married as those laws confer on persons married under the general law. Consequential provisions need to be made for the exercise of powers etc by other persons with respect to traditional spouses under those laws, and for the apportionment of benefits between plural spouses. A definition of 'tradition al marriage', and the related evidentiary provisions discussed in Chapter 13,[1243] should also be added. Other legislation recognizing traditional marriage can then incorporate by reference that definition, avoiding inconsistent or overlapping definitions in different Acts.

1242 As to which see Chapter 38.
1243 See para 258-69.

# 15. The Protection and Distribution of Property

326. ***Scope of this Chapter***. The previous chapter discussed the issue of property distribution in the context of Aboriginal traditional marriage and considered whether it was desirable for the law to be changed to take account of traditional marriages for those purposes.[1244] In the areas affecting property distribution it focussed on the recognition of the marriage for the purposes of family provision (testator's family maintenance) and intestacy. This chapter is concerned with the transfer of property and the problems which may occur if Aboriginal traditions for transfer and distribution do not accord with the legal requirements.

## Distribution of Property between Living Persons[1245]

327. ***Differing Attitudes to Property***. Traditional Aboriginal societies were not materialistic. Although land and what might be described as 'intellectual property' were of great significance, those material possessions unrelated to ceremonial activities were not:

> The range of directly useful material objects is not large ... Basically for women there is the digging stick. For men there are spears, spear-thrower, and perhaps the boomerang and club.[1246]

However the giving of gifts (food or other items) was an important way of creating bonds and satisfying obligations within the kinship system:

> economic activity was not for personal profit or economic gain. The important thing was not the economic value of the gift given, or the relative value of the gifts in an exchange, but the act of giving and receiving which reinforced social bonds. If Aborigines gave things away, it was not because they did not value things or the rights of private ownership (for they personally owned all their tools and weapons), but that they placed a higher value on fulfilling kinship obligations.[1247]

Gifts were not only exchanged to reinforce kinship bonds but also on an inter-tribal basis, and there were extensive trade routes.[1248] Berndt and Berndt list the various bases of gift exchange as including:

- gifts made to settle grievances and debts;
- gifts in return for services or for goods which would include gifts associated with carrying out ceremonies:
- formalized gift exchange involving trade between various defined partners:
- general trade: and
- gift exchange which occurs in relation to large sacred ceremonies.[1249]

328. ***Transfers of Personal Property***. The general law allows substantial freedom to individuals in the handling and disposition of their property, and imposes, for the most part, minimal requirements of form with respect to the transfer of personal property, especially between living persons. Few conflicts appear to have arisen between Aboriginal customary laws and the general law. While the formal requirements of the law for the transfer of goods from one person to another do not appear to have created particular problems, the growing demand for Aboriginal artwork and its production for commercial purposes has raised some difficulties. These difficulties go much wider than the mere transfer of personal property. Many Aboriginal objects and paintings depict myths and totemic figures which have significance not only to the individual

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1244 See para 280-94.

**1245** Most property transactions involve a transfer by sale or gift *inter vivos*, that is, from one living person to another. In addition to voluntary transfers, property may change hands compulsorily as a result, for example, of bankruptcy or the execution of a court order. It has been pointed out that the distinction between distribution of property inter vivos and on death is of 'questionable utility', especially for comparative purposes: JL Comaroff and S Roberts, *Rules and Processes*, Uni of Chicago Press, London, 1981, 176. For present purposes, the distinction is adopted because it reflects different degrees and kinds of control exercised by the general law over dispositions of property.

1246 RM Berndt & CH Berndt, *The World of the First Australians*, 4th rev edn, Rigby, Adelaide, 1985,117.

1247 R Broome, *Aboriginal Australians*, George Allen & Unwin, Sydney, 1982, 16-17.

1248 See eg K Ackerman, 'Material Culture and Trade in the Kimberleys Today' in RM Berndt and CH Berndt (ed) Aborigines of the West, *Uni of WA Press*, Perth, 1980, 243.

1249 Berndt & Berndt (1985) 122-134.

artist but to some or all members of the group to which the artist belongs. Selling or giving away such paintings or sacred objects may involve a serious breach of Aboriginal customary laws yet fulfil the requirements of the general law for transfer of property. Important questions arise as to the protection of Aboriginal artwork and designs.[1250] In the present context the issue is whether it is necessary or desirable for the law covering the transfer of personal property to be amended to take into account aspects of Aboriginal customary laws. Amendment to the law could create uncertainty for ordinary transactions and thus cause more difficulties than it resolves. In any event there has been no demonstrated need, nor have any submissions been made to the Commission, for changes to the law to be made in this area. Aboriginal customs of gift giving, the exchange of goods and services and the sale of personal property appear to fit within the normal legal rules. Problems with sale of artefacts and restoration of items of cultural significance need to be addressed specifically, not through the mechanism of any general change to the law of property.

329. ***Real Property and Aboriginal Customary Laws***. The term 'real property' includes a wide range of legal and equitable interests generally related to land. It thus includes the land itself and intangible interests such as a right of way (easement) to walk across land owned by another person, or a profit a prendre, that is, a right to harvest natural resources on the land. Questions of hunting, fishing and foraging rights, involves broader issues than the range of fights that can be granted by way of easement or profit a prendre: they are dealt with in Part VII of this Report.

330. ***Aboriginal Land and Real Property Law***. At present, Aborigines who have acquired land individually are free to deal with it in the same manner as any other land-owner.[1251] For the same reasons as with personal property, there seem to be no demand for or need to change the law in this regard. Different considerations apply with respect to Aboriginal land fights created by special legislation. As noted, these issues have not been the subject of investigation in this Report.[1252]

## Distribution of Property on Death

331. ***The Significance of Death and its Consequences***. Death was a significant event in traditional Aboriginal societies, often involving an elaborate series of rituals. These related not only to the feelings of grief and emotional upset but to the passing of the spirit from the body. According to Aboriginal beliefs each person's body and spirit had a separate though united existence, and these became disunited on death.[1253] Rituals associated with death involved the actual burial, periods of mourning (usually months but sometimes a year or more), and (in some cases at least) an inquest to determine who had been responsible for the death. The rituals involved an attempt to dissociate from the fact of death, and particularly to dissociate or 'free' the dead person's spirit. This dissociation formed the basis of the disposal of a person's property along with his or her body after death:

> ... everything that was associated with him is destroyed, avoided or purified. His camp and grave are deserted; his belongings destroyed or broken. Though he will no longer need his body as a means of action, yet in some rites, it is weighted down or tied up or the legs are broken so that he will not be able to wander ... In certain tribes certain mourners must not speak for some time, and in all, the name of the dead may not be mentioned for months and even years ... Food taboos are observed, and of particular interest are those special ones which are adopted because the food was the deceased's totem or was one of which he was fond.[1254]

Customary rules governed who should have custody of sacred objects. Other rules governed the giving of gifts and the fulfilling of kin obligations. It was common for a dead person's belongings (his spears, tools etc) to be burned or buried with him. The hut or shelter which was his home would similarly be burned or destroyed and the camp would be moved. Not all of a person's possessions were destroyed. Meggitt asserts that among the Walbiri:

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1250 For reasons explained in para 213, this issue is not dealt with in this Report.

1251 An exception to this would be an Aboriginal holder of a pastoral lease in the Northern Territory. The land may be the subject of a claim under the Aboriginal Land Rights (Northern Territory) Act 1976 (Cth) which could limit the individual holders rights to deal with it.

1252 As explained in ch 11, issues of land rights have been treated as outside the scope of this Reference, though in some situations these may involve a recognition of Aboriginal customary laws. See para 66-7, 77-8, 212-13.

1253 K Maddock, *The Australian Aborigines*, 2nd edn, Penguin, Ringwood, 1982, 158.

1254 AP Elkin, *The Australian Aborigines*, rev edn, Angus & Robertson, Sydney, 1979, 342-3.

> [the] dead man's goods are later given to the senior mother's brother of the matriline to share with the other mother's brothers of that kin and, sometimes, of his community. When a woman dies, her daughters and sisters hand her possessions to her senior mother's brother to distribute to the women of the matriline.[1255]

The change to a more sedentary lifestyle with permanent housing has led to other variations, eg to periods of mourning, and to practices involving destruction of shelters and the movement of the camp. It is now less likely that personal possessions will be destroyed. Since housing has become more permanent, destruction following death is not practiced. However, it is common for houses to be vacated for periods of time during mourning,[1256] and even for families not closely related to exchange houses in order to fulfil mourning obligations.

> I know at Jigalong when there has been a big pressure on housing the community has decided in a meeting that although it has only been, say, two months, some family is appointed who is quite distant from the deceased — in other words they are not closely related to the deceased and they have been put into that accommodation.[1257]

Such informal exchanges of accommodation may create no particular legal difficulties and the Commission has received no evidence of problems. But these practices demonstrate the need for administrative flexibility in the provision of housing.

332. ***Succession***. The Present Law and its Application to Aborigines. In general the way in which a person's property is distributed on death is the same for both real and personal property, although the formalities of transfer of title may be different. Upon death a person's property devolves upon a new owner according to a specified pattern provided by the law of succession. This pattern for transferring ownership is for the most part regulated by legislation in each State and Territory and can be divided into 3 categories:[1258]

- wills;
- intestacy: and
- family provision or testator's family maintenance.

As will be seen, the rules of succession are very much directed at the interests of the family, defined in rather narrow terms. This focus on the family, in particular and its narrow formulation, can create problems in the context of Aboriginal customary laws. It is thus necessary to consider the present rules which regulate property distribution on death. Are there traditional Aboriginal mechanisms of property distribution which should be supported or reinforced and which operate without legal recognition?

333. ***Wills: General Principles***. A person is, in general, free to determine what is to be done with his property after he dies. This testamentary freedom is, however, affected in several ways. First, there are certain formal requirements, specified in State and Territory legislation, for a valid will. Generally, a testator must be 18 years of age and the will must be in writing signed by the testator and attested by two witnesses. Secondly, legislation allows the court upon application by certain close family members, to set aside or vary the testator's will if inadequate provision has been made for those members.[1259] What must be considered is whether the law of wills causes problems in the context of the recognition of Aboriginal customary laws, and in particular whether it may interfere with traditional Aboriginal customs of property distribution. If an Aborigine makes a valid will this presumably expresses a personal intention to distribute personal assets in a particular way.[1260] The effect may be wholly or partly consistent with traditional affiliations or

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1255 MJ Meggitt, *Desert People*, Angus & Robertson, Sydney, 1962, 321. It is possible that this was a more recent development, brought about by people acquiring more possessions. And see A Nelson Napururla and B Naburula, *Submission 386* (7 October 1985) 2. See also ALRC, ACL Field Report 9, *Northern Queensland* (July 1984) 9 for conflicting opinions.

1256 id, 5. See para 460.

1257 R Johnston, *Transcript of Public Hearings*, Strelley (24 March 1981) 423; D Peinkinna, *Transcript* Aurukun (30 April 1981) 2062. On housing issues see eg M Heppell and J Wrigley, *Blackout in Alice*, ANU Press, Canberra 1981; H Dagmar, *Aborigines and Poverty*, Nijmegen, 1978, ch 6; House of Representatives Standing Committee on Aboriginal Affairs, *Strategies to Help Overcome the Problems of Aboriginal Town Camps*, AGPS Canberra, 1982; HC Coombs, MM Brandl, WE Snowdon, *A Certain Heritage*, CRES, Canberra, 1983, 246-253, 393-4.

1258 The distribution of small estates could be regarded as a fourth category. In some Australian jurisdictions there are simplified administrative practices for the distribution of small estates. These can be informally distributed; this would allow, for example in accordance with Aboriginal tradition where relevant.

1259 See para 341.

1260 The number of Aborigines who make wills is very small, especially in more remote communities.

responsibilities or may reject them altogether, but in any event it is an expression of the right to maintain, or not to maintain, a traditional lifestyle. This, together with the absence of any evidence of problems occurring in this area, supports the view that the basic principle of testamentary freedom as it applies to Aborigines should be maintained.

334. ***Informal Wills***. Problems could conceivably arise, however, over the formal requirements for making a will. In this context the rules relating to informal wills are relevant. Certain wills are deemed to be valid notwithstanding that the formal rules for validity have not been adhered to. This category of 'privileged wills' includes, in general terms, the wills of soldiers on military service and sailors at sea.[1261] In most jurisdictions a privileged will need not even be in writing.[1262] As well as having a specific provision relating to privileged wills, the Wills Act 1936 (SA) has a provision enabling a court to declare a will valid although it does not comply with the formal requirements of the Act.

> A document purporting to embody the testamentary intentions of a deceased person shall, notwithstanding that it has not been executed with the formalities required by this Act, be deemed to be a will of the deceased person if the Supreme Court, upon application for admission of the document to probate as the last will of the deceased, is satisfied that there can be no reasonable doubt that the deceased intended the document to constitute his will.[1263]

This provision applies generally and not to a specific category of persons. It does, however, require the testator's intentions to be contained in a document, thus precluding an informal oral will.

335. ***Informal Wills and Aborigines***. The idea of informal or privileged wills may have particular application for present purposes. Aboriginal culture is based on oral tradition and it may be more likely that a traditionally-oriented Aborigine would express a testamentary intention in words rather than in writing. This may provide some justification for the extension of the category of privileged wills. A provision, similar to that existing in South Australia, allowing a will to be valid despite non-compliance with formalities could assist those Aborigines with little or no understanding of the general law relating to wills. However there seems no sufficient justification for confining such a provision for informal wills to Aborigines. Problems with legal forms and technicalities in this are a are not confined or specific to Aborigines, whether they are traditionally-oriented or not. There does not seem to be a case for a 'special law' of this kind.[1264]

336. ***Interpretation of Wills***. If a traditional Aborigine makes a will, he is likely to understand its language by reference to his own customary laws and traditions, rather than in the sense in which the general law construes the language of wills. For example, a reference to his 'wife' might well mean his wife by customary law. Reference to his 'children' would no doubt be intended to include children whether or not regarded as illegitimate by the general law. Reference to relatives ought not be restricted to relatives by blood but may be intended to include classificatory relatives.[1265] In such circumstances the will should be interpreted against any background of applicable customary laws, so that ambiguities can be resolved in accordance with the (presumed) intention of the testator. Australian courts would probably construe a traditional Aborigine's will in this way, without the need for legislation. In doing so they would be aided by two existing principles of common law governing the interpretation of wills. In the first place, the court has to discover the intention of the testator by reference to the words used in the will, and can receive evidence of 'the state of the testator's family, his property, his friends and acquaintances'.[1266] In applying this so-called 'armchair' principle, a court could have regard to the state of the testator's family from his or her point of view. Secondly:

> Where the testator belonged to a special group of persons and the words used have a special meaning for that group of persons, the court will give effect to that special meaning ... The question whether the words have acquired a special customary meaning is a question of fact, and evidence is admissible to resolve it ... [T]he use of the special meaning ... applies even where there is no difficulty in giving the words their ordinary sense. Thus it is a true exception to the 'usual meaning' rule.[1267]

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1261 An exception regarded by most commentators as an anomaly.
1262 eg Wills Act 1936 (SA) s 11.
1263 s 12(2). For a general discussion of this provision see SNL Palk, 'Informal Wills: From Soldiers to Citizens' (1976) 5 *Adel L Rev* 382.
1264 For the non-recognition of traditional marriage for the purposes of revocation of wills see para 291 n 57.
1265 This might depend on whether the will was professionally prepared and, if so, what attempt had been made by the solicitor taking instructions to understand the real intent of the testator. See further para 546.
1266 IJ Hardingham MA Neave & HAJ Ford, *Wills and Intestacy*, Law Book Co, Sydney, 1983, 267-8, citing *Day v Collins* [1925] *NZLR* 280, where a reference to the testator's wife was held to mean his de facto wife rather than a long deserted de jure wife.
1267 Hardingham, Neave and Ford, 270 citing *Shore v Wilson* (1842) 9 CI & Fin 355.

Under this 'customary meaning' rule, the fact that the testator belonged to a group of Aborigines who followed Aboriginal customary laws and that under Aboriginal tradition words used in his will had a special meaning, would be relevant in interpreting the will. Although there appears to be no Australian precedent on the question, these principles would prevail over a strict or technical interpretation of words in a will. No legislative provision on the point is, therefore, necessary.

337. ***Intestacy: General Principles***. Where deceased person has not made a valid will or has not by will disposed of all his other property, the rules of intestacy determine how the estate (or the residue of the estate) will be distributed. These rules, set out in State and Territory legislation, prescribe the persons who are entitled to share in the estate and the proportions in which they take. A surviving spouse, though generally accorded the paramount position, may be required to share the property of the estate with the children, or with other relatives of the intestate if there are no children. The next of kin who may qualify for an interest in the estate vary between the different jurisdictions. In New South Wales, South Australia, Queensland, the Australian Capital Territory and the Northern Territory the definition of next of kin is narrower than in Victoria, Western Australia and Tasmania. In all jurisdictions, the 'next of kin' are defined exclusively: only relatives within the statutory definition can claim. Hardingham argues that approach by way of the exclusive definition is to be preferred to a more flexible approach as it produces less uncertainty and makes administration easier. In addition 'it is more fitting that the community rather than very remote relatives, should benefit from intestate estate'.[1268] This approach may be suitable within the general Australian society, but a narrow, fixed interpretation of next of kin may be wholly inappropriate in the Aboriginal context. The Aboriginal kinship system may include persons who are not blood relations at all (as distinct from classificatory relations), and yet there may be important obligations and rights existing between the deceased and such a person. Is it appropriate that the formal rules of intestacy with its narrow concepts of family and next of kin should apply or should there be a wider formulation?

338. ***Intestacy and Traditional Marriage***. An initial premise is that an Aboriginal traditional spouse should be eligible to qualify as a spouse under the relevant legislation. At present the general position is that only a spouse under a Marriage Act marriage would qualify. Aboriginal traditional marriages are only recognised for this purpose in the legislation of the Northern Territory.[1269] In other jurisdictions, a traditional spouse would be regarded as a de facto spouse and would be ineligible to claim.[1270] The Commission has already recommended that Aboriginal traditional marriages be recognised for the purposes of intestacy legislation.[1271]

339. ***Traditional Distribution***. On this basis, the issue is whether a wider range of persons should also be eligible to receive a share of the estate. Only the intestacy legislation in the Western Australia, Northern Territory and Queensland makes any concession to Aboriginal traditions in this regard.

- *Western Australia*. The Aboriginal Affairs Planning Authority Act 1972 (WA) has specific provisions dealing with the estates and property of Aboriginal persons. The provisions have only limited application both because of the narrow definition of 'Aboriginal person', and because of the limited scope of the regulations.

    - *Definition of 'Aboriginal person'.* 'Aboriginal person' is defined for this purpose as:

        > a person of Aboriginal descent only if he is also of the full blood descended from the original inhabitants of Australia or more than one fourth of the full blood.[1272]

        This definition is difficult to apply, and likely to become more so.[1273] Only those deceased Aborigines who are deemed to fall within the definition will have their estates distributed in accordance with the method prescribed. Whether this leads to particular hardships is not clear.

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1268 IJ Hardingham, *Intestate Succession*, Law Book Co, Sydney, 1978, 23.

1269 Traditional marriages may receive recognition in Western Australia and Queensland under special legislation for the distribution of estates of deceased Aborigines.

1270 Formally, South Australia is an exception: Administration and Probate Act 1919 (SA) s 4 defines spouse as including a putative spouse. The Family Relationships Act 1975 (SA) establishes the status of 'putative spouses' (narrowly defined).

1271 See para 291-4.

1272 Aboriginal Affairs Planning Authority Act 1972 (WA) s 33.

1273 See para 88-95 where the definitional question is discussed.

- *Operation of the WA provisions*. Under the WA provisions, the estate of a deceased Aborigine is distributed in accordance with the deceased's will. If there is no will, it automatically vests in the Public Trustee who has full legal and administrative responsibility for the estate regardless of its size. The Public Trustee is required to distribute the estate according to State intestacy law (s 34, 35). But if no person can be ascertained as entitled to an interest according to the normal rules, the Regulations (made pursuant to s 35(1)) prescribe the method of distribution. The Regulations are required to provide as far as practicable 'for the distribution of the estate in accordance with the Aboriginal customary law as it applied to the deceased at the time of his death' (s 35(2)). Regulation 9 of the Aboriginal Affairs Planning Authority Act Regulations 1972 provides for a distribution where the deceased had not married in accordance with the laws relating to marriage, but has 'left surviving him any fem ale person of Aboriginal descent who according to the social structure of the tribe to which he belonged was his wife'. In such a case that person and any children of the marriage are entitled to a share in the estate. If there is more than one such wife or children they are entitled in equal shares. A surviving male person is similarly entitled (although there is no provision for plural husbands). If the Public Trustee is unable to ascertain any Aboriginal person entitled to succeed to the estate within 2 years there is provision for distribution to be made to persons having a moral claim. If no claim is made the balance of the estate vests in the Aboriginal Affairs Planning Authority 'for the benefit of persons of Aboriginal descent' (s 35(3)). Apart from the definition of 'Aboriginal person' the Western Australian legislation has important limitations. The regulations do not differ markedly from the normal rules of intestacy distribution, except that they take into account a traditional spouse (where there is no 'legal' spouse). They do not make a wider category of kin eligible to claim. In fact, reg 9(1)(vii) and (2) seek specifically to exclude this possibility. Regulation 9(2) states:

  > Where under the provisions of sub-regulation (1) of this regulation, any person of Aboriginal descent (whether male or female) is entitled to the estate or to a share in the estate of a deceased person, then notwithstanding any tribal law or custom to the contrary that person is so entitled for his or her own separate and personal use, and the Public Trustee shall, so far as lies in his power, within the provisions of the Act, manage control and administer that estate or that share in the estate for the personal benefit and advancement of the person of Aboriginal descent entitled thereto.

  Nor do the provisions allow for the distribution of the estate on the basis of Aboriginal tradition. They make no allowance for existing or developing Aboriginal ways of property distribution. There are also administrative problems. Most Aboriginal estates are small, yet distribution can take a considerable time because of the need to determine if an Aboriginal person is 'more than one fourth of the full blood'[1274] and to find next of kin.[1275]

- *Northern Territory*. The Northern Territory goes much further than any other jurisdiction in Australia in its intestacy legislation as it applies to traditional Aborigines. As well as providing for a traditional spouse or spouses to share in the estate, it establishes a mechanism for a 'traditional distribution of property'.

  - *Operation of the NT Provisions*. Section 71B of the Administration and Probate Act (inserted in 1979) provides:

    > (1) A person who claims to be entitled to take an interest in an intestate estate of an intestate Aboriginal under the customs and traditions of the community or group to which the intestate Aboriginal belonged or the Public Trustee may apply to the Court for an order under this Division in relation to the intestate estate.

1274 This determines whether the Public Trustee has responsibility for the estate although in practice the Public Trustee handles other Aboriginal estates.

1275 This is a more general problem. Complaints have also been made about the delays in 'processing of Aboriginal intestate estates by the public trustee in the NT', due in part to inadequate Aboriginal population records: P Ditton, *Submission 465* (1 January 1985).

> (2) An application under sub-section (1) shall be accompanied by a plan of distribution of the intestate estate prepared in accordance with the traditions of the community or group to which the intestate Aboriginal belonged.[1276]

Application for a traditional distribution must be made within 6 months after the date on which administration was granted, although the Court has a discretion to grant extensions of time (s 71C). This discretion is appropriate because there may be extended periods of mourning (perhaps as long as a year) after a person has died, and these would interfere with the preparation of a plan of distribution. In making an order for a traditional distribution the Court is required to take into account the plan of distribution and the traditions of the community or group to which the intestate Aborigine belonged. It must be satisfied, in addition, that the order it makes would, in all the circumstances, be just (s 71E). Property distributed before an application is made under s 71B may be redistributed by the Court (s 71F). It should be noted that there is no provision for a traditional distribution if the deceased Aborigine has made a will. In addition, a traditional distribution may be overridden by a claim for family provision,[1277] a claim which may override both the normal rules of intestacy and the special rules for traditional distribution.

- *Critique of the NT Provisions*. While the Northern Territory legislation is in general a commendable model, a number of points should be noted. First, it applies to the estate of an intestate Aborigine[1278] only if the intestate 'has not entered into a marriage that is a valid marriage under the Marriage Act 1961 of the Commonwealth'. This appears to be based on the assumption that an Aboriginal person who is (validly as distinct from invalidly) married under the Marriage Act no longer lives a traditional lifestyle, or adheres to traditional ways. This takes no account of the reality of why a Marriage Act marriage may have taken place. For example, an Aborigine brought up on a mission may have entered into a traditional marriage which was later sanctioned by a church marriage, a procedure adopted for all persons living on the mission. There is no justification for automatic exclusion from these provisions based on Marriage Act marriage.

- *Queensland*. The Community Services (Aborigines) Act 1984 s 75 provides for the administration of Aborigines' estates. It requires the Under Secretary of the Department of Community Services to administer the estate of an Aborigine who is missing or who dies without appointing an executor (or where the executor is incapable of executing the will). The Under Secretary may renounce these rights in favour of the Public Trustee. If an Aborigine has not made a will and if it is impracticable to determine the persons who should succeed to the estate, the Under Secretary is empowered to determine the person or persons who should succeed. This could have the effect of allowing a traditional distribution, but there is no guarantee of this: the matter is at the discretion of the Under Secretary.

340. ***Traditional Distribution: the Preferred Approach***. It is recommended that there should be provision for an intestate Aboriginal estate to be distributed in accordance with the traditions or customary laws of the deceased's community. This could be implemented in a variety of ways. There could be specific provision allowing application for a traditional distribution as in the Northern Territory, or there could be a discretion in the Court or a public official with responsibility for intestate estates to include other persons in the distribution of the intestate estate, which would in effect result in a traditional distribution. The Commission favours the former approach, along the lines of the Northern Territory provision (although without any exclusion of Aborigines married under the general law). The initiative should come from those concerned themselves to seek the alternative distribution, by application. Time limits for application should be flexible enough to take into account long periods of mourning in many Aboriginal communities.

341. ***Family Provision (Testator's Family Maintenance)***. In all States and Territories there is legislation enabling a claim to be made for further provision out of the deceased's estate, if the will makes inadequate

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1276 According to the Northern Territory Public Trustee, no application pursuant to s 71B has yet been made: Information supplied 25 October 1985.

1277 Family Provision Act (NT) s 8.

1278 The term 'Aborigine' is defined, more flexibly and generally than in the WA legislation, to mean 'a person who is a member of the Aboriginal race of Australia' (s 6).

provision for the proper maintenance and support of dependants. Application may also be made if the rules of intestacy fail to make adequate provision. The legislation specifies the persons who are eligible to apply: these include surviving spouses, children (regardless of age), and in some jurisdictions and in certain circumstances, surviving former spouses. Only in the Northern Territory is there specific recognition of Aboriginal traditional marriage for this purpose. In the previous chapter it was recommended that a surviving traditional spouse should be eligible to make a claim for family provision.[1279] In addition, there are good reasons for extending the range of eligible persons, especially where the extended family and kin network may result in a person having a large number of dependants, or where the kinship system imposes certain family-like obligations upon that person. Provision for a traditional distribution of an Aboriginal estate may not be adequate to deal with this situation, especially if an Aborigine has made a will. Where an Aborigine has made a will or if the normal rules of intestacy are being applied, the range of persons eligible to make a claim for family provision should be broadened. This could be done in a number of ways. The persons able to claim could be specified, but this would be difficult to do accurately or exhaustively, taking into account the variety of circumstances and differing kinship rules and structures in different communities. The better course is be to give the Court a discretion, on application, to include dependants determined according to relationships under the customary laws and traditions of the deceased's group or community.[1280]

342. ***Wills. Intestacy and Family Provision: Priority of Claims***. These recommendations for extending the law relating to the distribution of deceased estates raise important questions of priorities. At present an application for family provision may override a will, or the normal intestacy rules. Should provision for a traditional distribution of an Aboriginal estate prevail over other claims, or should a claim for family provision still be available? Should an application for traditional distribution be capable of overriding a will? Competing claims for priority are important both in terms of general policy and to potential beneficiaries.

- *Wills and Traditional Distribution*. One submission to the Commission, by Mr W Clifford, formerly Director of the Australian Institute of Criminology, argued that claims to traditional distribution should take priority over a will:

  > I would question whether traditional distribution should not prevail over the clear terms of a will. If we are really serious about recognising custom, then we must recognise it would be impossible in customary law to exclude such customary claims.[1281]

  If an Aboriginal person makes a will this is an indication of the desire to distribute property in a particular manner, which may wholly or partly reflect traditional ways, but must in any event be assumed to reflect individual priorities. The Commission's Terms of Reference require it to take into account the freedom of Aborigines to pursue the lifestyle of their choice. The view of the majority of the Commission is that if a traditional Aborigine wishes to make a will (at present few do) he or she should remain free to do so in the ordinary way, subject to any claim for family provision, and that an application for traditional distribution should not override a will. Traditional elements may still be taken into account, to a certain extent, through provision for an extended class of claimants for family provision, or through the interpretation of the will by reference to relevant Aboriginal customary laws.[1282] However, one member of the Commission (Professor MR Chesterman) agrees with the argument put by Mr Clifford. In his view the distribution of a deceased persons property in accordance with Aboriginal custom should be given precedence despite the existence of a will.

- *Wills and Family Provision*. Since this testamentary freedom is an aspect of the general law of wills, it is subject to restrictions applying to that law, and in particular the possibility of a claim for family provision. The category of dependants who may make such a claim should include, as well as

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1279 See paras 293-4.

1280 Under this provision a person related by blood, kinship or marriage to the deceased person should be able to apply for an order for family provision if that person was at the time of the deceased's death entitled, in accordance with the customary laws of the Aboriginal community to which the deceased belonged, to expect support (including material support) from the deceased person.

1281 W Clifford, *Submission 356* (12 October 1982).

1282 cf the situation which faced Barker J in *Rogers v Rogers and Tatana*, unreported, NZ High Court (18November 1982). The deceased, a Maori woman, made a will leaving a small-holding and shares in another piece of Maori land to her grand-nephew, 'adopted in accordance with Maori custom and ... regarded as her mokopuna'. The deceased's only child applied for a family protection order, relying in part on Maori custom. Barker J held that he was entitled to take Maori customs in relation to land and adoption into account, and divided the land between the 2 claimants, with the adopted grand-nephew retaining the small-holding. In this case the power to make a will was at least as consistent with Maori custom as the right to claim family possession.

traditional wives, those relations under relevant Aboriginal customary laws who ought appropriately to be able to bring such claims.[1283]

- *Family Provision and Traditional Distribution*. If some mechanism for traditional distribution of Aboriginal estates is established the question arises whether it should be subject to a claim for family provision. It may well be that a traditional distribution could exclude a wife or other person eligible to claim family provision. In practice, it is unlikely that after a consensus has been reached with respect to a traditional distribution, an eligible individual would claim family provision, but the is sue is whether such a claim should be available in principle. On balance, a majority of the Commission take the view that a claim for family provision should be able to override a traditional distribution, for two reasons. First, family provision is a needs-based claim made by a close relative. It is undesirable to exclude the possibility of claims based on need in such cases. Secondly, in practice the problem will only arise in the context of larger estates and thus, despite the possible extension of traditional attitudes, practices and expectations, it will involve a substantial non-traditional element. In such a context claims by close relatives based on need are correspondingly stronger. However, such claims should only succeed where the need is clearly demonstrated and where there are no other ways of meeting the need. The court would have a discretion in making an order both for traditional distribution and for family provision, and should use it in this way.[1284] However, one member of the Commission (Professor MR Chesterman) believes that an application for family provision should not be considered if an application for traditional distribution has been made. The decision to make an application for traditional distribution would mean that all relevant interests from an Aboriginal perspective had been considered and this should not be able to be set aside by an application for family provision.

343. ***Machinery for Traditional Distribution***. Machinery for traditional distribution could be established to allow applications for an order for a traditional distribution to be made by any person claiming to be interested in a traditional distribution of the property of a deceased intestate Aborigine. Such an application would be made to the court having jurisdiction in the State or Territory over the deceased's estate. Any order of the court would be substituted for the ordinary provisions for distribution on intestacy. It is true that there is relatively little evidence of problems arising in this area so far. For example, there has been no application for a traditional distribution since the Northern Territory legislation came into force.[1285] In the great majority of cases, traditional estates are dealt with informally without any legal action or intervention at all (eg as 'small estates'). On the other hand it cannot be assumed that this situation will remain unchanged, or that the absence of evidence of significant difficulties in this area means that no difficulties will in fact arise. Legislation which takes into account Aboriginal customary laws and traditions in the way suggested is desirable in principle, even if seldom used. Whether these principles should be endorsed by Commonwealth, or by State or Territory, legislation is another question. Parts III-VII of this Report are concerned with the principles which should be applied in dealing with matters involving Aboriginal customary laws, leaving federal-State questions to be discussed in Part VIII.

1283 See para 341.
1284 cf *Rogers v Rogers and Tatana* (n 39).
1285 See n 33.

# 16. Aboriginal Customary Laws: Aboriginal Child Custody, Fostering and Adoption

> ... it is the role and the right of parents everywhere to pass on their beliefs, knowledge, customs, language, law ... to their children. In that way the culture of a group lives on and its distinctiveness, too, and consequently, the pride of the people who own it. The role and the rights of parents and families in this can become endangered when other institutions take over aspects of handing on a heritage.[1286]

## Introduction

344. ***The Need to Recognise Aboriginal Family Arrangements***. In Aboriginal societies, the role of the extended family, based on kinship relationships and obligations, is of fundamental importance in bringing up children.[1287]A child growing up in an Aboriginal community is surrounded by relatives who have responsibilities towards that child and play a meaningful role in child-rearing. If, for any reason, the biological parents are unable to take care of the child, other arrangements will be made for care within the extended family.[1288]

> In these cases we have the situation where children are being reared by persons, other than the actual parents, with the all round approval of the concerned parties. Children continue to know their actual parentage and to be aware of the consequences which flow from this relationship. These are consequences which would not follow for a white child adopted under Australian law.[1289]

During the Commission's Public Hearings, a recurrent message was the failure of non-Aboriginal Australians, and of welfare services in particular, to recognise the differences between Aboriginal and non-Aboriginal conceptions of child care. For example, the Commission was told of the case of an Aboriginal teenage girl being fostered by a non-Aboriginal family:

> ... There was obviously great conflict between the value system of the white family and the girl's own value system. She was being torn between the two. Had she been fostered with some of her extended family or their friends ... she probably would have been much happier, although their physical conditions might not have been exactly according to the requirements of the foster home.[1290]

The Commission was also told of the importance of Aboriginal children being brought up in Aboriginal families.

> ... Aboriginal children are brought up in extended family networks. Learning behaviours, the discipline, the parenting styles are significantly different from the majority of non-Aboriginal Australians. I think in terms of protecting Aboriginal children and protecting Aboriginal communities from the intervention of child welfare that does not recognise them, it is important that Aboriginal child care values are recognised in law ... if you consider the treatment of Aboriginal children who have been brought up in non-Aboriginal care, I think a number of these basic principles of human rights are being breached and have been breached.[1291]

The Royal Commission on Human Relationships acknowledged the problems caused by the practice of removing children from Aboriginal mothers to be brought up in non-Aboriginal homes.[1292] The Commission pointed to the practice of 'matching' children for adoption to the adoptive parents as much as possible in physical appearance and socio-economic status, so as to simulate what might have been the child's natural family and social environment. The Commission went on to argue that there did not seem to be any reason to depart from this in the case of Aboriginal parents and children.[1293] The concept of 'matching' is not now

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1286 M Brandl, 'The Aboriginal Children and Families Heritage Project' (1980) 5 *Australian Child and Family Welfare* 20.

1287 See para 230-1.

1288 B Sansom & P Baines, 'Aboriginal Child Placement in the Urban Context' in Commission on Folk Law and Legal Pluralism, *Papers of the Symposium on Folk Law and Legal Pluralism, XIth International Congress of Anthropological and Ethnological Sciences*, Vancouver, Canada, August 19-23, 1983, Ottawa, 1983, vol 2, 1083; E Sommerlad 'Homes for Blacks: Aboriginal Community and Adoption', in C Picton (ed) *Proceedings of the First Australian Conference on Adoption*, Committee of the First Australian Conference on Adoption, Clayton, 1976, 160, and see para 230-1.

1289 D Bell & P Ditton, Law: *The Old and the New. Aboriginal Women in Central Australia Speak Out*, 2nd edn, Aboriginal History, Canberra, 1984, 97.

1290 J Andrews, *Transcript of Public Hearings* Cairns (5 May 1981) 2183-2183(a).

1291 CJ Milne, *Transcript* Sydney (15 May 1981) 2663. cf also LWA O'Brien, *Transcript* Adelaide (17 March 1981) 50. S Carey, *Transcript* Launceston (21 May 1981) 2798; W Morgan-Payler, *Transcript* Melbourne (20 May 1981) 2757-8; P Coe, *Transcript* Sydney (15 May 1981) 2626-7.

1292 Australia, Royal Commission on Human Relationships, *Final Report*, Canberra, AGPS, 1977, vol 4, 125.

1293 id, 127.

widely accepted in adoption theory, but the notion that Aboriginality should be regarded as relevant to the placement of Aboriginal children remains. Yet in NSW only three of 21 Aboriginal children placed for adoption between 1980 and 1983 were adopted by Aboriginal families.[1294] These figures have been ascribed to the lack of Aboriginal families approved to adopt.[1295]

345. ***The Impact of Intervention***. Placement of Aboriginal children outside their family or community[1296] is in many cases visible evidence of the failure to recognise Aboriginal child-care arrangements. The removal of children (especially 'half-caste' children) from Aboriginal families was indeed a deliberate government policy earlier this century. The 1921 Report of the New South Wales Aborigines Protection Board stated that the 'continuation of this policy of dissociating the children from camp life must eventually solve the Aboriginal problem'.[1297] During the period 1883 to 1969, in New South Wales alone, it has been estimated that over 5,500 Aboriginal children were removed from their parents.[1298] This represents approximately one in six Aboriginal children being taken from their parents during this period compared to the figure for non-Aboriginal children of about one in two hundred.[1299] While there are no longer deliberate policies of removing Aboriginal children from the parents, there is evidence that substantial problems still exist. To some extent, these are a function of the poverty and alienation of many Aboriginal families. But even when individual child care arrangements break down and outside intervention or assistance is clearly necessary this can take a variety of forms, more or less intrusive. In such circumstances questions of recognition of and support for traditional child-care arrangements become very relevant.

346. ***The Present Situation***. Australia-wide statistics on the number of Aboriginal children in non-Aboriginal custody are difficult to obtain.[1300] However, some information on the numbers of Aboriginal children involved in custody or other care arrangements in particular States and Territories is available.

- In New South Wales, as at November 1985, 12% of the children in substitute care (excluding adoption) were Aborigines (362 of 3 000 children), although Aborigines make up less than 1% of the total population of New South Wales.[1301] This represents almost 5% of all Aboriginal children in substitute care, compared to 0.4% of all non-Aboriginal children.[1302]

- In South Australia, as at August 1983, 224 Aboriginal children were under State care and control.[1303] The Department of Community Welfare estimates that Aborigines represent 15-16% of all children under State care and control. Aborigines make up 0.9% of the total population of South Australia.[1304]

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1294 Working Party of the Standing *Committee of Social Welfare Administrators, Aboriginal Fostering and Adoption. Review of State and Territory Principles, Policies and Practices*, Sydney, October 1983, Table 9 (hereafter referred to as SWA Report). See also the survey (based on children who became wards in 1981-2 in NSW) in R Chisholm, *Black Children: White Welfare? Aboriginal Child Welfare Law and Policy in New South Wales*, Social Welfare Research Centre Reports & Proceedings No 52, Kensington, 1985, 56-67.

1295 *SWA Report*, 37.

1296 The term 'placement' is used here to include arrangements for fostering, pre-adoptive, adoptive and institutional placements of children as well as decisions with respect to guardianship and custody. It excludes criminal custodial sentences with respect to children and juveniles. Problems of sentencing of Aboriginal juvenile offenders are referred to in ch 21. See further para 367.

1297 Cited in P Read, 'The Stolen Generations: The Removal of Aboriginal Children in NSW, 1883 to 1969', Discussion Paper for the Aboriginal Children's Research Project, NSW, Family and Children's Services Agency, 1. See also Chisholm, *Black Children: White Welfare?* (1985) 10-32; CH Berndt and RM Berndt 'Aborigines' in FJ Hunt (ed) *Socialisation in Australia*, Australia International Press and Publications, Melbourne, 1978, 119; J Austin, 'The Destruction of Aboriginal Families' *Nunga News* (July 1976) 2-3.

1298 Read, 8.

1299 Read, 19.

1300 Information on an Australia-wide basis about the custody of Aboriginal children is not yet available. Much has been done in New South Wales in obtaining up-to-date information through the work of the Aboriginal Children's Research Project. WELSTAT, Department of Social Security, has recently collected statistics on Aboriginal and Torres Strait fostering placements from particular States. For further statistics see *SWA Report* (1983) Tables 1-10. cf id, recommendations 2, 3 for further development of WELSTAT statistics and of effective data bases at the State level.

1301 *SWA Report* (1983) Table 3a.

1302 cf Aboriginal Children's Research Project (NSW), *Draft Principal Report* (March 1982) 74, 75. See also the Project's Discussion Paper No 3, *Assimilation and Aboriginal Child Welfare — the NSW Community Welfare Bill* Sydney, 1982, 8 which points to the high rates of breakdown of foster care and adoption placements when Aboriginal children are placed with non-Aboriginal families. The Aboriginal Children's Research Project was State funded and commenced operation early in 1980. The Project ceased operation in 1983.

1303 *SWA Report*, Table 5.

1304 Information provided by SA Department of Community Welfare, 3 May 1984. However the Department's present policy, as the Director-General stressed, is as far as possible to place Aboriginal children with Aboriginal families: 'since the Department adopted (in 1978) the policy of attaching significant importance to cultural factors in the placement of Aboriginal children, most children have been placed with Aboriginal families. It is estimated that currently 80% of Aboriginal children in alternative care are with Aboriginal families ... With regard to the adoption of Aboriginal children the Department has a policy of placing these children with Aboriginal. adoptive parents. Only a few Aboriginal children have been available for adoption in recent years and all have been placed in Aboriginal families.' Dept of Community Welfare (SA) (IS Cox) *Submission 365* (17 December 1982) 2.

- In Western Australia, over 54% of the children (937 of 1710) in foster care placements are classified as Aboriginal and over 58% of the children (821 of 1411) in residential child care establishments were similarly classified. Aborigines represent 2.3% of the total population in that State.[1305]

- In the Northern Territory, as at 31 August 1983, 70% of the children (92 of 132) in care and protection were classified as Aboriginal or Torres Strait Islander.[1306] However it appears that the position has substantially changed as a result of changes in policy within the relevant Department, resulting in a substantial drop of Aboriginal children in care and also of total numbers of children in care.

The proportion of Aboriginal children in State corrective institutions relative to all children in such institutions is even more alarming.[1307] The number of Aboriginal adults in prison is also disproportionately high.[1308] It is not possible to establish a definite link between the very high rates of Aboriginal juveniles in corrective institutions and of Aborigines in prisons, and those persons having been placed in substitute care as children. But that there is a link between them has often been asserted. The New South Wales Aboriginal Legal Service has estimated that of the 525 Aborigines listed as being State wards in institutions in June 1969, 50% have since been in corrective institutions.[1309] In Victoria, analysis of clients seeking assistance from the Aboriginal Legal Service for criminal charges has shown that 90% of this group have been in placement — whether fostered, institutionalised or adopted. In New South Wales, the comparable figure is 90-95%, with most placements having been in non-Aboriginal families.[1310]

347. ***The Need for Reform***. Intervention in Aboriginal families on this scale suggests that Australian child welfare law and practice has been failing to recognise Aboriginal patterns and traditions of child care[1311] — a suggestion borne out by the apparently high failure rate of placements following such intervention. The difficulty of categorising Aboriginal child care arrangements in terms of the categories of Australian child welfare law (in particular, adoption) is no reason not to recognise such arrangements,[1312] though it may well influence the form recognition should take. The need to recognise Aboriginal child care arrangements was affirmed in a number of submissions. The IYC National Committee of Non-governmental Organisations commented that:

> The Australian Law Reform Commission should appreciate the importance to Aborigines of the problems of children, and should make strong efforts to ensure that the range of questions of concern to the IYC Committee ... are fully examined through the Australian Law Reform Aboriginal Customary Law Reference and any other mechanisms at the disposal of the Australian Law Reform Commission.[1313]

Similarly the Aboriginal Children's Research Project in New South Wales stated:

> If the motivation for law reform is to bring law into line with changing social patterns, rather than just attempting to achieve legal consistency between laws operating in different cultural settings. then law reform to protect Aboriginal children must recognise not only relevant aspects of Aboriginal customary law, but also contemporary Aboriginal culture and lifestyles in Australia today.[1314]

In response to such submissions, and to perceived needs, the Commission's research staff produced a Research Paper.[1315] At that time there was no legislation directed at the problem of Aboriginal child care,[1316] little Aboriginal involvement with decisions involving Aboriginal children in State care,[1317] and no account

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1305 Information provided by WA Department of Community Welfare, May 1984. Of 1350 children in long-term but non-permanent care in Western Australia in 1982 ('backlog' children) 61% were Aboriginal: Western Australia Department of Community Welfare, Backlog Procedures Committees, *Report: A System of Review and Planning for Children in Limbo*, September 1982, 2, Appendix F.

1306 *SWA Report* (1983) Table 8. Earlier estimates were that 90% of all Aboriginal children in placement (whether for adoption or in foster care) were with white families. Aborigines constitute 24.5% of the population of the Northern Territory.

1307 Aboriginal Children's Research Project (NSW) *Draft Principal Report*, 1982, 81.

1308 See para 394.

1309 A Jamrozik, *Empowerment and Welfare: The Issues of Power Relationships in Services for Aborigines*, NSW Ministry for Aboriginal Affairs, Occasional Paper No 2, Sydney, (1982), 9.

1310 Sommerlad (1976) 161.

1311 See para 230-2, 383-6.

1312 cf para 386.

1313 *Submission 141* (4 0ctober 1979) 11.

1314 *Submission 282* (15 May 1981) 7.

1315 ALRC, ACL Research Paper 4, JR Crawford & FM Howarth, *Aboriginal Customary Law: Child Custody, Fostering and Adoption* ALRC, Sydney, 1982. See also ALRC DP 18, 12-14 for a summary.

1316 ACL RP4, 14.

1317 id, 39.

was being taken of 'customary adoption'.[1318] Since 1982, advances have been made in some States and in the Northern Territory, both in terms of legislation and administrative changes. The issues have been considered both by individual States and Territories and by the Standing Committee of Social Welfare Administrators. To a considerable extent initiatives adopted by some States and the Northern Territory and the Standing Committee of Social Welfare Administrators accord with the recommendations expressed in this Report. These recommendations raise in acute form the question whether implementation of proposals in this report should be a matter for the Commonwealth or for the States, and a number of submissions on these issues were directed at this issue of implementation rather than at the more basic question of what ought to be done.[1319] However, consistently with the position adopted throughout this Report, attention will focus at this stage on what should be done. Questions of implementation. and of federal/State constraints in particular, will be dealt with in Part VIII of the Report.

348. ***Issues for Consideration***. Broadly there are three ways in which the problems identified in this Chapter might be addressed, thus enabling better informed and more secure decisions about Aboriginal child custody. These are:

- the adoption of principles (whether or not by legislation) directed at those responsible for decisions concerning Aboriginal children;
- Aboriginal involvement in decisions concerning such children; and
- special jurisdiction with respect to the placement of such children.

In addition two related questions are:

- whether it is desirable to have a specific form of recognition of customary adoption; and
- whether existing provisions for social security payments to persons having the care and custody of Aboriginal children are adequate.

These issues will be considered in turn.

## An Aboriginal Child Placement Principle?

349. ***The Child's Welfare as 'Paramount Consideration'.*** In general, decisions on the custody or placement of children are based on a single undifferentiated rule, directing attention to the 'best interests of the child' as the paramount consideration. The 'paramount consideration' applied in all cases of child custody can be illustrated by a clause common to State and Territory adoption legislation. The Adoption of Children Ordinance 1965 (ACT) s 15 states that: 'For all purposes of this Part, the welfare and interests of the child concerned shall be regarded as the paramount consideration'.[1320] This principle (commonly referred to as the 'welfare principle') is also applied under the Family Law Act 1975.[1321] and in cases in State courts involving custody disputes over children. It is also relevant to decisions on fostering and placement of children in institutional care under State child welfare legislation (although it is not always spelt out expressly in the legislation).

350. ***An Undifferentiated Criterion***. There can be little dispute that the overriding consideration in all cases of child custody should be the welfare of the child. The problem is that the relevant legislation usually fails to define or specify the matters to be considered in determining this.[1322] In practice it rests with the authority

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1318 id, 44.

1319 The *SWA Report*, and especially its rejection of federal legislation, was in turn rejected by the national organization of Aboriginal and Islander Child Care Organisations in March 1984: see Chisholm, *Black Children: White Welfare?* (1985) 110-11, and see further para 352 n 54. See also Third Australian Conference on Adoption, Recommendations and Statements, *Changing Families*, Adelaide, May 1982.

1320 See too Adoption of Children Act 1965 (NSW) s 17; Adoption of Children Act 1964 (NT) s 10; Adoption of Children Act 1964 (Qld) s 10; Adoption of Children Act 1966 (SA) s 9; Adoption of Children Act 1968 (Tas) s 11; Adoption Act 1984 (Vic) s 9; Adoption of Children Act 1896 (WA) s 2A.

1321 Family Law Act 1975 (Cth) s 64(1)(a).

1322 The tendency in more recent legislation is to seek to spell out relevant considerations in determining the 'best interests of the child': eg Family Law Act 1975 ((Cth) s 64 (inserted 1983); Community Welfare Act 1972 (SA) s 25 (inserted 1981). However these are usually, and perhaps necessarily, stated in such a general way that the scope of discretion is not significantly affected.

involved — whether judge, magistrate, welfare officer or public servant — to decide what constitutes the welfare of the child. Just as the forums for considering child placements vary from State to State, so too, we may expect, do the values and standards of the persons applying this principle in custody decisions. The Full Family Court of Australia has pointed out the open-ended nature of the principle:

> In determining a custody application the court must regard the welfare of the child as the paramount consideration ... Each case must be considered in the light of all the facts and circumstances particular to that case ...[1323]

Similarly, the United States Supreme Court commented that:

> judges ... may find it difficult in utilising vague standards like 'the best interests of the child', to avoid decisions resting on subjective values.[1324]

It has been argued that current adoption law and practice reflect the values of urban 'middle class' society and are unresponsive to Aborigines in need of care. The criteria used for selecting custodians tend to disqualify most Aborigines, and may reflect values and assumptions at variance to those of Aboriginal society.[1325] Practices of child care through the extended family and the different emphasis placed on material comforts in bringing up children, can present particular difficulties when the question of what constitutes 'the welfare of the child' is being determined.

351. ***Some Judicial Applications***. These difficulties can be reduced, if not overcome, in the context of a fully argued case where all the parties are represented and where the court is required to give reasons for its decision. Three cases, involving different courts and different factual and legal issues, illustrate this point, as they also illustrate the lack of explicit guidance given by the legislation.

- *In the Marriage of Sanders*.[1326] This case involved a custody dispute over the child of a white father and an Aboriginal mother.[1327] The Family Court Judge (Justice Lindenmayer) at first instance, while finding the mother reasonably capable of attending to her child's needs in a suitable environment, awarded the child to the father on the basis that Brisbane, where the father lived, was best suited to the immediate and longer term needs of the child. The mother was living in Elliott, Northern Territory, on an Aboriginal settlement, where the Judge found that the standards of cleanliness and hygiene were well below those of suburban Brisbane and the white community generally. The mother appealed to the Full Court of the Family Court. The Full Court noted that the Family Law Act 1975 does not specify what matters are to be considered as relevant to the welfare of the child and that the case had been ultimately decided on the issue of environment. 'Environment' was used to cover the areas of value judgment which were matters of greatest speculation and controversy in the case: emotional attachments, experience of discrimination, family and tribal relationships, and physical health. The Full Court found that the Family Court Judge had attached too much weight to the environmental and health issue and too little weight to the emotional benefits to the child of being in the constant care of its mother and in establishing with her a close and secure bond of affection.[1328] On this basis, the Full Court (by a majority, Chief Judge Evatt & Justice Watson, Justice Demack dissenting) allowed the appeal and the mother was awarded custody of the child. But the closeness of the case, and the subjective character of the 'welfare principle', is illustrated by the fact that the four judges in the case divided equally on the result.[1329]

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1323 *In the Marriage of Burton* (1978) 24 ALR 378, 383.
1324 *Smith v Organisation of Foster Families* 431 US 816, 836 n 36 (1977).
1325 Sommerlad (1976) 163.
1326 (1976) 10 ALR 604.
1327 The couple were married under the Marriage Act 1961 (Cth).
1328 (1976) 10 ALR 604, 614.
1329 For a similar case of a dispute between parents, but one which produced the opposite result, see *In the Marriage of Gouge* (1984) 54 ALR 513, noted by R Chisholm (1985) 13 *ALB* 9. In that case the Full Family Court by a majority (Ross-Jones, Strauss JJ, Evatt CJ dissenting) refused to overturn the decision at first instance awarding custody of the child to the non-Aboriginal father. Obviously the facts of the two cases were different, but one significant factor was the High Court's intervening decision in *Gronow v Gronow* (1979) 29 ALR 129, the effect of which is that evaluative judgements at first instance can rarely be overturned on appeal. But cf (1984) 54 ALR 513, 525-6 (Evatt CJ, dissenting) citing passages from ACL Research Paper 4. By contrast, *In re R* (1985) FLC 91-615 was a similar case where the final judge's decision in favour of the Aboriginal wife was upheld on appeal. On the question of Aboriginal custody disputes between parents see further para 367.

- *In the Matter of F; McMillen v Larcombe*.[1330] This case involved an application by white foster parents to the Supreme Court of the Northern Territory to dispense with the consent of the Aboriginal mother of a child whom the foster parents wished to adopt. Justice Forster noted that s 10 of the Adoption of Children Ordinance required that the welfare and interests of the child be regarded as paramount. The Judge considered that the only grounds on which he could dispense with consent would be if the advantages to the child of being adopted by the white foster parents amounted to special circumstances. While the foster parents could offer the child love and security within their family, the mother could offer him 'the love of his natural mother and an extended family in which, as he grows older, he will probably feel more at home than with a white family'.[1331] It was further found that the living conditions which the child would enjoy with his mother 'would, by European standards, be considerably less than those offered by the foster parents. However, by Aboriginal standards they are perfectly adequate.' The Judge concluded that what was offered by the foster parents in a material, emotional spiritual way was not superior to what the mother could offer and ordered that the child be returned to the mother's care.

- *F v Langshaw and Others*.[1332] In this case, the Aboriginal father of an ex-nuptial child applied for custody. The child's mother, a non-Aboriginal, had consented to adoption and it was intended to place the child with a Catholic family who had already adopted three other Aboriginal children. The child's father wished the child to live with him and his parents in Stanley Village, an Aboriginal community on the outskirts of Moree. The father's parents had experience in bringing up children other than their own. They satisfied the court that they could provide love and care and an adequate home. It was however argued that the level of racial tension in Moree was such that the child would be better off with the adoptive family where tensions of such nature did not exist. Justice Waddell concluded that:

  > It seems clear enough that if the child is brought up in Moree he will experience some difficulties and set-backs related to the circumstance that he is partly of Aboriginal blood and would be regarded as being a member of the Aboriginal community. He is likely to have significant experiences of this kind earlier in life than if he were to be placed with the proposed adoptive parents. On the other hand, his father and his grandparents being members of the Aboriginal community will be in a better position to support him and sustain his self-esteem on such occasions than would his adoptive parents. All in all, it seems to me that placing the child with the plaintiff and his grandparents would put him in a position where, at the least, he would be equally likely not to be hurt by racial discrimination than if he were to be adopted.[1333]

  The results in these cases represent what appear to be enlightened and sensitive interpretations of the paramount consideration of the best interests of the child.[1334] The fact remains that deliberate policies of assimilation in the past, together with the emphasis which sometimes tends to be placed on material comfort in determining child placements, have resulted in large numbers of Aboriginal children being removed from their families and placed within non-Aboriginal families and in institutions. In some cases such decisions are not taken publicly by judges who, after argument from both sides, are required to spell out their reasons for decision, but by an administrative official in private. In such situations the lack of specific guidance provided by the 'welfare principle' can mean that the original decision is virtually unreviewable.

352. ***The Application of the 'Paramount Consideration' to Aboriginal Children: Policy Guidelines***. Based on a recognition that the values and standards applied in determining Aboriginal child placements were resulting in high numbers of children being removed from their parents and their communities, Policy Guidelines on Aboriginal Adoption and Fostering were prepared in 1980 by the Department of Aboriginal Affairs. The Guidelines, which derived from the proceedings of the First Australian Conference on Adoption (1976), placed a high priority' on maintaining Aboriginal children with their family and community environment in the contexts both of adoption and fostering. In fostering cases, the Guidelines called for the following procedures to be applied:

- develop adequate support services in order to help parents care for their children in satisfactory ways: or

1330 (1976) NTJ 1001 (Forster J).
1331 id, 1005.
1332 (1983) 8 Fam LR 832, Waddell J; on appeal (sub nom *Rushby v Roberts*), unreported, NSW Court of Appeal (15 April 1983).
1333 (1983) 8 Fam LR 833, 841. The decision was affirmed on appeal both on its merits and by application of the principle in *Gronow*: see eg transcript, 441 (Hutley JA).
1334 See also *Torrens v Fleming* (1980) FLC 90-839; *Connors v Douglas* (1981) 7 Fam LR 360; *In re R* (1985) FLC 91-615.

- foster the children with Aboriginal relatives or with other Aboriginal foster parents preferably in the same community[1335]

In adoption cases, the responsible authorities were to apply the following guidelines:

- Aboriginal children should be considered as available for adoption in cases where:

  — the child has been surrendered voluntarily for adoption by his parents despite the offer of practical assistance to overcome any problems which may exist within the family environment;

  — consent is dispensed with on justifiable grounds in terms of the relevant legislation;

- Aboriginal children surrendered for adoption should be adopted with Aboriginal families wherever possible.[1336]

The Guidelines were considered at the Ninth Annual Conference of the Council of Social Welfare Ministers in 1978, but it was not until 1984 that the principles contained in the Guidelines received any express acceptance. At the 1984 Conference, the Council endorsed the Report of the Working Party established to review State Aboriginal fostering and adoption practices. The Report stated that 'within the framework of sound child care practice the child's Aboriginality is a significant issue which must be reflected both in decision making processes and in daily practice.[1337] The 1984 Conference endorsed the following recommendations in relation to fostering (and similar recommendations for adoption):

> It is recommended that in the foster placement of an Aboriginal child a preference be given, in the absence of good cause to the contrary, to a placement with:
>
> - a member of the child's extended family;
> - other members of the child's Aboriginal community who have the correct relationship with the child in accordance with Aboriginal customary law;
> - other Aboriginal families living in close proximity (Recommendation 6).
>
> It is recommended that selection criteria for Aboriginal foster parents be amended (by legislation if necessary) to:
>
> (a) recognise Aboriginal couples married according to the customs of their community;
>
> (b) recognise the prevailing social values and customs of the appropriate Aboriginal community;
>
> (c) consider the appropriateness of recognising de facto marriages for fostering purposes (Recommendation 7).[1338]

The endorsement of these recommendations represents a significant advance.[1339] In 1982, this Commission's Research Paper 4 had commented that there had been 'only limited acceptance of the Guideline ... to date ... In some States and Territories, policies generally in line with those spelt out in the Guidelines are followed in practice but this is by no means universal.[1340] The Working Party of the Standing Committee of Social Welfare Administrators called for State policies and procedures to recognise the broad principles contained in the DAA Guidelines, while at the same time stating that they should reflect the particular experience in each State.[1341] At present, there are policy guidelines in Victoria,[1342] South Australia,[1343] and Western

1335 Department of Aboriginal Affairs, Doc.B.10.3 (January 1980) 3.
1336 ibid.
1337 *SWA Report*, 31.
1338 id, 35-7.
1339 R Chisholm, *Black Children: White Welfare?* (1985), 108-111. cf R Chisholm, 'Destined Children. Aboriginal Child Welfare in Australia: Directions of Change in Law and Policy' (Part I) (1985) 14 *ALB* 6, 8. The Secretariat for National Aboriginal Islander Child Care (SNAICC) has rejected the Report on the basis that it fails to address issues of funding legislation and decision-malting powers for Aborigines and Islanders: *First Interim Report on the Aboriginal Fostering and Adoption Principles and its implementation in the States of Australia*, Fitzroy, Victoria, June 1985, 7.
1340 ALRC Research Paper 4, 19. For an example of State guidelines see Victorian Department of Community Welfare Services, Policy Guidelines in Aboriginal Adoption and Foster Care (June 1979). The Northern Territory Minister for Community Development (J Robertson MLA) endorsed the need for 'full consideration of Aboriginal cultural factors' to be reflected in adoption law and practice: *Submission 331* (18 May 1982), and cf J Burdett, Minister for Community Welfare (SA), *Submission 335* (27 May 1982).
1341 For Aboriginal responses to the *SWA Report*, and the Commission's views see para 365.
1342 Based on the guidelines prepared by the DAA, they seek to ensure that the removal of Aboriginal children from their families is only undertaken as a last resort. Measures aimed at retaining the Aboriginal child in the community environment are supported for example the

Australia,[1344] and draft policies in Queensland,[1345] the Northern Territory[1346] and New South Wales,[1347] which support special placement principles for Aboriginal children.[1348] Only in the Northern Territory[1349] and Victoria[1350] have principles such as those expressed in the Guidelines been implemented in child welfare or adoption legislation, though less specific legislation has been enacted in New South Wales.[1351]

## Overseas Developments

353. ***An Overseas Analogue: The Indian Child Welfare Act 1978 (USA)***. The Australian history of large scale intervention in Aboriginal families, resulting in the displacement of many children from their families, has close parallels in comparable countries such as the United States and Canada: Responses in such countries are therefore of considerable relevance. By far the most comprehensive legislative attempt to deal with the issue is the Indian Child Welfare Act 1978 (USA). The Act was proposed and enacted in an attempt to respond to the alarmingly high percentage of Indian families broken up by the removal of their children by non-tribal public and private agencies,[1352] usually to be placed in non-Indian foster and adoptive homes and institutions. In the Act, Congress stated its fin ding that the States, in exercising jurisdiction over Indian child custody proceedings, had 'often failed to recognise the essential tribal relations of Indian people and the cultural and social standards prevailing in Indian communities and families'.[1353] In consequence, s 3 of the Act states:

> The Congress hereby declares that it is the policy of this Nation to protect the best interest of Indian children and to promote the stability and security of Indian tribes by the establishment of minimum Federal standards for the removal of Indian children from their families and the placement of such children in foster or adoptive homes which will reflect the unique values of Indian culture, and by providing for assistance to Indian tribes in the operation of child and family service programs.

The Act applies to all Indian 'child custody proceedings', broadly defined to include foster placements (where the parents cannot have the child returned on demand), adoptive or pre-adoptive placements, and proceedings for the termination of parental rights (eg wardship or 'care and control' proceedings) where the child is an 'Indian child' as defined.[1354] On the other hand it does not apply to 'genuine' criminal proceedings (ie those involving 'a placement based upon an act which, if committed by an adult, would be deemed a crime'), or to an award of custody to one of the parents in divorce proceedings.[1355] In child custody proceedings as so defined, the Act both prescribes standards to be applied by State courts, and gives preference to the jurisdiction of Indian tribal courts with respect to their children. For present purposes, these aspects need to be treated separately.

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recognition of Aboriginal customs and the provisions of specialist Aboriginal services. The involvement of a nominated Aboriginal organisation in adoption cases and the Aboriginal Child Care Agency in fostering cases is provided for.

1343 Department of Community Welfare, 'statement on Fostering of Aboriginal Children' (July 1983). The policy of placement of Aboriginal families in Aboriginal communities is affirmed, as is the involvement of Aboriginal Child Care Agencies or 'local Aboriginal groups or members of the Aboriginal community'. In relation to fostering preferred placements are set out. These emphasise the importance of the extended family and kinship ties. See also para 364.

1344 Department of Community Welfare, 'Aboriginal Child Placement' (December 1983). These guidelines set out an Aboriginal placement principle emphasising the extended family and consultation with the Western Australian Aboriginal Child Care Agency.

1345 Department of Children's Services, 'Draft Statement of Policy and Procedures in Relation to Aboriginal and Islander Fostering and Adoption'. The Queensland policy seeks to ensure that indigenous factors are taken into account in the placement of children. Preference is given to placement within the extended family to be followed by a placement within the correct kin relationship or, should this be available, within the Aboriginal community. It states that wherever possible decision-making at all levels should actively involve consultation with 'relevant representatives from the Aboriginal and Islander Community'.

1346 Department of Community Development, 'Aboriginal Child Welfare, Procedures, Aboriginal Child Placement'; 'Aboriginal Child Welfare. Principles and Objectives'; 'Aboriginal Child Welfare Policy Guidelines'.

1347 Department of Youth and Community Services, 'Policy Statement: Intake of Aboriginal Children Coming into Care and Detention'. This policy states that the Aboriginal community is to be involved in 'any case, conference or other meeting convened to make a decision' about the future of an Aboriginal child that is 'likely to enter care or already in care'.

1348 Tasmania has no formal or stated policy on this question.

1349 Community Welfare Act 1983 (NT) s 69. See para 360.

1350 Adoption Act 1984 (Vic) s 50 (not yet proclaimed); Children (Guardianship and Custody) Act 1984 (Vic) s 12(5)(12).

1351 See para 359-64 for an outline of State and Territory legislative initiatives

1352 A survey of States with large Indian populations conducted by the Association on Indian Affairs indicated that approximately 25-35% of all Indian children were separated from their families and placed in foster homes or other institutions. Information cited in MP Guerrero, 'Indian Child Welfare Act of 1978: A Response to the Threat to Indian Culture caused by Foster and Adoptive Placements of Indian Children' (1979) 7 *Am Indian L Rev 51*, 53.

1353 Indian Child Welfare Act 1978 (USA), s 2(4) (hereafter ICWA). See House of Representatives, 95th Congress 2nd Session, *Report together with Dissenting Views to Accompany HR 12533* (1978), for an explanation of the purposes of the Act.

1354 ICWA s 4(4). The definition includes any child who is a member of an Indian tribe, or who is eligible for membership and is the biological child of a tribal member. The Act is exceptional in federal legislation for American Indians in that it extends beyond tribal boundaries and membership to Indian children who are not themselves tribal members nor resident or domiciled on a reservation.

1355 ICWA s 4(1).

354. ***Standards to be Applied in State Courts***. Where State courts retain jurisdiction over Indian child custody proceedings, the Act imposes relatively strict standards at the different stages and to the different kinds of proceedings. Thus in cases involving involuntary termination of parental rights, s 102 provides:

> (d) Any party seeking to effect a foster care placement of, or termination of parental rights to, an Indian child under State law shall satisfy the court that active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that these efforts have proved unsuccessful.
>
> (e) No foster care placement may be ordered in such proceeding in the absence of a determination, supported by clear and convincing evidence, including testimony of qualified expert witnesses, that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child.
>
> (f) No termination of parental rights may be ordered in such proceeding in the absence of a determination, supported by evidence beyond a reasonable doubt, including testimony of qualified expert witnesses, that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child.

In cases of voluntary termination, special provision is made to ensure that parental consent is genuine and sustained, and that the consequences of consent are fully understood (if necessary through the provision of interpretation into the relevant Indian language).[1356] Consent may be withdrawn at any time before the final decree of termination or adoption, and even, in the case of fraud or duress, within two years of a final adoption decree.[1357] Even after parental rights have been duly terminated, the Act seeks to protect Indian children by maintaining them within their own extended family or community. Section 105 provides:

> (a) In any adoptive placement of an Indian child under State law, a preference shall be given, in the absence of good cause to the contrary, to a placement with (1) a member of the child's extended family; (2) other members of the Indian child's tribe; or (3) other Indian families.
>
> (b) Any child accepted for foster care or pre-adoptive placement shall be placed in the least restrictive setting which most approximates a family and in which his special needs, if any, may be met. The child shall also be placed within reasonable proximity to his or her home, taking into account any special needs of the child. In any foster care or pre-adoptive placement, a preference shall be given, in the absence of good cause to the contrary, to a placement with -
>
> (i) a member of the Indian child's extended family;
>
> (ii) a foster home licensed, approved, or specified by the Indian child's tribe;
>
> (iii) an Indian foster home licensed or approved by an authorised non-Indian licensing authority; or
>
> or operated by an Indian organisation which has a program suitable to meet the Indian child's needs.

Moreover, this preference principle is to be applied as nearly as possible in accordance with the standards of the relevant Indian community:

> The standards to be applied in meeting the preference requirements of this section shall be the prevailing social and cultural standards of the Indian community in which the parent or extended family resides or with which the parent or extended family members maintain social and cultural ties.[1358]

Special provision is also made for notification to parents, custodians and the Indian child's tribe,[1359] for their right to intervene in State court proceedings,[1360] and for legal aid and access to documents and reports.[1361] Where an adoption is terminated or set aside, a biological parent or previous Indian custodian has a right to the return of the child, unless such return would not be in the best interests of the child.[1362] These standards do not apply to temporary emergency removal or placement of a child 'in order to prevent imminent physical damage or harm to the child', although they do of course apply to any subsequent child custody proceedings with respect to that child.[1363] Nor do they apply if State or other federal law imposes a higher standard or

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1356 ICWA s 103(a).
1357 ICWA s 103(b), (c) and (d).
1358 ICWA s 105(d). Power is given to the tribes to vary the order of preference established by s 105(a) and (b), provided that 'the placement is the least restrictive setting appropriate to the particular needs of the child': s 105(c).
1359 ICWA s 102(a).
1360 ICWA s 101(c);cf also s 104.
1361 ICWA s 102(b) (c), 105(e), 107.
1362 ICWA s 106(a).
1363 ICWA s 112.

confers a greater degree of protection on Indian children.[1364] In this respect the Act establishes a uniform minimum standard for Indian child custody proceedings throughout the United States.

355. ***Tribal Court Jurisdiction over Indian Children***. From the United States' perspective, an equally important — possibly more important — aspect of the Indian Child Welfare Act is the preference it establishes for Indian tribal courts.[1365] Section 101(a) of the Act provides that:

> An Indian tribe shall have jurisdiction exclusive as to any State over any child custody proceeding involving an Indian child who resides or is domiciled within the reservation of such tribe, except where such jurisdiction is otherwise vested in the State by existing Federal law. Where an Indian child is a ward of a tribal court, the Indian tribe shall retain exclusive jurisdiction, notwithstanding the residence of domicile of the child.

Where an Indian child is not domiciled or resident on the reservation, a State court is required to transfer a child custody case involving the child to the relevant tribal court upon request, unless a parent objects and 'in the absence of good cause to the contrary'.[1366] Related provision is made for full faith and credit to be given to tribal court custody orders,[1367] for resumption of tribal court jurisdiction over custody proceedings,[1368] and for tribal-State agreements with respect to transfer of cases, concurrent jurisdiction, and care and custody of Indian children generally.[1369]

356. ***The Indian Child Welfare Act in Practice***. The Indian Child Welfare Act has been generally welcomed in the literature,[1370] and by Indian organisations and communities, and has, apparently, gained increasing acceptance by State courts. Some criticism has been levelled at the various 'escape clauses' in the Act (eg the power of a State court to retain jurisdiction where there is 'good cause' to do so), but it seems that fears that such provisions allow State court judges to exercise 'broad discretions to continue prior practices' have, so far, proved unjustified.[1371] On the other hand the Act has been criticised as an unwarranted intrusion into areas of State responsibility[1372] and as subordinating 'children's rights to the rights of parents and tribes'.[1373] Fears have been expressed that the Act might indeed be, at least in part, unconstitutional on due process or equal protection grounds or as an intrusion into areas of State jurisdiction.[1374] There has not yet been a thorough examination of the constitutional issues, but the challenges made so far have failed,[1375] and the consensus of judicial and academic opinion is that the Act is substantially constitutional.[1376] Similarly, disagreement with the basic principles of the Act seems not to have been sustained. The Act has stimulated Indian tribes and organisations and government agencies to educate State and tribal judges and welfare personnel, to provide improved Indian child care programs, and to assume increased responsibility for care generally.[1377] Continuing difficulties relate more to areas excluded from the Act, in particular, voluntary foster-care programs. The Act does not apply to voluntary foster-care programmes where there is no termination of parental rights.[1378] Several State courts have also held that the Act does not apply to intra-family disputes.[1379] There have also been difficulties with notification of placements under the Act,[1380] and

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1364 ICWA s 111.

1365 For a brief account of the Indian court system in the US, see para 780-91.

1366 ICWA s 101(b); see also Cohen, 348.

1367 ICWA s 101(d); Cohen, 349. This is the only case in which State courts are required by law to give full faith and credit to tribal court orders.

1368 ICWA s 108.

1369 ICWA s 109.

1370 Guerrero (1979); LA Marousek, 'The Indian Child Welfare Act of 1978: Provisions and Policy' (1980) 25 *South Dakota L Rev* 98; MT Jones, 'Indian Child Welfare: A Jurisdictional Approach' (1979) 21 *Arizona L Rev* 1123; J Limprecht, 'The Indian Child Welfare Act — Tribal Self-Determination through Participation in Child Custody Proceedings' [1979] *Wisconsin L Rev* 1202. More reserved, but still generally favourable is G Wamser, 'Child Welfare under the Indian Child Welfare Act 1978: A New Mexico Focus' (1980) 10 *New Mexico L Rev* 413, esp 428-9; B Davies, 'Implementing the Indian Child Welfare Act' (1982) 16 *Clearinghouse Review* 179. And see US Senate 96th Congress 2nd Session, *Hearings before the Select Committee on Indian Affairs on Oversight of the Indian Child Welfare Act*, 30 June 1980, esp 117-23 (Unger).

1371 See esp RL Barsh, 'The Indian Child Welfare Act of 1978: A Critical Analysis' (1980) 31 *Hastings LJ* 1287 1319-20. For a review of State court decisions see T Buthod, 'Children: An Analysis of Cases Decided Pursuant to the Indian Child Welfare Act of 1978' (1982) 10 *Am Indian L Rev* 311.

1372 *HR Report* (1978) 19; Limpreeht, 1217.

1373 RS Fischler, 'Protecting American Indian Children' (1980) 25 *Social Work* 341. cf EL Blanchard and RL Barsh, 'What is best for tribal children?' id, 350 for a response.

1374 *HR Report* (1978) 12-19, 35-41 (views of Department of Justice).

1375 *In re Melinda Twobabies* (Unreported, Oklahoma District Court, 1979); *In re DLL and CLL* 291 NW 2d 278 (1980, SD Sup Ct).

1376 See para 137 and works there cited.

1377 See eg National American Indian Court Judges Association, (1980) 7 *Indian Courts Newsletter* 4-6; and the same Association's publication, *Linkages for Indian Child Welfare Programmes* (1981, continuing). See also American *Indian Lawyer Training Programme, Indian Child Welfare Act of 1978. A Law for our Children* (1979).

1378 s 4(1)(i). In the 1981-2 school year approx 1 000 Indian children were placed voluntarily in the Mormon Church Placement Program. Though probably the biggest, this only one of a number of similar programs.

1379 Davies (1982) 184-8.

especially with continuing funding of Indian child care programs.[1381] A further problem has resulted from the narrow construction placed by some courts on the words 'Indian custodians' as a person who may have standing to intervene and have the child placed in the extended family.[1382] Nevertheless the Act is regarded as a distinct improvement upon the previous position. A rather curious indication of its success is provided by the following statement:

> The American Association on Indian Affairs has compiled some statistics in the aftermath of the Indian Child Welfare Act of 1978 which point to an alarming number of native children coming from Canada to be adopted in the United States. Some American child welfare agencies have released data which indicate that virtually all of the native children they have placed for adoption have been from Canada. The Yukon Territorial government has even been reported as advertising in the US media that they will subsidise vacation costs for a holiday in the Yukon for prospective adoptive parents of native children.[1383]

This may suggest that some of the demand for cross-cultural adoption stems from the needs of adoptive parents rather than of the children.

357. ***Canadian Experience***. The Commission is not aware of legislation along the lines of the Indian Child Welfare Act 1978 (USA) in other comparable countries. However, in Canada there is serious concern about the policy and administration of Indian child welfare arrangements, and much work is being done to improve these. According to Hepworth:

> There are approximately 300 000 status Indians and 750 000 non-status Indians and Metis in Canada; of these, over 40 per cent ie, 420 000 are children under 15 years of age. Over four per cent of Status Indian children and over 3.5 per cent of all Native Children are in the care of the child welfare services, both provincial and federal. The picture for all Canadian children in care is much less — 1.35 per cent.[1384]

It has been estimated that Native children constitute some 50 per cent of children in care in the western provinces and approximately 20 per cent of all children in care in Canada.[1385] The Manitoba Review Committee on Indian and Metis Adoptions and Placements found that there had been a 'systematic delivery of [Indian] children beyond the boundaries of Manitoba with subsequent culture and identity loss'.[1386] Responses to this problem are taking a variety of forms.

- *Ontario Children and Family Services Act 1985 — Declaration of Principles*. A Report by Associate Professor Morse of the University of Ottawa examined the options for change in Indian child welfare in Ontario.[1387] The Report did not recommend separate legislation for Indian child welfare, largely because of the constitutional difficulties associated with special provincial legislation in this field.[1388] It did, however, urge that general child welfare legislation be amended in such a way as to make it more responsive to the particular needs of Indian children. The Report emphasised the importance of Indian involvement at both the administrative and policy level of Indian child welfare arrangements. It called for proper recognition to be given to the important role of the extended family in child care arrangements in Indian communities, on the basis that the standards to be applied in interpreting the law should be those of the community to which the parents and children belong. In addition, the Report recommended that legislation should provide for validation of all adoptions conducted in accordance with Indian customary law. But it did not propose that Indian bands be given jurisdiction

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1380 id, 188-9.
1381 id, 193-6 and cf Barsh (1980) 1304, 1322.
1382 s 101(c); Davies, 191.
1383 BW Morse, 'Indian Child Welfare: Options for change in Ontario. Final Report', unpublished, Ottawa, May 1981, 34.
1384 HP Hepworth, *Foster Care and Adoption in Canada*, Canadian Council on Social Development, Ottawa, 1980, 112. On Canadian Indian child welfare issues see id, 111-122; BW Morse, 'Native Indian and Metis Children in Canada: Victims of the Child Welfare System' in GK Verma and C Bagley, *Race Relations and Cultural Differences*, Croom Helm, London, 1983, 259; P Johnston, 'The Crisis of Native Child Welfare' (1982) 5 *Canadian Legal Aid Bull* 175, and works cited below.
1385 C Chartier & O Mercredi, 'The Status of Child Welfare Services for Indigenous Peoples of Canada; The Problem, the Law, and the Solution' (1982) 5 *Canadian Legal Aid Bulletin* 163.
1386 Manitoba Review Committee on Indian and Metis Adoptions and Placements (Associate Chief Judge EC Kimelman) File *Review Report*, Manitoba, April 1984, 52. In its Interim Report it found that '55% of all Treaty Indian children were placed outside the province of Manitoba as well as 40% of all Metis children but only 71% of all Caucasian children ...' Of the 55 placements made in the USA, 54 or 98% were Aboriginal children. These numbers could not, in the Committee's view be justified as 'what has been repeatedly referred to as "special needs placement"': *Interim Report*, Manitoba, 26 May 1983, 6.
1387 Morse (1981).
1388 The distribution of legislative power in Canada is based largely upon lists of-exclusive federal and provincial powers. In Australia, by contrast, Commonwealth power (including s 51(xxvi)) is mostly concurrent, leaving the States free to legislate until the Commonwealth occupies the field.

over Indian child protection cases.[1389] The Report was followed by a Provincial consultative paper suggesting a range of measures.[1390] In 1985 the Ontario Parliament passed the Children and Family Services Act.[1391] This provides that in both adoption proceedings and child protection proceedings the 'importance, in recognition of the uniqueness of Indian and native culture, heritage and traditions, of preserving the child's cultural identity[1392] shall be taken into consideration in determining the best interests of a child. In child protection proceedings where the court decides it is necessary to remove the child from its existing custody arrangement, the court shall in the case of an Indian or native person, consider whether it is possible to place the child with a member of the child's extended family, a member of the band or native community or another Indian or native family.[1393] Should a child be made a society or Crown ward, the society having care of the child shall choose a residential placement for the child with a member of the child's extended family, his band or native community or another Indian or native family if possible.[1394] In relation to adoption matters there appears to be no such specific child placement principle. The Act however does recognize customary care, defined as:

> [t]he care and supervision of an Indian or native child by a person who is not the child's parent, according to the custom of the child's band or native community.[1395]

The Act enables the Minister to make agreements with bands and native communities for the provision of services, and for the designation of an Indian or native child or family service authority. Once designated under the Act, a child care agency is given considerable authority over child care cases, in a way not yet seen in Australia.[1396] Section 196 endorses consultation between any agencies providing services or exercising powers under this Act and native communities or bands about the provision of services or exercise of powers effecting children.[1397] Other Provinces have enacted, or are considering, child welfare legislation which is more responsive to Indian child welfare needs.[1398]

- *Spallumcheen Band By-Laws*. There have also been developments in the way of administrative transfers of child welfare programs to Indian bands in Alberta, Manitoba and (in one case) British Columbia.[1399] Under the (British Columbia) Spallumcheen Band's Child Welfare By-Laws which came into effect in June 1980, the Band is assigned exclusive jurisdiction over child care proceedings of children who are members of the Band, regardless of their residence.[1400] Where a child is in need of protection, the Chief and the Band Council have authority to determine its placement in accordance with Indian customs and in accord with the following order of priorities:

  > (a) with one of the child's parents;
  >
  > (b) with a member of the extended family living on the reserve;
  >
  > (c) with a member of the extended family living on another Indian reserve;
  >
  > (d) with a member of the extended family living off the reserve;
  >
  > (e) with an Indian living on a reserve;

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1389 One reason given was that before any recommendations could be made in relation to native courts there needed to be further review and discussion. id, 100, 101.

1390 Ministry of Community and Social Services, *The Children's Act A Consultation Paper*, Ontario, October 1982. See BW Morse, 'The Children and Family Services Bill. Impact upon the Indian People of Ontario', unpublished, Ottawa, 1984.

1391 The Act has not yet been proclaimed.

1392 s 37(4), 130(3).

1393 s 53(5). See also s 54(2)(b), 54(4)(d), 60(4)(d) and 65(1)(e) relating to rights of the representative of the band or native communities which the child belongs to apply for access, review the child's status or appeal.

1394 s 57(2)(d).

1395 s 191.

1396 s 15-20.

1397 The Lieutenant-Governor-in-Council may make regulations exempting an Indian or native children family service authority or band or persons caring for children under customary care from any provision of the Act or regulations and may prescribe matters requiring consultation between native communities and bands for the purposes of s 196: see s 206.

1398 See eg Child Welfare Act 1984 (Alberta) s 73 which provides for consultation with the relevant Indian band council before making arrangements for or applying for orders in relation to the guardianship of an Indian child. However the legislation is on its face more concerned to ensure that Indian children do not lose Indian status and associated rights than it is to influence placement decisions: cf s 66. In addition several child welfare agreements have been entered infor for Indian and Metis child services agencies to provide services (both on-reserve and in an urban setting): D de Jong, Alberta Social Services and Community Health, *Submission 493* (6 September 1985)

1399 D Ahenakew, National Chief, Assembly of First Nations, *Submission 336* (2 June 1982), and enclosures.

1400 See generally JA MacDonald, 'The Spallumcheen Indian Band By Law and its Potential Impact on Native Indian Child Welfare Policy in British Columbia' (1983) 4 *Can J Fam L* 75.

(f) with an Indian living off a reserve;

(g) as a last resort — with a non-Indian living off the reserve.[1401]

In analysing these priorities the Band Council is required to give paramount consideration to the best interests of the child.[1402] A decision of the Council may be reviewed by the General Meeting of the Band.[1403] Such decisions are not made by way of a formal judicial inquiry.[1404] The validity of the By-laws is open to challenge on the grounds that the Indian Act 1970 (Can) s 81 does not expressly authorise Indian bands to legislate for child protection.[1405] This is one reason why the Spallumcheen experience has not been followed elsewhere. A similar by-law passed by an East Kootenay Indian Band was disallowed by the Minister in October 1982.

- *Tripartite Agreement on Indian Child Welfare in Manitoba*. In February 1982 the Federal and Manitoba Governments entered into a tri-partite agreement (the Canada — Manitoba — Indian Child Welfare Agreement) with the Four Nations Confederacy. The agreement delegates to the Confederacy responsibilities for the development and delivery of child welfare services on Indian Reserves in Western Manitoba. The agreement is not restricted to the membership of bands, but enables the delivery of services to all Indians residing on reserves covered by the agreement. The transfer to the Indian Child Care Agencies took place under the Manitoba Child Welfare Act s 7, which permits a Director of Child Welfare to invest a committee of 'local citizens known to be interested in child welfare' with the obligations and responsibilities prescribed by the Act. Thus Indian Child Care Services are subject to the Manitoba Child Welfare Act, which defines the standards of child protection, the mode of judicial decision making and the placement options for children found in need of protection. It does not specifically provide for Indian practices or customs to be taken into account.[1406] A review of the Agreement is one of the matters under consideration by the Manitoba Review Committee on Indian and Metis Adoptions and Placements. The Committee has recommended administrative procedures to be strictly followed in the placement of Indian and Metis Children.[1407] The procedures seek to ensure Indian and Metis involvement in the placement of children and that children are placed in culturally and linguistically appropriate homes.

358. ***The Relevance of the North American Experience***. There are of course dangers in translating the North American experience into Australian legislation or administrative practice. It is possible to point to the differences in authority structures among American Indian tribes, compared with Australian Aborigines. American Indians, if not traditionally then certainly in modern times, appear to have placed more emphasis on established and structured authority systems than have Australian Aborigines. More importantly, in the United States, tribal sovereignty is still the basic premise of Indian law. But these differences are more relevant to questions involving tribal court systems than to implementation of a statutory child placement principle.[1408] In examining whether it would be appropriate for an Aboriginal child placement principle to be enacted, the similarities between the American Indian situation and that of Australian Aborigines are persuasive. The more important similarities include a history of high numbers of children being removed from their families and placed in substitute care outside their communities; continuing over-representation of Aboriginal children is the child welfare and juvenile justice systems; the desire of local groups and agencies to play an active role in the design and delivery of child welfare services relating to indigenous children; the traditional and widespread use of the extended family in child care arrangements, and their relatively low economic status when compared to that of the general community.

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1401 By-laws, s 10, MacDonald (1983) 89.
1402 s 10.
1403 s 12, 15, 18, 19 and 23.
1404 MacDonald (1983) 90.
1405 id, 91-2.
1406 The delegation of responsibilities for child care to Indian organisations is not new. In Alberta employees of the Blackfoot Band Council have had authority to administer the Alberta Child Welfare legislation with respect to local children since 1975. There are a number of other examples.
1407 *Interim Report*, Manitoba, 26 May 1983, 31-9.
1408 See para 791.

## The Prospects for Reform in Australia

359. ***State and Territory Initiatives***. In considering the prospects for reform it is important to have regard to recent developments in some Australian States and Territories towards ensuring greater legal protection for Aboriginal children, and reducing the undesirable impacts of official intervention in those cases where it may be necessary. In 1983 the Northern Territory took the initiative in legislating for an Aboriginal child placement principle to apply in the placement of children found in need of care. Legislative and administrative changes in a number of the States also need to be considered.

360. ***Community Welfare Act 1983 (NT)***. This Act, which came into force in April 1984, includes an Aboriginal child placement principle which may be said to be inspired by aspects of the Indian Child Welfare Act 1978 (USA). Section 69 provides:

> Where a child in need of care is an Aboriginal, the Minister shall ensure that —
>
> (a) every effort is made to arrange appropriate custody within the child's extended family;
>
> (b) where such custody cannot be arranged to his satisfaction, every effort is made to arrange appropriate custody of the child by Aboriginal people who have the correct relationship with the child in accordance with Aboriginal customary law; and
>
> (c) where the custody referred to in paragraph (a) or (b) cannot be arranged without endangering the welfare of the child after consultation with-
>
> (i) the child's parents and other persons with responsibility for the welfare of the child in accordance with Aboriginal customary law; and
>
> (ii) such Aboriginal welfare organizations as are appropriate in the case of the particular child,
>
> a placement that is consistent with the best interests and the welfare of the child shall be arranged taking into consideration-
>
> (iii) preference for custody of the child by Aboriginal persons who are suitable in the opinion of the Minister;
>
> (iv) placement of the child in geographical proximity to the family or other relatives of the child who have an interest in; and responsibility for, the welfare of the child; and
>
> (v) undertakings by the persons having the custody of the child to encourage and facilitate the maintenance of contact between the child and its own kin and with its own culture.

The Act establishes a Family Matters Court (consisting of a magistrate). In the original discussion draft of the legislation circulated for comment[1409] the placement principle set out in what is now s 69 was in terms applicable only to decisions of the Minister, not to those of the court. Section 43 of the Act now requires that the court consider the criteria contained in s 69 when an application that an Aboriginal child be found in need of care is made by the Minister. Section 43(e) provides that in such proceedings the court shall consider:

> where the child is an Aboriginal — the person or persons to whom, in its opinion, custody of the child should be given should the child be found to be in need of care, having regard to the criteria imposed on the Minister by section 69.

The court is required to consider the importance of maintaining and promoting the relationship of the child with its parents, guardians and its extended family where appropriate,[1410] thus enabling recognition to be given to the role of the extended family within Aboriginal communities. Section 43 also provides that any assessment of an Aboriginal child as in need of care should be determined in the light of the standards of the community in question:

> (2) Subject to sub-sections (1) and (3), the Court shall only declare a child to be in need of care where it is satisfied that an order declaring the child to be in need of care would ensure that the standard of care of the child as a result of that order would be significantly higher than the standard presently maintained in respect of the child.

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1409 Community Welfare Bill 1983 (NT), tabled in the Legislative Assembly, 24 March 1983. The Commission expresses its appreciation to the NT authorities for the opportunity to comment in detail on aspects of the legislation.

1410 s 43(1)(c).

(3) For the purpose of sub-section (2), the Court shall, in assessing the standard of care of the child, consider the social and cultural standards of the community in which the parents, guardians or persons having the custody of the child (and, where appropriate, the extended family of the child) reside or with which they maintain social and cultural ties.

Section 69 in conjunction with s 43 thus specifies ways in which a placement decision can be challenged by Aboriginal people affected, on the grounds that it fails to take account of legitimate concerns relating to Aboriginal children.[1411]

361. ***Adoption Act 1984 (Vic)***. Similar potential exists under the Adoption Act 1984 (Vic). Section50 (not yet proclaimed) provides that:

(1) The provisions of this section are enacted in recognition of the principle of Aboriginal self-management and self-determination and that adoption is absent in customary Aboriginal child care arrangements.

(2) Where-

(a) consent is given to the adoption of a child by a parent-

(i) who is an Aborigine; or

(ii) who is not an Aborigine but, in the instrument of consent, states the belief that the other parent is an Aborigine —

and who, in the instrument of consent, expresses the wish that the child be adopted within the Aboriginal community; or

(b) the Court has dispensed with the consent of the parents and the Director-General or principal officer of an approved agency believes on reasonable grounds that the child has been accepted by an Aboriginal community as an Aborigine and so informs the Court-

the Court shall not make an order for the adoption of the child unless the Court is satisfied as to the matters referred to in section 15 and, where a parent has given consent, is satisfied that the parent has received, or has in writing expressed the wish not to receive, counselling from an Aboriginal agency and-

(c) that the proposed adoptive parents are members, or at least one of the proposed adoptive parents is a member, of the Aboriginal community to which a parent who gave consent belongs;

(d) that a person of a class referred to in paragraph (c) is not reasonably available as an adoptive parent and that the proposed adoptive parents, or at least one of the proposed adoptive parents, is a member of an Aboriginal community; or

(e) that a person of a class referred to in paragraph (c) or (d) is not reasonably available as an adoptive parent and that the proposed adoptive parents are persons approved by or on behalf of the Director-General or the principal officer of an approved agency and by an Aboriginal agency as suitable persons to adopt an Aboriginal child.

(3) In this section, 'Aboriginal agency' means an organization declared by order of the Governor in Council ... to be an Aboriginal agency in accordance with sub-section (4).[1412]

Section 50 has to be read in conjunction with s 15, specifying the general criteria for the making of an adoption order. Section15 requires the Court to be satisfied, among other things that:

(b) the Director-General ... has given consideration to any wishes expressed by a parent of the child in relation to the religion, race or ethnic background of the proposed adoptive parent or adoptive parents of the child; ...

(d) the welfare and interests of the child will be promoted by the adoption.[1413]

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1411 See also s 4(3)(b) (definition of 'maltreatment' by reason of severe psychological or social malfunctioning to be 'measured by the commonly accepted standards of the community to which [the child] belongs'), 68 (requiring the Minister to 'provide support and assistance to Aboriginal communities and organisations as he thinks fit in order to develop their efforts in respect of the welfare of Aboriginal families and children, including the promotion of the training and employment of Aboriginal welfare workers'), 70 (providing for an agreement with a community government council or incorporated association for it to undertake functions under this Act in relation to the welfare of children'), s 77(e) (providing for the licensee of a licensed children's home to record as far as reasonably ascertainable 'the race or ethnic origin' of any child received into the home).

1412 s 50 provides for the criteria for Aboriginal agencies and related matters. In particular it provides that for an organization to be 'declared' under s 50(3) the Director-General must be satisfied that it is 'managed by Aborigines, that its activities are carried on for the benefit of Aborigines and that it has experience in child and family welfare matters'. s 50 has not yet been proclaimed.

A number of comments may be made on the provisions of the Adoption Act 1984 (especially s 50) applying specifically to Aboriginal children:

- *Limitation to cases where parents consent*. Section 50 is limited by the requirement, that (except where parental consent has been dispensed with) the parent's written wishes that the child be adopted within the Aboriginal community must be given. The Act seeks to ensure that a parent is aware of the right to make such a request by a requirement as to counselling by an Aboriginal agency, which applies unless the parent has expressed the wish not to receive such counselling.

- *Condition of access by Aboriginal community members may be imposed*. Section 37 (not yet proclaimed) enables parents to specify that consent to adoption is subject to a right of access to the child by parents, relatives and, in the case of Aboriginal children, to the Aboriginal community to which the child belongs:

  > In the case of a consent in which the wish is expressed under section 50 that the child be adopted within the Aboriginal community — a condition [may be imposed] that members of the Aboriginal community to which the child belongs have a right of access in accordance with the prescribed terms to the child.

- *Strict application of placement principle where s 50 applies*. Where s 50 does apply, the effect of the priorities set out in s 50(2)(c)-(e) is strict. If no member of the consenting parent's Aboriginal community or (if no such person is reasonably available) of another Aboriginal community is reasonably available, then the proposed adoptive parents must be persons approved by the ordinary adoption authorities and by an Aboriginal agency as suitable persons to adopt an Aboriginal child.[1414] In such cases the Aboriginal agency has, in theory at least, power to prevent adoption of the child by persons it regards as unsuitable to adopt an Aboriginal child. The regime imposed by s 50(2)(c)-(e) is thus a relatively strict one, adding emphasis to the basic prerequisite that the consenting parent request its application.

- *Notification of Aboriginality*. Sections 70(2) and 114 of the Act together establish machinery by which Aboriginal children to whom s 50 applies (and the adoptive parents of such children) are to be given notice, when the child reaches 12 years of age, `to the effect that the adopted child may be entitled to certain rights and benefits that exist for the benefit of the child'.[1415]

- *Relation to other provisions for guardianship and child welfare*. As s 50(1) of the Act expressly recognises, 'adoption is absent in customary Aboriginal child care arrangements'. The Children (Guardianship and Custody) Act 1984 (Vic), introduced together with the Adoption Act, makes new provision for forms of long term guardianship or custody by members of the child's family or 'relatives', not involving adoption in the ordinary sense. As the Minister pointed out in introducing that Act:

  > Guardianship and custody orders are particularly suitable for Aboriginal families, since they are more consistent with Aboriginal cultural values than adoption.[1416]

  Although the Act does not in terms establish a placement principle along the lines of s 50 of the Adoption Act 1984 (Vic), it does establish two rules which will assist in ensuring that decisions as to guardianship and custody are made consistently with that principle. First, s 12(12) of the Act defines a 'spouse', in relation to a parent or relative, to include a person who is traditionally married under Aboriginal customary laws.[1417] The effect will be to recognise a broader range of 'relatives' (as defined in s 3) eligible to apply for guardianship or custody under the Act. Secondly s 12(5) provides that the Court shall not make an order for guardianship or custody under the Act in respect of an Aboriginal child 'unless the Court has received a report from an Aboriginal agency', a term which has

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1413 For the Act's recognition of traditional Aboriginal marriage for the purpose of qualification for adoption see para 281.

1414 It is proposed to proclaim the Victorian Aboriginal Child Care Agency as an Aboriginal agency under s 50. Similar agencies which may be established in country areas may also be proclaimed: Director-General, Victorian Department of Community Welfare Services, *Submission 416* (9 May 1984).

1415 s 114(2). Neither s 37 or s 114(2) have yet been proclaimed.

1416 Victoria, *Parl Debs (Legislative Assembly)* (2 May 1984) 4245 (Hon P Toner MLA).

1417 See para 277.

the same meaning as it does in the Adoption Act 1984 (Vic).[1418] Since it is not proposed that the Aboriginal placement principle should establish a statutory preference in favour of Aboriginal as against non-Aboriginal relatives[1419] and since the Act is concerned only with long-term guardianship of 'relatives' as broadly defined (s 12(2), (12)) the Act seems fully consistent with the placement principle in the Adoption Act 1984 (Vic). The Children (Guardianship and Custody) Act 1984 provides a suitable alternative form of placement for Aboriginal children, and it will be reinforced by the restraints imposed by s 50 of the Adoption Act 1984 where adoption outside the extended family is proposed as an alternative.

362. ***Family and Community Development Bill 1984 (Qld)***. Provisions of this Bill, tabled in Parliament on 26 April 1984 as a discussion draft, seek to ensure that a child's Aboriginality is taken into account by the court in hearing applications for child protection orders. Clause 181(vii) provides that, in proceedings for the protection of children in need of protection, the court shall take account of the need `to foster and assist the indigenous, ethnic and cultural identity of a child, his parents and other members of his family'. Similarly cl 196(2) provides that where a child is under the guardianship or custody of the Director it shall be the duty of the Director, among other matters, to:

> (c) give preference to placing the child-
>
> (i) in geographic proximity to his family;
>
> (ii) with persons who share the child's indigenous, ethnic or cultural background, unless, in the opinion of the Director, it is not reasonably practicable to do so or it is not in the welfare and interests of the child to do so.[1420]

These provisions do not go as far as either the Victorian or Northern Territory provisions, nor as far as the Queensland Department of Children's Services own draft policy guidelines.[1421] They do not provide that any assessment of an Aboriginal child as in need of protection should take account of the relevant standards found in that child's community. They make no provision for Aboriginal involvement and leave decision making to the Director of Children's Services.[1422] Nevertheless they do represent a step forward, especially if they are to be implemented in the light of the Department's draft guidelines. Apparently new regulations are proposed under the Adoption of Children Act Amendment Act 1983 (Qld) that will take account of Aboriginal child care principles.[1423]

363. ***Community Welfare Act 1982 (NSW)***. This Act, only some provisions of which have been proclaimed, spells out the implications of the 'paramount consideration' of the welfare of the child in cross-cultural situations. Section 81(4) provides:

> Where the court is of the opinion that a child the subject of a [care] application ... has been brought up substantially in accordance with the culture of a particular ethnic group or is regarded as belonging to a particular ethnic group, the court shall not, unless the child has expressed a wish to the contrary, make an order [for wardship or institutional care] ... unless it has taken into account the desirability and feasibility of making an order ... placing the child in the custody of a person belonging to that ethnic group.

In performing its duty under s 81(4) the Court must have regard to a report prepared by a competent person 'dealing with the conflict of cultural factors' involved.[1424] No doubt it was intended to include Aborigines as one 'ethnic group' covered by s 81(4), although the term 'ethnic' does not necessarily include indigenous groups such as Aborigines, and the Act itself distinguishes, in s 5, between 'Aborigines, as defined in section 2(1) of the Aborigines Act, 1969' and 'members of an ethnic group'.[1425] It may be that a placement principle, similar to that recommended for Aboriginal children, should be enacted for children of immigrant communities with distinctive cultures of their own, though this is, of course, outside the Commission's

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1418 These provisions were added to the Bill in response to criticism that in its earlier version it did not conform to the Aboriginal child welfare provisions in the Adoption Bill. See eg P MacKenzie, *Submission 409* (14 August 1984) 2.

1419 See para 367.

1420 c1196(2)(c).

1421 See para 352.

1422 See para 373.

1423 *SWA Report*, 15.

1424 s 81(3).

1425 s 5(1)(c)(iv), (vii). s 5(1)(c)(vi) defines all Aborigines as 'persons disadvantaged' and in need of assistance. There is no definition of 'ethnic group' in the Act. It would be open to a Court, in the light of s 5, to hold that Aborigines are not an 'ethnic group' and are therefore excluded from the rather limited protection of s 81(4).

Terms of Reference.[1426] But one could not justify a placement principle for ethnic children to the exclusion of Aboriginal children. For this reason at least, s 81(4) may well be construed more broadly. But it would be desirable for the matter to be put beyond doubt by an amendment to the Act.

364. ***Other States and Territories***. In South Australia the Adoption of Children Regulations, reg 17(2) provides that:

> The Director General may also waive one or more of the criteria where it is desirable that a child should be adopted by applicants of the same racial origin and approved prospective adopters of that racial origin who meet all the criteria are not available.

The criteria referred to are those established by the Regulations pursuant to s 72(1a) of the Adoption of Children Act 1966 (SA). There is no power to waive statutory criteria for adoption (such as recognised marriage). Nor are there specific provisions in the adoption or child welfare legislation of South Australia,[1427] Western Australia, Tasmania or the Australian Capital Territory which address Aboriginal child welfare issues in any of the specific ways outlined in the previous paragraphs.[1428]

## Questions of Principle and Implementation

365. ***The Need for Specific Protection***. The history of disproportionate intervention in Aboriginal families, and the evidence of continuing problems, strongly support the case for specific protection for Aboriginal children and their families. This need has already been widely accepted in Australia, as evidenced by the adoption of policy guidelines at federal level and in most States and Territories[1429] and by the recent legislative initiatives already described, in particular those in the Community Welfare Act 1983 (NT) and in the Adoption Act 1984 (Vic). It is supported also by analogous developments in North America, where the impact of the child welfare systems on Indian families has been very similar to the Australian experience. The need has also been recognised by other Australian inquiries into the question. The Final Report of the NSW Aboriginal Children's Research Project recommended legislative protection:

> A Commonwealth Aboriginal Child Welfare Act may be the only way to protect all Aboriginal children against undue welfare intervention. With the success of the Indian Child Welfare Act 1978 (USA) in safeguarding Indian children, this option deserves urgent investigation by the Commonwealth government in conjunction with Aboriginal communities.[1430]

The Working Party of the Standing Committee of Social Welfare Administrator's reported that it was

> disturbed by the varying discrepancies it found between policy and practice throughout Australia — discrepancies that could not be blamed on inadequate resources alone.[1431]

and found that:

> While the working party felt that legislation at either State or Commonwealth level would not, on its own, be a panacea, it would at least afford an acceptable measure of protection.[1432]

Legislation providing for an Aboriginal Placement Principle would be consistent with the stated Policy Objectives of the International Year of the Child 1979, National Committee of Non-Government

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1426 For the distinction between recognition of Aboriginal customary laws and of immigrant traditions see para 163. It should be said that there is no evidence of the disproportionate impact of the child welfare system on immigrant families such as has long existed, and continues to exist, in the case of Aborigines. See para 345.

1427 However the SA Department of Community Welfare has adopted a proposal for Community Self-Management of Aboriginal Welfare Services: Department for Community Welfare, (M Harris) *Submission 439* (8 June 1984). A discussion paper circulated to Aboriginal communities stated that: The aim of community self management is to provide local people with direct control over their own welfare services to families and individuals so that they meet the needs of the local community, are related to Aboriginal culture and the natural caring within communities is extended. (id, 3).

1428 The Community Welfare Act 1972 (SA) s 10(4) provides that:
In recognition of the fact that this State has a multi-cultural community, the Minister and the Department shall, in administering this Act take into consideration the different customs, attitudes and religious beliefs of the ethnic groups within the community.
cf para 363 on the meaning of 'ethnic group' in this context.

1429 See para 352.

1430 Aboriginal Children's Research Project (NSW) *Draft Principal Report* (March 1982) 161.

1431 *SWA Report*, 33.

1432 id, 39.

Organisations. That Committee called on bodies (including the Commission) to develop mechanisms which would ensure that in cases involving the placement of Aboriginal children:

> ... priority be given to placement with the Aboriginal extended family or foster family, with an Aboriginal Family Group home or hostel ...[1433]

Support for a placement principle embodied in federal legislation was expressed by the national organization of Aboriginal and Islander Child Care Organizations (SNAICC) in 1984,[1434] although it was pointed out that further consultation with local Aboriginal groups and organizations was required both on the principles of such legislation and its implementation.[1435]

366. ***The Commission's Conclusion***. In the Commission's view, legislation should deal expressly with the placement of Aboriginal children. It is not sufficient to rely on the sensitivity of particular welfare officers, authorities or magistrates in ensuring that appropriate principles are applied — and that concealed ethnocentric judgments are not applied — in deciding on the future of Aboriginal children. Legislation providing a statutory basis for an Aboriginal child placement principle would help to ensure that those involved in making decisions on Aboriginal child placements make every effort to ensure that, wherever possible, Aboriginal children are placed within the care of their own families and communities.[1436] It would provide a basis on which decisions made in clear defiance of such a principle might be challenged, especially where alternative care arrangements consistent with the principle are available. This would make the implementation of the principle more secure than it will be if it continues to depend only on benevolent or enlightened exercises of a general discretion. Such legislation should define more specifically the factors to be considered in determining what is in the best interests of an Aboriginal child, the most important principle being that, wherever possible, Aboriginal children should be placed within their own family or community, and in a way consistent with the child care traditions of that family and community. It should require that, in cases of adoptive and foster placements of Aboriginal children, preference should be given, in the absence of good cause to the contrary, to placements with (1) a parent, (2) a member of the child's extended family; (3) other members of the child's community (and in particular, persons with responsibilities for the child under the customary laws of that community)'. In the specific case of fostering, where such a placement is not possible, preference should be given to institutions for children approved by members of the local Aboriginal community having special responsibility for the child or by an Aboriginal child care organisation working in the area, and which have programs suitable to meet the child's needs. The legislation should provide that in making these decisions account should be taken of the standards of child care and child welfare of the Aboriginal community to which the child belongs. In each Australian jurisdiction legislative protection along these lines should be enacted.

367. ***The Scope of Protection***. In addition to questions of implementation, of financial and other support for Aboriginal agencies, and of the scope of their involvement in the delivery of child care services,[1437] certain basic questions arise as to the scope of any child care principles.

- ***Defining 'Aboriginal child'.*** The definition of Aboriginality for general purposes was discussed in Chapter 7.[1438] The accepted definition, based on the combination of descent, identification and self-identification, is capable of presenting problems in the case of some children. As Chisholm has pointed out 'especially with younger children, the question of identification is what has to be determined'.[1439] Apparently this has not been a problem in practice with existing legislative provisions and administrative guidelines, which do not adopt special or narrow definitions of 'Aboriginal child'.[1440] Although the operation of the placement principle may be affected, and in some cases

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1433 International Year of the Child National Committee of Non-Governmental Organisations, *Aboriginal Children and the law* (1979) 18. cf also WA Backlog Procedures Committee (1982) 15-16.

1434 Chisholm, *Black Children, White Welfare?* (1985) 110-11.

1435 However, SNAICC rejected the recommendations in the *SWA Report*, because of lack of consultation with and participation by Aboriginal groups, and especially the child care agencies, in formulating the Report, and also because of the Reports outright rejection of federal legislation in this field: SNAICC, *First Interim Report* (1985) 7.

1436 cf Chisholm, *Black Children: White Welfare?* (1985) 115-17.

1437 See para 368-373.

1438 See para 88-95.

1439 Chisholm, *Black Children: White Welfare?* (1985) 6.

1440 The exclusion of Torres Strait Islander children from guidelines or a placement principle would not be justified, but their inclusion in the Commission's recommendation might be thought to present difficulties. See para 96 for discussion and see further Chapter 39 for the Commission's conclusions on the application of its recommendations to Torres Strait Islanders in appropriate cases.

attenuated, by uncertainties about whether a particular child is Aboriginal or by the fact that a child does not belong to or identify with an Aboriginal community, it is undesirable to treat such factual questions at the threshold or the jurisdictional level, whatever their substantive relevance may be. The placement principles are, so far as their content is concerned, sufficiently flexible to deal with definitional uncertainties. Accordingly it should be sufficient to define an 'Aboriginal child' as a child of Aboriginal descent for the purposes of the placement principles.[1441]

- ***Application of the Principle to Disputes between Parents***. With such a definition, disputes can arise between parents (or indeed between relatives, eg grandparents) where one party is not Aboriginal. The question is whether the placement principle should apply in such circumstances, so as to give a preference to the Aboriginal parent or relative. The point was usefully discussed by Chief Judge Evatt (dissenting), in Goudge. After pointing out that the Commission's tentative proposal in Research Paper 4 would not apply to custody disputes between parents, she said:

> While such a principle has obvious relevance when deciding whether to place a child from one culture in a family of another culture, it cannot readily apply to children of a mixed racial marriage who have been brought up in contact with two differing cultural heritages. Nevertheless, it is another indication that cultural factors are to be given weight in deciding the welfare of children. Many cases arising under the Family Law Act involve children who have real connections with two different cultural, racial or religious backgrounds. The principle that emerges from such cases is that while neither culture is to be preferred over the other, both may be of importance to the child. As a result, the implications of any order for the continuing connection of the child with each culture need to be considered.[1442]

Clearly, the child's Aboriginality, and the circumstances in which the child has been brought up, are relevant factors in such cases. Indeed, in all recent Australian cases, in both the Family Court and Supreme Courts, they have been expressly treated as relevant.[1443] But it is one thing to treat them as relevant and another to create by legislation a preference for a parent of one race or cultural background as against another. Neither the Indian Child Welfare Act 1978 nor any equivalent legislation or ad ministrative guidelines so far enacted or adopted in North America or Australia have this effect — although such provisions do have the indirect but desirable effect of drawing attention to the conflicting cultural factors which are usually involved. In the Commission's view no more specific provision is justified.[1444] This recommendation makes it unnecessary to consider whether such a preference could be justified consistently with standards of equal protection or racial non-discrimination.[1445]

- ***Application to Juvenile Offenders***. So far the discussion in this Chapter has concerned questions of child welfare in the ordinary sense (adoption, custody, guardianship or protection). However courts also have to make decisions affecting the long term future of children and young persons convicted of offences, and these decisions may affect guardianship and custody, for example by transferring guardianship to the State or to officials. It has been reliably estimated that 'the numbers of children removed from their families and communities today by the juvenile justice system greatly exceed those removed under child welfare and adoption laws'.[1446] Existing formulations of a placement principle, in Australia and (with one partial exception) North America, do not apply to sentencing decisions affecting juvenile offenders, even where those sentencing decisions affect custody or guardianship. The exception is the provision in the Indian Child Welfare Act 1978 (USA)[1447] which applies the Act to 'status' offences involving children (ie, to offences which are criminal only because of the defendant's age). This is to avoid what are really placement decisions being made under the guise of sentences for crimes, a problem that is particularly acute with offences such as 'being an uncontrolled child'. The tendency in more recent years has been to insist on a stricter distinction between juvenile criminal proceedings and civil care or custody proceedings,[1448] and many of the old

1441 cf Chisholm *Black Children: White Welfare?* (1985) 5-6.
1442 (1984) 54 ALR 513, 526.
1443 See para 351.
1444 As R Chisholm, *Submission 494* (29 August, 14 September 1985) pointed out, the position might very well be different if the courts tended to make ethnocentric judgements favouring non-Aboriginal parents or relatives, or in other ways to overlook the identity crises which many Aboriginal children brought up in non-Aboriginal families experience.
1445 For the consistency of the ICWA with these standards see para 137, 356. See generally para 158-165.
1446 Chisholm, 'Destined Children' (1985) 15 *ALB* 7, 8. See also para 396.
1447 ICWA 4(1). See para 353.
1448 See ALRC 18, *Child Welfare*, AGPS, Canberra, 1981, ch 5-8 for full discussion.

'status' offences have been repealed.[1449] The potential still exists, given the range of additional sentencing powers of children's courts, for decisions to be made affecting custody or guardianship in 'genuine' criminal proceedings. However a first priority should be to establish the placement principle in the areas of its primary applications, that is, the areas of civil custody, guardianship and adoption, etc. There are other ways in which information about cultural and other factors can be provided to courts sentencing Aboriginal juvenile offenders: some of these are referred to in Chapter 21 of this Report.[1450] The matter should be kept under review, and consideration should be given to an extension of the placement principle to at least some categories of Aboriginal juvenile offenders if it appears that the juvenile justice system is being used as a way of avoiding the application of that principle.

368. ***Questions of Implementation***. Given that legislation embodying an Aboriginal placement principle, along the lines suggested, is desirable, the question is whether the legislation should be federal legislation. The need for legislative guidelines at the federal level has been supported by the Family Law Council of Australia:

> (ii) Council supports the view that the Commonwealth exercise its 'aboriginal' power to deal with the custody of all 'aboriginal' children whether of tribally married parents or not;
>
> (iii) Council draws the attention of the Commission to the question whether, if this were done, it would be necessary to include in the legislation appropriate criteria or principles to assist in the determination of such proceedings, although the Council expresses no view about any such criteria at this stage.[1451]

There would be advantages in the enactment of such a principle by the Commonwealth Parliament. The principle would apply throughout Australia, as a uniform standard of public policy. It would be likely to be better known within Aboriginal communities and organisations, and the chances of effective implementation would to that extent be increased. The Commonwealth already has some financial involvement in Aboriginal child care programs;[1452] legislation could be seen as an appropriate accompaniment to this involvement. It is unlikely that similar uniformity or involvement would be achieved by action at State or Territory level. It is no doubt for such reasons that calls have been made, by the Aboriginal Child Care Agencies and other bodies, for federal legislation in this field.[1453] On the other hand there are difficulties in the way of federal legislation in this field. Federal legislation would undoubtedly be regarded as an intrusion into a field child welfare — so far occupied by the States to the exclusion of the Commonwealth. It can also be argued that circumstances and child care programs vary so much around Australia that uniform legislation would not work.[1454] The Social Welfare Administrators' Working Party, in reviewing the Commission's tentative proposal for federal legislation, made the following assessment:

> The working party reviewed the proposal of the Australian Law Reform Commission for federal legislation of an Aboriginal placement principle, and considered the alternatives at State and Territory level. For legislation for an Aboriginal placement principle to be effective the following requirements were considered important:
>
> — it should be integrated into the overall scheme of legislation governing the State or Territory;
>
> — it should be responsive to the particular needs of the cultural requirements of the local Aboriginal population; and
>
> — it should be able to be easily amended to cater for problems arising in the implementation phase.
>
> The working party considered none of these requirements can be met by national legislation ... It is recommended that each State, in consultation with appropriate Aboriginal communities and organisations, consider legislative provisions to enact the Aboriginal placement principle in State law and that following these consultations, consideration be given whether federal legislation is needed.[1455]

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1449 cf id, para 118.
1450 See para 493, 514, 537.
1451 *Submission 393* (28 November 1983) 3.
1452 See para 370.
1453 In addition to the views already cited, see Third Australian Conference on Adoption (1982) recommendation 1(1): 'the Federal Parliament should enact an Aboriginal and Torres Strait Islander Child Care Act, in exercise of the power granted by s 51 of the Commonwealth Constitution'.
1454 The Director-General of the SA Department for Community Welfare commented that local consultation and decision-making 'is seen as infinitely preferable to a centralised organisation as local groups are more likely to be aware of local issues and kinship networks and are more sensitive to these needs'. *Submission 365* (17 December 1982) 2.
1455 *SWA Report*, Recommendations 38, 39.

The considerations referred to by the Working Party are very real ones. Provided that compliance with the underlying principles (which, it should be noted, the Working Party Report fully accepted) is secured by State or Territory legislation, they might be decisive against federal legislation. On the other hand Aboriginal opinions expressed to the Commission have been virtually unanimous in support of federal action, and as pointed out already, State law at present does not provide the secure protection the Working Party's Report itself recognised was necessary. The matter will be discussed further in Chapter 38, in the context of the implementation of the Commission's recommendations generally.

## Ensuring Aboriginal Involvement

369. ***Aboriginal Participation in Aboriginal Child Custody Decisions***. Aboriginal opinions expressed to the Commission and elsewhere have also been emphatic about the need to ensure Aboriginal participation in child custody decisions concerning Aboriginal children. This view was expressed. for example, by the New South Wales Aboriginal Children's Research Project:

> Where Aboriginal people have sought to regain control over their children through the development of groups like the Aboriginal Children's Service, they have met with indifference and obstruction. Where there has been co-operation, there has been no guarantee it will continue. For this reason Aboriginal people want the right to look after their own children by Law ... Without legal safeguards, the record of the past, and the attitudes of many welfare workers today, offer no guarantee that Aboriginal child care and the operation of the extended family will be respected.[1456]

The IYC National Committee of Non-governmental Organisations stressed the need for Aboriginal control, in terms of Aborigines action of the legal processes, particularly as they affect children:

> To sustain authority within Aboriginal groups which directly influence the power of Aboriginal people to deal with their children and their children's problems it is desirable that the legal process in all types of Aboriginal communities is Aboriginalised to the extent desired by communities.[1457]

Aboriginal participation in the child welfare processes has increased significantly in recent years, but it remains largely informal and without any statutory basis. Various means of ensuring that Aboriginal people can participate in decisions regarding the placement of Aboriginal children will be discussed below. But first the establishment and role of the Aboriginal Child Care Agencies, which are likely to remain central to the question of Aboriginal involvement, should be outlined.

370. ***Aboriginal Child Care Agencies***. Moves to establish Aboriginal child care agencies began following the First Australian Conference on Adoption in 1976. Agencies were established in Victoria and New South Wales; since then agencies, of varying size and support, have been set up in all States and the Northern Territory. The Federal Department of Social Security funds some 13 child care agencies in capital cities and major centres such as Nambucca Heads, Mt Isa, Alice Springs, Townsville, Cairns and Launceston. Funds are made available under the Children's Services Program. The level of estimated expenditure for 1985-86 is approximately $1.84 million.[1458] A national body, the Secretariat of National Aboriginal and Islander Child Care (SNAICC) has received some funding since September 1983.[1459] Obviously, finance is an important prerequisite to the effective operation of the services. At first, the child care agencies only became directly involved in particular child placements in emergencies. Their main role has been advisory and consultative in the areas both of fostering and adoption. This role is expressly recognised in the policies of Western Australia, South Australia and Victoria, and is said to be recognised in practice in Queensland, New South Wales and the Northern Territory.[1460] In fact there are considerable variations between the agencies in the extent to which they are involved, and consequently in their effectiveness.

371. ***Support at the Policy Level***. The Department of Aboriginal Affairs Aboriginal Adoption and Fostering-Policy Guidelines recognise the very important role which such Agencies could play. They provide that:

> Advice should be sought on a regular basis from appropriate Aboriginal bodies which might:

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1456 Aboriginal Children's Research Project (NSW), Discussion Paper 3, *Assimilation and Aboriginal Child Welfare — the NSW Community Welfare Bill 1981* (September 1981) 5-7 (emphasis in original).
1457 IYC National Committee of NGO's, *Aboriginal Children and the Law* (1979) 18.
1458 Office of Child Care, Department of Social Security, *Submission 406* (23 March 1984).
1459 ibid. The Northern Territory Administration has also provided some interim funding for the Central Australian Child Care Agency.
1460 See para 371. For the NT Act see also para 360.

- form a channel for the provision of advice to the relevant State authority on adoption and fostering procedures and individual placements where appropriate;

- assist with the assessment and post placement follow-up of Aboriginal children who are adopted and fostered;

- seek out Aboriginal parents wanting to adopt or foster and encourage them to apply; and

- assist with the co-ordination of relevant child and family services.[1461]

Victorian Departmental policy requires that Child Care Agencies be consulted in all cases, while Western Australian and South Australian policies require consultation in all cases except in emergencies.[1462]

372. ***Some Non-Statutory Forms of Aboriginal Participation at Present***. There is scope for greater involvement through Aboriginal participation in decision-making forums, even under legislation which contains no specific recognition of Aboriginal child care needs. For example, the Community Welfare Act 1982 (NSW) provides for a number of bodies through which there may well be further scope for Aboriginal involvement in both administration and policy formulation of arrangements for Aboriginal child care. These include Children's Panels, the Community Welfare Appeals Tribunal, the Children's Board of Review and the Community Welfare Advisory Council.[1463] Another form of participation is through case conferences held by the Department of Youth and Community Services in New South Wales. These conferences are held to settle care arrangements for children in the care of the Department and consist of departmental officers who have been working on the case, together with other persons involved. The other persons can include psychologists or school counsellors, natural parents and foster parents, and the children themselves: the decision as to who attends is made by the Department.[1464] There is clearly scope to include Aborigines at case conferences involving the placement of Aboriginal Children. In 1982 the NSW Steering Committee cal led for Aboriginal people to be nominated to all decision making bodies to be established under this Act. To what extent Aboriginal involvement in formulating and applying child-care policies will actually be developed through these means remains to be seen.[1465] Another less direct but nevertheless important form of participation in child care arrangements for Aboriginal children is provided through the Aboriginal liaison units established within a number of State and federal departments. The Aboriginal Liaison Unit in the Commonwealth Department of Social Security plays an important preventive role in the area of child care. By identifying families in need of financial support and arranging for social security benefits to be paid, the need for children to be placed in substitute care may be substantially reduced.[1466] It has been said that in recent years 'the amount of consultation has been significantly increased, and that it has often influenced the outcome of decisions about Aboriginal children'.[1467]

373. ***Statutory Endorsement of a Consultative Role***. However such methods of participation represent in most cases only scope for involvement rather than a right of involvement.[1468] The Commission believes that a right on the part of the relevant Aboriginal people to be consulted and involved in decisions involving Aboriginal children needs to be formally and explicitly acknowledged. It is a clear concomitant of the Aboriginal placement principle already recommended. The present law does guarantee the right of the mother, at least (and in some cases the father[1469]) to be involved in decisions involving a child, but in the case of Aboriginal children this right may not be effective, for a variety of reasons. Experience shows that some further guarantee of involvement and consultation in decisions concerning the child is necessary, whether this is with appropriate family members or an appropriate Aboriginal agency. At present this occurs only in Victoria and Northern Territory.

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1461 Guideline 4.
1462 See also WA Backlog Procedures Committee (1982) 26, and see para 364.
1463 An outline of the role of these bodies and an assessment of the scope for Aboriginal involvement in decision making was provided by R Chisholm, 'The NSW Community Welfare Act 1982: Opportunities for Aboriginal Involvement' (1982) 5 *ALB* 13.
1464 R Chisholm 'Aboriginal Self-Determination and Child Welfare: A Case Conference' (1982) 17 *Aust J Soc Issues* 258.
1465 NSW Steering Committee, 10.
1466 See also para 391.
1467 R Chisholm, 'Destined Children' (1985) 14 *ALB* 6, 7-8.
1468 id, 8-9. See further Chisholm, *Black Children: White Welfare?* (1985) 110-20, where the differences between consultation and decision-making powers are discussed.
1469 See para 271-9.

- *The Adoption Act 1984 (Vic)*. Provisions of this Act, not yet proclaimed, seek to ensure the involvement of the Victorian Aboriginal Child Care Agency by providing that where either parent of the child is an Aborigine, the court shall not make an adoption order unless it is satisfied that 'the parent has received or has in writing expressed the wish not to receive, counselling from an Aboriginal agency'.[1470] The agency has a further role if section 50 applies and no member of an Aboriginal community is reasonably available as an adoptive parent: in that case any other adoptive parents have to be approved by the Aboriginal agency as suitable persons to adopt an Aboriginal child (s 50(2)(e)). Section 50 is structured in such a way as to comply with the priorities in consultation recommended by the Working Party of Social Welfare Administrators, as well as meeting legitimate claims to confidentiality of the persons most directly concerned.[1471]

- *The Community Welfare Act 1983 (NT)*. The priorities in consultation established by the Community Welfare Act 1983 (NT) s 69 have a similar effect: Aboriginal people or agencies other than the child's family or kin have no right to be consulted or involved unless care arrangements involving the family or kin 'cannot be arranged without endangering the welfare of the child'. However, in that case the Minister is required to consult with

  > (i) the child's parents and other persons with a responsibility for the welfare of the child in accordance with Aboriginal customary law: and
  >
  > (ii) such Aboriginal welfare organisations as are appropriate in the case of the particular child.

  This could allow a placement decision to be challenged if the requirement of consultation had not been met. Legislation of this kind may not ensure that every Aboriginal child remains within the care of its own family or community, but it is capable of making a significant contribution to better informed and more sensitive decisions on what is in the best interests of an Aboriginal child. The Commission believes that provisions of this kind are not merely desirable but necessary.

374. ***A General Rule?*** Whether legislation embodying assurances of proper consultation should be federal is, of course, another question. It will be discussed in Chapter 38.[1472] However, the statutory endorsement of this basic principle meets with a number of difficulties, which need to be referred to here.

- *Federal problems*. It is clear that the nature and extent of Aboriginal representation, and the selection of representatives will need to vary, depending on the circumstances of the case and the decision-making body involved. Even if it were constitution ally possible, it may not be practical for the Commonwealth to specify the extent or character of direct Aboriginal participation in State courts, tribunals or other forums. It is beyond federal power for the Commonwealth to interfere with the constitution of State courts or other State agencies.[1473] The most the Commonwealth Parliament could constitutionally do — short of establishing special Federal courts or agencies to the exclusion of the States in this field — would be to require consultation or agreement of specified Aboriginal persons or organisations before decisions are made.

- *Problems of local variation*. Even apart from federal issues, however, problems of local variation, and the circumstances of particular families, present difficulties for any single rule. These difficulties were emphasised by the Working Party of the Council of Social Welfare Administrators:

  > The suggestion of mandatory consultation with a single Aboriginal Child Care Agency assumes a homogeneous Aboriginal population which is easily represented by a single organisation. This is by no means the case. There can be problems with involving outsiders, who have no right to be involved, in the business of a family, particularly if those outsiders fall within certain categories of proscribed relationship. To have their private business placed in the hands of such people can bring shame upon the family concerned. Even among urban Aboriginal people, it is common for certain families to refuse to deal with a particular Aboriginal organisation because of its composition (eg staffed or controlled by people from a particular family or locality). To fail to respect these issues would represent an affront to, rather than a compliance with, Aboriginal culture ... It would be convenient if a single Agency could provide the panacea whereby the

1470 See para 361.
1471 See also Children (Guardianship and Custody) Act 1984 (Vic) s 12(5). See para 361.
1472 And cf para 368.
1473 For State courts, see *Le Mesurier v Connor* (1929) 42 CLR 481; for other State agencies, see *In the Marriage of Harrison* (1978) 18 ALR 689, *Russell v Russell* (1976) 9 ALR 103.

> requirement to consult is easily absolved. However the whole issue of genuine consultation is far more complex than this and requires a more individualistic approach. While established Aboriginal child care agencies certainly have a highly valuable role to play in this area, it should not be seen as an exclusive one. In relation to an Aboriginal child, *it is recommended* that consultation should occur prior to care action being undertaken, before subsequent placement decisions are made and before changes are made to a child's case plan.
>
> (a) The purpose of such consultation is to ensure a significant Aboriginal influence on any decision made.
>
> (b) Priority in consultation shall be (subject to an expressed desire of a parent for confidentiality):
>
> - the child's extended family;
> - people who have a correct relationship with the child in accordance with local Aboriginal customs;
> - recognised Aboriginal agencies.[1474]

These difficulties are real, but in the Commission's view not insurmountable. That this is so is demonstrated for example by the requirement of consultation contained in s 50 (not yet proclaimed) of the Adoption Act 1984 (Vic).[1475]

375. ***Devolution of Decision-Making Powers***. But the question of Aboriginal involvement goes further than just a consultative role. The Working Party of the Standing Committee of Social Welfare Administrators noted that suggestions had been made about the devolution of functions to Aboriginal agencies and communities in all States and the Northern Territory. It concluded that:

> This is a complex issue which requires further consideration within each state and by the Standing Committee of Social Welfare Administrators, especially in relation to the legal process of devolution and the ensuing statutory responsibilities of the appropriate agencies.[1476]

In South Australia a discussion paper has been prepared outlining a proposal for community management of Aboriginal welfare services.[1477] The Community Welfare Act 1983 (NT) s 70 enables a community government council constituted under the Local Government Act, or an association, incorporated under the Associations Incorporation Act, to undertake functions for the welfare of children, should the Minister so agree.[1478] Direct involvement of Aboriginal representatives in placement decisions is of great importance in developing a greater degree of Aboriginal self-management with respect to Aboriginal children. In this respect, the Ontario Family and Children's Services Act 1985 is instructive.[1479] The Act aims to ensure Indian bands and native communities have greater involvement and control with respect to Indian children over and above a purely consultative role. Section 194(1) enables the band or native community to designate a body as an Indian or native child and family service authority. The Minister may then designate this authority as a society for the purposes of the Act,[1480] giving it wide powers to investigate allegations that a child may be in need of protection, to protect children, to provide guidance, counselling and other services, to supervise children assigned to its supervision under the Act, to place children for adoption and to assign children committed to its care under this Act.[1481] Children may be placed, for example, under the control of the society as society or Crown wards[1482] in which case the society is required to place the child consistently with the child placement principle. The proposals contained in s 191-196 and 15(2) of the Ontario Act go well beyond current practice in Australia in terms of decision-making by Aboriginal organizations. Obviously the proposals are formulated to take account of the existing Indian band structure, although the Act also extends to other Indian communities. There may well be difficulties in applying the Ontario

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1474 *SWA Report*, 43, Recommendation 15 (emphasis in original). See also WA Backlog Procedures Committee (1982) 21: 'The need for consultation with the various Aboriginal groups should be emphasised, but the best means of carrying this out is yet to be determined'. For criticisms of the SWA Report see SNAICC, *First Interim Report* (1985) 15.

1475 See para 361.

1476 *SWA Report*, 35.

1477 Department for Community Welfare Discussion Paper on Community Self Management of Aboriginal Welfare Services, and see Department for Community Welfare, (M Harris) *Submission 439*, (8 June 1984). For a less optimistic view see Department of Youth Community Services (NSW), 'Possible Options for Aboriginal Community Involvement Regarding Care of Aboriginal Children' in SNAICC, *First Interim Report* (1985) Appendix 1, 4.

1478 See para 760, 763.

1479 See para 357.

1480 s 194(2)(c).

1481 s 15(2).

1482 See para 357.

proposals in terms, given the absence of local legal equivalents to band councils.[1483] Nonetheless, the proposals have much to commend them. More attention should be given by State and Territory Governments and authorities to developing these and other avenues for participation in decision-making, in accordance with the wishes of the relevant Aboriginal people and organisations. This should be accompanied by the resources and assistance necessary to make the programs effective.[1484] Whether there should be Aboriginal Courts to hear custody cases is another question.

376. ***Separate Aboriginal Forums***. The model of the Indian Child Welfare Act 1978 (USA) might suggest the need for separate Aboriginal courts or forums for child custody issues, similar to the American Indian Courts which exercise preferential jurisdiction over the custody of Indian children.[1485] However, the Indian Child Welfare Act did not create special courts for custody cases, but gave power to existing Indian Courts. There are presently no equivalent Aboriginal courts and the Commission does not recommend the establishment of any general system of Aboriginal courts or similar bodies.[1486] If this recommendation is accepted, then Aboriginal custody disputes will not be able to be resolved by conferring jurisdiction on special Aboriginal courts or forums.[1487]

## Federal, State and Territory Forums for Issues of Aboriginal Child Custody

377. ***The Present Institutional Framework***. Any remedy proposed for problems of Aboriginal child custody and adoption will have to cope with the variety of forms which placement or custody decisions can take in Australia, and with the complexity of the judicial and administrative arrangements for making such decisions. The forums for consideration of cases of child custody (including Aboriginal child custody) vary, according to the nature of the case in question (for example federal or State matters), and in matters of State jurisdiction from State to State. The Chief Justice of Australia has referred to:

> the confusion and inconvenience that is caused by the fact that jurisdiction in cases relating to the custody of children is divided between State and Federal courts. Not only are the parties left uncertain as to the proper forum, thus causing costs to mount and delays to increase, but there is no one court which can determine the custody of the two children in the present case notwithstanding that they are half brother and half-sister.[1488]

Unless Aboriginal spouses are married under the Marriage Act 1961 (Cth), the Family Court's jurisdiction does not apply,[1489] but even apart from federal complications the pattern of family jurisdictions in Australia is a complex one.

378. ***The Family Court of Australia and State Courts***. In determining custody disputes over children, the Family Court has jurisdiction over the custody of a 'child of a marriage' between parties to the marriage and in certain other circumstances.[1490] Children of Aboriginal traditional marriages are not as such within the Family Court's jurisdiction.[1491] The Family Law Act 1975 (Cth) gives each State an opportunity to establish a Family Court, but Western Australia has been the only State to do so. The Western Australian Family Court has extensive jurisdiction (to the exclusion of the WA Supreme Court) in matters such as adoption and the custody of ex nuptial children. The Victorian Aboriginal Legal Service contended that:

> ... the failure of the Family Law Act to apply in this situation, thereby requiring the parties to go through the cumbersome and often intimidating Supreme Court proceedings, is an area requiring urgent reform.[1492]

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1483 Incorporated councils on Aboriginal communities presently perform a range of local government functions, but it cannot be assumed that they are suitable bodies to exercise child welfare powers — though this may be so in particular cases. For the NT provision for delegation of powers to councils see para 360.

1484 This has been an important issue in the USA (see para 356), and it is equally important in Australia, as various submissions pointed out: P Ditton, *Submission 465* (1 January 1985); R Chisholm, *Submission 494* (29 August 1985).

1485 See para 355.

1486 See para 812-817.

1487 On the other hand the recommendations in Part VI do not rule out the establishment, possibly on an experimental basis, of courts or other local justice mechanisms in particular communities which desire the establishment of such a mechanism. A subsidiary aspect of such an experiment might be the conferral of certain powers with respect to child custody. See para 819.

1488 *Fountain v Alexander* (1982) 40 ALR 441, 449 (Gibbs CJ).

1489 cf para 324.

1490 Family Law Act 1975 (Cth) s 5.

1491 The Court's custody jurisdiction was extended in 1983, but still does not apply to most ex-nuptial children. See generally HA Finlay, *Family Law in Australia*, 3rd edn, Butterworths, Sydney, 1983, ch 6.

1492 Victorian Aboriginal Legal Service, *Submission 283* (20 May 1981) 2.

As this submission points out, Supreme Courts retain family law powers under State legislation over the custody and maintenance of children who are not children of a marriage as defined in the Family Law Act 1975 (Cth) or between parties to a custody dispute for whom the Family Court is not available. Custody disputes over children of an Aboriginal traditional marriage will usually have to be brought before a Supreme Court. Supreme Courts also have the power, of particular relevance to Aboriginal children, to make a child a ward of court and to supervise the child in a variety of ways.

379. ***Other Forms of Child Care Arrangement***. Apart from the Family Court of Australia, the Family Court of Western Australia, and State Supreme Courts, a number of other courts and authorities exercise jurisdiction over child care matters. These include:

- *Adoption Courts/Authorities*. Adoption orders can generally only be made by judicial order, after a court or tribunal has considered the welfare of a child and determined that the parent's consent has been given (or properly waived). The actual arrangements vary considerably from State to State.[1493]

- *Children's Courts*. Each State and Territory has a children's court (or courts). These are usually constituted by special or stipendiary magistrates who are not full-time children's court judges, although there is a trend towards specialist children's court judges (as in South Australia). Children's courts generally have primary or exclusive jurisdiction over offences committed by children and young persons up to the age of 17 or 18. Amongst other things children's courts can play an important role in the process of placing children under State control, whether in their criminal jurisdiction or by way of their 'welfare' or 'protective' jurisdiction.[1494]

- *Administrative Custody*. A child may come into the custody, or care and control, of the State (represented by the Minister or the Director General of Community Welfare Services or their equivalents) as a result of an order of a children's court. Alternatively a child may be declared a ward of the Minister or placed in State custody on application by or with the consent of the child's custodian.[1495] Once a declaration or order is made in this way it is not revoked or cancelled merely because the parents or guardians of the child wish the child to be returned: such orders are, to that extent, coercive, and may have to be set aside by judicial order (eg by the Supreme Court).

- *Fostering*. The term foster care can be used to cover a variety of child care arrangements from formal governmental wardship arrangements to the more informal arrangements which may develop between parents, other family members and friends. The notion of foster care is familiar in the literature of social work. However, it is not a technical legal term. It is used in specific legislation to refer to situations where, custody having been transferred to the State or the Child Welfare Department, the Minister or Director boards the child out with people or organisations approved by him.[1496] Fostering may be a long or short-term arrangement, but in either event it does not involve a transfer of guardianship or parental rights to the foster parents and is revocable by the Minister or Director-General unless steps are taken to formalize the position through an adoption order. There are restrictions on informal or unsanctioned fostering arrangements, in some States at least, which might cut across traditional child-caring practices in Aboriginal extended families.[1497]

380. ***Jurisdictional Reform***. The present complicated structure of child custody jurisdictions in Australia creates particular problems for many Aborigines and adds to the confusion they (and other Australians) often experience in having to deal with family law issues. The question is whether special jurisdictional provisions should accompany recommended reforms in laws relating to the recognition of traditional marriage and the placement of Aboriginal children. Three possibilities are open: to confer jurisdiction (exclusive or concur rent) on the Family Court of Australia (and the Family Court of Western Australia); to make provision for separate Aboriginal courts or forums to decide such issues; or to leave the present situation unchanged.

381. ***The Family Court of Australia***. The question of extending Family Court (including State Family Court)jurisdiction over child custody matters consequent upon the recognition of traditional marriages was

1493 See J Crawford, *Australian Courts of Law*. Oxford University Press, Melbourne, 1982, 203-4; Finlay, ch 10.
1494 Crawford, 206-8.
1495 Crawford, 204, 207; but cf Community Welfare Act 1983 (NT) s 9(b), 62.
1496 eg Community Welfare Act 1982 (NSW) s 70-1.
1497 See para 385.

referred to in Chapter 14.[1498] There would be at least some advantages in such an extension. The Family Court of Australia is a specialist family court, with counselling facilities and other special provisions for dealing with child custody questions (eg provision for separate representation of children). Its orders have Australia-wide effect, pre-empting or excluding custody orders of State courts. On the other hand there are continuing problems over the boundaries of the jurisdictions of the Family Court and State courts in custody cases. Conferring exclusive jurisdiction on the Family Court over custody of Aboriginal children would only add to these conflicts and uncertainties, especially if the criterion of Family Court jurisdiction was the existence of a traditional marriage. If the criterion was simply the existence of a custody dispute with respect to an Aboriginal child, the scope for jurisdictional conflict would be reduced but not eliminated, since the definition of 'Aboriginal child' could well be an issue.[1499] It would be undesirable to have the Family Court's jurisdiction depending on questions of fact of this kind. And on the latter assumption the Family Court's custody jurisdiction would be much more extensive than it is now under the Family Law Act 1975 (Cth), since its jurisdiction over ex-nuptial children is a limited one. A more desirable approach might be to invest concurrent jurisdiction in the Family Court with respect to custody disputes involving Aboriginal children (whether or not ex-nuptial children). This approach was preferred by the Family Law Council.[1500] Such a provision would make the Family Court available to resolve custody disputes involving Aboriginal children, with the advantages already referred to.[1501] It would not deprive Supreme Courts of custody jurisdiction (except where a case was already pending before the Family Court), so that the possibility of jurisdictional conflict would be reduced. Power to transfer a case to a Supreme Court where appropriate could also be given to the Family Court (and a converse power to Supreme Courts). In exercising this jurisdiction the Family Court could be empowered to supersede the custody of a State child welfare authority, where this was necessary.[1502]

382. ***The Commission's View***. Apart from the possible conferral of concurrent Family Court jurisdiction with respect to custody cases in the strict sense, the Commission believes that it is undesirable to make general changes in existing judicial or administrative jurisdictions with respect to Aboriginal child custody cases as such. Given the present complicated arrangements in this area, further jurisdictional changes, however well intentioned, are likely to create further confusion. This argument has considerable force also in relation to any proposal for Family Court concurrent jurisdiction. In particular it is undesirable that a federal court's jurisdiction should depend on the Aboriginality of the child in question, that is, on a question of fact which may be contentious and which would have to be determined as a preliminary question. On balance, it seems better to seek to resolve present difficulties through the conferral of custody jurisdiction on courts on a more general basis, rather than limiting the conferred jurisdiction to Aboriginal children or to the children of traditional marriages. For these reasons, no change in the present situation is recommended. Nor does the Commission recommend the creation of separate Aboriginal Courts to deal with custody matters, for the rea sons given in paragraph. 376. However the conferral of child welfare functions on particular groups or communities, pursuant to legislation or by agreement with the relevant Department, is another matter altogether. This has been the major avenue for change in Canada,[1503] and some steps are being taken, or are proposed, along these lines in Australia.[1504] State and Territory Departments should be encouraged to negotiate arrangements of this kind with Aboriginal groups or communities seeking greater participation in the child welfare system so far as it affects their children. Transfers of power of this kind will need to be properly funded and supported and (as in Canada) will need to reflect local requirements and demands. Legislative provisions allowing delegation are also necessary, to provide a secure basis for the exercise of statutory powers at the local level.

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1498 See para 324. The term 'custody' here refers to custody in its ordinary legal sense, not in the extended sense used elsewhere in this Chapter.

1499 See para 367.

1500 'In either event the jurisdiction should be concurrent because of the factual and geographic problems which may otherwise arise ...' Family Law Council, (Justice JF Fogarty) *Submission 393* (28 November 1983) 2.

1501 It would be desirable, in consequence, to provide Aboriginal counsellors as part of the counselling service of the Court.

1502 That power was held not to be validly conferred on the Family Court under the Family Law Act 1975 (Cth), because of the restricted ambit of the marriage power (Constitution, section 51(21)): *R v Lambert, ex p Plummer* (1981) 32 ALR 505; but it could probably be validly conferred under the 'races' power, s 51(26).

1503 See para 357, 375.

1504 See para 360, 375.

## Recognition of Customary or De Facto Adoption

383. ***Aboriginal Customary Practices***. As has been seen[1505] in Aboriginal communities the extended family plays a very important role in child care arrangements. It is common for a member of a child's extended family, often a grandmother, to look after a child or children for periods of time where the parents are unable to do so for one reason or another. Sometimes these arrangements may extend for longer periods of time, to the point where the child might be identified as permanently in the custody of the person(s) looking after him or her and thus regarded as having been adopted. But it would not usually be correct to describe such placements as 'adoptions', since there is no severing of the parent-child relationship but rather a long term arrangement for substitute care.[1506] If an equivalent must be found in the State child welfare systems it would be fostering rather than adoption.[1507] In the Torres Strait Islands, on the other hand, there is a distinct practice of customary adoption, involving the permanent placement of children with members of the extended family.[1508] The new custodians of the child are thereafter regarded by the community as its parents.

384. ***Recognition of Customary Adoption?*** During the Commission's Public Hearings, it was suggested that the law should recognise and give some form of status to 'customary adoptions'.[1509] Such legal recognition could provide a form of protection against removal of children living in unofficial but acceptable arrangements for care had already been made. In Canada, where customary adoption is a common practice among the Inuit, the Northwest Territories Court of Appeal has held that formal provisions in Adoption Ordinances did not preclude recognition of customary adoptions.[1510] In Ontario it has been proposed that:

> Another method of recognizing the differences between the dominant culture and the Indian ones is to sanction custom adoptions the practice of which already exists in Ontario ... Notification of the custom adoption would simply require the names of the adoptive and natural parents, the name of the child, the date and place of the ceremony, and the names of two witnesses who can attest to the adoption's compliance with customary law ... the legislation would not require registration to validate the adoption, only to protect it from being challenged.[1511]

On the other hand, at the First Australian Conference on Adoption in 1976 it was stated that the concept of formal adoption was quite alien to Aborigines, but that many were forced to go through the legal process of adoption in order to 'guard against later interference by welfare agencies'.[1512] It was proposed that viable alternatives to legal adoption be made available so that 'placement of each individual child be determined by the needs of the child and his family, rather than by the straight-jacket of bureaucratic procedures'.[1513]

385. ***Existing Legislative Provisions***. Despite the relative frequency with which long term placements of children occur informally in Aboriginal communities, the law has so far made little or no provision for them. It is true that an important matter in considering the best interests of the child is the desirability of not disturbing existing settled arrangements for custody.[1514] It is possible that new arrangements for long-term custody by persons other than parents will be introduced as an alternative to adoption. An example is the Children (Guardianship and Custody) Act 1984 (Vic), which has already been referred to.[1515] The Act is, in part, designed to accommodate child care within the extended family, including Aboriginal families, orders for custody as distinct from adoption being 'more consistent with Aboriginal cultural values than is adoption'.[1516] By contrast, there are provisions, in the law of some States, which could in theory at least be used to penalise traditional Aboriginal practices for custody and 'fostering' in the extended family. For example, s 111 of the Child Welfare Act 1947 (WA) provides that:

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1505 See para 230-6, 344.
1506 See para 361 and cf Bell & Ditton (1985) 97: 'There is no clear analogy between the sweeping rights of adoption under the new law and the notion of a caring adult under the old law'.
1507 cf the Children (Guardianship and Custody) Act 1984 (Vic): para 361.
1508 ACL Field Report 6 (1982) 14, 18. Customary adoption agreements were at one time recorded in the Island Court books: id, Appendix 10.
1509 S Carey, *Transcript*, Launceston (21 May 1981) 2799. See also S Christian, *Transcript* Cairns (5 May 1981) 2183a; Tasmania Police, *Submission 296* (16 June 1981) 6, calling for the recognition of customary fostering practices as a way of giving 'intermediate legal status to the family caring for the child. Care would need to be taken to protect the legal rights of the natural parents, but at the same time formalizing any arrangements made for the care of children when the natural parents are unable to care for them'.
1510 *Re Deborah, Kitchooalik and Enooyak v Tucktoo* [1972] 5 WWR 203, 209-10 (Johnson JA). See generally D Sanders, *Family Law and Native People*, Canadian LRC, Background Paper, 1975, 41-4, 62-73, 160-5.
1511 Morse (1981) 46-3. See also British Columbia, *Fifth Report of the Royal Commission on Family and Children's Law*, Part VII *Adoption* (1975) 66-85.
1512 Sommerlad (1976) 162.
1513 id, 163.
1514 The point is now specifically provided for, in the context of care proceedings, in the Community Welfare Act 1982 (NSW) s 91(3), 94(2).
1515 See para 361.
1516 Victoria, *Part Debs (Legislative Assembly)* (2 May 1984) 4245.

> No person other than a near relative shall have the care, charge or custody of any child under the age of six years other than on a casual or day-time basis, without being licenced by the Department or approved by the Director in writing for that purpose.

This provision[1517] prohibits placement of a child with a person who is not a 'relative' (defined in s 44(2)) 'for the purpose of the fostering of the child' where the placement is not authorised and exceeds 50 days in any year.[1518] Such provisions are principally intended to prevent unlicenced child-minding centres with inadequate standards from operating. But, in some cases at least, they are in terms wide enough to provide a basis for intervention in extended Aboriginal families, where children are being looked after by persons who may not qualify as 'relatives' or 'near relatives' under the statutory definitions. The New South Wales Act, for example, has been criticized on this ground.[1519] There is, obviously, a need to ensure that provisions of this sort are not applied as a direct form of non-recognition of Aboriginal family arrangements. The provisions are aimed at commercial child-care facilities of various kinds, not at child-minding within the extended family. This result would probably be achieved by liberal interpretation of terms such as 'relative' in the legislation. There is no indication that these provisions have in fact been used as a vehicle for intervention in Aboriginal families. But they should not be applied to child care arrangements in accordance with Aboriginal tradition.

386. ***Categorical Difficulties in Recognition***. The question remains whether Australian law should affirmatively recognise, and thus protect, customary placements in the nature of adoption or fostering. The problem in doing so is that Aboriginal child care arrangements are not, in the ordinary sense, 'adoptions', since the children generally remain aware of, and involved in, their original families. They are distinctive systems of substitute care, which certainly deserve protection, but not necessarily by applying to them the inappropriate concept of 'adoption' — a fact recognised by the provisions of the Children (Guardianship and Protection) Act 1984 (Vic).[1520] In the Commission's view, sufficient protection is provided by the placement principle already recommended. It is preferable to ensure retention of children within Aboriginal families and communities, thus protecting appropriate arrangements for custody. This is the effect of the recommendations already made in this Chapter.

## Social Security and the Care and Custody of Aboriginal Children

387. ***The Issues***. During the Commission's Public Hearings, comments were made about the failure of social welfare authorities to recognise extended family child caring arrangements for the purposes of social security benefits. For example:

> ... The supporting mother's benefit is not so much a problem. It is more the family allowance because it tends to be seen as a parent's right, not a guardian's allowance. A lot of talking has been going on for some time about making sure that the guardian is getting an income.[1521]

> ... As to child endowment ... there is a problem, and it is an organizational one more than a legal one, of foster children Sometimes with foster children one family will look after them for a while, and then they are sent to a sister who will look after them for a while, and then to another place for a while. and it can be hard proving that you are looking after the child and also trying to chase up the payments from one place to another.[1522]

It was generally agreed that family allowances should be paid to the person who was actually looking after the children.[1523] In some places it was said that the problem did not exist, or was being remedied administratively.[1524] In others the obligation (eg of grandparents) to care for children without endowment

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1517 And differently worded prohibitions in other jurisdictions: eg Community Welfare Act 1982 (NSW) s 47 (replacing Child Welfare Act 1939 (NSW) s 28-9).

1518 See also Child Welfare Ordinance, 1957 (ACT) s 30; Community Welfare Act 1972 (SA) s 40-41 (and definitions of 'children's home' and 'child care centre' in s 6(1)); Child Welfare Act 1960 (Tas) s 64(5), (6) (for reward only). There are no real equivalents in Queensland or the NT.

1519 Whether the criticism is justified depends on what is a placement 'for the purpose of ... fostering'. 'Fostering' is not defined in the Act (and the definition in the cognate Adoption of Children (Community Welfare) Amendment Act 1982 (NSW), Schedule 1, para (4)(b) is unhelpful). It is doubtful whether informal placement of Aboriginal children within the extended family could be described as 'for the purpose of fostering'.

1520 cf also Adoption Act 1984 (Vic) s 50.

1521 C Adams, *Transcript* Nhulumbuy (10 April 1981) 1271.

1522 G Gleave, *Transcript* Willowra (21 April 1981) 1564.

1523 eg ACL Field Report 7 (1982) 6, 21, 32.

1524 T Birchley, *Transcript* Kowanyama (27 April 1981) 1940; but this view was contradicted by other witnesses at the same hearing: H Gregory & ors, id, 1837-8.

payments was described as 'a millstone around the grandmothers' and fathers' necks'.[1525] One witness stated that the problem derived from the requirement that the child endowee be 'recognised as a guardian of that child under the various State laws'.[1526]

388. ***The Legislative Framework***. Under the Social Security Act 1947 (Cth), payments are made for the care of children in a variety of ways for example, by increases in the rate of age, invalid and widows' pensions and unemployment benefits, or by supporting parents' benefit or child endowment. The two latter benefits, specifically designed to support persons caring for children, are of particular relevance here. In both cases the beneficiary is the person who 'has custody. care and control' of a child, and is otherwise eligible.[1527] These provisions would appear to require the claimant to have both custody and care and control of the child. On this view, the term 'custody' is not a mere synonym for 'care and control', but would have to be interpreted strictly as legal custody. In many, indeed most, child care situations within an extended family, legal custody will remain with the parents even though care and control is, for a shorter or longer time, located elsewhere.[1528] In fact there are conflicting decisions of the Administrative Appeals Tribunal on the interpretation of the phrase 'custody, care and control'. One group of decisions adopts the strict legal interpretation of 'custody'. For example in *Dowling v Director-General of Social Services* a second wife was looking after two of her own children by an earlier marriage, and three of her husband's children by his earlier marriage. The husband had, but she did not have, legal custody of the three children. The Administrative Appeals Tribunal held that she was not entitled to endowment in respect of these children because, although she had care, and possibly control, of them she did not have custody, a term which, in the Tribunal's words 'not being defined by the Act, I take to have its normal legal sense'.[1529] If this interpretation is correct, it has further consequences for transfer of children, since for present purposes an endowee ceases to be entitled to endowment only when he or she 'ceases to have the custody, care and control of the child' (s 103(1)(a)). An endowee could therefore retain the right to payment by retaining formal custody, even though the actual care and control, and full financial responsibility for the child, were vested elsewhere, for example with grandparents. By the same token the grandparents would not qualify for endowment in respect of the child because they would not have custody. They could, ordinarily, only obtain custody through bringing legal proceedings in the appropriate way. These should not be a prerequisite (even formally) to entitlement to social welfare benefits in respect of the case of children.

389. ***Conflicting Decisions***. On the other hand in several cases other members of the Administrative Appeals Tribunal have adopted a broader approach, treating the phrase 'custody, care and control' as 'a composite expression referring essentially to the responsibility for the actual day to day maintenance training and advancement of the child'.[1530] The conflict between the decisions remains unresolved.

390. ***Need for Clarification***. It is therefore not true to say that the appropriate payment of child endowment or supporting parents' benefit is a matter of administration rather than law. On the contrary, on one view the law precludes payment of child endowment or supporting parents' benefit to persons who, although not formal custodians, are actually responsible for children. It is not satisfactory here any more than is the context of traditional marriages, to rely on benign administrative practices where the legislation itself is in adequate or unsatisfactory.[1531] It is suggested that the purpose of child endowment and supporting parents' benefit is the financial support of persons with actual responsibility for children (both financial and in terms of day to day care). Especially in Aboriginal communities, these persons will often not have 'custody' in the technical sense, and will therefore not be eligible for payments such as child endowment. The Social Security Act 1947 (Cth) should be amended to allow child endowment and other benefits on account of the care of children to be paid, as nearly as possible, to the person or persons with overall responsibility for the child or children in question, without undue emphasis on the location of legal custody. This could be achieved by deleting the word 'custody' from s 83AAA and 95(1) of the Act. 'Custody' would still remain relevant in assessing the location of 'control'. But bare custody without care or control would not be, as it is now, decisive. This suggestion accords with submissions and evidence to the Commission that social welfare

1525 R Felton, *Transcript* Mornington Island (25 April 1981) 1807.
1526 P Coe, *Transcript* Sydney (15 May 1981) 2639.
1527 s 83AAA(1) (definition of 'supporting parent'); 95(1) (child endowment).
1528 There is special provision for cases of joint custody, care and control (s 94(2), 99A), but these will usually be confined to parents (natural, adoptive or foster), rather than applying to members of the extended family (eg aunts, grandparents) with de facto control.
1529 (1982) 4 ALD 443, 445 (Sir William Prentice, Senior Member). To similar effect *Re Brakenridge* (1983) 15 SSR 152; *Re A* (1984) 19 SSR 199; *Re Qazag* (1984) 20 SSR 219; *Re B* (1984) 22 SSR 246.
1530 *Re Ta* (1984) 22 SSR 247; *Re Al Halidi* (1985) ASSC 92-044.
1531 cf para 308.

payments, especially for children, should reflect Aboriginal practices of child care within the extended family. Thus the IYC National Committee of Non-Government Organisations in 1979 called for a:

> review of legislation and regulations concerning family allowances to see if it is possible to cater for difficult situations where mother surrogates are bearing a large responsibility for the children whilst still in the custody of their father.[1532]

However child care within the extended family, while a distinctive aspect of Aboriginal family organisation, is by no means restricted to Aboriginal families.[1533] The change proposed should be a general one, not confined to Aboriginal children. A general amendment seems the best way of resolving this problem presented to the Commission in the context of Aboriginal child-care practices and traditions. Consideration should therefore be given by the Department of Social Security to the amendments outlined above.[1534]

391. ***Some Problems of Administration***. The Commission has been assured that the Department's policy is to ensure, as nearly as possible, that welfare payments for Aboriginal children are made to the persons with actual responsibility for caring and providing for these children. To some extent this aim is now being achieved, according to the evidence of the Public Hearings. Even if the requirement of 'custody' is deleted from the relevant provisions of the Act (thus permitting the Department to pursue its present policy in conformity with the Act), substantial administrative difficulties will remain. The task of ensuring that child care payments are paid to the appropriate person is obviously not an easy one, especially in more remote communities. The work of the Aboriginal Liaison Unit in the Department was referred to in Chapter 14, and it was suggested that this work should be supported and extended.[1535] This is equally necessary in the present context. Similarly, one aspect of the role of paid part-time agents living or working in Aboriginal communities, in consultation with the community in question, is to assist in tracing changes in the long-term care and control of children, thus allowing child endowment and similar payments to be made to the appropriate persons.

## Summary

392. ***Recommendations in this Part***. Accordingly the Commission makes the following recommendations on the recognition of Aboriginal customary laws in the area of marriage, children and family property:

*Recognition of Traditional Marriages: General Principles*

- It is not sufficient to leave the recognition of traditional marriages to the law on defacto relationships (para 245).
- The general law should not enforce Aboriginal marriage rules, including promised marriage rules (para 246, 251).
- Traditional Aboriginal marriages should be recognised for the purposes of particular laws (functional recognition), rather than being treated as a status equivalent to Marriage Act marriage for all or almost all purposes (para 257).
- Recognition should, in principle, extend to polygynous marriages where these exist in accordance with tradition (para 258-60).
- There should be no requirement of a minimum age for recognition (para 261).[1536]

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1532 IYC National Committee of NGOs (1979) 29.
1533 None of the cases cited in para 388-9 involved Aboriginal custodians.
1534 The difficulties created for maintenance of family allowance and pension entitlements by the fact 'that care and custody of children often is shared by the family's community' were noted by a Report of the Department of Social Security, Aboriginal Access to Departmental Programs and Services, Canberra, October 1983, para 3.18.5, though no specific recommendation was made.
1535 See para 312.
1536 One member of the Commission (Professor JR Crawford) would recognize traditional marriages only where the parties are, at the time when the claim to recognition is made, above the minimum marriageable age in Australian law. In his view the legislation should contain a provision equivalent to Marriage Act 1961 (Cth) s 88C(3). See para 261.

- A relationship should not be recognised as a traditional marriage if one of the parties has never. at or before the time in question, consented to the relationship (para 262).

- Recognition should extend to any relationship between two persons which is recognised as a traditional marriage under the customary laws of an Aboriginal community of which one of those persons is a member, irrespective of whether the other person is a member of that or any other Aboriginal community (para 264-6).

- Recognition should be extended to a relationship, previously recognised as a traditional marriage, which continues after the parties cease to reside in the relevant community (para 267).

- A certificate as to the existence of a traditional marriage, given by the public officer of an Aboriginal council or like body, should be admissible as evidence of the facts stated in it (para 268).

- Recognition should be extended to traditional marriages already existing, but that legal effect of recognition should be prospective only (para 269).

- No residual provision. recognising traditional marriage for all purposes, is desirable. But it should be possible for other laws, including State and Territory laws, to recognise traditional marriage for the purposes of those laws (para 269, 324).

- Traditional marriages should be specifically recognised for the following purposes:

    - status of children (para 271).

    - adoption, fostering and child welfare laws, including both parental consent to adoption. and qualifications to adopt, (para 272-9).

    - distribution of property on death (intestacy, family provision) (para 292, 294).

    - accident compensation (including workers' compensation, compensation on death, criminal injuries compensation and repatriation benefits) (para 297, 299, 300).

    - statutory superannuation schemes (and private superannuation schemes established in the futures) para 301).

    - for all purposes of the Social Security Act 1947 (Cth), with special provision being made for separate payment to spouses, and an associated regulation making power (para 310-12).

    - spousal compellability and marital communications in the law of evidence (para 315-6).

    - unlawful carnal knowledge, provided both consent and traditional marriage are proved (para 319).

    - the Income Tax Assessment Act 1936 (Cth) and related legislation (para 322).

- Traditional marriages should not however be recognised for the following purposes:

    - variation of maintenance and property rights during a relationship (para 284-6) or on divorce (para 289-90).

    - bigamy (para 317).

    - rape in marriage (para 318).

    - powers under the Family Law Act 1975 (Cth) to grant injunctions with respect to domestic violence (para 321).

- the Family Court's jurisdiction with respect to principal and ancillary relief (para 323)

*Distribution of Property*

- No change should be made to the laws governing the transfer of real or personal property in an attempt to accommodate Aboriginal ways of transfer (para 328, 330).

- Aboriginal people have the right to make a will and if they do the usual laws should apply (para 333). In particular there should be no special provision for informal wills by traditional Aborigines (para 335). In interpreting the words used in a will or other document, regard should be had to Aboriginal customary laws where relevant, but since this represents the common law rule, no legislative provision to this effect is necessary (para 336).

- Traditional marriages should be recognised for the purpose of intestacy legislation (para 338).

- Aborigines should be able to apply to have an intestate estate distributed in accordance with the traditions or customary laws of the deceased's community (para 340, 342).[1537]

- State and Territory legislation for family provision (testators family maintenance) should allow for applications for family provision by persons related by blood, kinship or marriage to a deceased member of an Aboriginal community and who could at the time of the deceased's death, have reasonably expected support (including material support) from the deceased in accordance with the customary laws of that community (para 341).

- Claims for family provision should prevail, in clear cases of need, over claims for traditional distribution on intestacy (para 342).[1538]

*Aboriginal Child Custody, Fostering and Adoption*

- There should be an Aboriginal child placement principle established by legislation, requiring preference to be given, in decisions affecting the care or custody of children, and in the absence of good cause to the contrary, to placements with:

    - a parent of the child;

    - a member of the child's extended family;

    - other members of the child's community (in particular, persons with responsibilities for the child under the customary laws of the community) (para 366).

- Where such a placement is not possible, preference should be given to placement with families or in institutions for children approved by members of the relevant Aboriginal communities having special responsibility for the child, or by an Aboriginal child care organisation working in the area (para 365-6).

- In making these decisions account should be taken of the standards of child care and child welfare of the Aboriginal community to which the child belongs (para 365-6).

- An 'Aboriginal child' for this purpose should be defined as a child one of whose parents was Aboriginal (para 367).

- The placement principles should not apply to give a statutory preference to one parent over another (para 367).

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1537 One member of the Commission (Professor MR Chesterman) would allow an application for traditional distribution to override the provisions of a will. See para 342.

1538 One member of the Commission (Professor MR Chesterman) dissents from this recommendation. In such cases, in his view, traditional distribution should prevail. See para 342.

- For the time being at least, the placement principles should not apply to decisions taken within the juvenile justice system. However this should be kept under review, to ensure that the guidelines are not avoided by treating civil custody issues as sentencing questions (para 367).

- Child welfare legislation should provide explicitly for consultation with the relevant Aboriginal custodians of a child and (unless they direct to the contrary) with the relevant Aboriginal child care agency, before placement decisions (except emergency decisions involving short-term placement) are made (para 373).

- Careful attention should be given to the possibility of devolving child care responsibilities to regional or local child care agencies by agreement, and with appropriate resources (para 371).

- Subject to this, there should be no change in existing judicial or administrative jurisdictions with respect to Aboriginal child custody cases. In particular, jurisdiction should not be specially conferred on the Family Court in custody cases involving Aboriginal children or children of traditional marriages (para 382).

- There should be no specific recognition of customary adoption (para 386).

- Consideration should be given to amending the Social Security Act 1947 (Cth) to ensure that child endowment and other benefits on account of the care of children are paid as nearly as possible to the person or persons with overall responsibility for the child or children in question without undue emphasis on the location of legal custody (para 390).

# PART IV:

# ABORIGINAL CUSTOMARY LAWS: THE CRIMINAL LAW AND SENTENCING

# 17. Aboriginal Customary laws and the Criminal Justice System

> It is, no doubt, a question of high legislative policy whether tribal aboriginals, who are unable to understand the concepts of the ordinary law, ought to be tried under that law.
> *Ngatayi v R* (1980) 30 ALR 27, 34 (Gibbs, Mason, Wilson JJ)

> The existence of two systems of law side by side, the prevailing one and aboriginal customary law, with their very different attitudes to guilt and responsibility, creates serious problems and the question of how far our laws should apply to aboriginals and how far their law should be allowed to apply to them is controversial.
> id, 36-7 (Murphy J)

393. ***The Commission's Terms of Reference***. The Terms of Reference refer to the 'difficulties that have at times emerged in the application of the existing criminal justice system to members of the Aboriginal race' and require the Commission to investigate, among other things:

> (a) whether, and in what manner, existing courts dealing with criminal charges against Aborigines should be empowered to apply Aboriginal customary law and practices in the trial and punishment of Aborigines; and
>
> (b) to what extent Aboriginal communities should have the power to apply their customary law and practices in the punishment and rehabilitation of Aborigines.

Although the Reference is not restricted to the recognition of Aboriginal customary laws in the criminal law, a particular concern of the Reference is the difficulties often experienced by Aborigines dealt with by the Australian criminal justice system (and, equally, by the criminal justice system in dealing with those Aborigines). These questions are considered in this part of the Report. In this chapter it is proposed to set out the basic factual and comparative background, and to outline the various is sues which arise in considering the recognition of Aboriginal customary laws in the trial and sentencing of Aborigines. Chapter 18 will consider the problems arising with the substantive criminal law in its application to Aboriginal defendants, including the question whether a new defence should be recognised based on Aboriginal customary laws. Chapter 19 discusses the converse question, whether Aboriginal customary laws should themselves be imported into the general legal system in some way, so as to be a basis for criminal liability and punishment under the general law. Chapter 20 discusses procedural as distinct from substantive forms of recognition of Aboriginal customary laws in this area. Finally, Chapter 21 discusses in more detail questions of the sentencing of Aborigines convicted of offences, and in particular the application of 'customary law and practices' in their punishment and rehabilitation.[1539]

## The Statistical Background

394. ***The Disproportionate Impact of the Criminal Justice System***. That Aborigines are subject to the general criminal law has long been established.[1540] Great difficulties have sometimes been experienced in the trial of traditional Aborigines, whose comprehension not only of the forms and procedures of their trial but also of the substance of the charge is often slight or even non-existent.[1541] But, despite difficulties in particular cases, the criminal law has been applied to Aborigines in all its aspects. The results of its application are now so well known as to be notorious. Aborigines are grossly over-represented in Australian criminal statistics, both in terms of conviction rates and rates of imprisonment. In her 'pioneering study', Dr Eggleston pointed out that in Western Australia in 1965, Aborigines, who constituted 2.5% of the State's population, were convicted of 11% of offences and made up 24% of the prison population.[1542] In South

1539 Issues of evidence and procedure affecting Aborigines in their contact with the criminal justice system are dealt with in Part V of this Report.
1540 For the history of the application of British law to Aborigines see para 39-45.
1541 eg *Tuckiar v R* (1934) 52 CLR 335; see para 5 1.
1542 E Eggleston, *Fear, Favour or Affection*, ANU Press, Canberra, 1976, 15.

Australia in the same year, Aborigines (0.7% of the population) accounted for 14% of the admissions to prison.[1543] This overrepresentation, she found, was not only the result of different patterns of criminality, but of differences in arrest, prosecution and sentencing practices.[1544] Although the distribution of offences has changed since the 1960s,[1545] the overall situation remains similar. National Prison Census figures for 1984 indicate that Aborigines, while less than 2% of the Australian population, comprise approximately 10.5% of the prison population. The rate of imprisonment of Aborigines is over 16 times that of non-Aborigines. On a State by State basis the rates are as follows:

NUMBER & % OF PRISONERS BY JURISDICTION AND ABORIGINALITY[1546]

| | NSW | VIC | QLD | WA | SA | TAS | NT | ACT | TOTAL |
|---|---|---|---|---|---|---|---|---|---|
| Aborigines & TSI | 242 | 47 | na | 492 | 88 | 22 | 127 | – | 1018 |
| All Prisoners | 3354 | 1845 | 1881 | 1543 | 564 | 241 | 249 | 17 | 9694 |
| % of prison population | 7.2% | 2.5% | na | 31.9% | 15.6% | 9.1% | 51.0% | – | 10.5% |

Indeed, it is possible that these figures understate the real situation, at least with respect to some classes of offence. In a study of violent crime on Queensland Aboriginal reserves, Dr Paul Wilson found an annual homicide rate (for the 17 communities studied) of 39.6 per 100 000, compared with a rate for Queensland of 3.28 and for all Australia of 4.0.[1547] The rate of serious assault on these reserves was also far greater than the Queensland rate.

> Assault is far more likely than murder to be ignored by white police, to go unreported, or to be dealt with informally by Aboriginal police on reserves. But even with assault we find the same bleak picture emerging from the statistics. The rate for serious assault charges on reserves is 226.05 per 100 000 compared with a Queensland figure of 43.85. So, although the reported Aboriginal rate is five times greater than for that State as a whole, the enormous 'hidden' assault rate — crimes not reported — is probably 10 to 15 times the State or national figure.[1548]

395. ***The Position with Minor Offences***. The exorbitant crime and imprisonment rates recorded in these studies are not confined to serious or violent crimes. At least in recent times, a high proportion of Aboriginal offences has been of a minor, repetitive, sometimes even trivial character.[1549] The New South Wales Anti-Discrimination Board in a study of street offences by Aborigines found that:

> in 10 NSW towns with high Aboriginal populations, Aborigines charged with minor offences in public places greatly outnumber non-Aborigines. The behaviour resulting in the charges was in the main or' a trivial nature, the majority of offences involving the use of unseemly words. Penalties, too, have a more severe impact on Aboriginal people. An appreciable number of those convicted and fined in the 10 towns in this study went to jail rather than pay the fine, even though jail is not a punishment option available under the Offences in Public Places Act.[1550]

In South Australia between 1 January 1983–30 June 1983, 34% of all persons convicted of 'drunkenness', 'minor street offences' an 'offences against order' were Aboriginal.[1551] In country areas a similar pattern emerges to that in NSW:

> A study of court records ... show that courts servicing communities with a substantial Aboriginal population ... have markedly higher rates of imprisonment for vagrancy offences and fines and imprisonment for public drunkenness offenders than other courts. An Aboriginal defendant charged with offensive behaviour before the country courts in

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1543 id, 16.
1544 id, 24, 170-2, 178-80.
1545 One reason for this has been the abolition of certain welfare and status offences only applicable to Aborigines: id, 226-41.
1546 Source: J Walker and D Biles, *Australian Prisoners 1984*, Australian Institute of Criminology, Canberra 1985, 22. A small proportion of all prisoners were not identified as to race (c 10% in SA and Vic, 1-2% in NSW and Tas; none in WA and NT). Figures for Queensland are not available. The figures do not include persons detained locally in police lock-ups etc.
1547 P Wilson, *Black Death White Hands*, George Allen & Unwin, Sydney, 1982, 4.
1548 id, 5. See also PR Wilson, 'Black Death White Hands Revisited: The Case of Palm Island' (1985) 18 *ANZ J Crim* 49.
1549 House of Representatives, Standing Committee on Aboriginal Affairs, *Aboriginal Legal Aid*, AGPS, Canberra, 1980,40-4.
1550 NSW Anti-Discrimination Board, *Study of Street Offences by Aborigines* (1982) iv. Commenting on this Study, Senior Sergeant Bill Galvin of the NSW Police Aboriginal Liaison Unit said:
> It is my considered opinion that the report is methodologically questionable, it lacks validity, freely adopts the use of damaging generalisations and makes improper use of then and now statistics and out of date facts. The recommendations referred to in the report were already in operation ... at the time the survey was taken.
NSW Police Seminar Notes, *Aborigines and the Criminal Justice System*, 3-4 November 1982.
1551 Office of Crime Statistics (SA), *Courts of Summary Jurisdiction 1 January-30 June 1983*, Attorney-General's Department, Adelaide, 1985, 45. Aborigines represent 0.7% of the population of SA.

> this State is five times more likely to receive a prison sentence and six times more likely to be refused bail than non-Aboriginals.[1552]

The National Prison Census of 1984 indicates that 14.3% of all persons in prison for 'offensive behaviour' offences are Aboriginal or Torres Strait Islander. Aborigines and Torres Strait Islanders are similarly disproportionately represented for other 'good order' offences (26.5% of all prisoners) and for justice procedure offences eg breach of bond (17.3%).[1553] Changes in the law aimed at remedying this situation — such as the decriminalisation of intoxication or reform of the law relating to street offences — have often not produced the desired result. Such changes do not necessarily lead to a reduction in the level of contact by Aborigines with the criminal justice system, and especially with the police.[1554]

396. ***Aboriginal Juvenile Offenders***. The statistics for juvenile offenders present a similar picture. For example, in the Northern Territory in 1983-4, 400 of the 894 appearances (44.7%) by juvenile defendants in criminal cases were made by Aborigines; in Western Australia in the same year the figure was 1173 of 8266, (14.2%).[1555] As the Director of the Office of Crime Statistics in South Australia has pointed out, such figures:

> consistently ... show that young Aboriginal people suspected of offending are:
>
> - more likely to be arrested than summonsed;
>
> - more likely to be referred to courts rather than to aid panels (during the first half of 1982, 64% of young Aboriginal defendants went to court, compared to only 36% of other defendants — penalties imposed by aid panels generally are far less severe than courts);
>
> - more likely to have been remanded in custody.[1556]

397. ***What do the Statistics Mean?*** Commenting on earlier but similar Aboriginal imprisonment rates the then Director of the Australian Institute of Criminology said:

> These are dramatic rates of imprisonment by any standards and for any community. Just to quote them is to question their justification. You have to believe either that Aboriginals are the most criminal of minorities in the world or that there is something inherently wrong with a system which uses imprisonment so liberally.[1557]

The problems reflected by these statistics cannot be attributed to any one cause, whether this is actual offending rates, the problematic definition of offences in some cases, or discriminatory policing. The situation — or rather, the range of situations — which underlie the statistics is undoubtedly the product of a variety of factors. But understanding of these remains limited, and the need for careful assessment of the present position, as well as for appropriate action, is obvious. Where the situation described in these studies and reports results from discriminatory policing, steps should be taken to prevent such discrimination in future. To the extent that it results from insensitive application of the law, the law or its administration should be appropriately reformed. To the extent that it results from poverty, social and educational deprivation and poor standards of health (engendering attitudes of apathy, boredom or despair) these should be confronted and if possible remedied. To the extent that it results from alcohol or petrol sniffing, the provision of appropriate rehabilitation and support services should be encouraged. All this is well enough known and ought to be generally accepted. In many areas some steps have been or are being taken, by or in

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1552 Aboriginal Legal Rights Movement, *Annual Report 1982-3*, Adelaide, 1983, 5.

1553 Walker and Biles (1984) 66.

1554 cf C Ronalds, M Chapman & K Kitchener, 'Policing Aborigines' in M Findlay, SJ Egger & J Sutton (ed) *Issues in Criminal Justice Administration*, George Allen & Unwin, Sydney, 1983, 168, 172.

1555 Figures cited in Secretariat for National Aboriginal & Islander Child Care, *First Interim Report on the Aboriginal Fostering and Adoption Principles and its Implementation in the States of Australia*, Fitzroy, 1985, Appendix 3 & 5.

1556 A Sutton, 'Crime Statistics Relating to Aboriginal People In South Australia' in B Swanton (ed), *Aborigines and Criminal Justice*, Australian Institute of Criminology, Canberra, 1984, 363, 365. See also R Bailey, 'A Comparison of Appearances By Aboriginal and Non-Aboriginal Children Before the Children's Court and Children's Aid Panels in South Australia', id, 43; J Wundersitz & F Gale, *Aboriginal and Non-Aboriginal Appearances before Children's Courts and Children's Aid Panels in South Australia (1 July 1979-30 June 1983): The First Four Years of Operation of the Children's Protection and Young Offenders Act 1979*, unpublished report submitted to SA Department for Community Welfare, Adelaide, 1984; and the research by Brady and Morice described in para 399. See further para 537.

1557 W Clifford, 'An Approach to Aboriginal Criminology' (1982) 15 *ANZ J Crim* 3, 8-9. For earlier data on WA see MA Martin, *Aborigines and the Criminal Justice System: A Review of the Literature*, WA Department of Corrections, 1973, 5. For NSW see A Gorta and R Hunter, 'Aborigines in NSW Prisons' (1985) 18 *ANZ J Crim* 25; Ronalds, Chapman & Kitchener (1983) 172-83; T Milne, 'Aborigines and the Criminal Justice System' in M Findlay, SJ Egger & J Sutton (ed) I*ssues in Criminal Justice Administration*, George Allen & Unwin, Sydney, 1983, 184, 189-194. For SA see Aboriginal Legal Rights Movement, *Annual Report 1982-3*, Adelaide, 1983, 5; Office of Crime Statistics (SA), *Crime and Justice in South Australia*, Attorney-General's Department, Adelaide, 1985, 78. See also para 491, 532-4.

collaboration with Aboriginal agencies and organisations, in the directions suggested above. But the question remains: what is the relevance of these statistics for this Reference? To what extent are they the product of non-recognition of Aboriginal customary laws? Do they reflect problems experienced by all Aborigines, or only certain groups? Are the problems a product of conflict between the general law and Aboriginal customary laws, and if so, to what extent can they be resolved through their recognition?

398. ***Large Heterogeneous Communities***. Many Aborigines, including many traditionally oriented Aborigines, now live in much larger groups than was usual in pre-contact times.[1558] Many of these groups comprise people from different language groups and localities, with consequent dislocation and disharmony. The survey of Queensland reserves conducted by Wilson:

> found two distinct clusters of reserves. One cluster had a very high rate of violence and the other was relatively low, although the latter rate was high by white standards. Examples of communities where violence rates were high included Palm Island, Weipa South and Yarrabah, where the average rate of violence was 7.07 per 1000 people. Those in the low-violence group (with a violence rating of 2.31 per 1000) include Lockhart, Doomadgee and Aurukun. High violence reserves were marked by a number of characteristics: alcohol was legally available: they had only low to medium levels of traditional culture; they had relatively high populations: most importantly, they were reserves that had received displaced Aborigines from other areas. Palm Island was originally established as a penal settlement. Weipa South had taken in people forcibly removed by police from their tribal lands at Mapoon, as well as others from Aurukun and Edward River. Yarrabah has people from a number of tribes. Reserves with a lower rating had nearly the reverse pattern: they were communities in which alcohol was not legally available; where relatively high levels of traditional culture survived: they had low populations: they were generally isolated from white influence; they were not receivers of people forced from their traditional areas. These trends in violence and destruction on Aboriginal reserves point to explanations which are familiar to observers of other societies. Whenever there is a lack of community cohesion, considerable mobility from one area to another and tribal disharmony, crime and violence rates escalate.[1559]

It may be that a similar trend could be shown among 'mixed' Aboriginal communities in the Northern Territory, compared with relatively homogeneous communities on their own land.[1560] But even if this is the case, that does not mean that the problems can be resolved by the recognition, or restoration, of Aboriginal customary laws. Even in more traditionally oriented communities, local responses to crime or violence will not necessarily involve reliance upon customary laws: they may involve an appeal to the general Australian law to assist (eg through increased policing). That there has been a resurgence of Aboriginal customary laws in some places (or an end to its suppression) is true. In conjunction with other factors this may contribute to a reduction in crime and disorder in those communities. But there is no simple correlation between adherence to Aboriginal tradition in a traditionally oriented community, and lower rates of crime and disorder.

399. ***No Simple Relationship between Adherence to Aboriginal Customary Laws and Low Offending Rates***. The absence of any such correlation is supported by analysis of the characteristics of recorded offences involving Aborigines in traditional areas. Again, no detailed statistical material is available for all or even most Aboriginal groups, but some indications can be given based on the limited studies so far carried out.

- Duckworth, Foley-Jones, Lowe and Mailer studied the characteristics of 96 Aboriginal prisoners at three prisons in North-Western Australia in 1980.[1561] 80% of those interviewed had been or expected to be 'put through the law' (ie initiated in full or part), and 71% admitted continued adherence to customary law. Most were therefore, traditionally oriented. The authors report the following characteristic of the offenders and their offences:

    - 78% had been in prison before;

1558 See para 22, 29. The 'homeland' or outstation movement is reversing this trend to some extent, but many relatively large communities remain. See para 33-34.

1559 Wilson (1982) 17-18. See also Wilson (1985).

1560 On the other hand, crime rates on Groote Eylandt have been shown to be very high. Although it does not fall neatly into either of Wilson's categories, undoubtedly the people of Groote Eylandt retain relatively high levels of traditional culture. See the material presented in Groote Eylandt Aboriginal Task Force, *Report (1985)* 14-15, 20-2, 25-8, and cf D Biles, *Groote Eylandt Prisoners. A Research Report*, Australian Institute of Criminology, 1983. See further para 536.

1561 AME Duckworth, CR Foley-Jones, P Lowe and M Mailer, 'Imprisonment of Aborigines in North Western Australia' (1982) 15 *ANZ J Crim* 26.

- 72% were serving short sentences (less than 6 months);[1562]
- 77% were arrested in towns (although only 40% were town residents);
- 85% knew they were committing an offence at the time;
- 74% were really drunk at the time (and a further 18% had been drinking);
- only 6% (6) said that their offence was also a violation of tribal law: of these, two had been or expected to be traditionally punished. Three were uncertain what would happen to them in that regard.[1563]

Few differences emerged from a comparison between traditionally oriented and the non-traditional group:

> More non-traditional, than traditionally oriented prisoners report prison as easy and a higher percentage of traditionally oriented report that they miss the company of their relatives. In addition, fewer traditionally oriented people could volunteer a reason for having prisons. These differences apart, the two sub-populations did not differ greatly over other responses.[1564]

- Judith Worrall investigated the offences prosecuted in what was then the NorthWest Aboriginal Reserve (SA) in 1979-80.[1565] These were cases heard locally by a visiting Magistrate. They therefore did not include the more serious offences not within the jurisdiction of a court of summary jurisdiction (except in those cases where a lesser charge may have been laid as an alternative to proceedings in a higher court in Port Augusta or Adelaide).[1566] Fifty individual offenders were charged with 103 offences (excluding traffic offences). Of the 50 all were male, 20 were juveniles. The major offences were breaking and entering (28), unlawful use of a motor vehicle (26), wilful damage to property (22) and drunkenness (11). The offences were overwhelmingly directed at Council or Government staff members, or at property belonging to the Council or the Government. According to Worrall:

> Only the [2] assaults might possibly have involved customary law. In the first assault case, the defendant, while drunk, threatened his wife with a rifle. When she raised the alarm, a senior member of the community came to her aid and beat the husband. Only the husband was charged and the magistrate was asked to take the beating into account when setting the penalty. In the other assault case, the defendant assaulted his brother-in-law, whom he saw striking his (the defendant's) sister. In both cases, there is considerable doubt that tribal law was involved at all. At the most, it could simply be interpreted as people having some say in the administration of the law in their community. It can reasonably be said that customary law has little or no effect on the administering of European law in this particular tribal community. If tribal punishments for breaches of customary law occur, and there is fair evidence that they do, the administers of the punishment do not seem to be punished by European law.[1567]

The North-West Aboriginal Reserve — now Pitjantjatjara land under the Pitjantjatjara Land Rights Act 1981 (SA) — is an area where Aboriginal customary laws are strong. Worrall concludes that in practice:

> [t]he European law predominantly protects property: that of the white people in the community and of the Aboriginal Community Council. It is also used to control the use and abuse of alcohol in the community and juvenile offences associated with petrol sniffing. There are few offences against the person prosecuted and I can only speculate that this reflects a tolerance of the Aboriginal people [dealing] with interpersonal trouble in their own way: conflict appears to be resolved by community intervention or the utilization of traditional law.[1568]

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1562 ie less than 6 months to their release (whether or not on parole): id, 28.
1563 id, 30. No comment was given for the other case.
1564 id, 37-8.
1565 J Worrall, 'European Courts and Tribal Aborigines — A Statistical Collection of Dispositions from the North-West Reserve of South Australia (1982) 15 *ANZ J Crim* 47.
1566 For the SA Police practice of laying lesser charges locally see para 473.
1567 Worrall, 53. These conclusions are similar to those reached in an earlier unpublished study (1977-8) by ALC Ligertwood, *Submission 104* (Sept 1978). See now A Ligertwood, 'Aborigines in the Criminal Courts' in P Hanks & B Keon-Cohen (ed) *Aborigines and the Law*, George Allen & Unwin, Sydney, 1984, 191.
1568 Worrall, 54.

- Brady and Morice investigated Aboriginal juvenile offences at Yalata which came before the Children's Court or a Children's Aid Panel in 1979 and 1980.[1569] A study of juvenile offenders, even in a community which retained a degree of traditionality,[1570] would not be expected to disclose much or any traditional law influence, and this proved to be the case. After identifying the very high incidence of offences involving young males at Yalata (a majority of the young men living at Yalata appeared for at least one offence in the period under review), and demonstrating that these were overwhelmingly property offences against white residents, or Government or community property,[1571] the authors comment:

> It may be that in some communities teenage boys do try to avoid initiation ceremonies, stealing cars or committing some other illegal acts in the process of leaving the area. But to link offending behaviour in general with a 'breakdown of tribal ways' is to confuse the issue. 'Tribal ways' contained no sanctions against the modern illegal behaviours engaged in by adolescents. The fact that modern Aboriginal adolescents commit illegal acts against European laws does not necessarily have any bearing on 'tri bal ways' at all. No offence which resulted in a court appearance during our research period at Yalata could be linked with 'traditional' matters. The involvement of adolescent boys in offending behaviour did not appear to influence decisions made regarding their ritual incorporation ... The true dilemma of Aboriginal versus Australian law lies in the situation whereby an action which may conform to Aboriginal law comes to be adjudicated upon by Australian law as an illegitimate act. It is rare for such a situation to evolve with reference to Aboriginal adolescents. The illegal acts they performed (breaking and entering, illegal uses), had no associated traditional sanctions. Consequently, there was dependence on the Australian legal system when it came to dealing with teenage breaking and entering charges, or illegal uses.[1572]

- In September 1982 this Commission issued Research Paper 6A, a selection of 47 cases in which issues of customary law or community opinion were regarded as relevant in sentencing.[1573] Only four of these cases were not Supreme Court matters. The cases (all but one in the period 1974-1982) were selected for their relevance to issues of traditional punishment and community opinion in sentencing Aborigines, and are not representative of all cases involving traditionally oriented Aborigines. But they can be regarded as representative of the kinds of matters before Supreme Courts in which customary law issues may arise.[1574] For present purposes the following characteristics are relevant.

    - Overwhelmingly the selected cases involving adults (all but one of whom were males[1575]) related to homicide or some form of physical assault (including rape). Only one case involving an adult (in both the Aboriginal and general law sense) did not involve violence.[1576] This confirms a frequent observation about the different kinds of offences of adult and juvenile Aborigines living in traditionally oriented communities.[1577]

    - The influence of alcohol was very marked. In 34 cases the defendant was significantly affected by alcohol. Intoxication was cited as a partial defence in 11 of the 34 cases involving alcohol.

    - In only three of the selected cases could it be said with some certainty that the defendant was justified in acting as he did under Aboriginal customary laws.[1578] In a considerable majority of the cases the defendant's act was a violation both of his own community's law and of the general law, and the issue was the interaction between them in sentencing.[1579] In a few cases the defendant's acts were regarded as not serious by the local community, or were viewed

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1569 M Brady & R Morice, *Aboriginal Adolescent Offending Behaviour. A Study of a Remote Community*, Flinders University of SA, Western Desert Project, 1982.

1570 As Brady and Morice point out, this was the case with Yalata: id, 35, 78-80, 87, 141.

1571 id, 94-103.

1572 id, 177-8, 180. On the question of Aboriginal ceremonial matters in sentencing see para 491.

1573 ACL RP 6A, J Crawford and P Hennessy, *Cases on Traditional Punishments and Sentencing* (September 1982).

1574 A large number of other cases, both during this period and more recent ones, have since come to the Commission's attention. They confirm the conclusions drawn from the sample of cases in RP6A. See also para 497, and cf para 492-6 where some of the more significant cases are discussed.

1575 The exception (Case No 34) was a borderline mentally retarded girl who killed her husband under severe provocation and received a 12 month suspended sentence: id, 36-7.

1576 Case No 3 (arson): id, 5-6.

1577 cf Brady & Morice, 90.

1578 ACL RP6A, 64.

1579 id, 64-5.

sympathetically in the circumstances, and again the issue was the relevance of this factor in sentencing.[1580]

400. ***Some Implications***. The implications of the material outlined in para 394-399, and the situation it portrays, will be discussed in more detail in Chapter 21 in the context of sentencing. Given the disproportionately high representation of Aboriginal people within the criminal justice system, the lack of critical criminological analysis of the statistics is both surprising and unsatisfactory. The paucity of well presented data on a wider scale makes it difficult to respond with any degree of confidence to the questions raised in para 397. However, for present purposes, some general conclusions may be drawn:

- Even when traditionally oriented Aborigines are involved in criminal charges, the case will frequently involve non-traditional elements (especially alcohol) or a non-traditional offence.

- It is commonly the case. even for traditionally oriented Aborigines, that the act the result of the charge cannot readily be identified as related to Aboriginal customary laws.

- The explanation for very high offence and imprisonment rates of Aborigines is not, necessarily in any direct way, the product of non-recognition of Aboriginal customary laws.

- It is unlikely that the problems reflected by those exorbitant rates will be solved by the recognition of Aboriginal customary laws within the substantive criminal law. Indeed, if the characteristics of traditionally oriented Aboriginal offenders do not differ markedly from the characteristics of other Aboriginal offenders, it may be that solutions will not be found directly through any form of recognition of Aboriginal customary laws. They are more likely to require changes in the general law and its administration, or improving the social, educational and economic conditions in which Aborigines live.

- Customary and cultural elements may however still be of relevance in criminal law cases (including both serious and minor offences[1581]). This aspect is returned to in para 402. These conclusions do not deny the possibility that the recognition of Aboriginal customary laws may assist indirectly in maintaining order in Aboriginal communities. But they do put into perspective the limited character of the Commission's inquiry in the area of the substantive criminal law.

## The Interaction of Aboriginal Customary Laws and the Criminal Law

401. ***The General Principle***. Aborigines are subject to the general criminal law in Australia, and in the Commission's view this should remain the position. In fact the appropriateness of the general application of Australian law to Aborigines has not really been disputed in evidence or submissions to the Commission.[1582] Rather, the issue has been the perceived failure of the general law, and its enforcers, to allow room for Aboriginal customary laws and traditions to operate in areas where those customary laws and traditions are strong. As it was vividly put, the general law is 'pressing in upon' Aboriginal communities in their efforts to maintain order.[1583] In the Commission's view, the general law should in appropriate cases take into account or allow for the customary laws and traditions of local Aboriginal groups, without being displaced by them. This implies in turn that the recognition of Aboriginal customary laws will involve the modification rather than the displacement of criminal liability under the general law. Techniques of modification could include the application or extension of existing criminal law defences, or the creation of new ones in at least some cases,[1584] and the use of powers or discretions both at the pre-trial stage and during the trial to avoid or

1580 eg Case No 5 (carnal knowledge): id, 8-9. See also para 398 n 22.

1581 The relevance of Aboriginal traditions and customary laws to minor 'public order' offences has been stressed by M Langton, 'Medicine Square': For the Recognition of Aboriginal Swearings and Fighting as Customary Law; unpublished, BA Honours thesis, ANU, Canberra, 1983.

1582 See para 195-6. cf Groote Eylandt Aboriginal Task Force, *Report*, 15.

1583 During discussions at Yirrkala, November 1981.

1584 A customary law defence applicable in all cases would (subject to evidentiary considerations) involve the wholesale displacement of the general criminal law. See further para 442-450.

mitigate conflict in particular cases (for example, the use of prosecution and sentencing discretions[1585]) and sensitive policing.[1586] Modifications of the rules of evidence and procedure may also be desirable.

402. ***Different Kinds of Conflict***. The question is, therefore, whether and in what ways Aboriginal customary laws should be recognised within the framework of the general criminal law. In responding to this question it must be recognised that conflicts between Aboriginal customary laws and the general criminal law are diverse in kind and may be seen in different ways. Whereas the general criminal law provides that certain conduct may constitute an offence which is punishable by the courts, Aboriginal customary laws are not so much a code of particular rules as a pattern or guide, structuring the ways in which conflicts, and responses to conflicts, occur.[1587] For these reasons, conflicts between Aboriginal customary laws and the general law may require different responses in different contexts. The following examples illustrate the range of conflicts that can occur: they are not an exhaustive categorisation.

- An Aborigine may commit an offence against the general law which will also elicit a customary response. Homicides and serious assaults by one Aborigine against another may result in what could be described as a 'customary punishment' (eg immediate payback or some form of community condemnation) even where the original offence had no particular customary basis.[1588] In some of these situations the dispute may have been resolved to the community's satisfaction before the matter comes before the court. Should the court refrain from intervening?[1589] If it is to intervene, how should customary laws or 'punishments' be taken into account: Is it sufficient to take them into account only in sentencing the offender?[1590]

- An Aborigine may be positively required under his customary laws to perform a certain act which will result in an offence against the general laws. For example in *R v Charlie Limbiari Jagamara*[1591] the accused, an elderly man, had pleaded guilty to the manslaughter of another Aborigine who he believed had had an illicit association with his wife. The accused had inflicted a stab wound with a spear into the shoulder of the dead man. In sentencing the prisoner to imprisonment until the rising of the court Justice Muirhead commented:

  > It is clear that the Crown has accepted the fact that there was no intention at this time to inflict a death-producing blow, but merely to inflict a wound which would satisfy the prisoner's traditional views as to the appropriate response in the situation in which he found himself faced. There is little doubt, and it comes through in the record of interview that he felt he was participating in the motions of the white man's law, but in his mind he was in no doubt that by his own customary law he had done what he believed was required to be done.[1592]

  Such cases are relatively rare, but they raise the questions whether the general law should in such situations allow the requirements of Aboriginal customary laws to operate as a defence, total or partial, to the charge,[1593] whether the general law should be restrained in its operation in some way by virtue of the fact that the matter has been resolved within the relevant community under its customary laws,[1594] and in such a way generally regarded as satisfactory, or whether these customary laws should be taken into account in reducing the punishment applicable under the general laws.[1595]

- Conduct which is regarded as a serious violation of Aboriginal customary laws may not be unlawful under the general law, yet the violation can cause great distress and disruption within Aboriginal communities. The question arises whether some form of in corporation of Aboriginal customary rules

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1585 See para 471-89, 504-22.
1586 See para 844-79.
1587 See references cited in para 37 and see para 99-101, 692-720.
1588 See *R v Claude Mamarika, Raymond Mamarika & Andy Mamarika*, Unreported, NT Supreme Court (Nader J) 17-19 August 1982.
1589 See para 471-89, 692-720.
1590 See para 442-50, 504-22.
1591 Unreported, NT Supreme Court (Muirhead J) 28 May 1984.
1592 id, 19-20.
1593 A partial defence would have the effect of reducing the gravity of the crime (eg from murder to manslaughter). A total defence would exonerate completely. See para 443.
1594 See para 471-89.
1595 See para 504-22.

in the general law may be appropriate, and, if so, what form it should take. This is one area in which requests have been made to the Commission to assist the operation of Aboriginal customary laws.[1596]

- Many offences against the general criminal law involve no question of Aboriginal customary laws (eg motoring offences). But Aborigines may respond in a customary way, for example, to the death of a person in a car accident.[1597] Supernatural factors (eg sorcery) may be regarded as significant in such cases. There mere fact of modern technology and its use does not mean that Aboriginal customary laws are irrelevant to consequences that may have been produced.

- Standards of behaviour of Aborigines acting in accordance with their customary laws may not fit neatly into the requirements of the mental element and defences to crimes in the general criminal law. Does the general law need changing so that it can properly take into account these factors? Should the courts in applying objective standards in determining criminality (eg through such terms as 'disorderly', 'insufficient', 'unreasonable') have regard to the standards of the relevant Aboriginal group or community rather than, or in addition to, any more general community standard?[1598]

- Aborigines can be especially disadvantaged when they come before a court, due principally to problems of language and lack of understanding of the proceedings or of the concepts employed (eg the concept of 'guilty'[1599]). Can these disadvantages be overcome by changing the laws relating-to evidence and court procedure, or their administration?[1600]

- The general law may be so culturally insensitive to the situation of Aboriginal defendants that they run, in effect, a special risk of conviction. This may flow from different attitudes to or understandings of a situation, as in these examples given by Terry Syddall SM:

> [T]raditional 'growling' has become 'disorderly conduct' in the eyes of a European police officer if conducted in public, and often results in the least culpable person being arrested and punished. Similarly ... countless ... men have been charged with obstructing police in the execution of their duty when all they were doing was fulfilling their roles as 'men who take and hold', or [Aboriginal] policemen.[1601]

But the special impact of the criminal justice system may result also from poverty, or different ways of life. This has often been the case with offences such as drinking or being drunk in a public place: given the living conditions of many Aborigines it may be very difficult to avoid technical offending. Similarly, offences such as 'being without visible lawful means of support' could easily be directed at Aborigines living in poverty. Some things have already been done by Australian legislatures and courts to remedy some of these problems. In some jurisdictions public drunkenness is no longer a criminal offence. Judges have interpreted offences which incorporate standards of 'suffiency' or 'reasonableness' by reference to the standards of the defendant 's community. For example in *Daniel v Belton*, the appellant was an Aboriginal resident at Roper River charged with having insufficient lawful means of support.[1602] The question was the proper standard to assess whether his means were 'sufficient'. Justice Blackburn said:

> [Counsel for the Crown] rightly emphasized that the law is for aboriginals and whites alike and that the appellant cannot claim to be exempt from provisions which create an offence for white men, on the ground that he is an aboriginal living aft a mission settlement. The contention that the provision applies equally to whites and to aborigines is of course unchallengeable, but the application of this particular law in any particular case must be in accordance with the principle [that what is relevant is D's *actual* standard of living and his means for supporting himself at that standard[1603]]. Unless that principle is applied, it is obvious that many aboriginals in the Northern Territory. are habitually committing that offence, for they are living in conditions which for white men would entail that they were without lawful visible means of support.[1604]

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1596 See para 454-70.
1597 D Frazer and others *Transcript of Public Hearings*, Alice Springs (13 April 1981) 1428.
1598 See para 425-7, 441.
1599 See para 546 where these problems are outlined.
1600 See para 543-613.
1601 T Syddall, 'Pre-Trial Diversion: A Magistrate's Perspective' in I Potas (ed) *Prosecutorial Discretion, Australian Institute of Criminology*, Canberra, 1985, 203, 210. See also Langton (1983) esp ch 2.
1602 (1968) 12 FLR 101. See Police and Police Offences Ordinance (NT), s 56(1)(a).
1603 Citing *Zanetti v Hill* (1962) 108 CLR 433, 441 (Kitto J).
1604 (1968) 12 FLR 101, 109.

The defendant's means of support, apart from a small amount of money, were 'the lilies of the lagoon, and wild turkeys', together with some support from friends and family. Applying the test of the defendant's actual standard of living, Justice Blackburn held that these means were sufficient for the purposes of the statute, and the conviction was quashed.

403. ***A Range of Issues***. It is clear that the problem of 'recognition' of Aboriginal customary laws in the general criminal law is not a single, clearly defined issue but involves a number of complex, interlocking questions.[1605] These will be dealt with in the following Chapters. Underlying all these issues, however, is a basic question about the extent to which recognition of the customary laws of indigenous peoples is desirable at all in the criminal law. Before dealing with the issues in detail, it is helpful to describe how this question has been answered in relevant overseas countries. No doubt care is needed in any such comparison, given the different histories of the countries being compared, and the different status of their indigenous populations today. But there are also similarities, especially with North America, and the basic issues being grappled with are essentially similar. It is proposed to deal with the United States, Papua New Guinea, and (more briefly) Canada.

## Legal Pluralism in the Criminal Law: Overseas Experience

404. ***The United States***. Indigenous Indian law and customs have been recognised in the United States largely through the recognition of tribal sovereignty, and the corresponding exclusion of State and federal law.[1606] However this sovereignty has been modified or affected by legislation over a long period of time, so that it is now of a residual and limited character. This is especially true in the context of criminal jurisdiction. There, Indian tribes remain free to apply traditional rules or ways of dispute-solving over crimes only in restricted cases.[1607] A good example is the case of crimes committed on 'Indian territory' where the defendant is an Indian. Until 1885, Indian tribes retained jurisdiction over all such cases to the exclusion of State and federal courts. In 1883 the Supreme Court made this clear in quashing a federal court decision sentencing to death one Indian for the murder of another on their own reservation. Such a decision, the court held, subjected Indians to trial:

> not by their peers, not by the customs of their people, nor the law of their land, but by superiors of a different race according to the law of a social state of which they have an imperfect conception and which is opposed to the traditions of their history, to the habits of their lives, to the strongest prejudices of their savage nature; one which measures the red man's revenge by the maxims of the white man's morality.[1608]

But Congress was unwilling to accept Indian settlements of serious offences, and the decision led to the passing of the Major Crimes Act 1886.[1609] That Act extended federal jurisdiction to seven (later increased to fourteen) specified 'major crimes', even though committed by Indians in Indian country. It is still unclear whether jurisdiction over major crimes is exclusive to federal courts, or is retained concurrently by tribal courts.[1610] Within the area of residual jurisdiction, it remains the case that ' Indian tribes have power to enforce their criminal laws against tribe members'.[1611] This power is subject to a maximum penalty of 6 months imprisonment or a $500 fine, as a result of the Indian Civil Rights Act 1968.[1612] Only in a relatively minor way, therefore, do the remaining Indian tribes retain criminal jurisdiction, and in practice this is not often used to apply distinctive aspects of Indian custom or traditional law. Nor is there any explicit recognition of Indian custom in the criminal law of the United States or (to the extent that it applies) in State criminal law.

405. ***Papua New Guinea: The Present Position***. In a number of ways in criminal cases, local customary law has been taken into account by the courts in Papua New Guinea, whether pursuant to or independently of

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1605 cf para 415, 475, 523, 543.
1606 See para 784-5.
1607 cf RN Clinton, 'Criminal Jurisdiction over Indian Lands: A Journey Through the Maze' (1976) 18 *Ariz L Rev* 531; FS Cohen, *Handbook of Federal Indian Law*, Michie, Bobbs — Merrill, Virginia, 1832, esp ch 6; G Hall, *An Introduction to Criminal Jurisdiction in Indian Country*, American Indian Lawyer Training Program Inc, 1981.
1608 *Ex parte Crow Dog* 109 US 556, 571 (1883).
1609 See now 18 USC para 1153 (1978).
1610 The Supreme Court has been careful to leave the point open: *Oliphant v Suquamish Indian Tribe* 435 US 191, 218 n14 (1978); *United States v Wheeler* 435 US 313, 314 n 22 (1978).
1611 id, 322.
1612 25 USCS para 1302.

specific statutory provision.[1613] However no consistent pattern has emerged. The general criminal law has been adapted to take account of local customs and conditions, for example, in determining the 'reasonableness' of a defendant's reactions in the context of provocation;[1614] in sentencing, where local custom has been taken into account as a mitigating factor, and also as a factor of aggravation in some cases;[1615] in determining whether conduct was 'indecent' or 'improper' and within the terms of Code offences[1616] and in assessing the criminal responsibility of a child acting on her mother's orders.[1617] On the other hand, the courts have declined to take customary law into account in other contexts. For example:

- the crime of incest was held not to be committed between a man and his customarily adopted daughter. The term 'daughter' in section 226 of the Criminal Code 1974 (PNG) was held not to include a daughter adopted by custom, even though customary adoption is recognised by law, because to do so would contravene the Constitutional requirement that a person should only be liable for an offence defined by a written law.[1618] Chief Justice Prentice said:

  > Is the Criminal Code's provision as to incest to take effect in the different societies and villages according to what may be proved as the particular adoption process and its particular local effect in each particular case? Such a possibility would render the operation of the Statutory Criminal Law and its administration quite uncertain. Findings of guilt in each case, would depend not upon the terms of the Statute, but upon the evidence as to the particular 'law' in each case. Availability of witnesses as to such 'law', and the variable enthusiasm of prosecuting counsel and of police, in procuring their attendance, would surely prove an unsatisfactory basis for finding the law.[1619]

- a customary law defence to unlawful assault was rejected on the ground that such a defence was not recognised by statute;[1620]

- defences based on belief in sorcery have been rejected (whether based on provocation, self-defence or mistake of fact).[1621]

A good illustration of the ambivalence often expressed by the courts in criminal cases involving customary law is a decision of the Full Supreme Court, *Acting Public Prosecutor v Nitak Mangilonde Taganis of Tampitanis*.[1622] During a dispute over a compensation payment the defendant killed the victim. The defendant and his line subsequently paid the victim's line 160 pigs and K1102 as customary compensation. The trial judge took into account the compensation and deducted a year from the sentence he would otherwise have imposed, resulting in effect in a 3 year sentence for murder. The Full Court on appeal agreed unanimously that this method of deduction was wrong in principle, and that the sentence was too lenient: by majority (Justice Pratt dissenting) they increased the sentence to 6 years. Chief Justice Kidu said:

> As the learned trial judge had accepted that the money and pigs paid by the respondent and his clan was required by their custom, the payment was properly taken into account. A word of caution is required however. Those who rely on compensation as a mitigating factor have the duty to prove, as a matter of fact, the existence of such custom in a proper manner. Evidence from the Bar Table is not the proper manner. I would myself, in future, refuse to accept such 'evidence'. I say this because it is not every society in Papua New Guinea that requires payment of compensation in cases of homicide or death ... However it is undesirable that a specified period be deducted from an appropriate sentence for any offence ... If the payment of K1000 and 160 pigs means now the deduction of twelve months from a sentence, should the court deduct ten years if the payment is K10,000 and 1,000 pigs? What happens if

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1613 See D Weisbrot, 'Integration of Laws in Papua New Guinea: Custom and the Criminal Law in Conflict', in D Weisbrot, A Paliwala & A Sawyerr (ed) *Law and Social Change in Papua New Guinea*, Butterworths, Sydney, 1982, 59; BM Narokobi, 'Adaption of Western Law in Papua New Guinea' (1977) *Melanesian LJ* 52; S Frost, 'The Use of Customary Law in the Criminal Justice System', in *The Use of Customary Law in the Criminal Justice System*, Australian Institute of Criminology, Training Project No 23, 1976, 11. See also PNGLRC, Report No 7, *The Role of Customary Law in the Legal System*, Waigani, 1977.

1614 But Weisbrot concludes that 'the factor actually taken into account is rarely ascertained and recorded custom, but rather the relative degree of sophistication or westernization of defendants': id, 76.

1615 PNGLRC 7, 57-8; Weisbrot, 76-8 and cases there cited.

1616 *R v Nobi-Bosai* [1971-2] PNGLR 271; PNGLRC 7, 54-5. cf Weisbrot, 67-8, 80-1.

1617 *R v Iakapo & Iapirikila* [1965-6] PNGLR 147; PNGLRC 7, 53-4.

1618 Constitution of the Independent State of Papua New Guinea, s 37(2).

1619 *Sangumu Wauta v State* [1978] PNGLR 326, 332-3, affirming *State v Misimb Kais* [1978] PNGLR 241; Weisbrot, 64-5.

1620 *R v Misam Wapet* (1970) No 602; Weisbrot, 77.

1621 PNGLRC 7, 55-6 and cases there cited. cf RS O'Regan, 'sorcery and Homicide in Papua New Guinea' (1974) 48 *ALJ* 76.

1622 [1982] PNGLR 299. The case involved sentencing principles rather than substantive criminal responsibility, but if anything this gives additional emphasis to the doubts expressed, since courts have always been more prepared to tare customary law into account in sentencing than in determining liability.

> an accused only pays K500 and 80 pigs? Do we deduct only six months? I do not consider that this court should encourage the concept that rich people can receive lower sentences and poor people higher sentences.[1623]

Justice Pratt (who would have imposed an even longer sentence than the majority) was even more cautious about the desirability of taking customary compensation into account.

> I do not wish to be regarded as accepting in principle that compensation payment in homicide cases is necessarily a factor of mitigation. I agree that many judges have done so over the years and outside of compensation paid for homicide, the area does not present any insuperable problems provided evidence of custom is properly adduced. I have often wondered whether the grafting of customary compensation onto the introduced requirement of sentencing to imprisonment for a term of years in homicide cases may not contain an inherent incompatibility of concepts which can never be really resolved. The assumption that compensation is a mitigating factor was clearly made both in counsel's submissions during the present case and by each of us sitting as the members of the Court. It is an assumption however which has never been the subject of proper investigation and detailed submission.[1624]

He went on to refer to some of the difficulties involved in taking into account customary compensation in sentencing. These included, in his view:

- possible discrimination against defendants from poor or weak clans;
- the difficulty of having to impose a longer sentence on defendants whose groups have no custom of compensation for death;
- the danger of encouraging continued disputes over the amount of compensation;
- the difficulty of compensation where the defendant is far from his own territory and family (with consequent lack of traditional protection);
- the absence of deterrent effect of compensation payments due to their continual use.[1625]

406. ***The Customs Recognition Act (PNG)***. The application of local customary law in Papua New Guinea is to some extent directed or required by statute. The Customs Recognition Act (formerly the Native Customs (Recognition) Act 1963, a pre-independence Act continued in force by the Constitution) provides in part:

> 6.(1) Subject to this Act, native custom shall be recognised and enforced by, and may be pleaded in, all courts, except in so far as in a particular case or in a particular context —
>
> (a) it is repugnant to the general principles of humanity:
>
> (b) it is inconsistent with an Act, Ordinance or subordinate enactment in force in the Territory or a part of the Territory;
>
> (c) its recognition or enforcement would result, in the opinion of the court, in injustice or would not be in the public interest; or
>
> (d) in a case affecting the welfare of a child under the age of sixteen years, its recognition or enforcement would not, in the opinion of the court, be in the best interests of the child ...
>
> 7. Subject to this Act, custom shall not be taken into account in a criminal case, except for the purpose of-

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1623 id, 301-2. Kapi DCJ agreed: id, 302-3.

1624 id, 305. For discussion of the specific problem see also R Scaglion (ed) *Homicide Compensation in Papua New Guinea. Problems and Prospects*, PNGLRC, Monograph No 1, 1981.

1625 [1982] PNGLRC 299, 305-7. It is interesting to compare a decision of the Supreme Court of Fiji, in *R v Lad* (Review No 1 of 1982, unreported, 5 January 1982). The respondents assaulted a Christmas visitor to their village. In consequence they were reprimanded and given three strokes of the cane by a village elder at a village meeting. Action was also taken to achieve a reconciliation with the victim's village in accordance with custom. On the respondents' subsequent trial for assault the magistrate imposed fines of 60 and a suspended sentence of nine months. The Supreme Court revised the decision on the ground that the magistrate did not 'give sufficient credit to the customary sanctions which from time immemorial have always been available within a village community ... Though these have no legal force as such they are nevertheless entitled, in a suitable case, to recognition by the courts in such a manner so as to uphold their sanctity and moral force within the Fijian society. As observed above all the respondents had been dealt with appropriately in the Fijian customary way and whatever potential strife that might have resulted between the two villages because of the incident had also been taken care of appropriately in the Fijian customary way. One could not wish for a more civilised way of sorting out a potentially explosive situation'. (Judgment, 2-3). The Chief Justice substituted twelve month good behaviour bonds.

(a) ascertaining the existence or otherwise of a state of mind of a person;

(b) deciding the reasonableness or otherwise of an act, default or omission by a person;

(c) deciding the reasonableness or otherwise of an excuse;

(d) deciding in accordance with any other law in force in the Territory or a part of the Territory, whether to proceed to the conviction of a guilty party; or

(e) determining the penalty (if any) to be imposed on a guilty party, or where the court considers that by not taking the custom into account injustice will or may be done to a person.

It will be seen that, in addition to the broad restrictions on recognition of native custom imposed by section 6, section 7 further restricts the issues in respect of which custom can be recognised in criminal cases. Indeed the 1963 Act seems to have been used more to *deny* recognition of native custom than as a basis for recognition.[1626] The Papua New Guinea Law Reform Commission has proposed the repeal of section 7, to 'enable a more comprehensive account to be taken of customary law, traditional perceptions and beliefs' than was possible under that section in criminal cases.[1627]

407. ***Recognition under the Constitution***. The 1963 Act is apparently reinforced by the Constitution itself, which adopts custom as part of the 'underlying law'.[1628] This is spelt out in Schedule 2:

(1) Subject to Subsections (2) and (3), custom is adopted, and shall be applied and enforced, as part of the underlying law.

(2) Subsection (1) does not apply in respect of any custom that is, and to the extent that it is, inconsistent with a Constitutional Law or a statute, or repugnant to the general principles of humanity.

(3) An Act of the Parliament may:

(a) provide for the proof and pleading of custom for any purpose; and

(b) regulate the manner in which, or the purposes for which, custom may be recognized, applied or enforced; and

(c) provide for the resolution of conflicts of custom.[1629]

According to BM Narokobi:

> The purpose of these provisions is to assist in the development of our indigenous jurisprudence adapted to the changing circumstances of Papua New Guinea, and on the face of it they appear generous to the customs of our people. In truth, however, the scope of their application is rather limited. First, they are made subject to the odious 'repugnancy to the general principles of humanity' provision. Second, they are limited by the Constitution itself and by numerous Acts of parliament. Third, the positive way in which the provisions adopting principles of common law and equity are expressed makes it very easy to apply English law on the ground that a custom is inapplicable or inappropriate. Fourth, custom is not included as a source of criminal law.[1630]

These limitations have been reflected in the jurisprudence of the Supreme Court since independence. It is difficult to point to a decision which would have been different under a sensitive application of the common law.[1631]

408. ***The Papua New Guinea Law Reform Commission's Report No 7***. In its Report No 7 on the role of customary law in the legal system, the Papua New Guinea Law Reform Commission proposed quite extensive changes to the general law to recognize custom and to encourage the courts to develop a genuinely indigenous underlying law. These included an Underlying Law Bill which would make custom the basis of

1626 cf PNGLRC 7, 46, 57, 64; Weisbrot, 68, 70.
1627 PNGLRC 7, 83. It also proposed the replacement of section 6 by a more positive and general Underlying Law Bill: id, 11.
1628 Constitution of the Independent State of Papua New Guinea, s 9(f), 20-21.
1629 Constitution, sch 2.1. The English common law is adopted by sch 2.2, but only to the extent that it is consistent, inter alia, 'with custom as adopted by Part 1'.
1630 Narokobi, 57, citing on this last point *Sangumu Wautu v State* [1978] PNGLR 326.
1631 Local custom is however applied more extensively and informally in Village Courts: Village Courts Act (Revised Laws ch 44), s 26-7. The operation of Village Courts in Papua New Guinea is discussed in more detail in para 769-79.

the underlying law rather than a subsidiary element of it.[1632] The Papua New Guinea Commission also considered in more detail the role of custom in the criminal law, proposing a considerably greater role for custom in determining criminal liability and in sentencing. Three main proposals were made.

- *A customary law defence for minor offences*. In respect of offences other than homicide and certain serious assaults, the Commission proposed an absolute customary law defence. This was expressed in the following terms:

> (1) Subject to Subsection (3), except where the act or omission is absolutely prohibited by statute, a person is not criminally responsible for an act or omission if on the information available and on the balance of probabilities the court is satisfied that:
>
> (a) the person when he did the act or made the omission was acting under customary law and traditional perceptions and beliefs: and
>
> (b) the act or omission was justifiable under customary law and traditional perceptions and beliefs of the customary social group to which the person belonged; and
>
> (c) the customary law was followed and traditional perceptions and beliefs were held at the time of the act or omission by a number of the members of the customary social group to which the person belonged; and
>
> (d) the person at the time of the act or omission was living in similar circumstances or was subject to similar social, employment or other experience as those members of his customary social group.[1633]

- *A new offence of diminished responsibility killing for certain homicides (excluding revenge or payback killings)*. The Commission proposed a new offence of diminished responsibility killing, akin to manslaughter but with a maximum penalty of 3 years imprisonment. An important exclusion, on public policy grounds, was payback or revenge killings, where the defence would not apply.[1634] The new offence would apply to 'a person who by an act or omission unlawfully kills another person in circumstances in which the killing would have been justifiable according to the customary law and traditional perceptions and beliefs of the customary social group to which he belongs', and would be available where the defendant was charged with wilful murder, murder, infanticide or manslaughter. However the court would first have to be satisfied on the balance of probabilities that the defendant was 'acting under customary law and traditional perceptions and beliefs', and that the same conditions applied as were proposed for the customary law defence in minor cases.[1635]

These proposals, if enacted, would constitute by far the most extensive incorporation of customary law in the criminal law in any comparable jurisdiction. However Report No 7 has not been presented to or debated in Parliament, and no steps have been taken to implement its recommendations.[1636] The Papua New Guinea Law Reform Commission's project on customary law continues. It is understood that implementation of the proposals in some form remains a possibility, although problems with urban crime (which raise distinct issues) have become even more prominent since 1977 and are tending to overshadow the earlier proposals.[1637]

409. ***Canada***. In many respects Canadian Indians and Inuit experience the same difficulties with the criminal law as do traditionally oriented Aborigines in Australia, and for many of the same reasons.[1638] But while there has been a degree of recognition of Indian and Inuit customary marriage and adoption, there has been no equivalent recognition in the area of the criminal law. Rather, possible conflicts have been ignored, or accommodated through non-prosecution, 'jury equity' or the exercise of discretions in sentencing.[1639] In this

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1632 PNGLRC 7, 19.

1633 PNGLRC 7, 77. The offences excluded by sub-section (3) are: homicide, attempted murder, grievous bodily harm, poisoning, and disabling or stupefying to commit an indictable offence.

1634 id, 59. But customary law considerations could still be taken into account in sentencing for such a killing: id, 76.

1635 id, 78. The same would apply to attempts to murder: id, 79.

1636 ibid. See also the note by D Weisbrot, (1977) 5 *Melanesian LJ* 164.

1637 This is especially the case with the minimum penalties legislation of 1983-4.

1638 cf DA Schmeiser, *The Native Offender and the Law*, Canada LRC, Background Paper, 1974, esp 81-2; Alberta Board of Review, Provincial Courts, Report No 4, *Native People in the Administration of Justice in the Provisional Courts of Alberta*, 1978, esp 46-64; P Havemann, K Couse, L Foster, R Matonovich, *Law and Order for Canada's Indigenous Peoples*, Department of the Solicitor General of Canada, Ottawa, 1984.

1639 cf WG Morrow, 'Law and the Thin Veneer of Civilization' (1972) 10 *Alberta L Rev* 38; WG Morrow, 'A Survey of Jury Verdicts in the Northwest Territories' (1970) 8 *Alberta L Rev* 50; WG Morrow, 'Women on Juries' (1974) 12 *Alberta LRev* 321; WG Morrow, 'Riding

respect the situation, involving a basic rule of non-recognition in the field of criminal law, is similar to that in Australia, although the need for greater sensitivity to and recognition of Indian and Inuit custom in the criminal law is now being expressed.[1640] However, few measures have yet been taken to create official mechanisms to allow Indians and Inuit to deal with their own law and order problems. The James Bay and Northern Quebec Agreement concluded in 1975 between the Governments of Canada and Quebec, the Cree Indians and the Inuit is perhaps the most significant development in recent years. The Agreement resulted from lengthy negotiations with the native people of the area who were to be affected by the building of a large hydro-electricity project. The Agreement contains specific provisions (s 18, 19, 20) dealing with the administration of justice in the area and imposes obligations on the governments of Canada and Quebec, in consultation with the native parties, to adapt the criminal justice system to the circumstances, usages, customs and way of life of the native parties. Although the Agreement has now been in existence for 8 years, little has been done to implement these provisions.[1641] Some attempts have also been made, again only in recent times, to make the general system more sensitive to the special needs and difficulties of the native people. Largely this has involved Indians being made more aware of their legal rights and the working of the legal system by such measures as the appointment of Indians as paralegals and 'native court workers', special recruitment into police forces and special entry provisions for Indians into University law schools.[1642] Some recognition of native law and custom has come from the courts themselves, or more particularly, certain judges sitting in certain courts.[1643]

410. ***Other Countries***. Although customary law has often influenced the content of criminal codes or laws, the Commission is not aware of any jurisdiction where indigenous customary law is incorporated to a significant extent in the general criminal law. On the contrary, in many countries a much greater degree of recognition is accorded to customary law in civil than in criminal cases.[1644]

411. ***Conclusions***. There appear to be no significant precedents in comparable jurisdictions for the recognition of indigenous customary laws in establishing or excluding substantive criminal liability. Great caution seems to have been exercised in this respect, even in jurisdictions where customary law has received a considerable measure of recognition in other contexts such as family and civil law. One reason for this is the concern about pluralism and equality in the criminal law, which was discussed in Chapter 9.[1645] Another explanation may be that the issues have not usually had to be squarely considered, because it has been the practice to avoid difficult cases arising through techniques of accommodation such as non-prosecution or prosecution for lesser offences, the exercise of procedural discretions (eg, not proceeding to a conviction despite sufficient proof), or the use of sentencing discretions to minimise or avoid imprisonment. These techniques seem to be very common. But this situation may not continue. Moves are being made, in some jurisdictions, for a more careful consideration of the impact of indigenous customary law in the substantive criminal law. The recommendations of the Papua New Guinea Law Reform Commission are a significant example of this, as is the prominent place accorded to criminal law issues in this Commission's Terms of Reference.

412. ***Issues to be Considered in this Part***. Against this background, therefore, four broad areas will be discussed in this Part:

- The impact of Aboriginal customary laws on liability for what would otherwise be criminal acts, both in terms of the existing law (requirements of intent and defences) and of a possible partial or general defence based on Aboriginal customary laws (Chapter 18);

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Circuit in the Attic' (1974) 58 *Judicature* 236; HW Finkler, *Inuit and the Administration of Justice in the Northwest Territories: The case of Frobisher Bay*, Department of Indian and Northern Affairs, Ottawa, 1976, 16-20.

1640 D McCaskill, 'Native People and the Justice System' in IAL Getty and AS Lussier, *As Long as the Sun Shines and Water Flows*, University of British Columbia Press, Vancouver, 1983, 288; Havemann, Couse, Foster and Mantonovich, esp ch 5.

1641 Minister for Indian Affairs and Northern Development, James Bay and Northern Quebec Agreement Implementation Review, Ottawa, 1982, 77-9.

1642 B Morse, 'Lessons from Canada?' (1983) 7 *ALB* 4-6.

1643 In this regard the decisions of the Northern Territory Supreme Court should be compared with the decisions of Justices Sissons and Morrow in the Territorial Court of the North-West Territories (Canada). See the works cited in n 100.

1644 eg Customary Law and Primary Courts Act 1981 (Zimbabwe), s 3 of which applies customary law in general terms to appropriate civil cases, but makes no provision for criminal cases. Instead community courts are given limited criminal jurisdiction over specified offences: ss 44, 15.

1645 See para 168-9.

- The question whether breaches of Aboriginal customary laws should be a further basis for criminal liability (ie, should there be Aboriginal customary law offences?) (Chapter 19);

- The recognition of Aboriginal customary laws in criminal cases through procedural means as distinct from the substantive law (which could be cumulative or alternative) (Chapter 20); and

- The relevance of Aboriginal customary laws in sentencing offenders (Chapter 21).

One difficulty is that the issues are very much interrelated: for example, whether a partial customary law defence (reducing murder to manslaughter)[1646] is desirable depends to a considerable extent on the approach taken to sentencing issues. There are al so important connections between questions of criminal liability and sentencing on the one hand and questions of evidence and procedure on the other.[1647] The latter questions will be discussed in Part V and Part VI of this Report, but these interrelations hips must continuously be borne in mind.

1646 See para 451-3.
1647 See para 488, 543, 844-80.

# 18. Aboriginal Customary Laws and Substantive Criminal Liability

413. ***Scope of this Chapter***. In this Chapter the ways in which Aboriginal customary laws can or should affect liability under the general criminal law will be discussed. Three main issues require examination: first, intent and related questions; secondly, existing criminal law defences and their application to Aborigines, and thirdly, the nature and scope of a possible customary law defence.

414. ***Disparate Ideas of Responsibility***. With certain exceptions these issues do not involve the direct translation or transposition of Aboriginal customary laws as such.[1648] Most systems of indigenous customary law concern themselves not so much with assessing culpability on grounds of 'fault', as with attributing responsibility for harms caused (or deemed to have been caused) by a particular person. Aboriginal customary laws are no exception to this. Under Aboriginal customary laws, punishment depends more on causation than intent, and only limited attention is paid to the concept of degrees of fault or responsibility.[1649] It is the general Australian law which, generally speaking, insists on fault as an essential basis of criminal responsibility,[1650] even assessing degrees of fault for major offences such as homicide. The law defines the range of prescribed harms (eg death, personal injury), but does not attribute criminal responsibility to those who cause such harms in the absence of their intention to cause, or recklessness as to causing, them (or, in certain cases, their blameworthy negligence).[1651] 'Fault' lies in voluntarily performing an act with some degree of awareness of its nature or likely consequences (in the absence of any relevant defence).

415. ***The Relevance of Recognition***. Thus a defendant's belief that he was entitled, or even required, to perform the relevant act is, in general, irrelevant to the assessment of criminal responsibility.[1652] On that basis (questions of a possible customary law defence apart), it might be argued that issues of the mental element in crime, and the availability of defences, are outside the scope of an inquiry into the recognition of Aboriginal customary laws. However, the matter is by no means so simple. If the law were to attribute to a traditional Aborigine a particular state of mind, or were to make defences available only where the defendant's actual state of mind corresponded with what it regarded as the 'normal' state of mind, there would be a real risk of imposing on a defendant attitudes and beliefs he did not share or even, in some cases, comprehend. The differences in world-view and cultural response between traditional Aborigines and persons brought up in a 'normal' Anglo-Australian environment can be enormous. It may be unjust not to recognize responses produced by adherence to Aboriginal customary laws and traditions, or to treat them as equivalent in exculpatory effect to responses produced by different backgrounds and beliefs. These problems will be examined in the context of the conflicts between the general criminal law and Aboriginal customary laws outlined in the previous Chapter, since Aboriginal customary laws, and associated traditions and beliefs, may often be the origin and explanation for the differing states of mind with which the general law has to deal.

## Intent and Related Matters

416. ***At Common Law***. At different times in the history of the common law it has been supposed or presumed that a person intends the natural and probable consequences of his acts. The danger with this form of imputed intent is that it may involve convicting a defendant who is fact lacked the required intent. The point was made by Justice Dixon in *Thomas v R* in 1937:

> The truth appears to be that a reluctance on the part of courts has repeatedly appeared to allow a prisoner to avail himself of a defence depending simply on his own state of knowledge and belief. The reluctance is due in great measure, if not entirely, to a mistrust of the tribunal of fact — the jury. Through a feeling that, if the law allows such a defence to be submitted to the jury, prisoners may too readily escape by deposing to conditions of mind and describing sources of information, matters upon which their evidence cannot be adequately tested and contradicted, judges have been misled into a failure steadily to adhere to principle. It is not difficult to understand such tendencies,

1648 On the different meanings of the term 'recognition' see para 199-208.

1649 See para 433 & see Ch 28 for further discussion. For a particular illustration see DB Rose, *Dingo Makes us Human: Being and Purpose in Australian Aboriginal Culture*, PhD thesis, Bryn Mawr College, Bryn Mawr, 1984, 333-379.

1650 Except for statutory offences of strict liability (largely irrelevant for present purposes).

1651 cf Glanville Williams, *Textbook of Criminal Law*, London, Stevens, 1978, 42-67.

1652 At common law a mistake of law (with rare exceptions) is not an excuse. See para 434. Conversely, a defendant may not be criminally responsible even though he did believe that what he was doing was morally and legally wrong. cf *Ngatayi v R* (1980) 30 ALR 27.

> but a lack of confidence in the ability of a tribunal correctly to estimate evidence of states of mind and the like can never be sufficient ground for excluding from inquiry the most fundamental element in a rational and humane criminal code.[1653]

It was repeated in *Parker v R* in 1963[1654] where, speaking for the whole Court, Chief Justice Dixon disapproved an earlier House of Lords case which adopted the 'natural and probable' test for intent.[1655] The modern law is well illustrated by the decision of the Western Australian Full Court in *Schultz v R*.[1656] Schultz was charged with murder but argued that he lacked the relevant intent. He sought to adduce expert evidence that he was on the borderline of being mentally defective, but the evidence was held inadmissible .at the trial. On appeal the verdict of guilty was quashed and a retrial ordered. Chief Justice Burt (with whom the other members of the Court agreed) said:

> Once it be acknowledged that there is no legal presumption that a man intends the probable consequences of his acts and that in every case the finding to be made is specifically and exclusively as to the intention of a particular person at a particular moment of time, then, as it seems to me, all facts personal to the person concerned which have bearing or which in the judgement of reasonable men may have a bearing upon the operation of his mind are relevant to that finding. Of course, facts which go no way to distinguish the person concerned from his fellows need not be made the subject of evidence because they require no proof. But such facts as do distinguish the person concerned from his fellows in a way which could, in the judgement of reasonable men , weaken an inference as to intent otherwise based upon the facts found would seem to me to be relevant to that question ...[1657]

He concluded:

> When intent is in issue the accused may call expert evidence to establish any abnormal characteristic which he may have or which he may have had at the relevant time which is not observable by and which without instruction is unlikely to be understood by the jury which affects or which at the relevant time may have affected the operation of his mind and to establish, again in general terms, what the effect was or may have been, but it is not permissible to go further and to give an opinion as to whether the effect in the particular case was or was not such as to negative a finding of intent.[1658]

Thus evidence of customary law or traditional influences on an Aboriginal defendant, being evidence of matters 'outside the supposed experience of ordinary people',[1659] will be admissible if it bears on the defendant's intent in performing the act in quest ion. There is no requirement that the defendant's intention be within the range of 'ordinary' states of mind, or that his belief in the existence or absence of relevant facts be 'reasonable'. If a particular intent is required for an offence, it is sufficient that the defendant lacked that intent, even if the defendant's state of mind is regarded as extraordinary or 'unreasonable'.[1660] To this extent, therefore, the criminal law allows for unusual states of mind which may be the result of adherence to Aboriginal customary laws or traditions.[1661] At the level of determining intent where this is required, the common law in Australia[1662] concentrates on the defendant's actual state of mind, rather than imputing an intention based on 'ordinary' or 'objective' standards.

417. ***The Queensland and Western Australian Codes***. Although both the Queensland and Western Australian Codes express the requirement of 'intention' in very different terms than that commonly used at common law, it appears that there is no great difference in result, and in particular that the Codes do not exclude evidence of a defendant's actual state of mind which would be admissible and could be taken into

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1653 *Thomas v R* (1937) 59 CLR 279, 309.

1654 (1963) 111 CLR 610, 632; on appeal (1964) 111 CLR 665 (PC), but without referring to this issue.

1655 *DPP v Smith* [1965] AC 290. This aspect of Smith's case was overruled in the UK by the Criminal Justice Act 1967 s 8. Cf *R v Hyam* [1975] AC 55, 71 (Lord Hailsham LC).

1656 [1982] WAR 171.

1657 id, 174. Accordingly, he held, expert evidence was admissible to help prove the special or personal factors.

1658 id, 176, citing *R v Honner* [1977] Tas SR 1.

1659 [1982] WAR 171, 176.

1660 *DPP v Morgan* [1976] AC 182 (genuine but unreasonable belief in consent to sexual intercourse preludes conviction for rape), followed by *McEwan v R* (1979) 1 A Crim R 242 (NSW Court of Criminal Appeal). cf *Pappajohn v R* (1980) 111 DLR (3d) 1. See generally C Howard, *Criminal Law*, 4th edn, Sydney, Law Book Co, 1982, 348-59; Glanville Williams, 68-106.

1661 See also para 433. Problems may still remain as a consequence of the definition of the mental element required for a particular offence: eg *DPP v Newbury* [1977] AC 500 (manslaughter by unlawful and dangerous act: no need for belief that act unlawful or dangerous). These may be dealt with to some extent by general defences, such as honest and reasonable mistake of fact.

1662 Problems are being experienced in England with the requirement of recklessness: cf *Caldwell v DPP* [1982] AC 341; Glanville Williams, 'Intention and Recklessness Again' (1982) 2 *Legal Studies* 189; D Cowley, 'The Retreat from Morgan' [1982] *Crim L Rev* 198. It is not yet clear how Australian courts will respond to these problems.

account at common law.[1663] Similarly, neither the Tasmanian Code[1664] nor the special definition of 'malice' in the Crimes Act 1900 (NSW)[1665] present any difficulty in this regard.

418. ***The Northern Territory Criminal Code 1983***. A similar situation applies under the Criminal Code 1983 (NT). except in situations where 'intoxication may be regarded for the purposes of determining whether a person is guilty or not guilty of an offence'.[1666] The legal position where intoxication may be so regarded does however present problems: these are discussed later in the, Chapter in the context of intoxication as a 'defence'.[1667]

419. ***Fitness to Plead***. A problem not unrelated to that of determining intent to commit an offence in the case of a traditional Aboriginal, involves the question of fitness to plead, where the defendant does not understand the nature of the proceedings.[1668] This problem is discus sed in Chapter.[1669]

## Criminal Law Defences and Aboriginal Customary Laws

420. ***A Long-Standing Issue***. A perennial issue in the application of the criminal law to traditional Aborigines (and to traditionally oriented native offenders generally) has been the appropriateness of various defences to what, according to the standards of the majority, may be unusual states of mind or belief. Much of the discussion has centred on the defence of provocation, but the question arises for a variety of other defences as well.[1670] It is convenient to deal with provocation first, as the defence which has been most discuss ed and with respect to which the law is now relatively clear in relevant respects.

## Provocation

421. ***The Older Law***. At common law and under the Codes, murder will be reduced to manslaughter if the act which caused death was done in the heat of passion, involving a loss of self-control which was caused by provocation sufficient to deprive an 'ordinary person' of self-control.[1671] Provocation was developed as a defence in recognition of the psychological reactions which may be set in motion by the behaviour of the deceased.[1672] The law recognises that the behaviour of the deceased can be such that it would cause a 'reasonable' or 'ordinary' person to lose self-control. But the concession to 'human frailty' has, at least since the nineteenth century, been tempered by the requirement that the provocation be sufficient to be capable of provoking a 'reasonable' or 'ordinary' person. For a time, at least, this test was applied in a relatively rigid way, excluding cases arising from abnormal susceptibilities or circumstances.[1673] This was a fully 'objective' test, preventing a defendant's peculiarities from being considered for the purpose of the application of the defence. The ordinary or reasonable man, even in Australia, was deemed to be the ordinary Englishman with no 'peculiarities'. The ethnic, cultural, or racial background of the defendant (if different from that of the ordinary Englishman) was considered to be a peculiarity of the accused, and thus irrelevant in the jury's consideration of provocation.[1674] By similar reasoning, it was held that, other than in very exceptional circumstances, mere words could not constitute provocation? But, whatever the reaction of the 'ordinary' Englishman to mere words, the use of some words, for example, prohibited words in an Aboriginal community, can be extremely provocative.

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1663 Qld, s 23; WA, s 23. See Howard, 382-95; *Mamote-Kulang of Tamagot v R* (1964) 111 CLR 62; *Timbu Kolian v R* (1968) 119 CLR 47; *Kaporonovski v R* (1973) 133 CLR 209.

1664 Tas, s 13; *Valiance v R* (1961) 108 CLR 56, esp 82-3 (Windeyer J).

1665 Crimes Act 1900 (NSW) s 5; *Mraz v R* (1955) 93 CLR 493; Howard, 39-40.

1666 For the general rule see NT s 31 ('intended or foreseen by him as a possible consequence of his conduct'). For the case of intoxication see s 7.

1667 See para 436-40.

1668 cf *R v Grant* [1975] WAR 163.

1669 See para 579-585.

1670 Strictly speaking provocation is not a defence but an element which, once appropriate evidence is available, has to be negatived by the prosecution beyond reasonable doubt. However the usual practice is to describe as criminal law 'defences' a variety of grounds of exculpation or partial excuse, whether or not these are, properly speaking, defences. This practice has been adopted in this Chapter. For a general classification of defences see PH Robinson, 'Criminal Law Defences: A Systematic Analysis' (1982) 82 *Colum L Rev* 199.

1671 For the position under the Codes see Howard, 88-9. Unlike most other defences, at common law provocation is available only to a charge of murder, and perhaps, attempted murder: P Fairall, 'Provocation, Attempted Murder and Wounding with Intent to Murder' (1983) 7 *Crim L Rev* 44. In the case of other offences it goes to mitigation of sentence only, not to liability. Generally on provocation see Howard, 77-89; Glanville Williams, 477-503. Under the Codes, provocation is available to a charge of assault (including any offence for which assault is an element): *Kaporonovski v R* (1973) 133 CLR 209.

1672 Or, perhaps, a third person: cf Howard, 86-7.

1673 eg *Bedder v DPP* [1954] 2 All ER 801.

1674 *Holmes v DPP* [1946] AC 588; *Bedder v DPP* [1954] 2 All ER 801.

422. ***Application of the Older Law of Provocation to Defendants from Differing Cultural Backgrounds***. This law came to be applied, both in England and elsewhere, to persons from very different cultural and ethnic backgrounds. In such cases, the 'ordinary' or 'reasonable' Englishman's mode of behaviour was often an inappropriate test by which to judge the values and beliefs of the defendant or the defendant's immediate community. An Australian example is *R v Young*,[1675] where the defence of provocation was held not to be available to an Aboriginal woman. The trial judge's withdrawal of provocation from the jury was upheld by the Court of Criminal Appeal. Implicit in the judgment is the application of a purely objective test, unrelated to the defendant's actual situation and perception of it.[1676] But it is very doubtful whether this approach was necessary even under the law as it then stood. The inappropriateness of a purely objective test had been admitted by the Privy Council on appeal from the West African Court of Appeal. The Privy Council, in discussing provocation, pointed out that:

> The tests have to be applied to the ordinary West African villager, and it is on just such questions as these that the knowledge and common sense of a local jury are invaluable.[1677]

423. ***A More Flexible Approach Applied to Aborigines***. This dictum provided a basis on which at least some Australian courts took account of local circumstances or perceptions in applying the defence of provocation to traditional Aborigines. For example in a series of unreported cases in the Northern Territory Supreme Court during the 1950s, Justice Kriewaldt introduced a degree of cultural sensitivity into the criminal law in this way.[1678] In one case Justice Kriewaldt directed the jury as follows:

> If you think that in the circumstances prevailing in that particular locality the abandonment of a young child ... by the person appointed to look after it ... would cause an ordinary reasonable person in that vicinity and of that description, so to lose control of his emotions as to retaliate with a spear then you would be entitled in this case to find a verdict of manslaughter.[1679]

Similarly, in *R v Muddarubba* in 1956, he declined to apply the English rule (restated two years earlier by the House of Lords in *Bedder*[1680]) that mere words could not constitute provocation. His Honour explained:

> In my opinion, in any discussion of provocation, the general principle of law is to create a standard which would be observed by the average person in the community in which the accused person lives. It is clear from the cases decided by courts whose decisions bind me that in white communities matters regarded as sufficient provocation a century ago would not be regarded as sufficient today. This suggests that the standard is not a fixed and unchanging standard; it leaves it open, and I think properly so, to regard the Pitjintjara tribe as a separate community for the purpose of considering the reaction of the average man. I tell you that if you think the average member of the Pitjintjara tribe ... would have retaliated to the words and actions of the woman by spearing her, then the act of spearing is not murder but manslaughter.[1681]

This position was adopted by some other courts in Australia. For example in *R v Rankin*, Justice Campbell stated:

> The accused was born at the Aboriginal settlement at Woorabinda in Central Queensland where he lived most of his life and it was there that the alleged crime was committed. I propose to direct the jury that the question which they must consider is whether the provocation was sufficient to deprive an ordinary Aboriginal who lives in an Aboriginal settlement of his power of self-control. A cross-section of such Aboriginals appeared before the jury and gave evidence.[1682]

So the 'objective' test in provocation was qualified in the case of at least some Aboriginal defendants, to take into account the beliefs and reactions of an ordinary Aboriginal living in the defendant's community or circumstances. This enabled courts and juries to find provocation in cases where the defendant was affronted by a breach of customary law: for example, by severe neglect of a child by the person looking after it,[1683] by

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1675 [1957] Qd R 599 (CCA).

1676 id, 602 (Philp J, with whom Hanger J agreed), relying on *Bedder's* case. O'Hagan J decided the case on evidentiary grounds: id, 604. cf also *R v Callope* [1965] Qd R 456 (CCA), another case of provocation being withdrawn from the jury where the defendant was Aboriginal. The Court referred only to 'the standard of the ordinary person': id, 463.

1677 *Kwaku Mensah v R* [1946] AC 83.

1678 See N Morris & C Howard, *Studies in Criminal Law*, Oxford, Clarendon Press, 1964, 93-4.

1679 *R v Patipatu* [1951] NTJ 18, 20.

1680 [1954] 2 All ER 801.

1681 [1956] NTJ 317, 322, cited by Morris & Howard, 96.

1682 [1966] QWN 16; [1966] QJPR 128. *R v Callope* [1965] Qd R 456 (CCA) was cited by counsel for the Crown as authority for an entirely objective approach, but was not referred to by Campbell J.

1683 *R v Patipatu* [1951] NTJ 18.

uttering a forbidden, extremely offensive term,[1684] or by disclosing tribal secrets.[1685] In such circumstances, the view was taken that an ordinary Aborigine in the defendant's situation might well be provoked. If so, the defendant's offence was reduced to the lesser offence of manslaughter, with consequent reduction in sentence.[1686] This more flexible approach was generally welcomed in the literature,[1687] but it was by no means clearly established in law. The decisions were all at first instance, and therefore had little weight as precedents. Secondly, there were conflicting decisions, for example in Queensland.[1688] Thirdly, it was not settled to whom the 'relaxed' rule should apply. The cases seemed to suggest a limitation to Aborigines living in a 'separate community': the extent and effect of this limitation remained obscure.[1689]

424. ***The New Law of Provocation***. In *Director of Public Prosecutions v Camplin*,[1690] the defendant, a 15 year old, had killed the victim who had forcibly buggered and then jeered at him. The trial judge directed the jury to pay no attention to his age or characteristics, following *Bedder's* case.[1691] The House of Lords unanimously refused to follow its own decision in *Bedder's* case, holding that all the circumstances, including the defendant's age and characteristics (other than personal characteristics of self-control) were relevant in assessing whether a 'reasonable man' would have been provoked. As Lord Morris said:

> If the accused is of particular colour or particular ethnic origin and things are said which to him are grossly insulting it would be utterly unreal if the jury had to consider whether the words would have provoked a man of different colour or ethnic orig in — or to consider how such a man would have acted or reacted.[1692]

Thus the House was prepared to refine the test of provocation by introducing a greater degree of subjectivity, allowing the jury to consider the characteristics (including culture and ethnic origin) of the defendant. This important development had been anticipated, and has since been followed, in Australia. In *Moffa v R*, decided the year before *Camplin*. Chief Justice Barwick stated that:

> There is nothing suggested about the applicant, his disposition or mental balance, which could be called in human terms extraordinary. That he was emotionally disturbed by his wife's disclosed attitude to him did not make him...other than an ordinary man' and in particular, other than an ordinary man of his ethnic derivation. If the use of the word 'reasonable', in the statement of what is called the objective test in relation to provocation, would exclude from consideration such emotional reactions, I have even greater reason for preferring the description 'ordinary' man in the formulation of the test.[1693]

This reference to 'ethnic derivation' seemed to affirm the propriety of considering the cultural background of a defendant such as *Moffa*, an Italian migrant. Nonetheless, in *R v Webb*, decided before *Camplin's* case but after *Moffa*, Chief Justice Bray held himself bound to follow *Bedder's* case, at the same time clearly disapproving the result.[1694] In this respect *Camplin's* case has freed Australian as well as English courts to adopt the standards of an ordinary person in the defendant's situation, rather than some abstract disembodied

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1684 *R v Muddarubba* [1956] NTJ 317.

1685 *R v Sydney Williams* [1976] 14 SASR 1.

1686 A similar position was arrived at by the Supreme Court of Papua New Guinea. See the cases cited by RS O'Regan, 'Provocation and Homicide in Papua and New Guinea' (1971) 10 *UWAL Rev* 1, esp 8-12, and 'Ordinary Men and Provocation in Papua and New Guinea' (1972) 21 *ICLQ* 551. See also JF Hookey, 'The "Clapham Omnibus" in Papua and New Guinea', in BJ Brown (ed) *Fashion of Law in New Guinea*, Butterworths, Sydney, 1969, 117; K Wilson, 'Provocation in Papua New Guinea' (1981) 5 *Crim LJ* 128.

1687 Morris & Howard; B Brown, 'The "Ordinary Man" in Provocation: Anglo-Saxon Attitudes and "Unreasonable Non-Englishmen"' [1961] *Crim L Rev* 41. cf the rather more reserved view of Glanville Williams, 492. The most perceptive account is, however, that of Eggleston: E Eggleston, *Fear, Favour or Affection*, ANU Press, Canberra, 1976 293-6, pointing out that to assume that an Aborigine is more readily provoked to violence than a white man is facile. The difference is cultural, not racial: id, 294-5. The real point, overlooked by some commentators and perhaps by Kriewaldt J himself, is that the standard for provocation in the case of traditional Aborigines is not necessarily 'more relaxed' (cf *R v Macdonald* [1953] NTJ 186, cited by Morris & Howard, 95, where Kriewaldt J referred to 'the lesser degree of provocation needed before an aboriginal of Australia loses his self-control'). Rather, it is different, because of the different perceptions and values held. In some circumstances conduct which might provoke an Aboriginal might not provoke a non-Aboriginal. The reverse is also true. For example, in many Aboriginal communities there is an extremely high level of tolerance towards misbehaviour by children. An 'ordinary' Aborigine would not be provoked by such misbehaviour, even when an 'ordinary' non-Aboriginal might be. This meets Eggleston's objection but it follows that evidence of the particular belief or cultural trait must be available, and that this evidence must be relevant to the particular defendant and the provocation shown: see para 427.

1688 See n 29, 35. cf *R v Panerkar* (1971) 5 CCC (2d) 1 (Saskatchewan CA), where evidence of cultural differences was ignored by invoking the 'ordinary man'.

1689 Why should a defendant cease to be influenced by 'ordinary' aspects of his culture or beliefs merely because he was not within his own community at the relevant time?

1690 [1978] AC 705.

1691 [1954] 2 All ER 801.

1692 [1978] AC 705, 721. cf id, 727 (Lord Simon).

1693 (1977) 13 ALR 225, 227. The replacement of the 'reasonable' by the 'ordinary' man, referred to by Barwick CJ, had been effected by the High Court in *Johnson v R* (1976) 11 ALR 23, and was affirmed (by a majority) in *Moffa*. See also P Fairall, 'The Objective Test in Provocation' (1983) 7 *Crim LJ* 142.

1694 (1977) 16 SASR 309, 313-4.

standard of reasonableness. This is true both in common law and Code jurisdictions. Thus in *R v Dutton*,[1695] the South Australian Full Court followed *Camplin* in preference to *Bedder* as a matter of Australian common law. Justice Cox concluded that:

> The ordinary man against whom the actions of the accused are to be judged is one possessing all the characteristics and idiosyncrasies of the accused himself — age, sex, race, colour, physical defects and so on — that would have affected his conduct in the circumstances in which the accused found himself, with the exception of any extraordinary excitability or pugnacity that the accused happened to possess.[1696]

A similar conclusion was reached by the Tasmanian Full Court. Justice Crawford held that the deceased's characteristics were to be attributed to the 'ordinary' person' for the purposes of provocation, relying upon *Camplin*.[1697]

425. ***The New Law of Provocation and Traditional Aboriginal Defendants***. It seems clear then that the law as stated by the House of Lords in *Camplin v DPP*[1698] and in the recent Australian cases cited in the previous paragraph now also represents the law. Under this 'situational' test for provocation, the developments made by Justice Kriewaldt, specifically to cope with Aboriginal defendants, can be explained and upheld on a broader basis. However it is sometimes suggested that the test of provocation is, or at least ought to be, entirely subjective, that is, whether the defendant was in fact provoked by conduct so as to lose' his self-control.[1699] The same view has been urged by some commentators and law reform agencies,[1700] although by no means unanimously.[1701] On the other hand, although the scope and flexibility of the defence of provocation have been considerably extended,[1702] the objective test, qualified as in *Camplin*, remains the law in Australia, both as a matter of common law[1703] and in the Code States.

426. ***The Case for a Subjective Test***. The question remains whether this situation is satisfactory in the case of traditional Aboriginal defendants, in the context of an inquiry into the recognition of Aboriginal customary laws. It might be thought that a purely subjective defence would enable the actual motives and influences, especially cultural or traditional influences, affecting the particular defendant to be taken into account, more effectively than any version of an objective test. The argument is, however, unpersuasive. It would be different if the law, through imposing an objective test based on the experiences, beliefs and reactions of a member of the 'majority' culture, were to regard the beliefs, culture and conditioning of traditional Aborigines as 'abnormal' or 'unreasonable' and thus irrelevant in assessing provocation. That would be a failure to recognize the influence of Aboriginal customary laws and traditions. But that is not the present law. All these factors are relevant in assessing the responses a traditionally oriented Aborigine might ordinarily make to provocation. Aboriginal customary laws, at least where adherence to them is a 'particular' characteristic of the offender,[1704] may be indirectly 'recognized' now through a reduction of murder to manslaughter, if the particular response was sanctioned by — or understandable in terms of- Aboriginal customary laws, traditions or beliefs. The adoption of a purely subjective test for provocation is thus not an issue in the context of the present Reference.

427. ***Evidentiary Questions***. Under the *Camplin* test the criterion for the availability of provocation is the reaction of an ordinary person in the defendant's circumstances. In the case of a traditional Aboriginal defendant, it has been suggested that white juries:

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1695 (1979) 21 SASR 356.

1696 id, 377. King CJ (id, 358) and Sangster J (id, 364, though dissenting on the facts) agreed.

1697 *R v Bedelph* (1980) 1 A Crim R 445, 456-7. Green CJ and Everett J concurred. The same test has been applied in NSW: *R v Croft* (1981) 3 A Crim R 307; in Victoria: *R v Dincer* [1983] VR 460; *R v O'Neill* (1981) 4 A Crim R 404; in WA: *Censori v R* [1983] WAR 89, and in NZ: *R v Taaka* [1982] 2 NZLR 198; *R v Dixon* (1983) 7 Crim LJ 122.

1698 [1978] AC 705.

1699 eg *Moffa v R* (1977) 13 ALR 225, 243 (Murphy J); *Johnson v R* (1976) 11 ALR 23, 63 (Murphy J).

1700 eg A Samuels, 'Excusable Loss of Self-Control in Homicide' (1971) 34 *Mod L Rev* 163; GP Fletcher, *Rethinking Criminal Law*, Little Brown, Boston, 1978, 242-50. Both in South Australian and Victoria, abolition of the 'objective' test has been recommended: SA, Criminal Law and Penal Methods Reform Committee (Chairman: Justice RF Mitchell), *Fourth Report. The Substantive Criminal Law*, Adelaide, 1977, 27-8; Victorian Law Reform Commissioner, Report No 12, *Provocation and Diminished Responsibility as Defences to Murder*, Melbourne, 1982, 17, 47.

1701 cf AJ Ashworth, 'The Doctrine of Provocation' (1976) 35 *Crim LJ* 292. An amendment to the New South Wales Crimes Act in 1982 extending the scope of provocation in various ways, retained the 'ordinary person' test: Crimes Act 1900, s 23(2).

1702 eg in the context of domestic violence: *R v R* (1981) 28 SASR 321; M Wasik, 'Cumulative Provocation and Domestic Killing' [1982] *Crim L Rev* 29. The requirement of proportionality is now one of fact rather than law, and there is no rule that mere words cannot constitute provocation: *Johnson v R* (1976) 11 ALR 23. See also Crimes Act 1900 (NSW) s 23, noted (1982) 6 *Crim LJ* 168; D Weisbrot, 'Homicide Law Reform in New South Wales' (1982) 6 *Crim LJ* 248.

1703 *Johnson v R* (1976) 11 ALR 23, 34-5 (Barwick CJ); *Moffa v R* (1977) 13 ALR 225.

1704 cf *R v McGregor* [1962] NZLR 1069, 1081-2; *Newell v R* (1980) 71 Cr App R 331.

> would be likely to base their views on provocation not on any precise knowledge of Aboriginal custom and law but on folklore about how Aborigines behave.[1705]

One answer would be to allow evidence to be called to show:

> that the type of provocation the defendant received was perceived by him as more serious than it would be by a white person and that the way he responded to it was socially sanctioned, that is that it was in accordance with tribal law.[1706]

However in *Camplin* at least some members of the House of Lords thought that evidence would not be admissible to prove the likely reaction of an 'ordinary person' in the defendant's circumstances. This was a matter for the jury.[1707] If this view were to prevail, a non-Aboriginal jury[1708] might well be reduced to uninformed speculation on this question. It does not seem right to make the issue one of the defendant's own cultural background and influence, but to deny the defendant the opportunity to demonstrate to the jury what these are. A provision, similar to section 7 of the Customs Recognition Act (PNG), could be enacted to allow evidence of customary law to be taken into account for the purpose of:

- deciding the reasonableness or otherwise of an act, default or omission by a person;
- deciding the reasonableness or otherwise of an excuse.[1709]

Whether evidence of Aboriginal customary laws for these purposes is admissible has not yet been decided by an Australian appellate court. However such evidence is undoubtedly admissible to assist in explaining the defendant's actual state of mind, which is a necessary component of a defence of provocation.[1710] It may be too refined a view to allow the evidence for that purpose, but not for the purpose of assessing the reactions of an ordinary traditional Aborigine in the defendant's circumstances. It seems that in at least some of the Australian cases at first instance evidence of this kind has been accepted.[1711] If this represented present Australian law then no special rule would be necessary to cope with situations arising under Aboriginal customary law.[1712] On the other hand, the law is by no means clear on the point, and it should be clarified in the interests of certainty.[1713]

## Duress

428. ***Scope and Basis of the Defence of Duress in Australia***. At common law, the defence of duress may be available if the defendant can show that the offence was committed because of a threat that serious violence would be inflicted on the defendant, his family or friends, if he refused to commit the offence. The common law did not allow duress as a defence to murder or treason, on the theory that these crimes are so serious that they could not be excused. In *Director of Public Prosecutions v Lynch*[1714] the House of Lords by a majority held that the defence is available to an accessory to murder, where the defendant has been induced to aid the principal by threats of violence or death against himself or his friends or family. However the Privy Council, by a different majority, held in *Abbott v R* that the defence is not available to a principal (as distinct from an accessory) to murder.[1715] *Abbott's* case has been followed in Australia,[1716] and it would seem that it reflects the Australian common law. The distinction it draws between principals and accessories to murder been

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1705 Eggleston (1976) 296.
1706 id, 295.
1707 [1978] AC 705, 716 (Lord Diplock), 727 (Lord Simon). The issue here was not precisely the same. A mere expression of a witness's opinion as to how an 'ordinary' man should or might have reacted might well be thought to involve an attempt to decide the very issue of evaluation which is for the jury. But the case under consideration here is the effect upon a traditional Aborigine of some provocative act, in accordance with or against a background of the traditions rules and beliefs of his community. This is not only a matter affecting what an ordinary Aborigine might do, under the Camplin test, but one as to which the jury are likely to be unaware and inexperienced, and about which concrete evidence, as distinct from speculation, could be offered.
1708 It is rare for an Aborigine to serve in a jury, even (indeed perhaps especially) where the defendant is Aboriginal. The matter is discussed at para 586-594.
1709 See para 406.
1710 See para 416.
1711 cf *R v Rankin* [1966] QWN 16 where Campbell J pointed out that 'a cross-section of Aboriginals [sc living on an Aboriginal settlement] appeared before the jury and gave evidence'.
1712 For general questions of the proof of Aboriginal customary laws see ch 24-6.
1713 See para 445.
1714 [1975] 1 All ER 913.
1715 [1977] AC 755.
1716 *Darrington v R* [1980] VR 353.

criticised, for example on the ground that it undermines the fault basis of the criminal law. Liability is attached to an offender in situations where there has been no free agency, no real ability to refuse to do the act which has brought the defend ant before the Court.[1717] Under the Criminal Codes of Queensland, Western Australia and Tasmania, for duress to be available the threat has to be of immediate death or grievous bodily harm to the defendant by a third party who is present at the scene of the crime.[1718] The Northern Territory Code refers to a threat to commit an offence against the person for which the offender may be sentenced to 7 years imprisonment, but it does not require the third party to be present at the scene of the crime. The third party must however be in a position to carry out the threat. Duress is specifically excluded as a defence for treason, murder, piracy or offences involving grievous bodily harm or an intention to inflict grievous bodily harm. There is no provision making the defence available where the threat is of violence to a person other than the accused.[1719] Thus in a number of respects the common law allows the defence where the Codes do not.[1720]

429. ***Subjective or Objective Test?*** Neither the High Court nor the House of Lords has decided whether the test for duress is an objective one or is wholly subjective. However it appears that an accused may not rely on duress unless a person of 'ordinary firmness' would have been coerced into doing what he did. This conclusion has been reached by both the English Court of Appeal[1721] and the New South Wales Court of Criminal Appeal.[1722] The question therefore arises whether or not the objective test to be applied is an abstract one, having no regard to the defendant's personal characteristics. In both *Graham*[1723] and *Lawrence*[1724] the analogy with the 'new' test for provocation was expressly drawn. The defendants in these cases were not Aboriginal, and there was no cause to refer to Aboriginality as a relevant characteristic or circumstance. But there is no reason to think that the objective test for duress is any different from that for provocation.

430. ***Duress Compared with Compulsion under Aboriginal Customary Laws***. Under Aboriginal customary laws an Aborigine may sometimes be expected or even required to inflict harm on another Aborigine who has committed a breach of customary laws. Threats of physical or other forms of retribution from other members of the group may be made if the act is not carried out. Elizabeth Eggleston suggested that duress may be an appropriate defence in some situations where Aborigines act under their customary laws because of fear of death or physical harm. She referred in particular to the case of *Skinny Jack* (also known as Chimney Evans).[1725] In that case a number of young Aboriginal men were exhorted to kill another Aborigine because the latter had broken their customary laws in selling a sacred item. The young men involved were threatened with a similar fate if they refused to carry out the orders. Eggleston noted however that as well as fear there may well have been other elements of Aboriginal culture that influenced the defendants in this case:

> In the latter case the element of fear in the immediate situation is reinforced by the element of legitimacy and also there is more reason to believe that the threat will be a continuing one since the persons making the threats have access to powerful sanctions to back up their threats.[1726]

In Eggleston's view, duress is not a generally applicable defence in customary law cases, though it may be available in particular instances where the strength of the operation of customary laws may add reality to the threats. But suggestions have since been made for the extension of the defence of duress to cover cases where a person is 'forced' by his or her adherence to customary laws to commit an offence.[1727] The difficulty

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1717 cf M Wasik, 'Duress and Criminal Responsibility' [1977] *Crim L Rev* 453; ATH Smith, 'Defences of General Application: The Law Commission's Report No 83(1) — Duress' [1978] *Crim L Rev* 128; M Sornarajah, 'Duress and Murder in Commonwealth Criminal Law' (1981) 30 *ICLQ* 660. And cf *R v McCafferty* [1974] 1 NSWLR 89. The absurdly fine distinctions that may have to be drawn are demonstrated by *R v Graham* [1982] 1 WLR 294, where the Crown conceded that duress was available on a charge of murder.

1718 Qld and WA Codes, s 31(3); Tasmanian Code, s 39, 49.

1719 NT Code, s 40.

1720 cf *R v Clark* (1980) 2 A Crim R 90.

1721 *R v Graham* [1982] 1 WLR 294.

1722 *R v Lawrence* (1980) 32 ALR 72.

1723 [1982] 1 WLR 294, 300 (Lord Lane CJ).

1724 See esp (1981) 32 ALR 72, 101 (Moffitt J). Nagle CJ and Yeldham J in substance agreed.

1725 Eggleston, 289-92, 296-7; cf ALRC DP 17, 38.

1726 Eggleston, 297.

1727 eg D Hore-Lacey, *Submission 499* (14 November 1985) 7. But the Tasmanian Aboriginal Centre stated that duress should only be allowed as a defence where this was supported by 'the expressed wishes of the Aboriginal community in question': *Submission 237* (10 April 1981) 11. Chief Justice Forster commented: I have sometimes been attracted to the opinion that a special sort of duress should be a defence to change ... even involving homicide if the perpetuator was acting pursuant to tribal law. *Submission 163* (24 April 1980).

with such proposals is that traditionally oriented Aborigines follow their customary laws, not just because of fear of punishment, but because of belief in their legitimacy. No doubt there is a sense in which someone could be said to be 'coerced' by sincere beliefs into doing an act, though only in some secondary sense of 'coercion'.[1728] However it is very doubtful whether the common law defence of duress can be said to apply in such circumstances in the absence of external pressure,[1729] and the same appears to be true of its Code equivalents.[1730] There will be situations involving Aboriginal customary laws where the defence of duress is appropriate. However there will also be situations where Aborigines have followed their customary law voluntarily without any external pressure being applied or having to be applied. In this situation it is inappropriate to seek to resolve the issue by artificially extending the defence of duress. The issue is rather whether Aboriginal customary laws should be accepted as a defence as such. This will be dealt with later in this Chapter.[1731]

## Other Defences

431. ***Self-Defence and Excessive Self-Defence***. A person is entitled to use a degree of force to repel an unlawful attack upon himself or another person. However, the degree of force used must bear a reasonable relationship to the danger caused by the attack. In some circumstances a person may need to use extreme levels of violence in self defence, even killing the aggressor if this is necessary. However, in another situation he may only need to use a slight degree of force, or (by withdrawing or retreating) none at all.[1732] Where a homicide results from the use of excessive force to repel an attack the defendant may be convicted of either murder or manslaughter. Where the defendant has used a degree of force which is considered excessive, and it is shown that he was aware that the degree of force was greater than was needed to repel the attack, the jury may convict of murder. However, if the defendant believed that the degree of force used was necessary, he is guilty only of manslaughter. In the leading Australian case, *Viro v R*,[1733] the Court drew a distinction between the defendant's belief as to the prevailing circumstances and his belief as to the degree of force which the situation warranted. In relation to the former, an objective test is applied. The defendant's belief as to the necessity of defence must be a reasonable one in the circumstances as he believed them to be. In relation to the degree of force the defendant believed necessary a subjective test is applied. The question is whether the defendant actually believed that the degree of force used was necessary under the circumstances. It seems that the effect of *Viro's* case is to introduce into the 'reasonable man' test an element of subjectivity similar to that which now applies in the law of provocation. As Howard comments:

> [T]his formulation is subtly but significantly different from the standard of the reasonable man. Although it requires D's belief to be reasonable, or perhaps not unreasonable would be nearer the mark having regard to the burden of

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1728 cf *R v Old Barney Jungala*, unreported, Northern Territory Supreme Court (Muirhead J) 8 February 1978, where Muirhead J commented: 'There is no suggestion that [the defendant] intended to cause the death of this young woman and I accept the fact that he acted as he believed the law which he respected compelled him to do'. The defendant was convicted of manslaughter on grounds of lack of intent to kill, not duress.

1729 In *R v Isobel Phillips*, unreported Northern Territory Court of Summary Jurisdiction (Mr JM Murphy, SM) 19 September 1983, the defendant a woman from the Warumungu tribe, was required by Warumungu customary law to fight in public any woman involved with her husband. Warumungu law also set limits to the fight, which were not exceeded in this case. Anthropological evidence was called to show that the defendant was under a threat of death or serious injury if she did not respond. The Magistrate held that 'a Warumungu woman of ordinary firmness would have carried out the instructions she was given ... as the defendant did ... The threats ... are backed up by the sanctions of the Warumungu law, and she cannot as she remains in a Warumunga environment, evade these consequences'. Transcript of Decision 11, 13. The charges were dismissed on the ground that the defence of duress applied.

1730 It has been suggested that the special defence of coercion to murder in the NT Code s 41 could apply to cases of 'compulsion' under Aboriginal customary laws. Commenting on s 41 the NT Attorney-General stated that the defence would be available to an Aborigine acting in accordance with his customary laws:

> Section 41 of the Territory Code, relating to coercion, purposely made just such a defence available to persons, such as Aborigines, who may be forced through physical or mental pressure (their culture) to do what they would not otherwise do ... Section 41 addresses the problem of their no longer being a discretion as (formerly) provided by section 6A of the Criminal Law and Consolidation Act.

Hon J Robertson, *Submission 419* (17 May 1984).

But under s 41 the coercion must have been 'of such a nature that it would have caused a reasonable person similarly circumstanced to have acted in the same or a similar way'. 'Coercion' is defined by s 1 to mean 'physical or mental pressure forcing the person said to be coerced to do what he would not otherwise do'. There may be difficulties in claiming that a person's beliefs or convictions constitute 'mental pressure forcing [him] ... to do what he would not otherwise do'. The point has not yet been decided by the courts.

1731 See para 442-53. A defence with some similarities to duress is necessity. If it does exist as a general defence at common law it applies only in restricted cases, of limited or no relevance to present purposes. It would not, for example, be open to a defendant to argue that it was 'necessary' to impose some traditional punishment because of the adverse consequences of not doing so, since these would (apart from cases of duress) be of an indirect or long-term character. cf *R v Dudley & Stephens* (1884) 14 QBD 273; *Morgentaler v R* (1975) 53 DLR (3d) 161; Howard, 412-417; Glanville Williams, 553-576. The same is true of the limited Code provisions concerning 'extraordinary emergencies': Qld, s 25; WA, s 25; NT s 33.

1732 See generally Howard, 89-94, 137-9; Glanville Williams, 448-76.

1733 (1978) 18 ALR 257.

> proof on D, it follows developments in the law of provocation by laying stress on what might have seemed reasonable to the particular person rather than to a fictional abstraction called the reasonable man.[1734]

The position with the 'objective' test in this context seems therefore to be the same as it is with provocation, in which case the arguments about possible legislative reinforcement or change will be similar.[1735]

432. ***Mistaken Belief***. The relevance of mistaken belief to criminal responsibility differs depending on the kind of mistake, and on the offence. A mistake of law is, with certain exceptions, irrelevant: this rule, and the exceptions to it, are discussed below.[1736] A mistake of fact as to a particular element of an offence may be relevant in several different ways. It may negative the intent necessary for the offence: for example, if the defendant mistakenly but honestly believed that the victim was consenting to sexual intercourse, the defendant cannot be guilty of rape. There is no requirement in such cases that the defendant's belief be reasonable, provided it is shown to be genuine.[1737] In other cases, there may be no requirement that the defendant believed in the existence (or was reckless as to the non-existence) of particular facts. However at common law it is a defence to most criminal charges that the defendant actually believed on reasonable grounds in the existence of facts which, if true, would have exonerated him from liability.[1738] This defence applies especially to regulatory or statutory offences, many aspects of which are (apart from the defence) subject to a regime of strict liability. For present purposes, these offences are however of little or no relevance.

433. ***Mistake and Aboriginal Customary Laws***. Mistaken or 'unreasonable' belief can be produced by adherence to a world-view based on traditional or customary beliefs or patterns of behaviour. Adherence to tradition or to customary laws is not to be equated with superstition, but the two may be associated, and when they are legal problems of considerable difficulty arise. For example an American Indian was convicted of manslaughter when he shot what he believed was a Wendigo, an evil spirit in human form.[1739] Similar problems have arisen in Papua New Guinea with sorcery, although the courts have refused to entertain defences based, for example, on mistake of fact.[1740] Equivalent problems do not seem to have been raised in Australian cases, at least not in the last fifteen years. There are certainly Aboriginal practices of 'magic' or 'sorcery',[1741] but they do not seem to have had much impact in criminal cases. Eggleston suggests that a defence based on mistake may have been available to the defendants in the *Skinny Jack* case, but it was not in fact raised there.[1742] It is unlikely that the defence of honest and reasonable mistake of fact would be directly relevant in cases involving customary law issues. What is more likely is that mistaken assumptions or beliefs based on tradition may affect the defendant's intent (in cases where *mens rea* is required), or his belief as to an appropriate response in cases of self-defence or provocation. Given the qualified nature of the 'objective' requirement for both defences, appropriate account could probably be taken of customary laws and traditional' practices in such cases, under the existing law.[1743]

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1734 Howard, 91. cf *Viro v R* (1978) 18 ALR 257, 302-3 (Mason J), 309-10 (Jacobs J).

1735 See para 441.

1736 para 434.

1737 See para 416-18.

1738 *Thomas v R* (1937) 59 CLR 279; *Proudman v Dayman* (1941) 67 CLR 536; *R v Reynhoudt* (1962) 107 CLR 381; Howard 363-377. The position is substantially the same in the Code States: Qld, s 24; WA, s 24; Tas, s 14; NT, s 32.

1739 *R v Machekequonabe* (1894) 28 Ont 309. See Glanville Williams, 'Homicide and the Supernatural' (1949) 65 *Law Q Rev* 491; Howard, 41, 106.

1740 See RS O'Regan, 'Sorcery and Homicide in Papua New Guinea' (1974) 48 *ALJ* 76; Weisbrot (1982) 79-82; and see also the works by RB Seidman, 'Mens Rea and the Reasonable African: The Pre-Scientific World-View and Mistake of Fact' (1966) 15 *ICLQ* 1135, and 'Witch Murder and *Mens Rea*: A Problem of Society under Radical Social Change' (1965) 28 *Mod L Rev* 46.

1741 cf RM Berndt & CH Berndt, *The World of the First Australians*, 4th rev edn, Rigby, Adelaide, 1985, 319-335. The only instance is which 'sorcery' was mentioned in the cases collected in ACL RP6A was Case No 1, where D was said to feel himself 'in danger from spirits who would take [his] kidney fat while asleep': id, 4-5. This was taken into account by Justice Forster in sentencing, but on any view D's act of manslaughter was wrongful in that case. On this question from a socio-medical viewpoint see J Reid, *Sorcerers and Healing Spirits Continuity and Change in an Aboriginal Medical System*, ANU Press, Canberra, 1983, esp 92-118; 1H Jones, 'stereotyped aggression in a group of Australian Western Desert Aborigines' (1971) 44 *Br J Med Psychol* 259; 1H Jones & DJ Home, 'Psychiatric Disorders among Aborigines of the Australian Western Desert' (1973) 7 *Soc Sci & Med* 219; JE Lemaire, *The Application of Some Aspects of European Law to Aboriginal Natives of Central Australia*, LLM thesis, University of Sydney, Sydney, 1971, 118-126; J Cawte, *Medicine is the Law*, University Press of Hawaii, Honolulu, 1974, esp ch 6. See also LR Hiatt, *Kinship and Conflict*, ANU Press, Canberra, 1965 119-21 ; WL Warner, *A Black Civilisation*, Harper & Bros, London, 1937, ch 7, 8; B Spencer and FJ Gillen, *The Native Tribes of Central Australia*, McMillan, London, 1899, ch 16; DB Rose, 'Dingo Makes us Human: Being and Purpose Australian Aboriginal Culture'. Phd Thesis, Bryn Mawr College, Bryn Mawr, March 1981, 372-3.

1742 Eggleston, 298.

1743 But the Papua New Guinea Supreme Court refused to treat sorcery as giving rise to a defence of provocation: Weisbrot (1982) 79. The Sorcery Act 1971 s 20 expressly allows sorcery to count as provocation, provided the ordinary villager in similar circumstances would have reacted in a similar fashion.

434. ***Honest Claim of Right***. As has been seen it is no defence to a criminal charge that the defendant mistakenly believed he had a legal or moral right, or even a duty, to do what he did.[1744] Thus a traditional Aborigine may well believe that a particular action is required by his customary laws: that is, in general, no excuse if the act contravenes the general law, though it may be relevant in sentencing.[1745] But a defence of claim of right is available in offences involving property. The basis of offences involving property is that a person intends to take or damage property in a manner inconsistent with the rights of the true owner of the property. If the defendant honestly believes that the property belongs to himself, or that he has a justified claim to it, then it is not possible to prove the necessary criminal intent, whether under the common law or the Codes.[1746] In particular, there is no requirement that any mistaken claim of right be reasonable, so long as it is honest.

435. ***Claims of Right under Aboriginal Customary Laws***. An example of the way in which the claim of right defence may assist Aborigines acting in good faith under their customary law is *R v Craigie and Patten*, a case heard in the District Court of New South Wales.[1747] Two Aborigines had broken into a private art gallery and taken possession of traditional Aboriginal bark paintings which they believed they had a right to claim for the Aboriginal people. They were charged with breaking and entering in order to steal the paintings. Thus their guilt depended on whether the taking of the paintings was theft. The art in question was traditional art which, it was claimed, under Aboriginal customary laws belongs not to an individual but to the relevant Aboriginal group. The defendants took possession of the paintings in order to prevent them from leaving Australia. Judge Bell indicated to the jury that a claim of right must be founded on the law of New South Wales and not on Aboriginal customary laws. The prosecution had the onus of proving that the defendants 'did not have an honest belief in the existence of a set of facts which, if it had existed, would have justified their acts according to law, and that means according to the law of New South Wales'.[1748] But the defendants claimed that according to the law of New South Wales as well as Aboriginal customary law they were entitled to take the paintings. His Honour continued:

> I do not administer the Aboriginal Customary 'laws' in this Court, and you are required to bring your verdict in according to the New South Wales law, not according to the law that was in force here before the whites came. But the relevance of what you we re told about those aboriginal customs is a limited one in that, had there been no such evidence, you would have dismissed in the first minutes of the trial any suggestion that either of these people could have believed that what he was doing was lawful. But now each of them is able to say, 'Under our law the situation was thus, and that is the reason why we believe or believed that the New South Wales law permitted us to do what we did'.[1749]

The jury returned verdicts of not guilty in respect of both defendants.[1750] Thus it may be that, where an Aborigine honestly believes that Australian law will enforce a right of possession which is recognised by his customary laws, a defence of claim of right will be established.[1751] But the defence is not likely to be available as a general form of recognition of honest, though mistaken, claims based on Aboriginal customary laws. It applies only in the case of property offences, which represent a very small proportion of offences where Aboriginal customary laws are involved. It is only available where the defendant can assert an honest belief about the general law, not about Aboriginal customary laws as such. If Aboriginal customary laws are to be a defence to crimes under the general law, they should be a defence as such, not just in those cases where the defendant happens to be mistaken about the relationship between Aboriginal customary law and the general law. No change is therefore desirable, in the context of this Reference, to the defence of claim of right. Whether there should be a customary law defence is considered later in this Chapter.[1752]

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1744 Howard, 367-71; Glanville Williams, 405-15. cf para 415.

1745 *Power v Huffa* (1976) 14 SASR 337. In *Grant v Borg* [1982] 1 WLR 638, 64 Lord Bridge described this principle as 'fundamental'. And cf P Brett, 'Mistake of Law as a Criminal Defence' (1966) 5 *Melb U L Rev* 179; AJ Ashworth, 'Excusable Mistake of Law' [1974] *Crim L Rev* 652.

1746 For the common law see Howard, 218-9. For the Codes see NT s 30; Qld, s 22; Tas, s 45; WA, s 22.

1747 Unreported, November 1980; see ACL RP 6A, 67-9.

1748 Transcript, 5.

1749 id, 26.

1750 Another case in which claim of right was invoked was *R v Holroyd*, unreported, Cairns District Court, 1978, where D cut fishing nets which he believed interfered with the use of tribal lands: see W Goss & B Harrison, *Submission 273* (7 May 1981) 12.

1751 For a strong application of this principle, in circumstances somewhat analogous to Craigie and Patten, see *Police v Minhinnick* New Zealand, Rotorua Magistrate's Court, unreported (Trapski SM) 3 March 1978. But for difficulties with the defence in customary law contexts overseas see CO Okonkwo, 'The Defence of Bona Fide Claim of Right in Nigeria' (1973) 17 *JAL* 271.

1752 See para 442-453.

## Intoxication and Diminished Responsibility

436. ***The Impact of Alcohol on Aboriginal Communities***. The problems many Aboriginal communities experience with alcohol have been documented in some detail.[1753] Aboriginal communities are still seeking ways of dealing with alcohol and alcohol-related problems. These do not, for the most part, involve the use of traditional sanctions or dispute resolving mechanisms,[1754] but rather co-operation with outside authorities (eg licencing courts or commissions, police) to reduce or contain alcohol abuse.[1755] Longer term solutions are likely to be found only through various forms of support for Aboriginal groups in developing methods of prevention and treatment,[1756] although even this has been doubted.[1757] One thing, however is clear. Despite recent moves in this direction, the more stringent application of legal penal ties for drunkenness is practically certain to be ineffective, resulting only in more and longer terms of imprisonment for offenders whose real problems remain unaddressed. This point was powerfully made by Justice Muirhead in *R v Douglas Wheeler Jabanunga*:

> The courts cannot effect a cure or diminution of the incidence of alcohol induced violence. but the situation cries out for community concern, intelligently planned programs and action rather than words. All the courts can do in the meantime is to punish those who kill or injure, but the deterrent value of what we do is, I am afraid, precisely nil.[1758]

437. ***Alcohol and Aboriginal Customary Laws***. Alcohol is an introduced problem which causes great disruption in Aboriginal communities. There are few, if any, traditional restraints on alcohol abuse. Drinking alcohol is an activity which individuals or groups choose to engage in and which is largely considered to be their own business. Individuals and collectivities (such as Councils) have limited jurisdiction over the actions and disputes of others.[1759] Aborigines do not regard alcohol as justifying or totally excusing otherwise wrongful acts, although it can be an explanatory or mitigating factor (as well as, in some cases, a catalyst for offences). Breaches of customary laws may be caused by alcohol:

> It is admitted also by many drinkers that alcohol makes one lax in matters of traditional law. On numerous occasions I have heard drunken persons use the names of the recently dead. This causes consternation among sober listeners. Sexual liaisons between forbidden partners are also mentioned as a distressing outcome of drinking. Probably the most serious misdemeanour of all, however, is the revelation of secret-sacred material to those who have no right of access to it.[1760]

Such breaches are seriously regretted but they do not appear to lead to any change in drinking patterns.[1761] And the existence of alcohol as a factor in an offence does not necessarily preclude or prevent some later response or retaliation, especially where the consequences of the offence (in terms of injury or death) are lasting or serious.[1762]

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1753 See eg M Brady & K Palmer, *Alcohol in the Outback: Two Studies of Drinking* North Australia Research Unit, Darwin, 1984; House of Representatives, Standing Committee on Aboriginal Affairs, Alcohol Problems of Aboriginals, AGPS, Canberra, 1977; Wilson (1981) 48-62; C Fua & L Lumsden, 'Aboriginal Alcohol Abuse and Crime in Queensland' in B Swanton (ed) *Aborigines and Criminal Justice*, Australian Institute of Criminology, Canberra, 1984, 6; J McCorquodale, 'Alcohol and Anomie: The Nature of Aboriginal Crime', id, 17.

1754 See eg P Roe, D Grey, *Transcript of Public Hearings*, Broome (15 March 1981) 500-1, B Wooramurra, *Transcript*, Fitzroy Crossing (31 March 1981) 743; WH Edwards, *Transcript*, Adelaide (17 March 1981) 37; Stanley, *Transcript*, (29 April 1981) 2005-6.

1755 See eg EM Grubb, *Transcript*, Adelaide (17 March 1981) 8-11; NH Edwards, *Transcript*, Adelaide (17 March 1981) 37-8; F Warner, *Transcript*, Adelaide (17 March 1981) 74; R Reid, *Transcript*, Pt Augusta (18 March 1981) 145-6; R Norling, *Transcript*, Strelley (24 March 1981) 365-70.

1756 P Wilson, *Black Death White Hands*, George Allen & Unwin, Sydney, 1981, 63; Fua & Lumsden, 13-14.

1757 Brady & Palmer, 75-7 argue that Aboriginal groups are for various reasons reluctant or unable to take steps over alcohol abuse, and that most action taken in this area is based upon wishful thinking and false assumptions.

1758 Unreported, Northern Territory Supreme Court, 16 October 1980, transcript of proceedings, 27-8; ACL RP6A, 26-7.

1759 This is not to deny the possibility that customary laws and traditional dispute-resolving techniques may be modified or adapted to deal with alcohol. But at present, it seems that EP Millikin's simple assertion, that 'to the majority of individual Aborigines, what other Aborigines do in respect of drinking alcohol in their own business' remains true: EP Millikin, 'Social Structures and the Problems of Northern Territory Aborigines', in RM Berndt (ed) *A Question of Choice*, UWA Press, Perth, 1974, 44, 51. He added that corrective action may be taken 'not because a person has been drinking, but because he is creating a disturbance': ibid. cf Brady and Palmer, 76: 'Despite a public display of concern over the issue of drinking, evidenced by the Minutes of Council meetings, the members of the community subscribed to the view that drinking was a universal right'.

1760 R O'Connor, 'Alcohol and Contingent Drunkenness in Central Australia' (1984) 19 *Aust J Soc Iss*, 173, 174.

1761 id, 175.

1762 cf Brady & Palmer, 36: 'To some extent ... people ... made allowances for what people did when drunk ... on the other hand, a man who had served time in gaol for manslaughter and who persisted in committing violent assaults when he was drunk was known as a "murderer" of whom people were frightened. His behaviour ... caused severe anxiety.' See further id, 61. But for the notion of 'diminished responsibility' for drunkenness see id, 26-8, 70.

438. ***Intoxication and Criminal Responsibility***. Under the common law in Australia as laid down in *O'Connor v R*,[1763] intoxication, whether or not voluntary or self-induced, is relevant to criminal responsibility in that it may help to show that the defendant acted involuntarily or lacked the necessary intent. Under the common law in England[1764] and under the State Codes, on the other hand, intentional intoxication[1765] is regarded as irrelevant to criminal responsibility in relation to 'offences of basic intent', although it is relevant (in the same way as at common law) to the existence of a 'specific intent' where this is a constituent of the offence.[1766] An offence of 'specific intent' is one where 'an intention to cause a specific result is an element of [the] offence'.[1767] Although the distinction between the two remains obscure, it is settled that offences such as murder, theft and wounding with intent are crimes of specific intent, whilst manslaughter and assault are crimes of basic intent.[1768] The status of rape is uncertain.[1769] As was pointed out in para 437, under Aboriginal customary laws intoxication is not regarded as a complete justification or excuse, though it may be a mitigating factor. There seems to be no warrant in Aboriginal customary laws for preferring one version of the intoxication rule to the other, especially since in practice the difference between them is less than might appear. Both the Australian common law and the State Codes allow account to be taken of the beliefs and pressures which may underlie an offence triggered by alcohol, in sentencing and in determining the defendant's state of mind in other respects. In the case of both the common law and the Codes, intoxication may be relevant in casting doubt upon the existence of a specific intent in murder cases, thus reducing the charge to manslaughter and attracting a sentencing discretion.[1770] Accordingly, no special provision is justified in the context of this inquiry. However customary law elements in an offence committed while the defendant was intoxicated should still be able to be taken into account. Accordingly the legislation set out in Appendix 1 contains a provision which makes it clear that intoxication does not necessarily exclude the application of the other provisions for the recognition of Aboriginal customary laws in determining criminal liability.

439. ***Intoxication under the Northern Territory Code***. As originally enacted the Criminal Code 1983 (NT) section — established a legal presumption ('until the contrary is proved') that, in any case where 'intoxication may be regarded for the purposes of determining whether a person is guilty or not guilty of an offence', the accused 'foresaw the natural and probable consequence, of his conduct and intended them'.[1771] The effect of section 7, it appears, would have been to place the burden of proof on an accused to prove that he did not foresee nor intend the natural consequences of his conduct while intoxicated. It would thus have greatly increased the likelihood of a murder conviction, irrespective of the accused's actual state of mind.[1772] Following representations from the Commonwealth,[1773] section 7 was amended with retrospective effect. It now provides that:

> (1) In all cases where intoxication may be regarded for the purposes of determining whether a person is guilty or not guilty of an offence —
>
> (a) it shall be presumed that, until the contrary is proved, the intoxication was voluntary; and
>
> (b) unless the intoxication was involuntary, it shall be presumed evidentially that the accused person foresaw the natural and probable consequences of his conduct.

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1763 (1980) 29 ALR 449. See Howard, 323-7; PA Fairall, 'Majewski Banished' (1980) 4 *Crim LJ* 264; M Goode, 'some Thoughts on the Present State of the "Defence" of Intoxication' (1984) 8 *Crim L J* 104. For a US study see LC Sobell and MB Sobell, 'Drunkenness, A "Special Circumstance" in Crimes of Violence: Sometimes' (1975) 10 *International Journal of the Addictions* 869. For an application of the rule see Herbert, *Sampson & Wurrawilya v R* (1982) 42 ALR 631; retrial (1983) 23 NTR 22; further appeal (1984) 53 ALR 542.

1764 *DPP v Majewski* [1977] AC 442. For criticism see eg Glanville Williams, 416-38; ACE Lynch, 'The Scope of Intoxication' [1982] *Crim L Rev* 139.

1765 This does not refer to one who intends to get drunk, merely to one who intends to drink and in fact gets drunk, ie to voluntary drunkenness: *R v Kusu* [1981] Qd R 136, 141 (WB Campbell J).

1766 Qld, s 28; WA, s 28; cf Tas, s 17. See *R v Kusu* [1981] Qld R 136; *R v Martin* (1979) 1 A Crim R 85; RS O'Regan, 'Intoxication and Criminal Responsibility under the Queensland Code' (1977) 10 *U Queens L J* 70-82. For the Northern Territory position see para 439.

1767 cf Qld, s 28(3).

1768 Glanville Williams, 428. Why murder is a crime of specific intent is not clear, but it is clear that it is: cf *R v O'Connor* (1980) 29 ALR 449, 465 (Barwick CJ).

1769 CR Williams, *Brett and Waller's Criminal Law*, Butterworths, Sydney, 1983, 657.

1770 Intoxication was regarded as reducing murder to manslaughter in 11 of the 24 cases of manslaughter in ACL RP6A, 64. Alcohol was involved in 30 of the 47 cases there: id, 65.

1771 The presumption did not apply if intoxication was involuntary, but it was similarly presumed to be voluntary: s 7(a).

1772 The Code also abolished the existing sentencing discretion for Aborigines in murder cases: see para 519-20. The effect of s 7 would thus have been substantially to increase the number of life sentences imposed on Aborigines by law. See ALRC DP 20 (1984) para 29.

1773 Action under the Northern Territory (Self-Government) Act 1978 (Cth) s 9 was proposed. See (1984) 9 Commonwealth Record 472, recording the agreement between the Commonwealth and Northern Territory Attorneys-General for amendments to the Code.

The effect of the new section is unclear, and much will depend on how readily the evidentiary presumption in section 7(1)(b) is rebutted. Evidentiary presumptions in similar contexts appear to be readily rebuttable. Moreover the presumption now goes only to the question of foresight as distinct from intent. It may well be the case then that section 7(1)(b) will not vary in any significant way 'the traditional onus of proof of intent in cases where an offender was intoxicated'.[1774] However it is most undesirable that persons should be convicted of murder and be imprisoned for life in cases where there was no actual intention to kill or cause serious harm, and where no judicial consideration of questions of mitigation has been possible. If section 7(1)(b) were to be construed to produce this result, it would need to be further amended. The provision should be kept under review by the appropriate authorities.

440. ***Diminished Responsibility***.[1775] The defence of diminished responsibility may be made out if a defendant, charged with murder, is able to show that he was labouring under a mental disorder at the time the offence was committed, sufficient to reduce the gravity of the offence to manslaughter. The degree of mental disorder required is less than that required for insanity. The defence of diminished responsibility recognises that a defendant may have been labouring under a defect of mind which has partially reduced his responsibilities for his actions. Its legal effect is to reduce murder to manslaughter, thereby attracting a sentencing discretion in those jurisdictions where murder carries a mandatory life sentence.[1776] In Australia the defence is a statutory one, available only in Queensland, New South Wales and the Northern Territory. For example, section 304A of the Queensland Code provides:

> (1) When a person who unlawfully kills another under circumstances which, but for the provisions of this section, would constitute murder, is at the time of doing the act or making the omission which causes death in such a state of abnormality of mind (whether arising from a condition of arrested or retarded development of mind or inherent causes or induced by disease of injury) as substantially to impair his capacity to understand what he is doing, or his capacity to control his actions, or his capacity to know that he ought not to do the act or make the omission, he is guilty of manslaughter only.[1777]

The notion of 'abnormality of mind' is much broader than for insanity, and the defence is accordingly more flexible. In *R v Byrne* the Chief Justice Lord Parker described its English equivalent in the following terms:

> 'Abnormality of mind' ... means a state of mind so different from that of ordinary human beings that the reasonable man would term it abnormal. It appears to us to be wide enough to cover the mind's activities in all its aspects, not only the perception of physical acts and matters, and the ability to form a rational judgment as to whether an act is right or wrong, but also the ability to exercise willpower to control physical acts in accordance with that rational judgment. The expression 'mental responsibility for his acts' points to a consideration of the extent to which the accused's mind is answerable for his physical acts which must include a consideration of the extent of his ability to exercise will power to control his physical acts.[1778]

Adherence to Aboriginal customary laws is, of course, not an indication of 'abnormality of mind'. However it has been argued that the tensions caused for indigenous peoples through cross-cultural conflict and related problems can lead to a 'recognizable psychiatric disease[1779] which would, if it resulted in homicidal acts, give rise to a defence of diminished responsibility.[1780] In such cases diminished responsibility is a better and more flexible vehicle for assessing criminal responsibility than the old defence of insanity.[1781]

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1774 ibid (Senator Evans). Other provisions of the Code specifically penalising intoxicated offenders were also amended, especially s 383. But cf s 154(4) (which however preserves the judicial sentencing discretion).

1775 See Howard 94-8; Glanville Williams 622-30; S Dell, 'Diminished Responsibility Reconsidered' [1982] *Crim L Re*v 809; M Gannage, 'The Defence of Diminished Responsibility in Canadian Criminal Law' (1981) 19 *Osgoode Hall LJ* 301. The Victorian Law Reform Commissioner has recommended the introduction of the defence: Report No 12, *Provocation and Diminished Responsibility as Defences to Murder*, Melbourne, 1982, 1-46.

1776 See para 518-21 for the present position with sentencing discretions in murder cases.

1777 cf Crimes Act 1900 (NSW) s 23A (inserted 1974); Criminal Code (NT) s 37.

1778 [1960] 2 QB 396, 403.

1779 CP Hellon, 'Legal and Psychiatric Implications of Erosion of Canadian Aboriginal Culture' (1969) 19 *U Toronto LJ* 76.

1780 Diminished responsibility would certainly have been available in one case in ACL RP6A (Case No 1) and possibly in others. In *R v Alwyn Peter*, diminished responsibility was relied on to reduce the offence to manslaughter, although in the event the Crown accepted a plea of guilty to manslaughter on the ground of intoxication. Accordingly Dunn J expressed no opinion on the diminished responsibility plea, except to describe the evidence as 'indeed thought provoking': *R v Alwyn Peter*, unreported, Queensland Supreme Court, 18 Sept 1981, reasons for sentence, 2. See further Wilson (1982).

1781 On insanity (which raises no specific issues for present purposes) see Howard, 327-43; Glanville Williams, 589-617.

## Conclusion: Intent and Criminal Law Defences

441. ***The Need for Legislation?*** There is, as this Chapter has demonstrated, a reasonable degree of scope for taking into account Aboriginal customary laws through the application of existing defences. The criminal law attempts to reflect measures of subjective guilt or criminality in its assessment of criminal responsibility and to a considerable extent it is now able to do this in cases with customary law elements. Difficulties experienced by traditionally oriented Aborigines may help demonstrate the need for the introduction or reform of a defence (such as diminished responsibility) as it applies generally. However, it is important that Aboriginal customary laws and traditions be taken into account in assessing criminal responsibility, for example through notions such as 'reasonableness', and it is within the Commission's Terms of Reference to recommend that this be done. The question is whether legislation is necessary or desirable to reinforce this requirement.[1782] In the area of the criminal law, the constraints upon special legislation are considerable: on the other hand, so too are the problems.[1783] So far as provocation is concerned, the courts have been responding to the particular situations of Aboriginal defendants (and other defendants from different cultural backgrounds) in the ways already described. The case for legislation specifically on provocation is not, therefore, particularly strong. On the other hand, uncertainties remain, and it is not clear whether a similar approach as to provocation will be adopted in the context of other defences. A legislative provision would reinforce the present law and help ensure that it is applied fairly and consistently. Accordingly, legislation should provide that Aboriginal customary laws and traditions should be able to be taken into account, so far as they are relevant, in determining whether the defendant had a particular intent or state of mind, and in determining the reasonableness of any act, omission, or belief of the defendant. If Aboriginal customary laws are to be taken into account in assessing the reasonableness of acts or excuses, it will be necessary to allow evidence of them to be adduced, so that traditional concepts of reasonableness may be explained to and understood by the jury. It may be that such evidence would now be admissible. But the matter is not clear, and the Commission therefore recommends legislation to clarify this point. Evidence to prove these questions should be admissible,[1784] a result which would be achieved by the general provisions proposed in this Report for the proof of Aboriginal customary laws.[1785]

## A Special Customary Law Defence?

442. ***Forms of Direct Recognition***. So far the discussion in this Chapter has concerned the problem of taking into account Aboriginal customary laws in deciding on criminal responsibility under the general law. This is only an indirect way of taking customary law into account. If Aboriginal customary laws are to be directly recognized in determining criminal liability under the general law, two different questions must be faced:

- the establishment of some form of defence based on customary laws, which would exclude criminal liability under the general law where the defendant's acts were determined and justified by customary law or which would at least reduce the extent of the defendant's culpability; and

- the incorporation of customary law offences in some form in the general criminal law, so as to establish criminal liability on the ground of breach of customary law.

The first question will be discussed here, the second in Chapter 19.

443. ***Terminological Issues***. It is necessary to clarify some issues of terminology. A defence based upon Aboriginal customary laws would be 'special' in the sense that it would apply only in cases where Aboriginal customary laws were applicable and were followed.[1786] It might also apply only in the case of

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1782 The question whether legislation implementing the Commission's recommendations should be Federal, or State or Territory legislation is a separate one, which is discussed in Chapter 38 of this Report.

1783 See para 168-9, 394-400, 411.

1784 cf Eggleston (1976) 295. In ALRC DP 20 (1984) para 11-12, the Commission tentatively recommended legislation to provide that Aboriginal customary law and traditions should be taken into account in determining liability under the general criminal law, in particular in determining whether the defendant had the necessary intent and whether his acts were 'reasonable' for the purposes of any general defence. The Commission received submissions both for and against this proposal. Those against included National Police Working Party, *Submission 459* (4 October 1984); those in favour included AJ Murray, *Submission 455* (28 May 1984); G James QC, *Submission 418* (21 May 1984); Justice Kearney *Submission 411*, (1 May 1984); C McDonald, *Submission 398* (20 February 1984). See also ALRC, *Notes of ACL Regional Consultants Meeting*, (Melbourne, 24 November 1983).

1785 See para 641-2.

1786 The use of the term 'defence' does not necessarily carry any implication for onus and standard of proof.

specific offences, rather than generally to all or most offences. But in another sense such a defence would be 'total' or general, in that it would entirely absolve a defendant from criminal liability. An alternative would be a 'partial defence', reducing the level of liability in specific cases (eg murder to manslaughter). These two alternatives will be called, respectively, a 'customary law defence' and a 'partial customary law defence', and will be dealt with in turn.

444. ***The Impact of a Customary' Law Defence***. In many respects a customary law defence would be the clearest a, well as the most direct way of linking criminal responsibility under the general law with Aboriginal customary law. As Brady and Morice comment:

> The true dilemma of Aboriginal versus Australian Law lies in the situation whereby an action which may conform to Aboriginal Law comes to be adjudicated upon by Australian law as an illegitimate act.[1787]

For example, where one Aborigine inflicts what is sometimes referred to as 'traditional punishment' on another in response to some 'offence' or wrongdoing under customary laws, only a customary law defence would, in most cases at least, prevent the conviction of the first Aborigine (for assault or even homicide) for an act which he may have regarded as justified, or even required.[1788] At the level of the substantive law, only a customary law defence would deal directly or completely with the dilemma to which Brady and Morice refer. It would not prevent such cases from coming before the courts, but it would enable the defendant to avoid conviction provided he showed that his conduct was justified under his customary laws.[1789] Other forms of recognition are indirect and therefore may not cover all the cases that can arise. To the extent that they rely on exercises of discretion they are, it can be argued, inherently unreliable.

445. ***Proposals for a Customary Law Defence***. There has been only limited consideration given to a customary law defence in Australia or elsewhere. The extent to which customary law is taken into account in the substantive criminal law in comparable overseas countries is very limited.[1790] The Commission is not aware of any country which has accepted a general customary law defence in the criminal law. However the following examples or proposals are relevant:

- The Laverton Royal Commission in its Report adopted as one of its recommendations:

  > Amendment to the relevant criminal statutes to make it a defence where a court is satisfied that an Aboriginal acting bona fide and in compliance with his tribal law contravenes a provision of a criminal statute, pending information being obtained on Aboriginal law and until a decision is made whether to incorporate part of that law into statutory law.[1791]

- The Preliminary Report of the South Australian Aboriginal Customary Law Committee recommended that further consideration be given to a customary law defence. The Committee suggested:

  > That in certain circumstances there be a defence of Customary Law. The question of whether, in such circumstances, it should be a complete defence, qualified defence or a factor in mitigation of penalty needs to be the subject of further detailed consideration by the Committee.[1792]

- By-law 17 of the By-laws of the Bidayadanga Aboriginal Community La Grange Incorporated, made pursuant to the Aboriginal Communities Act 1979 (WA), provides that:

  > It is a defence to a complaint of an offence against these By-laws to show that the defendant was acting under and excused by any custom of the Community.[1793]

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1787 M Brady & R Morice, *Aboriginal Adolescent Offending Behaviour. A Study of a Remote Community*, Flinders University, Western Desert Project, 1982. cf JE Newton, 'Aborigines and the Criminal Justice System' in D Biles (ed) *Crime and Justice in Australia*, Australian Institute of Criminology, Canberra, 1977, 134, 144: 'Clearly it is unjust to subject to criminal punishment in white courts an Aboriginal defendant who is ignorant of white law and who acts in accordance with the requirements of his own customary law'. As expressed, this argument is based upon ignorance of law rather than preference for Aboriginal customary laws.

1788 For examples of such cases see para 402, 430. For the inapplicability of consent as a defence to assault see para 502-3. For the difficulty of equating `traditional punishments' with punishments under the general law see para 484-6, 513.

1789 Other requirements might also have to be demonstrated to establish the defence. See eg the PNGLRC's proposal (para 408), and cf para 453.

1790 See para 404-12.

1791 *Report of Laverton Royal Commission* (Royal Commissioners: GD Clarkson, CF Bridge, EF Johnston) Perth, 1976, 212, adopting the recommendations of the Laverton Joint Study Group as accepted by the Aboriginal Affairs Co-ordinating Committee: id, 261.

1792 South Australia, Aboriginal Customary Law Committee (Chairman: Judge J Lewis) *Preliminary Report*, Adelaide, 1979, 56-7.

Four other Aboriginal communities incorporated under the Western Australian Act have by-laws in the same or similar form. Given the limited extent of the bylaws the circumstances in which By-law 17 could be relied on are also limited. However, the customary law defence in By-law 17 could be relied on, for example, where a defendant had entered upon community land (By-law 4), had engaged in fighting thereby causing a disturbance (By-law 11), or had interrupted a community or customary meeting by noise or any other disorderly behaviour (By-law 12).

- The Community Services (Aborigines) Act 1984 (Qld) provides in section 43 that an Aboriginal court shall exercise its jurisdiction having regard to 'the usages and customs of the community within its area'. The way in which this provision will work in practice is unclear; but experience with the courts so far suggests that it is unlikely to have much effect.[1794]

- A number of statutory provisions recognizing or establishing particular rights to Aboriginal land incorporate Aboriginal customary laws so as to create, in effect, a customary law defence to offences against those provisions. For example section 69 and 70 of the Aboriginal Land Rights (Northern Territory) Act 1976 (Cth) make it an offence under certain circumstances to enter upon sacred sites or Aboriginal land. In both cases, no offence is committed if the entry is 'in accordance with Aboriginal tradition'.[1795] This seems entirely appropriate given that the Act creates or recognises rights to land deriving from Aboriginal tradition.

- The Papua New Guinea Law Reform Commission has proposed a general customary law defence, which was discussed in para 408. The following features of that proposal may be recalled:

    - the defence would completely exonerate a defendant in the case of certain offences, excluding homicide, serious assault and regulatory offences

    - a partial defence (with a maximum of 3 years imprisonment) would apply to diminished responsibility killings and related serious assaults: these acts, even though fully justified by the relevant customary law, would remain offences against the general law;

    - the defence would have no application to payback or revenge killings or assaults, to which the ordinary law would continue to apply;

    - the defence would only apply to persons 'living in similar circumstances or ... subject to similar social, employment or other experience' as the members of the customary social group in question (and to which the defendant must belong).

    No action has yet been taken to implement these recommendations.

446. ***A Customary Law Defence to Specified Offences***. There is a clear distinction between a customary law defence applicable generally to offences of whatever kind, and a customary law defence to specific offences which are themselves a form of recognition of Aboriginal customary laws or of Aboriginal community authority. Examples of the latter include By-law 17 of the Bidayanga Community By-laws, or s 69(2) or 71(1) of the Aboriginal Land Rights (Northern Territory) Act 1976 (Cth).[1796] A customary law defence in such cases may be entirely appropriate. If it is sought to recognise land rights based on traditional Aboriginal occupation, it may also be appropriate to allow other persons to use the land provided their use is in accordance with or consistent with those traditions. The situation with respect to a customary law defence of a general kind, which would justify or excuse what would otherwise be a breach of the ordinary criminal

1793 By-laws dated 19 October 1979, approved by the Governor in Council, 7 February 1980. See para 747-758 for description of 1979 Act and its operation.

1794 There was no equivalent provision in the now repealed Aborigines Act 1971 (Qld) although reg 20 made pursuant to that Act provided that the Council was charged with the 'good rule and government' of the reserve 'in accordance with Aboriginal customs and practices and shall have the power to make By-laws for such good rule and government and to cause all By-laws lawfully made by it to be observed and enforced'. Aboriginal courts on reserves were given responsibility for enforcing the by-laws but none of these, with the exception of a prohibition on sorcery (ch 24.1), could be said to be based on Aboriginal customs or traditions. For discussion of the Aboriginal Courts see para 723-746.

1795 Aboriginal Land Rights (Northern Territory) Act 1976 (Cth), s 69(2), 71(1) (but subject to s 72(2)). See para 200.

1796 See para 445.

law', raises different, and much more difficult questions. For example, would such a defence apply in cases of homicide?

447. ***Exoneration under a Customary Law Defence in Cases of Homicide***. The question of tribal killing or execution was referred to in Chapter 10.[1797] The Commission's conclusion was that such killings (and related life-threatening assaults) cannot be justified, let alone authorised. It follows that a customary law defence should not be available in such cases. To provide such a defence would involve the general law in specifically endorsing or licensing customary law' actions such as payback killings. The Commission has already concluded that this ought not to occur. Sufficient account could be taken of the customary law aspects of such cases through a partial defence (reducing murder to manslaughter) and in sentencing.[1798]

448. ***Arguments for a Customary Law Defence in Other Cases***. The question of a complete defence was however raised' in a few submissions to the Commission, in the context of the 'lesser offences' covered by the Papua New Guinea Law Reform Commission's proposals. Much of the discussion has related to 'spearing' and similar responses (ie to 'traditional punishment[1799]) but in the form proposed by the Papua New Guinea Law Reform Commission the defence would also apply to charges such as

- non-aggravated assault;
- rape not involving the infliction of serious bodily harm:
- entry to land; and
- abduction not involving the infliction of serious bodily harm.

It has not been expressly argued before the Commission that a customary law defence of such breadth should be introduced. However the more limited argument, that such a defence should apply in cases of 'traditional punishments' such as spearing, has been made:

> It is submitted ... that since there is considerable evidence that spearing continues to be used either as a threat or in reality as a means of resolving disputes then provision ought to be made for such continuation by creating customary law defences by amendment to the relative federal and State statutes. Alternatively, it is open to those administering justice to ignore the existence of customary acts amounting to breaches of the criminal law by 'looking the other way'. In the view of the writer, such an approach would be, at most, a dishonest one, and at least, one with which the Crown ought to have no association. Essentially, this submission amounts to one in which it is urged that legislation be passed to create the defence of customary law in appropriate cases ...[1800]

Such a defence would, it can be argued, be both the most honest and the most direct way of taking Aboriginal customary laws into account in criminal cases, and of acknowledging the conflict of obligations

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1797 See para 179-80, 184, 192.

1798 See further para 516-522. But C McDonald argued for an unlimited customary law defence: *Submission 398* (20 February 1984).

1799 cf para 444, 505-7.

1800 Judge J Lewis, *Submission 271* (5 May 1981) 6. The writer continued:

> Creation of the Defence of customary law to offences against the law of Australia and South Australia, will inevitably give rise to arguments by many that to have such defences is to engage in legal pluralism or to create a repugnancy of laws, or that there is a sovereign state created in by the Pitjantjatjara areas. It seems to me that these arguments are unilateral and that the arguments can only serve to bring about the state of affairs which will be profound in its accelerating the disappearance of the Pitjantjatjara Culture and that the conclusions as a basis for discussion in DP 17 do not come to terms with the real problems where a group of people are steadfast in their resolve to continue to use spearing and physical punishment as a means of resolving disputes. (id, 8.)

The question of a customary law defence in some form was raised in a number of other submissions. Thus HA Wallwork suggested that there should be:

> a statutory right to take the Aboriginal law into account when deciding the guilt or punishment of the Aboriginal person. A body of case law would then grow up which could be referred to by subsequent courts for guidance.

*Submission 35* (22 July 1977) 1. In the opinion of the Tasmanian Aboriginal Centre:

> The only real basis for not allowing duress as a defence (whether full or qualified) [in cases of the influence of customary law beliefs] can only be the expressed wishes of the Aboriginal community in question.

*Submission 237* (10 April 1981) 11. T Pauling SM expressed the view that 'the Papua New Guinea recommendation (or a customary law defence) should be adopted for the one or two cases that might arise Territory-wide each year': *Submission 140* (9 November 1979) 4. MW Daunton-Fear & A Freiberg do not expressly argue for a customary law defence, although they do state that 'modifications should be made to those rules of substantive law which seer to impose on [traditional Aborigines] characteristically European concepts', a reference, apparently, to ethnocentric judgments based on 'reasonableness' rather than to a general customary defence: see '"Gum-tree" Justice: Aborigines and the Courts', in D Chappell & P Wilson (ed) *The Australian Criminal Justice System*, 2nd edn, Law Book Co, Sydney, 1977, 45, 78-80, 96, 99. On the other hand, a number of submissions argued for procedural rather than substantive reform to take into account these conflicts of rules: see para 471, 485-88, 543.

that can occur. It would also help to ensure consistency in the application of the general law. A major defect of existing informal procedures of recognition (eg non-prosecution) is the danger that they can be applied arbitrarily or selectively. or varied by executive or police decision without notice. A formal defence would help to avoid these dangers.

449. ***Arguments Against a Customary Law Defence***. There are, however, a number of difficulties in the way of a customary law defence of this kind:

- *Few cases in practice*: The defence would only apply in cases where the violation of the general law was specifically legitimised by customary law. In practice, such cases rarely come before a court. It is even rarer for defendants to be actually penalised in cases where a customary law defence would apply.[1801] If the present system (with perhaps some modification or reinforcement) can deal adequately with these cases, it can be argued that a controversial and complex amendment, the effects of which in practice would be uncertain, should be avoided.

- *Translating customary, law into a defence*: The notion of a 'defence' does not fit very well with the operation of an informal customary law system. Payback or punishment can itself lead to further acts of payback or punishment, if the former are excessive or if the other side wishes to prolong the matter. Traditional ways of resolving disputes are finely balanced mechanisms for the resolution of conflict through threats or demonstrations of limited violence. While for more serious offences actual violence may occur, argument and discussion (often heated and angry) are used to settle disputes. Discussions may go on at intervals for weeks or even longer. Traditional methods of resolving disputes seek — not always successfully — to maintain social cohesion within the community. It is unlikely that a strictly formulated defence would come close to corresponding with or 'fitting' this reality. Procedural mechanisms may be a more appropriate way of dealing with such cases, as a number of submissions have pointed out.[1802]

- *Reducing protection to victims*: A customary law defence might also have the effect of depriving persons — including Aboriginal victims of assaults — of legal protection.[1803] The 'equal protection' implications of a customary law defence were referred to in Chapters 9 and 17.[1804] A customary law defence which absolved a defendant from liability entirely would affect the level of legal protection afforded to victims and thus run counter to notions of equal protection.

- *Exposure of Aboriginal traditions*: Another problem is that a customary law defence would tend to require a searching analysis, definition and testing of the relevant customary laws by the courts. Putting customary laws under the microscope in this manner risks several negative consequences. It detracts from the continuing flexibility of customary laws and from Aboriginal control over their laws and traditions. Aborigines have commented on the risks and dangers involved in revealing aspects of Aboriginal law or tradition in the courts.[1805] A less searching or intrusive examination is necessary at the sentencing or procedural levels.

450. ***The Commission's Conclusion***. The Commission concludes that a general customary law defence[1806] is not desirable even in cases falling short of homicide, and that the problem of the conflicts between the two laws in serious cases of this kind is better dealt with in other ways. This is consistent with Eggleston's view:

> Even though it might be unjust to individual Aborigines to punish them for killings, especially in the early days of contact, the conviction may be justifiable ... The harshness and injustice can be modified by imposing lenient sentences. Today, when considerable modification of tribal custom has already occurred, it seems a retrograde step in most cases to make tribal law an absolute defence to a charge of murder, though it should mitigate punishment and could possibly be made the basis for reducing the charge to manslaughter.[1807]

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1801 cf *R v Claude, Raymond and Andy Mamarika* (unreported, NT Supreme Court (Nader J) 17-19 August 1982); *R v Charlie Gimbiari Jagamara* (unreported, NT Supreme Court (Muirhead J) 28 May 1984). See also para 497-8.

1802 See para 471.

1803 In practice women are often the victims of domestic violence which has, or is said to have, customary aspects. See para 394, 399, 497-8.

1804 See para 162, 165, 401, 411.

1805 P Dodson, ALRC, *Notes of ACL Regional Consultants Meeting* (Melbourne, 24 November 1983) 8; ACL *Field Report* 8, 20.

1806 As distinct from a defence to specified offences which are themselves a form of recognition of local customary laws or community authority: see para 446.

1807 Eggleston, 300.

## A Partial Customary Law Defence

451. ***Diminished Responsibility under Aboriginal Customary Laws: A Partial Defence?*** Even if a customary law defence, entirely absolving a defendant from criminal liability, is rejected, it can be argued that compliance with Aboriginal customary law should be regarded at least as a partial defence, similar to diminished responsibility, with the effect of reducing what would otherwise be murder to manslaughter. A partial customary law defence would not be subject to a number of the criticisms made of a general defence. It would not deprive potential victims of legal protection or of the right to redress in the same way as a general defence would tend to do. It would not involve an endorsement of payback killings or woundings, but would be an acknowledgment of the direct conflict of laws and allegiances that can occur. A partial defence goes as much to mitigation of punishment as to substantive criminal liability. Given that, except in New South Wales, sentencing discretions are not at present available in murder cases,[1808] the situation is that judges are not able to reflect any reduced degree of culpability in sentencing where Aboriginal customary laws have been a key factor in an offence. Thus a partial defence would be an adjunct to existing sentencing discretions, and it would also involve the jury as representatives of the general community.[1809] It would make that discretion available (as it may not be now) in cases which would otherwise be classified as 'murder'.

452. ***Contrary Arguments***. There are significant differences, then, between a partial defence and the general customary law defence already rejected. But some at least of the arguments outlined in paragraph 449 tell against even a partial defence. For example, proving the requirements for the defence would still be difficult, and might bring unwelcome scrutiny onto the local community's traditions and laws. A partial defence would not apply in many cases, since relatively few homicides involving customary laws result in a verdict of guilty of murder.[1810] On the other hand, such a partial defence would be most relevant in cases of deliberate homicide, the very situation where, it has been concluded, there is least justification for allowing customary law processes to operate.[1811] In all other cases the same result can be achieved, in a less formal way, through the use of discretions. It can be argued that the law must set its face, at the level of responsibility, against all forms of killing and life-endangering assaults, and that in all other cases a sentencing discretion is available to take into account the absence of subjective criminality.[1812]

453. ***Conclusion: A Partial Defence***. A general sentencing discretion exercisable in all cases would substantially reduce the need for partial defences which were originally introduced to circumvent mandatory sentences for murder.[1813] But partial defences are an established part of the criminal law, which regulate degrees of culpability in homicide and guide judicial discretion in sentencing. Reliance on existing procedural discretions is not sufficient. Sentencing discretions should be available in all cases involving Aboriginal customary laws, and creating a partial defence would have the effect of activating existing sentencing discretions in all Australian jurisdictions.[1814] Such a partial defence would also constitute a more direct and explicit recognition of Aboriginal customary laws. Given the acknowledged difficulties Aborigines experience with the criminal justice system[1815] this is an important and, in the Commission's view, the decisive, consideration.[1816] A partial customary law defence should be created, similar to diminished responsibility, reducing murder to manslaughter. It should be provided that, where the accused is found to have done an act that caused the death of the victim in the well-founded belief that the customary laws of an Aboriginal community to which the accused belonged required that he do the act, the accused should be liable to be convicted for manslaughter rather than murder. Thus it must be shown (the onus being on the accused on the balance of probabilities) that the accused's belief actuated his conduct, (ie that he was not acting for some extraneous motive using Aboriginal customary laws as an excuse), and that the belief in question was well-founded in the customary laws of the community.[1817] It can be argued that the former

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1808 See para 519-522. The NSW discretion is only available in limited cases.

1809 This assumes that juries can or should act in this capacity in the trial of traditional Aboriginal defendants. See para 586-95 for discussion of the role of juries.

1810 See para 497.

1811 See para 447.

1812 For the suggestions that the Criminal Code 1983 (NT) s 41 defence of coercion may have this effect see para 430 n 83.

1813 S Bell, 'Diminished Responsibility Reconsidered' [1982] *Crim L Rev* 809.

1814 See para 520-22.

1815 See para 394-400.

1816 In ALRC DP 20 (1984) para 25 the Commission tentatively suggested a partial defence along these lines. This approach was supported in a number of submissions: Sir William Kearney, *Submission 411* (1 May 1985); AJ Murray, *Submission 455* (28 May 1984). On the other hand the National Police Working Party did not favour any form of a customary law defence: *Submission 459* (18 September 1984).

1817 The PNGLRC recommendation (para 408) requires not only that the accused have acted in accordance with 'the customary law and traditional perceptions of the customary social group to which he belongs', but that the customary law should have been followed by a

requirement only is sufficient (as it is with the defence of bona fide claim of right[1818]), and that to require the belief to be well-founded as well as honest is too strict a test. But, in the Commission's view, provided at least that purely subjective factors can be taken into account in sentencing,[1819] an objective element is also required. If concessions are to be made at the level of criminal liability to the customary laws of Aboriginal communities the accused should be required to have acted in accordance with those laws as they are. Aboriginal groups have consistently expressed the view to the Commission that they should have some independent voice in the outcome of the criminal justice process, where Aborigines are tried and Aboriginal customary laws or community values are relied on as mitigating factors.[1820] A requirement that the defendant's belief be well founded in the customary laws of the community is more consistent with this view.

'significant number' of that group (in the case of diminished responsibility killings) or a 'number' of them (in the case of general defences). It does not require that the victim have been a member of that group, or have accepted its custom, and it pays no attention to the victim's 'customary law and traditional perceptions and beliefs'.

1818 See para 434.

1819 See para 516-7, 522.

1820 See para 195, 414, 448 n 149, 455-8, 510, 524, 531, 712.

# 19.Aboriginal Customary Law Offences

## Aboriginal Customary Law as a Ground of Criminal Liability

454. ***Special Customary Offences***. The creation of special customary law offences is one way to underwrite and reinforce customary laws within Aboriginal communities. Such offences could be additional or alternative to offences against the general criminal law, and would fall (in the absence of special provision to the contrary) within the jurisdiction of existing courts. The Commission received a number of submissions from Aboriginal communities seeking the assistance of the general legal system to support their customary laws. This was often described as a way of making the two systems work together. Some of the submissions went to considerable detail, and appeared to involve a form of codification of the customary laws of the community presenting them, although there were differing perceptions of how such laws would be enforced. Some submissions were based on the assumption that power would be given to the community to deal with encroachments, for example through the creation of some kind of Aboriginal court to enforce local by-laws. Others assumed that the ordinary courts would hear charges for breaches of the codified customary laws as they would hear breaches of any other law. The former question will be discussed in Part VI of this Report: only the latter question is dealt with here.

455. ***The Lajamanu Submission***. The most extensive submission involving a form of codification of customary law along with elements of the general criminal law was presented by the Lajamanu Community (NT) at a Public Meeting on Alice Springs on 13 April 1981.[1821] It was in the following form:

> 1. Makurnta and Makurnatawangu skin group — (Jupurrula * Japanangka)
>
> 2. *Example*
> Jupurrula would call Japanangka Makurnta and again Jupurrula could call Jangala Makurntawangu.
>
> 3. Our custom to share goods with one another. We would not like to see spearing or killing or as we say (pay-back). Would like to see heavy fine or imprisonment.
>
> 4. Wrong marriages. We would like to see law against it. If law was broken in wrong marriages we would like to see it in white roans court for heavy fine or imprisonment or pay compensation for the straight one.
>
> 5. Promise systems must be fulfilled. If broken, compensation must be paid to the man who the parents promised their daughter (for straight one).
>
> 6. *Customary Law*. Right brother-in-law must make initiation ceremony for his little brother-in-law. It must be the right ngumparria.
>
> 7. If a child do wrong, mother or father and uncle or big brother in skin system must punish the child (boy or girl) by hitting him or her straight away the wrong's been done. If not carried out this way we would like to see mother and father pay compensation.
>
> 8. All ceremonies must be performed in soberly manner (with sober people). If drunken people on site, will be dealt with by law (fine or imprisonment).
>
> 9. If another man takes another man's wife that man must return the woman back to her rightful husband and charged under white marts laws (heavy fine or imprisonment). If that man is married and plays around with another man's wife he must square himself with the wife to the man he's doing wrong to through the Aboriginal Court and pay compensation to that woman's husband.
>
> 10. Wrong skin system of marriage. Their children should follow their mother's side of skin group or family.
>
> 11. If widow woman wants to marry again she must get permission from her son-in-law first and then from her late husband's brothers and there should be an agreement within close relatives, if there is no agreement then the widow should not marry again, but should be dealt with through the Court.
>
> 12. If there is a kaminingi between 2 groups or 2 men this must be dealt with through the Court. Example' If Jupurrula doesn't want Napangardi to marry Jampijimpa, Janamarra or Japaljarri, this means kaminingi.

1821 M Luther, *Transcript of Public Hearings* Alice Springs (13 April 1981) 1281-1300.

13. Any tribal man must dance and practice his own dreaming and his heritage.

14. Any person caught destroying or stealing sacred objects will be charged through the court or imprisonment.

15. If a woman goes through man's sacred grounds she must (go walkabout through the bush) heavy fine or imprisonment.

16. If a man kills someone in family or another group, should take imprisonment for 15 to 20 years.

17. If a man make avoiding cousins through initiation of a little boy, he then mustn't make love to the little boy's sister, if he does he should pay heavy fine or imprisonment.

18. We want rape charges to be enforced by the law of Australia.

19. If man and woman makes trouble during ceremonies, they should pay compensation, heavy fine or imprisonment.

20. Mother-in law can take her son-in-law to court if promise system not working.

21. Sorry cuts not allowed and that to be enforced. That goes for man or woman.

22. Anyone threatening anyone, the matter will have to be settled in Court, pay compensation or imprisonment.

23. *Aboriginal Law*. When woman dances with fire sticks in her hand in the ceremony of a boy that makes her an in-law to the boy and she will then promise her daughter to him.

24. If a young man plays around with his elder brothers promised wife, he then cannot be accepted by his elder brother in tribal business which concerning them both.

25. No widow should go walkabout.

26. There is no law to call anybody names especially sister.

This is a comprehensive attempt to work out different ways in which the general law and Aboriginal customary laws should interact. It concentrates on aspects of customary laws which cause problems in the community as well as on general law and order problems. Clearly it is based on the notion of the community either having its own court to deal with such matters, or at least having some direct input into the general court system. The established Aboriginal Council at Lajamanu might also be involved in the establishment of any such schemes.

456. ***The Mornington Island Submission***. A submission from the Mornington Island Community (Qld) sought the power to deal with a broad range of customary law matters as well as general law and order offences. It was envisaged that an Aboriginal court run by the community would have responsibility for enforcing these laws:

CRIMES THAT THE ELDERS WISH TO PUNISH PEOPLE FOR

*Children's crimes*
- vandalism
- damaging property
- stealing
- cruelty to animals
- not attending school

*Violent crimes*
- causing injury
- killing a person
- murdering a person

*Crimes to do with people's property and public property*
- stealing
- damaging property
- breaking & entering
- entering somebody's house or yard without permission or good reason

*Otherwise causing harm to people*

- threatening
- insulting
- spreading lies and gossip that may cause harm to someone

*Crimes to do with magic and pooripoori business*

- people are not to bring anything from the mainland to make pooripoori or make sorcery (like stones)
- young men must not wear red headbands or rags

*Crimes to do with keeping the peace*

- swearing
- fighting
- making a loud noise that will make other people in the community unhappy

*Land laws to be kept*

- anybody catching turtle or dugong must give the correct pieces of meat to the local toolmata
- anybody who wishes to get water lilies, panja, wotut, bana, pandanus nuts, must get permission from the local toolmata

*Laws to do with food taboos*

- a person cannot eat an animal, fruit, or vegetables if it is their own totem
- pregnant women and young women must eat the right foods as directed by the elders

*Crimes to do with looraka*

- new looraka men not to have sex until cleared by elders
- new looraka men to eat the right foods as instructed by the elders

*Crimes to do with looraka*

- new looraka men not to drink beer or alcoholic drinks except under the supervision of the elders
- bark parcels must be looked after by the correct relatives
- only men who have been through looraka are allowed to go near the koordu-koordu ground
- looraka men must show respect for any women who danced for them in the ceremony
- looraka men must not use their name in vain. It is forbidden to escape from personal responsibilities or misbehave in any way by saying 'I'm a man now, you can't stop me'.
- Young men who come out of high school for the looraka ceremony must go back to high school for a time after the ceremony

*Family laws*

- Parents and other responsible relatives (grandparents, uncles, aunts, especially on mother's side), must look after their children properly. This includes (a) keeping them out of trouble; (b) punishing them when they get into trouble; (c) sending them to school; (d) feeding them good foods; (e) spending government cheques on things needed for the children. Note:- in the case of someone who continues not to look after their children, or in the case of a child who doesn't have parents on Mornington Island, then the closest responsible relative must look after the child. All government cheque money (child endowment, supporting mother's benefit, family allowance) must be handed over to that relative by the guilty parent/s.
- Young people must not have sex, or live together as man and wife, unless they are straight skin for one another, and both of their families have agreed. Otherwise no person should try to tempt a partner for sex, nor carry out sexual relations.
- If a child is making trouble, parents and other relatives must step in as soon as possible to stop the child.
- If a woman gives birth to a baby, her brother must not visit her until elders give permission.
- Parents, grandparents, uncles and aunts who are responsible for children who commit crimes can be punished also.

NB All these laws will apply to Mornington Island people when they are on the mainland. People committing crime, there will be punished when they return.

PUNISHMENT THAT THE ELDERS WISH TO USE

- fining people for money
- crossing people off the beer canteen list
- making people do council work
- making people work on a community farm to be started a long way up the island
- men might be sent to Forsyth Island for a period of time
- people might be sent to the mainland for a period of time
- young men may have to defend themselves with a fighting stick against an elder (but no blows will be delivered to the body)
- people may have to give gifts or payment, or do work for persons who suffer, because of their crimes
- people will be sent to the Mornington Island jail
- people will be sent to a mainland jail.[1822]

1822 For discussion of these proposals see *Transcript*, Mornington Island (24 April 1981) 1720-87.

Some aspects of the Mornington Island proposal could be incorporated relatively easily into the Aboriginal court system operating on Aboriginal trust areas (formerly reserves) in Queensland. Mornington Island had such a court until its status changed from a reserve to a local government shire in 1978.[1823] One innovation of the Mornington Island proposal relates to the incorporation into local community laws (equivalent to the by-laws in trust areas) of aspects of local customary laws. The Mornington Island Community Council is in the process of drafting local by-laws, but it remains to be seen whether they will incorporate any aspects of local customary laws.[1824]

457. ***The Roper River Submission***. In contrast to this proposal, members of the Roper River community (NT) in discussion with the Commission sought a broader interaction of the two laws but were less specific about customary law matters. A number of ways in which 'European law should recognise breaches of traditional law' were suggested; but in addition administrative arrangements to improve the way in which the general legal system impinges upon Aborigines were also suggested. The following resolutions were presented on behalf of the Roper River community to the Commission's Public Meeting in Darwin on 3 April 1981.[1825]

> *RESOLUTIONS PASSED BY THE TRIBAL ELDERS OF ROPER RIVER*
>
> DRINKING OF ALCOHOL
> This is a matter for white persons law. If a person brings alcohol into Roper River without a permit then this matter can be properly handled by white persons law. However, if a person breaks traditional law by say drinking alcohol and walking into a sacred ceremony whilst under-the influence of alcohol he should be first punished by the elders. The European legal system should recognise the right of the elders to punish such persons, even by physical punishment, including spearing in the leg, if necessary. We believe that there should be a Registry set up under European Law recognising the rights of tribal elders to traditionally punish persons who offend our Sacred Law. If necessary our tribal elders can then refer the offender to the police to be dealt with under European Law if such action is appropriate.
>
> MARRIAGE
> If a person steals someone who is promised to another person in marriage, or if a person goes with a person of a different skin group, they should also be punished in our traditional way by the elders, and if necessary by physical punishment. We would also like traditional marriages to be recognised under European Law and for wives and husbands to have the rights and obligations which come from this recognition of traditional marriages. If at any time this recognition of traditional marriages, under European Law, creates conflict to our traditional culture, then these conflicts must be resolved by a meeting of our elders.
>
> SECRET AND SACRED LAWS
> If a young person breaks our law and has no respect for our law then he must pay compensation to the Master of Ceremonies and then if necessary, the Master of Ceremonies can pass this compensation on to the elders, at their direction.
>
> The compensation normally takes the form of compensation in money ($500.00) or kind (spears, boomerangs). Sometimes persons placed a Sacred Taboo on a shop and this prevents people from getting food from the shop. This is the wrong thing to do and is against our law. The person who makes the Sacred Taboo must pay compensation. If he refuses to pay this compensation he should be placed in gaol. Thus is such a situation the European Law should recognise breaches of traditional law as 'being punishable by European punishment. These laws should apply to both men and women.
>
> POST MORTEMS
> Sometimes people die and nobody knows the reason. It could be because of a pay back or perhaps the person dies of natural causes. Whatever the reason for the death the cause of death should be passed on by the European Doctor to the tribal Elders in the strictest of confidence. The Elders can then decide on the appropriate action in dealing with this information.
>
> POLICE ON SACRED SITES
> We do not believe that Police should be allowed to visit sacred areas, particularly during ceremonies. If they have to see someone they should first send a tracker down. They should have to pay compensation if they breach this law and if necessary, be punished in the white courts.

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1823 See para 740.
1824 See para 726.
1825 These resolutions were discussed during the Commission's Public Hearings: *Transcript* Darwin (3 April 1981) 884-90, 901-15, 961-76, 986-90.

458. ***Yirrkala Proposals***. The Garma (Law) Council of the Yirrkala Community also provided the Commission with a set of agreed rules to be followed by all members of the community and by visitors.

> *General rules about how to behave*
> 1. (a) It is wrong to do anything which will or could injure another person.
> (b) It is wrong to take or damage anything which belongs to somebody else.
> (c) It is wrong to go where other people have a right to be by themselves.
> (d) It is wrong to do anything which will cause great noise or violence and will make other members of the community frightened or unhappy.
> (e) It is wrong to behave outside the community in a way which will offend members of other communities or will cause trouble with them.
> (f) It is wrong to do anything forbidden by Aboriginal Law and tradition or to do anything which will make that Law weak.
> (g) It is wrong not to do those things which by Aboriginal law or tradition should be done.
> (h) It is wrong to do anything forbidden by Balanda law.
> 2. If a member of the community does any of these wrong things he or she may be punished by the community.[1826]

459. ***The Groote Eylandt Aboriginal Task Force Report***. The Task Force was asked to investigate among other things 'the means by which traditional customary law can be strengthened to deal with problems' on Groote Eylandt. The Task Force considered that the complexities of this issue required 'time and expertise ... beyond the existing available resources of the Task Force'. It therefore recommended that:

> The Australian Law Reform Commission be requested to undertake an investigation into the incorporation of Groote Eylandt Customary Laws within the judicial system presently operating in Groote Eylandt in close consultation with the leaders of the Aboriginal Communities.[1827]

Commission staff returned to Groote Eylandt for a third time in October 1985 and discussed this recommendation with members of the Task Force and others. There appeared to be few customary laws which the people of Groote Eylandt wanted the visiting magistrate to deal with. However the question whether a by-law should be made under the Community Government Act (NT) on one particular matter was raised. No clear view was expressed as to whether such a by-law should be made, or whether the matter was best dealt with in other ways. The Commission also received strong requests for the magistrates courts to take greater account of the views of the community, particularly in sentencing, and for hearings to take place within the communities rather than at Alyangula. There seemed to be considerable local support for the scheme operating at Galiwin'ku, and for its extension to Groote Eylandt. These matters are discussed in Part VI of this Report.[1828]

460. ***Alternative Courses of Action***. Proposals such as these clearly indicate the reality of Aboriginal customary laws in the communities in question. They manifest a real concern to work out ways of reconciling the conflict between customary laws and the general legal system. The proposals would not involve the exclusion of the general legal system; rather they seek to work out in some detail the interplay between local customary laws and the general criminal law. The submissions illustrate the wide range of customary matters that could potentially be incorporated as offences under the general legal system. The submissions all involve some form of codification, although there is no agreement on how this should be done, or how the laws should be enforced. Some communities expressed the view that they should enforce the laws themselves, others preferred the matters to be dealt with by the general courts. The resolutions passed by the tribal elders at Roper River treat some matters as falling within 'white person's law', other matters as customary matters which should be recognised by the general legal system, and yet others which can be resolved by simple administrative changes. There is no clear indication whether the laws should apply only to members of the local community, though there may be no reason why they should not apply to outsiders, at least in some cases. Nor was there any consensus on whether penalties should be restricted to the range of punishments under the general law or whether special customary punishments should be available. The common element is that Aboriginal communities have customary laws which they seek to have observed and enforced, and they consider the general law should assist in this process. There are several ways that this may be achieved:

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1826 HC Coombs, *Submission 114* (2 January 1979), *Submission 157* (28 May 1980). The term 'balanda' means 'white' or 'non-Aboriginal. The Yirrkala scheme is dealt with in detail in para 707-712, 820-832.

1827 Groote Eylandt Aboriginal Task Force, *Report*, 1985, 20. See also C McDonald, *Submission 130* (28 August 1979) 26.

1828 On the NT community government scheme see para 760. On local by-law powers see para 809-11. For the Galiwin'ku project see para 764.

- the incorporation of special customary offences;
- increased use of existing general laws, together with special measures of protection in specific instances; and
- the exercise of by-law powers.

These three options will be examined in turn. They do not, of course, preclude forms of administrative recognition. The sensitive handling at the administrative level of issues which touch on customary law matters may go a long way to meeting many of the requests for recognition. Examples of such requests that may be able to be met administratively include requests:

- that bodies be returned to communities for burial;
- that post-mortems interfere as little as possible with customary funeral rites;[1829]
- that the practice of vacating houses following death not be interfered with;[1830]
- that Aboriginal people themselves not be required to fill in the names of dead people in death certificates, funeral notices and the like;[1831]
- that exemptions be made to the requirement of a birth certificate where none was in fact issued;[1832] and
- that where possible Aboriginal women who wish to give birth within the community be allowed to do so.

The remainder of this Chapter examines options for legal (as opposed to administrative) incorporation of customary laws.

## The Commission's Approach

461. ***Customary Laws as a Basis for Criminal Liability***. There are a number of dangers in making customary law matters, such as those raised in the submissions summarised earlier, grounds for substantive criminal liability. Many Aborigines in the course of the Commission's consultations expressed fears that such incorporation would deprive them of control over their law, which they perceive as more a way of life and of resolving conflict than an external body of rules.[1833] Furthermore it is clear that each community is likely to have very different laws, with the result that no general set of rules or prescriptions could be agreed on:

> Should a code of substantive rules be favoured. however. it would be necessary to ask oneself whether it is reasonable to expect a community to produce a list of rules governing the entirety of the conduct of members together with an indication of how to weigh them against each other in cases of conflict between members who were invoking different rules ... Our knowledge of present realities is insufficient to provide the necessary information and too large a research effort would be needed to provide it ... Actions forbidden in some communities are permitted in others. Acceptance of one or other of these possibilities would, furthermore, freeze customary law at an arbitrary point in time unless provisions were made for future changes in the rules. If rules of change were provided, they would presumably operate rather rigidly. since all the communities would have to be kept in line with each other irrespective of developments in each ...[1834]

But it is not just that codification of customary laws is difficult or impractical. In the Commission's view, it would be undesirable in principle for the general legal system to seek to codify those laws.[1835] The Lajamanu

1829 See F Yunkaporta, *Transcript*, Aurukun (30 April 1981) 2073; ALRC, ACL *Field Report 9 Northern Queensland* (1984) 4-5; 18.
1830 See para 329-30, J Bucknall, *Transcript*, Pt Hedland (24 March 1981) 423, B Nuakyunkwokka, *Transcript*, Aurukun (29 April 1981) 2011-2.
1831 It should be possible for non Aboriginal personnel to fulfil this task where necessary. SN Vose, *Transcript*, Pt Hedland (24 March 1981) 394-5.
1832 See J Bucknall, *Transcript*, Strelley (23 March 1981) 315. For recognition of traditional marriages in the context see para 271.
1833 See eg ALRC ACL *Field Report 7, Central Australia* (1982) 22, 24, 27; ALRC ACL *Field Report 9, Northern Queensland* (1984) 18.
1834 K Maddock, *Submission 11* (31 October 1977) 22-3.
1835 See para 200, 623 for a discussion of the arguments against codification. This view was also supported by the Department of Aboriginal Affairs, *Submission 315* (21 January 1982) 2.

proposal presents this kind of risk: if such laws were to be enacted or formalised they would to that extent be removed from Aboriginal control, and the flexibility which is a fundamental feature of their operation would disappear, especially if such laws were to be enforced by the general legal system rather than by Aborigines themselves either through some form of Aboriginal court or unofficially. It would also be difficult to establish the mechanisms needed to enforce, for example, the compensation provisions sought in the Roper River proposal. For reasons already given, it is unlikely that the wishes of some elders to use certain customary punishments could be given recognition by the general law.[1836]

462. ***The Preferred Approach***. For these reasons the Commission does not support the general codification of Aboriginal customary laws or its direct enforcement by the ordinary courts. However, it may be that in particular cases the 'incorporation' of Aboriginal customary laws as the basis for a particular offence is desirable. Consistently with the views reported in the last paragraph, Aborigines themselves, in discussions with the Commission, saw this as necessary in some cases, principally to protect their traditions, rules and sites from outside invasion or violation; that is, as a method of enforcement against outsiders, rather than as a reinforcement of customary law within their communities. To some extent this occurs now, in provisions protecting Aboriginal land and sacred sites, such as the Aboriginal Land Rights (Northern Territory) Act 1976 (Cth). The Aboriginal and Torres Strait Islander Heritage (Interim Protection) Act 1984 (Cth) is another example of this approach. Where there are problems that require more than an administrative response, it is therefore necessary to ask three questions:

- whether the matter can be adequately dealt with by the community under any bylaw making powers, and whether any amendment or extension of these powers is needed;

- whether resort can or should be made to existing provisions under the general legal system; and finally

- whether some additional specific measures of protection may be required.

463. ***Use of Local By-law Making Powers***. There is potential in several States for infringements of Aboriginal customary laws to be dealt with by the Aboriginal community concerned under by-law making powers. Legislation in both Western Australia and Queensland provides for the making of by-laws as part of the machinery for local self government.[1837] The Community Government Act also enables some Aboriginal communities in the Northern Territory to make their own by-laws.[1838] These by-laws may allow Aboriginal customary laws to be applied in certain cases in the ordinary courts. There is also scope for customary laws to be invoked in the settling of disputes under community justice schemes that do not make use of the ordinary courts. For example, the Mornington Island proposal supported local by-laws incorporating aspects of customary law, enforced by a local Aboriginal court, although effective power to bring about changes to the by-laws would need to be provided. These matters are dealt with in some detail in Part VI of this Report.

464. ***Use of Existing Laws***. Public order offences have quite often been directed against Aborigines for trivial breaches of decorum or public order.[1839] But they have also been used on occasions to support Aboriginal concepts of decorum and public order. For example in *Police v Charlie Ngalmi*,[1840] the defendant was charged with several offences including offensive behaviour. The basis of this charge was that the defendant while drunk had called out a dead person's name at Angurugu, an Aboriginal settlement on Groote Eylandt. Calling out the names of dead persons in such circumstances is a violation of Aboriginal customary laws and may be extremely offensive.[1841] The magistrate, after hearing evidence of the offence and its impact on the community, convicted and cautioned the defendant; on a related offence he imposed an 18 month good behaviour bond. He took into account an informal fine of $110 apparently levied by the Council. The use of public order offences in this way may well be appropriate to assist in deterring conduct which may be highly disruptive. There is little doubt that a person who uses language which he knows or suspects will be regarded as highly offensive by the local community may be guilty of 'offensive behaviour' or similar offences. As Justice McCullough pointed out in another context:

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1836 See para 442-50, 512-515.
1837 See para 463, 727, 748-755.
1838 See para 760-3. The scheme so far applies to 3 communities.
1839 See para 394-395.
1840 Unreported, NT Court of Summary Jurisdiction, 13 June 1979 (Mr G Galvin CSM). The Commission has been told of other such cases.
1841 See eg TI Pauling, *Submission 27* (June 1977).

> Where the defendant is addressing an audience which he knows has special susceptibilities, a breach of the peace may be the natural and probable result of behaviour which would not provoke an audience not having this susceptibility in such a way.[1842]

While use of general provisions and powers in these sorts of ways may be helpful, it is not without its pitfalls. For example, what the general law regards as a trivial matter may be regarded as a serious violation of Aboriginal customary laws. This problem can be dealt with to some extent by the use of sentencing discretions, assuming that evidence of the community's view, and of the disruptive effects of the offence, is available.[1843] But the range of penalties available may be quite inappropriate, so that attempts at reinforcing Aboriginal tradition may risk trivializing it.[1844] This underlines the need for care and restraint in this area: nonetheless the use of existing public order offences where breaches of customary laws create community disruption and tensions may well be appropriate in some cases.[1845]

465. ***Need for Additional Specific Measures***. The matters raised in the submissions set out in para 455-459 cover the following broad areas.

- *Public order offences* (eg making unnecessary noise, damage to property). Almost invariably these offences can be dealt with under existing general law offences. In Western Australia and Queensland, Aboriginal communities can also make such matters the subject of local by-laws.[1846]

- *More serious criminal offences* (eg murder, rape). General law offences already cover these matters. The Commission addresses the role of customary laws in relation to these offences elsewhere in this Part.[1847]

- *Reinforcement of customary laws securing the maintenance of social relationships* (eg correct marriages, avoidance laws, appropriate customary distribution of food). These are more properly the province of the individual Aboriginal local concerned and should be dealt with by the community itself (unofficially or possibly through community justice mechanisms).[1848] The underwriting of these rules by the general law would usually be of limited assistance in maintaining them, and might even be counter-productive. However, it may be that the general law can assist Aboriginal communities in ways other than by underwriting the customary rules. For example, the Commission's recommendations for the functional recognition of traditional marriage may assist by reducing conflict between the general marriage law and customary marriage laws. Secondly it may be that breaches of customary rules governing social relationships cause disruption within the community, in which case resort could be had to the general law relating to, among other things, offensive behaviour.[1849] Thirdly, certain customary laws serving social relationships may fall within the category of sacred/secret matters.

- *Customary laws governing Aboriginal sacred/secret matters* (eg intrusion on secret and sacred sites, desecration of sacred objects, revelation of secret words, songs, rituals).[1850] It is in areas such as these that special incorporation of customary laws as a ground of substantive liability can assist in preventing breaches of customary laws particularly by outsiders. However this must necessarily be done on a case-by-case basis. Some examples of particular problems and possible remedies are discussed in the following paragraphs.

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1842 See *Parkin v Norman* [1982] 2 All ER 583, 588 ('insulting behaviour whereby a breach of the peace was likely to be occasioned').

1843 As it was in *Ngalmi's* case.

1844 A point forcibly made in RD Marika & NM Williams, *Submission 41* (15 October 1977): your law, taking the place of our law, does not satisfy our canons of justice: your law saves people, and our law prescribes death for offenders in serious cases. See also Justice Toohey, enclosing Comments of Elders of Port Keats Community, *Submission 77* (7 June 1978).

1845 Other avenues of redress may also be available, depending on the willingness of the authority or body in question to be involved. This is not always present. The Commission raised with the Australian Press Council the question of press publication of the names of recently deceased Aborigines in traditional communities (following incidents of this kind in Central Australia): letter of 7 March 1984. The Council declined to formulate guidelines or otherwise to assist in relation to such reports: Letter of CJ McKay, Executive Secretary of the Council, to the Commission, 30 March 1984.

1846 See para 727, 751, 754, 761.

1847 See Chapter 18.

1848 See Part VI of this Report.

1849 See para 464.

1850 These customary laws may also secure the maintenance of social relationships. cf para 37.

## Specific Measures of Protection

466. ***Customary Burials***. There were several contexts in which Aboriginal people sought recognition of their customary laws relating to Aboriginal remains and burials. For example the Cemeteries Act (NT) s 21 imposes penalties for burials outside cemeteries without the written permission of the Minister.[1851] The Act deals with cremations and burials, and it appears to outlaw Aboriginal mortuary practices in Central Australia. Consideration should be given to amending the Cemeteries Act (NT) s 21 and similar legislation to allow for burials in accordance with Aboriginal customary laws, particularly in relation to burials on Aboriginal land, but possibly elsewhere also (for example on pastoral land), provided relevant permissions are obtained. Another matter relating to the return of Aboriginal skeletal remains to Aboriginal people[1852] has at least been addressed, if not resolved, by provisions of the Aboriginal and Torres Strait Islander Heritage (Interim Protection) Act 1984 (Cth). Section 20 of this Act provides that a person who discovers Aboriginal remains shall advise the Minister for Aboriginal Affairs who shall then take reasonable steps to consult with any Aborigines he considers may have an interest in the remains with a view to determining appropriate action to be taken. Where Aboriginal remains are delivered to the Minister he is required to return them to Aborigines entitled and willing to accept custody and control of the remains in accordance with Aboriginal customary laws, or otherwise deal with them according to reasonable directions from Aborigines so entitled. If there are no Aborigines so entitled the Minister is to transfer the remains to the prescribed authority. In the case of Aboriginal remains that are themselves significant Aboriginal objects (objects of particular significance to Aborigines in accordance with Aboriginal tradition) declarations can be obtained from the Minister, including a declaration ordering the delivery of the remains to the Minister or to Aborigines entitled to the remains in accordance with Aboriginal tradition (s 12, 21).[1853]

467. ***Sacred Sites and Relics***. It has been found necessary to enact special legislative measures to incorporate Aboriginal customary laws relating to the protection of sacred sites and relics. These were referred to in Part I of this Report.[1854] Legislation in force in Queensland and South Australia protecting relics provides that it does not prejudice the rights of ownership of any Aboriginal tribe or member of an Aboriginal tribe in relics used or held for use for tribal purposes. Such provisions appear to acknowledge that customary rights to ownership in relics exist.[1855] Legislation in other States provides that the relics shall be the property of the Crown.[1856] Difficulties with sacred sites and relics have to some extent been addressed by the Aboriginal and Torres Strait Island Heritage (Interim Protection) Act 1984 (Cth) which aims to protect and preserve areas and objects in Australia and Australian waters that are of particular significance to Aborigines in accordance with Aboriginal tradition (s 4). The Minister has the power to make a declaration in relation to any object that is a significant Aboriginal object or one of a class of significant Aboriginal objects and that is under threat of injury or desecration. Significant Aboriginal objects are defined as those objects of particular significance to Aboriginals in accordance with Aboriginal tradition (s 3). These provisions of the Act have, for example been used as a basis for injunctions forcing the withdrawal of Aboriginal artefacts from sale at auction.[1857] Resort can sometimes be made to customs regulations, which provide that no Aboriginal archaeological and anthropological material may be exported from Australia without the written consent of the Minister for Customs.[1858] However the customs regulations are regarded by many Aborigines as inadequate, in that there is no provision for Aboriginal involvement in decisions to refuse an export permit.

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1851 N Andrews, *Submission 390* (31 October 1983).

1852 The remains of Truganini (supposedly the 'last' Tasmanian Aborigine) who died in 1876 were on public display in the Tasmanian Museum from 1904 to 1947. In 1976 after much controversy the skeleton was cremated and the ashes scattered in D'Entrecastesux Channel by representatives of the Tasmanian Aboriginal community: Tasmanian Museum Act 1976 (Tas). More recently the Crowther collection was returned to the Aboriginal Community in Tasmania, pursuant to provisions of the Museums (Aboriginal Remains) Act 1984 (Tas). Steps have also been taken to recover the remains of Tasmanian Aborigines held by museums and universities in other countries. See further C Fulton, 'Tassie' (1985) 16 *ALB* 5; M Mansell, 'The Bodysnatchers' (1985) 17 *ALB* 10.

1853 Aboriginal remains do not include bodies buried in accordance with State or Territory law or buried on land that is in accordance with Aboriginal tradition used or recognised as a burial ground. Nor does it include the remains of a body to be dealt with in accordance with State or Territory law relating to medical treatment or post mortem examinations, though this has caused some concern: see J Bucknall, *Transcript* Strelley 24 March 1981) 422-3. Nor does it include any objects made from human hair or other bodily material that are not readily recognised as being bodily material (s3). Various submissions called for the protection of Aboriginal burial grounds: eg G Blitner, *Submission 92* (25 August 1978) 13. See para 468. For a comparative account see LV Prott & PJ O'Keefe, *Law and the Cultural Heritage*, vol 1 *Discovery and Excavation*, Professional Books, Abingdon, 1984, 136-42.

1854 See para 77, 78.

1855 Aboriginal Relics Preservation Act 1967 (Qld) s 4, Aboriginal and Historical Relics Preservation Act 1965 (SA) s 4.

1856 eg Archaeological and Aboriginal Relics Preservation Act 1973 (Vic) s 20.

1857 *Sydney Morning Herald*, Editorial, 22 June 1985; *Sydney Morning Herald*, 19 June 1985.

1858 Item 2, second schedule, Customs (Prohibited Exports) Regulations made pursuant to Customs Act 1901 (Cth) s 112.

468. ***Private or Secret Matters***. A further area in which Aboriginal people have sought protection of their customary laws by the general law related to dealings with certain restricted information otherwise than in accordance with Aboriginal customary laws. Material regarded as highly secret, acceding to Aboriginal customary laws, is generally only known to particular persons. Disclosure may threaten the fabric of Aboriginal society structured around who holds such information.[1859] Thus Aboriginal people have sought the support of the general law to prevent the publication of aspects of Aboriginal secret matters, the filming of Aboriginal dance, or the recording of Aboriginal songs. It is possible to deal with these matters to a limited extent under common law powers. For example an injunction was obtained restraining the Centralian Advocate from publishing certain information about Aboriginal customary laws.[1860] Injunctions have also been granted forbidding the publication of photos depicting persons, places and ceremonies and secrets of a religious nature[1861] and orders have been made for delivery of slides to the Prothonotary and restraining their sale.[1862] In some circumstances an action for breach of confidence may be available to protect secret material, eg entrusted to an anthropologist.[1863] The problem of preventing revelations of secret matters during legal proceedings is discussed in Chapter 25. Common law remedies provide some protection, but clearly cannot cover all situations where revealing information may itself be a breach of customary laws.[1864]

469. ***The Sale of Aboriginal Artefacts***. In recent times there have been a growing number of objections to the sale of Aboriginal paintings and objects particularly to overseas buyers. The sale and gift of such objects, have caused problems which have come before the criminal courts.[1865] Much Aboriginal artwork involves the depiction of mythical beings and totemic figures which may have particular significance either to the individual artist or to other members of the artist's group. A person or a number of persons may have custodial rights or obligations under Aboriginal customary laws over figures which appear in paintings, and which have only been 'loaned' to the artist. According to Berndt and Berndt:

> Sacred boards may be personally owned, and so may the valuable feathered string ropes and feather-tasselled spirit dilly bags of eastern Arnhem land; but most sacred emblems, songs and dances even though made or performed by particular persons, are owned by the local group or clan as the case may be. There are cases of the selling of clan designs as in eastern Arnhem Land, in the sense of handing over the sole rights to their reproduction, but this is rare.[1866]

Provisions of the Aboriginal and Torres Strait Islander Heritage (Interim Protection) Act 1984 (Cth), referred to above, may not assist where the paintings are not themselves significant objects. State Aboriginal relics legislation does not generally extend to the sale of artefacts or the unauthorised use of designs.[1867] One question to be considered is whether a form of intellectual property should be recognised either in the items, or in the symbols depicted. It has been argued that, because paintings, artefacts and even songs belong to the group or a section of the group, rather than to the individual artist, there should be a form of community copyright rather than individual copyright. It might be considered wrong that a person should gain economic or other benefits from using certain figures, designs or emblems which according to customary law 'belong' to someone else. The issue could arise, for example, if certain tribal designs were mass produced on souvenirs (eg tea towels or T-shirts). If these tribal designs were based on an Aboriginal painting which was

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1859 See B Keon-Cohen, *Submission 389* (17 October 1983); G Neate, *Submission 373* (9 April 1983).

1860 *Nationwide Publishing Ltd v Furber*, Full Federal Court, unreported, 13 April 1984. See further P Ditton, Central Australian Aboriginal Legal Aid Service, *Submission 395* (10 January 1984).

1861 In *Foster v Mountford & Rigby Limited* (1976) 14 ALR 71 an interim injunction was granted against the publication in the Northern Territory of a book containing information about secret religious ceremonies, on the basis that publication would or might involve a breach of confidence.

1862 *Pitjanyatjara Council Inc & Nganingu v Lowe & Bender* (1982) 4 *ALB* 11. In that case the Pitjantjatjara Council was in possession of a number of slides taken by Mountford which contained secret or sacred material, publication of which would be an offence to Pitjantjatjara people.

1863 *Foster v Mountford & Rigby Limited* (1976) 14 ALR 71, 73. Another possibility is the purchase by the Commonwealth of the offending slides and photographs on behalf of Aboriginal groups. See further C Tatz, *Submission 146* (3 September 1979); M de Graaf, *Submission 102* (27 October 1978).

1864 See para 657-665.

1865 *R v Skinny Jack & Ors*, SA Supreme Court, unreported (13 July 1964), where the victim sold sacred objects, contrary to customary law, and was some years later killed by members of the tribe. See further E Eggleston, *Fear, Favour or Affection*, ANU Press, Canberra, 1976, 289-292. In *R v Craigie and Patten*, NSW District Court (No 1201 of 1979) the defendants were charged with stealing Aboriginal paintings. One reason put forward for the taking of the paintings was to prevent their sale out of Australia (by way of bona fide claim of right). They claimed the paintings were owned by all Aboriginal people and therefore it was not an offence to take the paintings away. They were acquitted by a jury. See para 435.

1866 RM Berndt & CH Berndt, *The World of the First Australians*, 4th rev edn, Rigby, Adelaide, 1985, 134.

1867 For example the Archaeological and Aboriginal Relics Preservation Act 1972 (Vic) s 2 defines a 'relic' as not including a handiwork made for the purposes of sale.

the original work of an Aboriginal artist, copyright (if it exists at all[1868]) would reside in the particular artist. However there is no place in the present law of copyright for collective ownership. In fact the protection of traditional designs is difficult to reconcile with the law relating to intellectual property, which grants a short-term monopoly to the artist on the condition that the design or idea will eventually be available in the public domain. Some Aboriginal communities would be likely to object to certain designs ever becoming public property. Clearly, there are important issues at stake here, but the law of intellectual properly provides only limited protection.

470. ***Further Measures of Protection***. The law of unfair competition, copyright and confidentiality can provide some limited protection for distinctive Aboriginal artwork and designs. The common law can also provide some protection of secret matters generally. But each case will depend on its own facts. These aspects of Aboriginal culture are not protected by the Aboriginal and Torres Strait Island Heritage (Interim Protection) Act (Cth) 1984, which is limited to the protection of particular sites and objects, nor by State Aboriginal relics legislation, which does not generally extend to Aboriginal paintings and artefacts produced for sale, nor to secret matters generally. This is an area where specific protective measures should be provided by the general law.[1869] Protection of the indigenous and national cultural heritage is increasingly an issue at the international level.[1870] In particular, Australia is currently giving consideration to the ratification of the UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property of 1970.[1871] The Commonwealth is also considering the implementation of the recommendations of a Working Party under the chairmanship of the Department of Home Affairs on the protection of Aboriginal Folklore. The Working Party identified three abuses to be controlled. These are, first, the use of sacred secret material other than in accordance with custom, secondly, the mutilation, destruction debasement or export of items of folklore, and thirdly, the use of items of folklore for commercial gain without payment of remuneration to traditional owners.[1872] As has already been indicated, these matters are not covered in this Report.[1873] However the Commission endorses the need for special legislative protection in these areas. Such special legislative measures, together with careful use of the general law, and greater use of existing by-law powers,[1874] offer greater assistance to Aboriginal people than the enactment of a broad range of customary, offences as part of the general body of the criminal law.

1868 It is possible that some paintings might not be regarded as original works. The emblems and designs may have existed in the tribe for thousands of years, and the work of an artist could be regarded as an unoriginal copy.

1869 In addition, the general law should not prohibit the carrying on of Aboriginal ceremonies or other ritual activities in accordance with Aboriginal tradition unless there is good reason to do so, and the prohibition is of general application. The Sex Discrimination Act 1984 (Cth) may prohibit ceremonies or other activities restricted under Aboriginal tradition to members of one sex, it provides no equivalent exemption to s 37 ('Religious bodies') in respect of these matters. An exemption should be enacted, as recommended in para 656.

1870 See M Bedjaoui, Special Rapporteur, 'Eleventh Report on Succession of States in respect of matters other than Treaties', *United Nations International Law Commission Yearbook* 1979 Vol II Pt 1, 78-82 for an account of international developments in this field.

1871 823 UNTS 231.

1872 Working Party on the Protection of Aboriginal Folklore, *Report*. Department of Home Affairs and Environment, Canberra, 4 December 1981. See R Bell, 'Protection of Aboriginal Folklore' (1985) 17 *ALB* 6.

1873 See para 211, 213.

1874 Discussed at para 809-11.

# 20. Some Procedural Alternatives

471. ***A Range of Alternatives***. The most important way in which recognition has so far been extended to Aboriginal customary laws in the criminal law (apart from sentencing discretions) has been informally through the exercise of administrative or procedural powers. These have included:

- non-prosecution for certain offences (eg in cases regarded as strictly 'traditional' or 'tribal'[1875]);
- prosecution for a lesser offence (eg to allow the matter to be dealt with locally by the Magistrate rather than in a distant centre by the Supreme Court or District Court on indictment,[1876] or for other reasons);
- the entering of a *nolle prosequi* by the Crown;
- decisions by a court to discharge absolutely or not to record a conviction (although these powers may only be available to lower courts).

The existence of such practices was noted by Eggleston,[1877] and they continue to be applied. It has been suggested that they provide a better way of recognising or accommodating Aboriginal customary laws in criminal cases than would changes in the substantive criminal law:

> The Commission should concentrate on the adaption of *procedure* to Aboriginal realities.[1878]

> My first point is fundamental. I do not believe that, whatever problem is identified and defined in connection with customary law, it will be solved by effecting changes exclusively to the substantive criminal law of the State. Some such changes there may have to be, but they are likely to be consequential or subsidiary. Any solution will probably be more effective if tribal customary law is treated rather as local custom was in England in times past. It seems to me that the greatest advantage is to be gained by reforming and enlarging the practices and procedures governing the administrative discretions of law enforcement agencies. It is vital that whatever powers are given to these agencies should be exercisable promptly by persons who are kept well-informed, and who are well able to make binding decisions without the sort of debilitating reviews that are so often introduced.[1879]

In this Chapter it is proposed to describe the various procedural or administrative discretions available and the ways in which these might be employed, reinforced or revised to recognise Aboriginal customary laws. It will also consider other procedures which could be introduced to divert certain cases away from the criminal justice system. In considering these issues, a distinction may be drawn between non-prosecution, because a particular matter has already been resolved, or because the defendant's subjective culpability (given the involvement of local customary laws) was such that a minimal, or no, penalty is likely to be imposed by the court, and diversion, involving the use of procedural powers in effect to transfer a case from the ordinary courts to some official or unofficial local mechanism for resolving the dispute in question. To some extent this distinction relates to the point in the process at which a decision is to be made: diversion is likely to arise as an issue at an earlier stage, before local dispute resolution processes have been applied. But the question whether to prosecute may also arise in a case where no such local processes will operate. For example the act which is the subject of the charge may be regarded by all concerned as legitimate under local customary laws, and no local response may be expected. However, such a distinction can be difficult to draw in particular cases,[1880] and the discussion of procedural alternatives in this Chapter accordingly overlaps with, and is preliminary to, the discussion of local justice mechanisms and other forms of local dispute resolution in Part VI of this Report.

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1875 For many years this was the prevailing policy in the Northern Territory following a direction of the Minister of the Interior:
I desire to inform you that natives should not be charged in respect of tribal offences unless after consultation with the Chief Protector or his representative. Letter from JA Carrodus, Secretary, Department of the Interior to The Administrator of the Northern Territory, 16 November 1936 (Australian Archives CRS FI Item No 36/592). See para 39-45, 58 for the earlier history of these policies.

1876 See para 473 n 13 for the practice in the North-West of South Australia.

1877 E Eggleston, *Fear Favour or Affection*, ANU Press, Canberra, 1976, 287-8.

1878 Fr MJ Wilson MSC, *Submission 111* (14 March 1981) 5. This was also the view of MC Kriewaldt, 'The Application of the Criminal Law to the Aborigines of the Northern Territory of Australia' (1960) 5 *UWAL Rev* 1, 15-21, 25-9.

1879 Justice WAN Wells, *Submission 17* (28 March 1977) 2-3.

1880 See para 402.

## Existing Procedures

472. ***Discretions not to Prosecute***. Problems of conflict between Aboriginal customary law and the criminal law are quite often resolved by the police deciding not to pursue the case or by the Crown electing not to prosecute. Such decisions are not necessarily the result of a conscious policy decision. Quite apart from offences which are not brought to police attention, the police may decline to take action in the absence of a complaint by the victim. This may be the case where traditional punishments, not involving the infliction of grevious bodily harm or life-threatening injuries, have been inflicted. Although the police and prosecuting authorities do not have unlimited discretion not to prosecute for particular offences,[1881] it is well established that they do have a broad discretion not to prosecute. Recent studies of this discretion, in Australia,[1882] England[1883] and elsewhere[1884] have agreed both on the need for continued prosecution discretion, and on the desirability of guidelines for the exercise of discretion. The Commonwealth Attorney-General in December 1982 announced guidelines for prosecution by the Commonwealth of federal offences, in response to this need.[1885] However, as is practically inevitable, the guidelines do not descend to the level of detail necessary to cope with situations of conflict such as those being considered here.[1886] Nor do they deal with prosecutions brought by State or Territory police or prosecutors for offences against the general criminal law in that State or Territory. These represent virtually all the criminal cases in which issues of Aboriginal customary laws are likely to arise.

473. ***Relevance of Prosecution Guidelines***. It may be that it would be helpful to lay down prosecution guidelines for police and prosecutors in cases involving customary law elements, perhaps as part of a broader set of guidelines on these questions. This is already the case in South Australia to a certain extent.[1887] If non-prosecution is an appropriate indirect form of recognition of the operation of customary law in particular cases, then it is not enough to leave the decisions to prosecute, as now, to the virtually unfettered discretion of the policeman or official in question. Guidelines would help to avoid 'arbitrary variations in prosecution policy and practice',[1888] at the same time reinforcing the accountability of law enforcement officials to the community. On the other hand, such special guidelines might be difficult to draft. Experience suggests that guidelines may be so open textured as in effect to return discretion to the officer or official in each case, although they could at least direct the official to take into account aspects of Aboriginal customary laws in reaching a decision.

474. ***Legality, of Guidelines***. In the absence of statutory authorisation, there are limits to the use of guidelines by police or prosecuting authorities in excluding proceedings in a class of cases. The discretion not to prosecute cannot be used so as in effect to dispense with the requirements of the criminal law,[1889] or to

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1881 cf *R v Metropolitan Police Commissioner, ex parte Blackburn* [1968] 2 QB 118. And see para 474.

1882 ALRC 15 (Interim), *Sentencing of Federal Offenders*, AGPS, Canberra, 1980, 61-71; AP Bates, TL Buddin and DJ Meure, *The System of Criminal Law Cases and Materials New South Wales, Victoria and South Australia*, Butterworths, Sydney, 1979, 119-30. See also this Commission's recent report, ALRC 29, *Standing in Public Interest Litigation*, Canberra, AGPS, 1985, para 367-377.

1883 Royal Commission on Criminal Procedure, *Report*, HMSO, 1981, 173-5; Royal Commission on Criminal Procedure, *The Investigation and Prosecution of Criminal Offences in England Wales: The Law and Procedure*, HMSO, 1981, 53-4, 210-17; AF Wilcox, *The Decision to Prosecute*, London, Butterworths, 1972, 112-123; AF Wilcox, 'The Proposed Prosecution Process' [1981] *Crim L Rev* 482; JLJ Edwards, 'The Integrity of Criminal Prosecutions — Watergate Echoes beyond the Shores of the United States', in PR Glazebrook (ed) *Reshaping the Criminal Law*, Stevens, London, 1978, 364.

1884 J Vorenberg, 'Decent Restraint of Prosecutorial Power' (1981) 94 *Harv L Rev* 1521.

1885 Commonwealth of Australia, *Prosecution Policy of the Commonwealth*, AGPS, Canberra, 1982. See also Commonwealth of Australia, 97 *Parl Debs* (Sen) (16 December 1982) 3648.

1886 Para 17 of the Commonwealth Guidelines treats as a major consideration 'whether ... the public interest requires the institution of the prosecution'. Factors relevant in assessing this 'public interest' are stated to include:

- the degree of culpability
- prevalence of the offence
- seriousness of the offence

among other 'relevant considerations'. Among factors listed as irrelevant are:

- the offender's race
- 'personal feelings concerning the offender or the victim' (para 19).

Neither the likelihood of a conditional discharge nor the absence of complaint by the victim are mentioned.

1887 With the approval of the South Australian Attorney-General, the police frequently exercise a discretion to prefer a lesser charge within the Magistrate's jurisdiction rather than proceeding for an indictable offence: cf South Australia Police, *Submission 183* (July 1980) 16-17. The Submission comments:

> The result of [this] when coupled with increased magistrates courts into these areas has expedited the criminal justice process, provided for the court process to be observed by the Reserve Aboriginals, and prevented the unnecessary delay and transportation of prisoners to Pt Augusta Circuit Court to appear in a jury trial — before jurors of limited experience in Aboriginal matters.

1888 Royal Commission on Criminal Procedure, *Report* (1981) 136.

1889 cf *R v London County Council ex parte Entertainments Protection Association Ltd* [1931] 2 KB 215; cf *Kumar v Immigration Department* [1978] 2 NZLR 553, 557.

exclude an entire class of offences or persons from prosecution. Thus in *R v Catagas*[1890] the Manitoba Court of Appeal disapproved a decision of the local Director of Wildlife that no prosecutions would be brought against Indians hunting for their own food on Indian reserves or unoccupied Crown land.[1891] The Court held the attempted dispensation void, notwithstanding that it 'flowed from a recognition of the Indian's historic right to hunt game for food'.[1892] The Court distinguished the exercise of prosecutorial discretion for good reason in particular cases.[1893] Statutory provisions[1894] authorizing 'directions or guidelines' with respect to prosecution certainly confirm and perhaps extend the scope of prosecutorial discretion, but would not be interpreted so as avoid the need to consider cases on their merits in the light of such guidelines.

475. ***Enforceability of Guidelines***. A further limitation on prosecution guidelines in this context is that they are unenforceable and may therefore be ineffective. The courts have no general power to intervene to stay criminal proceedings on the ground that the prosecution should not have been brought, except in rare cases of vexatious or oppressive proceedings.[1895] This might indicate that prosecution guidelines would be, in isolation, ineffective or inadequate. However the guidelines would not operate in isolation but in conjunction with other powers of the court, especially its sentencing powers. As Lord Justice Salmon pointed out in *Blackburn's* case, if in certain circumstances the courts are likely to adopt a 'humane and sensible course of imposing no penalty,[1896] it is no abuse of prosecution discretion to decline to proceed. The court's tendency to impose only a minor penalty, or no penalty at all, may discourage further prosecutions in like cases.[1897] Greater attention should be given by prosecuting authorities to the appropriateness of declining to proceed in certain cases involving customary laws. Prosecution guidelines may be one way of achieving this result, although other options, considered below, which could work either as an alternative to, or in conjunction with, a set of guide lines, need also to be considered.

476. ***Consent to Prosecute***. In certain limited cases, there is a statutory requirement that the consent of the Attorney-General or another officer be obtained before a prosecution is commenced.[1898] It might be argued that the introduction of such a requirement would assist in ensuring that appropriate rather than inappropriate decisions are made on the prosecution of offences with customary law elements. But a consent provision would not avoid the need for decisions to be made on a case-by-case basis, and it is doubtful how much practical difference such a provision would make. Creating another level of decision making in the prosecution process might bring delays and would require additional resources, even though in the end relatively few cases would be likely to be affected. Moreover the issue is not just who should decide but on what grounds: a consent provision by itself would do nothing to resolve the latter issue.[1899]

477. ***No Bill (Nolle Prosequi)***. The power of the Attorney-General or other law officer to enter a 'no bill' or *nolle prosequi* is a broad one, allowing the Attorney to terminate an action before or during court proceedings up to the time a verdict is given.[1900] No reason need be given to the Court. A nolle may be entered by the Crown on its own initiative or as a result of application by a defendant or his legal advisers, arguing that a prosecution would not be in the public interest. There are no formal procedures for making such applications and the notion of 'public interest' is very broad. The power is no doubt to be used with caution and only for good reason, but there are good arguments for at least certain cases involving Aboriginal customary laws to be disposed of in this way. In *R v Claude Mamarika. Raymond Mamarika & Andy Mamarika*,[1901] Justice Nader supported this view, suggesting that a no-bill application was a better vehicle than a potentially controversial decision of the court made on the basis of rules of public policy. The

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1890 (1977) 81 DLR (3d) 396.

1891 The Canadian Supreme Court had held that the law in question (the Migratory Birds Convention Act) overrode any native hunting rights that may have existed at common law: *Daniels v R* [1968] SCR 517. See para 896.

1892 (1977) 81 DLR (3d) 396, 401.

1893 This discretion, so long at least as it is exercised in relation to particular cases, is a broad one: *cf R v Metropolitan Police Commissioner, ex parte Blackburn* (No 3) [1973] 1 QB 241; *Buckoke v Greater London Council* [1971] Ch 655. See also P Bayne, 'Prosecutorial Discretion and Administrative Law' in IL Potas (ed) *Prosecutorial Discretion*, Australian Institute of Criminology, Canberra, 1984, 69.

1894 Such as Director of Public Prosecutions Act 1983 (Cth) s 8(1), 11(1).

1895 *Connelly v DPP* [1964] AC 1254; *DPP v Humphreys* [1977] AC 1; cf *Rourke v R* (1977) 76 DLR (3d) 193.

1896 [1968] 2 QB 118, 139.

1897 cf *R v Charlie Limbiari Jagamara*, unreported NT Supreme Court (Muirhead J) 28 May 1984; *R v Jacky Jagamara*, unreported, NT Supreme Court (O'Leary J) 24 May 1984. See para 488.

1898 See ALRC 15, para 63, 68; ALRC 29, para 364-5 for illustrations.

1899 See para 486 for the suggestion that a special officer be appointed to make decisions on prosecution in customary law cases.

1900 About 5% of a sample of cases in several Australian States were terminated by the Crown through a nolle: J Willis, 'Reflections on Nolles' in Potas (1984) 173, 176-9.

1901 Unreported, NT Supreme Court (Nader J), 17-19 August 1982.

proper officer to consider public policy arguments, in his view, was the Attorney-General.[1902] In the event the Attorney-General did not enter a nolle, and Justice Nader imposed suspended sentences on the two defendants who were convicted.

478. ***Conclusion on Prosecutorial Powers***. On the basis that the general law makes particular conduct criminal, and that there is sufficient evidence of an offence in a particular case, the various powers discussed in paragraphs 472-477 may be available to avoid prosecution or conviction for acts performed in the context of or with the sanction of Aboriginal customary laws. On the other hand these powers are not powers to dispense generally with the criminal law. If in an identifiable class of cases Aboriginal customary laws should be treated as justifying particular acts then those acts should not be criminal at all: the remedy lies in amendments to the substantive law, not in the exercise of executive discretions.[1903] Where prosecutorial discretions may be relevant is in those cases where Aboriginal customary laws, without necessarily justifying or excusing criminal conduct, are a significant mitigating factor, and where the Aboriginal community in question has through its own processes resolved the matter and reconciled those involved. Factors relevant in such cases would include the following:

- that an offence has been committed against the general law in circumstances where there is no doubt that the offence had a customary law basis:
- whether the offender was aware he was breaking the law;
- that the matter has been resolved locally in a satisfactory way in accordance with customary law processes;
- that the victim of the offence does not wish the matter to proceed;
- that the relevant Aboriginal community's expectations (or the expectations of each community, if there is more than one) is that the matter has been resolved and should not be pursued further;
- that alternatives to prosecution are available, eg a diversion procedure;[1904]
- that the broader public interest would not be served by engaging in legal proceedings for little or no purpose.

These factors should be taken into account by police and prosecuting authorities in deciding whether to bring or maintain prosections in such cases. They could usefully be incorporated in prosecution guidelines at State and Territory level, and the Commission so recommends.

479. ***Refusal to Proceed to Conviction; Conditional or Unconditional Discharge***. Powers of lower courts to refuse to proceed to a conviction, and of most courts to discharge without penalty a defendant whose subjective criminality is regarded as minimal (whether or not the discharge is conditional) are frequently used in cases of conflict of Aboriginal customary laws and the general law. Deferral of sentence is also an option available in some jurisdictions.[1905] These powers are exercised substantially as an aspect of sentencing discretions, which are discussed in Chapter 21. The recommendations made there for taking Aboriginal customary laws into account in sentencing, apply equally to these powers to discharge conditionally or unconditionally, or to defer sentence.

## Procedural Options

480. ***Other Procedures***. As well as the scope which exists for use to be made of existing procedures to give some degree of recognition to Aboriginal customary laws, a number of other alternatives need to be considered. These include:

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1902 Transcript of proceedings 176, 181-3.
1903 See para 442-53 for arguments about a customary law defence.
1904 See para 481-9.
1905 See S Jones, 'Deferment of Sentence' (1983) 23 *Brit J Crim* 381.

- Pre-trial diversion (paras 480-485);
- exclusion by a pre-trial administrative hearing (para 486);
- exclusion by judicial decision after a voir dire-type hearing (para 487).

## Pre-Trial Diversion

481. ***Scope of Diversion***. The concept of diversion is a broad one, which is receiving increasing attention. Each of the existing procedures discussed above may be used to screen Aboriginal customary law cases, and each therefore represents a form of diversion from the criminal justice system.[1906] The basic difference between them is the stage at which diversion occurs. At the earliest stage are offenders who do not, for a variety of reasons, come into contact with the police at all but who may be dealt with (if at all) privately within their families or their local community. At the next stage are those offenders whom the police decide not to charge or whom prosecuting authorities decide not to prosecute. At a much later stage in the criminal justice system there are the alternatives to imprisonment, such as conditional discharges and community service orders, which may also represent a form of diversion.[1907] As has already been noted it would be possible to extend the use of these existing diversionary powers. But it would also be possible to establish some formal pre-trial diversion scheme. Such schemes are of relatively recent origin and have been experimented with in the United States,[1908] Canada and elsewhere.[1909] Essentially they involve not proceeding with charges in a criminal court but dealing with the cases by alternative means such as mediation or local community resolution. A pre-trial diversion scheme can take many different forms. It may be a structured scheme similar to probation. Or it may be unstructured: offenders might be simply diverted by the courts, through the exercise of adjournment or conditional discharge powers, so as to allow the local community to play a part in rehabilitation. In the Aboriginal context, a system of pre-trial diversion could be limited to the screening of cases involving Aboriginal customary laws. Or it could be directed at providing local Aboriginal communities with the opportunity to have an input into the way in which an Aboriginal offender is dealt with in a much broader range of cases.

482. ***Canadian Experience***. The Canadian Law Reform Commission in its Report on *Disposition and Sentences in the Criminal Process*[1910] recommended pre-trial settlement of certain criminal cases in accordance with specified criteria. The work on this Report included a major piece of empirical research carried out in the East York community of Toronto,[1911] and a number of further pilot projects have since been undertaken, including one operated by the Native Counselling Service of Alberta (NCSA) in the 'High Level' area of North Western Alberta.

483. ***A Native Diversion Scheme***. The High Level Diversion Scheme[1912] began in 1977 as a pilot project funded by the Federal Ministries of Justice and Solicitor-General, with assistance from the Provincial Attorney-General and the Royal Canadian Mounted Police (RCMP). The area for the diversion program included two small towns, two Indian reserves and one Metis settlement, which were spread over a fairly wide area. It was chosen because of its relative isolation — oil had been discovered and the first liquor outlet opened during the 1960s — and the degree of social cohesiveness of the communities. But the principal factor in the choice was the high proportion of native people living in the area. The scheme sought to intervene at pre-trial stage. After a person (initially the scheme was limited to adults, but later juveniles were

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1906 cf ALC Ligertwood, *Submission 104*, (28 September 1978) 28 (proposing that there be a statutory duty upon the Commissioner of Police to consult with the local Council Chairman before commencing a prosecution, if the defendant has already been dealt with by a local community justice scheme, and not to prosecute unless the interests of justice clearly require it, having regard to action already taken).

1907 Canagarayar argues for a much wider concept of diversion, arguing that it should also include policies beyond the confines of the criminal law: JK Canagarayar, 'Diversion: A New Perspective in Criminal Justice' (1980) 22 *Can J Crim* 168.

1908 See eg FA Silas, 'Service, not Trial' (1984) 70 *ABA* J 34.

1909 For consideration of diversion in England see National Association for the Care and Resettlement of Offenders, *Diversion from Criminal Justice in an English Context*, Barry Rose, London, 1975; SR Moody and J Toombs, *Prosecution in the Public Interest*, Scottish Academic Press, Edinburgh, 1982, 67-75, 134-6. For Australia see eg T Syddall, 'Pre-trial Diversion: A Magistrate's Perspective' in Potas (1984) 203. See also para 482-3.

1910 Law Reform Commission of Canada, *Disposition and Sentences in the Criminal Process*, Ottawa, 1976, 15-16. For comments of this Report see Canagarayar (1980); A Vining, 'Reforming Canadian Sentencing Practices: Problems, Prospects and Lessons' (1979) 17 *Osgoode Hall LJ* 355 esp 380-3.

1911 Canada LRC *Studies on Diversion*, Ottawa, 1975; see also Working Paper No 7, *Diversion*, Ottawa, 1975.

1912 So described because of the northerly latitude of the area involved, not because 'high level' offences were included in the scheme (they were not).

included) had been charged an assessment would be made of whether the case was suitable for diversion or should proceed in the ordinary way. Initially the RCMP had a role in this assessment process, with the local Crown Prosector making the final decision. Later the system changed, with the decision to divert being made by the Court. This changed the nature of the program in a number of important ways: it became like other sentencing alternatives, and it tied the process to court sitting days.[1913] The diversion program had several stated objectives:

> 1. breaking the law breaking-incarceration cycles of Native offenders;
>
> 2. giving Native people a better understanding of the criminal justice system;
>
> 3. increasing community participation in the criminal justice system;
>
> 4. minimising the penetration of citizens into the criminal justice system.[1914]

In essence the scheme aimed at providing an alternative to imprisonment (or a fine leading to imprisonment for default) for minor offences through keeping minor offenders out of the courts. It also required a significant community involvement'

> The project was intended to involve community members extensively, through their participation in a Diversion Screening Committee which would develop, in conjunction with the victim and the offender, a suitable agreement whereby the offender would compensate for his offence ... The diversion agreements were to be flexible with the emphasis being on the resolution of the problem to everyone's satisfaction. Agreements might therefore require the offender to make a written or verbal apology, provide cash restitution, or to perform work for the victim or the community.[1915]

The scheme included only a small range of minor offences.[1916] For various reasons it failed to get widespread support, in particular from the criminal justice professionals involved. There was a low level of referrals, and a view that the objectives of the scheme could be achieved by greater use of other existing mechanisms, eg a fine-options program, or probation associated with a community work service order.[1917] There was also concern over the lack of control over the offenders under the diversion scheme .[1918] While conceding these problems, NCSA argued for its renewal based primarily on the success of the scheme (re-offence rates), the lack of success of other schemes when applied to Native people, and the community support received for it.[1919] But the scheme was abandoned with the withdrawal of funding in 1981.

484. ***Native Diversion in New Zealand***. A less formal diversion scheme has operated in the Maori community of West Auckland, New Zealand, for a number of years. The Te Atatu Maori Committee operates a kind of community court and hears cases referred to it by the court, the Police, the local school and voluntary community officers. It has thus dealt with cases, mainly involving juveniles, in which offences had been committed (eg theft) as well as cases involving anti-social behaviour (eg bullying) and general community problems (eg inadequate ca re of children).[1920] The Committee has gained the confidence of the police and the courts,[1921] who are prepared to divert cases to the Committee provided that the offender agrees to the matter being dealt with by the Committee. In hearing a case referred to it the Committee attempts to get the community involved by requiring the parents, family or others with a direct interest to attend. A description of one committee hearing gives an idea of the way matters are dealt with:

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1913 Native Counselling Services of Alberta, 'Creating a Monster — Issues in Community Program Control', Paper presented at the Canadian Association for the Prevention of Crime, Winnipeg, July 1981, 5-6.

1914 Native Counselling Services of Alberta, *Evaluation Report of the High Level Diversion Program*, 1981, 5.

1915 'Creating a Monster — Issues in Community Program Control', 2.

1916 These were: causing a disturbance; common assault; theft under 200; taking a motor vehicle without consent; false pretences under 200; fraud (food and lodging); and mischief under 50. id, 11.

1917 id, 3.

1918 High Level Evaluation Report, 24-32. For an overall assessment see Native Counselling Services of Alberta, *Final Report on the Demonstration Phase of the High Level Diversion Project 1977-81*, Winnipeg, 1981.

1919 ibid.

1920 Submissions to the Penal Policy Review Committee by the Hoani Waititi Marae Committee, 20 June 1981, 17.

1921 See K Hazlehurst, 'Community Care/Community Responsibility: Community Participation in Criminal Justice Administration in New Zealand' in K Hazlehurst (ed) *Justice Programs for Aboriginal and other Indigenous Communities*, Australian Institute of Criminology, Canberra, 1985, 95; M Brown 'The Te Atatu Maori Tribunal: Community Participation and Support of the Formal Court System, New Zealand', id, 87. But for suggestions that a more radical solution an alternative criminal justice system for Maori people is needed see M Knowles, 'A New Prosecution Policy' [1982] *NZLJ* 133.

> Discussions throughout the procedures were concerned with the total behaviour of the accused young persons and not just the offences alleged to have taken place. The result was a great deal of shame, remorse shown, restitution provided for, forgiveness afforded and a whole range of emotion which almost certainly has played a part in the fact that 8 of those 9 young persons have not re-offended.[1922]

The Committee usually orders community work to be done for a period of time (not more than 200 hours) depending on the seriousness of the offences and the extent to which remorse is shown by the offender:

> A vandal, for instance, would be given forty hours of community service to be spread over a number of weeks on his weekends and evenings. He might first be shown how to mend the windows of the community hall which he broke. Then perhaps he would be asked to mow the lawns of neighbouring pensioners. If his home life was in need, he may be required to apply his time to his own home — painting the house and mending the fence, digging the garden and helping his 'neglected' mother.[1923]

Where cases have been directed from the Court to the Committee a report on the outcome of each case is prepared and sent to the Court. If the Committee has been unable satisfactorily to deal with an offender it may recommend that the court proceedings be reactivated.

485. ***Submissions Supporting Diversion***. Several submissions to the Commission have proposed diversion schemes for cases with customary law elements.[1924] The suggestions involved an exclusionary hearing either before trial, or as an interlocutory proceeding. The submissions argued or assumed that , in respect of at least some customary law matters, intervention by the general legal system is in principle undesirable. They did not seek to exclude police action to protect persons under threat or to prevent imminent violence,[1925] but they did seek to protect the autonomy of Aboriginal groups in resolving the underlying disputes through customary processes, by preventing such disputes from coming before the courts in the form of criminal prosecutions.

486. ***Exclusion by a Pre-Trial Administrative Hearing***. One submission suggested, as a possibility for discussion, the appointment of an official with special expertise and experience in customary law matters, to whom decisions on prosecution would be referred by the police, and who would, after formal or informal investigation of the facts, recommend to the Attorney-General whether a prosecution should follow.[1926] Clearly any such recommendation, with accompanying reasons, would be influential, although not binding: in particular the Attorney-General would retain the discretion to order a prosecution in the general interest. One advantage of the proposal is that a person with special knowledge and experience in Aboriginal customary law matters would be responsible for preparing recommendations, rather than relying on prosecutors or departmental officers.

487. ***Exclusion by the Trial Judge on a Form of Voir Dire Hearing***. Alternatively, it has been suggested that the trial judge should himself have power, at any stage of the trial, to adjourn or even terminate the hearing if it becomes clear that the matter has been satisfactorily resolved under the Aboriginal customary laws applicable to the parties, so that the public interest would not be served by continuation of the case.[1927] A difficulty with this suggestion is that it might be thought to be inconsistent with the continued exercise of the trial judge's functions for him to determine such an application in the course of the trial. A further difficulty would be to spell out the terms of the power to terminate or adjourn, and the considerations relevant in its exercise. This is particularly so in that the power to terminate proceedings (eg by *nolle prosequi* ) has always been an executive function. As the case of *Claude, Raymond and Andy Mamarika* shows, even robust judges are inclined to avoid making decisions of this kind, preferring to influence the outcome of cases in more orthodox ways (eg by the use of sentencing discretions).[1928] On the other hand, this particular suggestion would avoid the need for appointment of a special officer whose work load would be variable and would be likely to involve only a relatively few cases. It might also help to ensure greater consistency and regularity of decision. A slightly modified version of this scheme was suggested to the Commission by Associate Professor Getches, based on his experience with United States Indians.

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1922 Hoani Waititi Marae Committee (1981) 17.
1923 KM Hazlehurst, *Submission 426* (7 June 1984) 4. See further para 801.
1924 Justice WAN Wells, *Submission 17*, (28 March 1977); C McDonald, *Submission 162*, (December 1980).
1925 cf Justice WAN Wells, *Submission 17* (28 March 1977) 4, arguing that a policeman dealing with a conflict or dispute 'should not be required to weigh the niceties of tribal custom'.
1926 id, 3-6.
1927 C McDonald, *Submission 162* (December 1980) 21-2.
1928 See para 477.

> Perhaps the Commission ought to consider some modifications in the present judicial system, probably requiring legislation, that could deal with the problem of regulating conduct of traditional Aborigines, place appropriate reliance on traditional ways, and yet be a part of the court system that must deal with serious criminal activities defined by Australian law. For instances, magistrates (and justices of the peace in remote areas not regularly accessed by magistrates) might be assigned jurisdiction to deal with all criminal activity within a certain area and might be given civil authority as well. They would be authorised to defer to any traditional sanctions to which a person appearing before them might be subject whenever both the actor and the victim in a criminal case were Aborigines or in cases where an Aborigine committed a victimless crime. The magistrate or justice of the peace would have to respond differently in different communities depending on the level of traditional justice that might be available. In some places deference could be to sanctions or remedies imposed by an elder or by other community members. The extent to which deference to Aboriginal forums would be given necessarily would vary. In some places and situations there would be little or no deference.[1929]

This proposal includes both a diversion scheme and a way for the court to take account of traditional sanctions and punishments but essentially it relies on the court as the decision-making body.

488. ***A Diversion Scheme for Aboriginal Customary Law Cases?*** In assessing the practicality of a pre-trial diversion scheme for certain Aboriginal offenders a number of questions need to be resolved. These include the selection and qualifications of the body or person who decides upon diversion in particular cases, the accountability of that body or person for decisions made, the supervision of offenders after diversion (including the supervision of any 'penalty', eg by way of reparation or community work imposed), and whether there should be a requirement of consent on the part of the defendant, the prosecution (and, perhaps, the victim) to the operation of the scheme. Difficulties such as these are among the reasons why diversion schemes within the general community, despite some promising experiments, have taken hold only to a limited degree.[1930] However there are several further problems with proposals for a formal diversion scheme specifically for customary law cases.

- *Stage of Proceeding at which Diversion Operates*. Questions of the selection and qualifications of the decision-making body depend on the stage at which diversion is to operate. A pre-trial procedure would require authority to be vested in the police, a special administrator or some other body. Diversion by the court itself would mean that the power was vested in the trial judge. Assuming the difficulty of consistency with the judge's later hearing of the case, already referred to,[1931] can be overcome, a further danger in giving the power to the court is that any pre-trial screening procedure may be deferred on the basis that the decision is one for the court. On the other hand, it has been argued that there should be some judicial control of pre-trial diversion, which should not be resolved simply by administrative means. Perhaps the best compromise would be to vest power in the committing magistrate, whose role is, appropriately, intermediate between an administrative and a judicial one, but who is not responsible for any eventual trial on the merits.

- *Selection of Cases*. But the assumption that a committing magistrate would be involved highlights the basic difficulty in applying diversion schemes to cases with Aboriginal customary law aspects, that is, the problem of selection of the cases to which such a scheme should apply. Not all offences committed by Aborigines will be appropriate for diversion. Some cases come before the courts as a result of members of the local Aboriginal community deciding, for whatever reasons, that they wish the person to be dealt with by the court. Local dispute-resolving processes may have been exhausted or may not, in the circumstances, be available.

- *Due Process in Major Offences*. It is the most serious offences against the general law (involving homicide or serious assault) that are most likely to involve Aboriginal customary laws, yet it is in respect of those offences that the 'due process' arguments against diversion, the problems of accountability and so on, are strongest.[1932] A 1984 Northern Territory case highlights this difficulty. In *R v Jacky Jagamara*[1933] the defendant was charged with murder. In 1979 he had stabbed another man in the thigh, severing an artery which resulted in the man's death. He had been subject to severe

1929 D Getches, *Submission 218* (22 January 1981).

1930 See eg W Helmer, 'Judicial Control of Prosecutorial Discretion in Pretrial Diversion Programs' (1982) 31 *Buffalo L Rev* 909. For differing views about diversion schemes for juvenile offenders see J Crawford, Australian Courts of Law. Oxford University Press, Melbourne, 1982, 208 and works there cited.

1931 See para 487.

1932 There is, for example, no provision in force or proposed in Papua New Guinea which would require or even expressly provide for custom to be taken into account in the exercise of prosecutorial powers. cf Customs Recognition Act (PNG) s 7; and see para 405-8.

1933 Unreported, NT Supreme Court (O'Leary J), 24 May 1984.

traditional punishment which included being speared in the leg by the relatives of the deceased man on 3 separate occasions. He was a Pintubi, one of the last to 'come in 'from the desert in 1966. He had lived all his life in a tribal situation and spoke virtually no English. He first came before the court in 1979 charged with the killing, was given bail but did not appear for trial as a result of confusion about when the court was sitting. Five years later he was recognised from a warrant in Western Australia, where he was then living, and extradited to Alice Springs. Justice O'Leary sentenced him to imprisonment until the rising of the court, ie in effect to immediate release. He took into account that the defendant had no previous convictions and had been in custody over 13 weeks in relation to the offence. He stated:

> It was an offence that was committed in an entirely tribal and traditional Aboriginal setting, and the prisoner has received very severe traditional punishment by way of pay-back at the hands of the deceased man's family. In my opinion it is not an offence that calls for any deterrent or retributive punishment by this court. He is in no sense a threat to the community at large. There is no reason to fear he will offend again in this way in the future, and I think that in all the circumstances he ought not to be subjected to any further punishment beyond the severe punishment he has already received.[1934]

It can be argued that little, if anything, is achieved by prosecuting in such cases, which involve time, effort and expense to the police, prosecuting authorities, the Aboriginal legal aid service, defence counsel, the accused and other witnesses. But such cases will usually involve serious offences, whereas the diversion schemes which have been attempted elsewhere and which (as with the West Auckland scheme[1935]) appear to have been successful, have involved only minor offences, offences which are least likely to involve aspects of Aboriginal customary laws.[1936]

- *Other Problems*. There could also be difficulties, with a diversion scheme that focussed on customary law cases, of appearing to delegate or sanction local responses to the offender which may be outside the control of a magistrate or other official.[1937] Moreover there is evidence that the relatively less common 'major cases' with customary law elements are capable of being resolved, to a substantial extent, through existing powers, especially sentencing powers.[1938] For these reasons the Commission does not recommend a diversion scheme specifically for customary law cases. If a more direct form of recognition (beyond a combination of a partial customary law defence with prosecutorial and sentencing discretions) is desirable, it should take the form of a general customary law defence, leading to the complete exoneration of the defendant. Such a defence was rejected in Chapter 18.[1939]

489. ***Pilot Diversion Scheme for a Wider Range of Cases?*** Nonetheless, as some of the overseas experience suggests, there are advantages to be gained from diversion schemes for more minor offences. These advantages include:

- reducing the degree of contact with the criminal justice system;
- breaking the common cycle of offence and imprisonment;
- recognising the role Aboriginal people may already play unofficially in dealing with offenders.

As the statistical material referred to in Chapter 17 indicates, much Aboriginal contact with the criminal justice system results from prosecution for minor or trivial offences.[1940] There are also indications that existing 'diversion' or 'conciliation' pro grams within the wider community are reaching relatively few

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1934 Transcript, 17. A week later in *R v Charlie Limbiari Jagamara*, Muirhead J sentenced a 75 year old traditional Aborigine to the rising of the court in similar circumstances. He commented:

> There are some cases, I don't necessarily say there are many of them but there are cases where I consider complete regard should be had for Aboriginal custom and tribal law. This is one ...

Unreported, NT Supreme Court (Muirhead J) 28 May 1984, *transcript*, 21.

1935 See para 483, 484.

1936 cf para 394-400.

1937 For the difficulties which can occur with 'delegation' of traditional punishments see 512-16.

1938 This was true in *R v Jacky Jagamara* (para 487 n 59), in *R v Claude, Raymond and Andy Mamarika* (para 477), and in many other cases. See para 492-8.

1939 See para 442-453.

1940 These can be symptomatic of other problems which may be able to be avoided if dealt with appropriately and in good time: cf Syddall (1984) 210-11.

Aborigines.[1941] One reason for this 'under representation' is no doubt the remoteness of some Aboriginal communities, but another and probably more important one is that these programs are essentially designed by and for members of the wider community. Successful schemes such as the West Auckland one are predominantly the result of local initiatives. Part VI of this Report discusses in more detail various proposals for local justice mechanisms in Aboriginal communities. The Commission recommends that careful attention be given, in the design and operation of any diversion or mediation schemes which may be established within the general legal system. to the involvement of concerned Aboriginal people, so as to make those schemes as relevant as they can be to Aboriginal offenders. It is a serious reflection on the criminal justice system that one of the few areas where Aborigines are under-represented in criminal justice statistics involves diversion schemes specifically established to reduce the impact of the system on young offenders or first offenders. Careful consideration should also be given to a trial diversion scheme specifically involving Aboriginal offenders, in particular, young offenders, if such a scheme is sought by any Aboriginal group or community.[1942]

1941 cf para 682 (NSW Community Justice Centres). This appears to be true of juvenile aid panels, where these operate: see RJ Bailey, 'A Comparison of Appearances by Aboriginal and Non-Aboriginal Children before the Children's Court and Children's Aid Panels in South Australia' in B Swanton (ed) *Aborigines and Criminal Justice*, Australian Institute of Criminology, Canberra, 1984, 43, 71; F Gale & J Wundersitz, 'Variations in the Over-representation of Aboriginal Young Offenders at each Level of the Criminal Justice System' (1985) 20 *Aust J Soc Issues* 209.

1942 On the need for Aboriginal initiative and involvement cf para 805, 819, 868-72.

# 21. Aboriginal Customary Laws and Sentencing

## Sentencing Issues

490. ***Introduction***. The primary purpose of this Chapter is to consider whether, and to what extent, Aboriginal customary laws should be taken into account in the sentencing process. Aboriginal customary laws may be relevant to sentencing in a number of different ways. An Aborigine may commit an offence against the general law when acting in accordance with customary laws, or the offence, whether it involves any aspect of customary laws or not, may have significant consequences and require, or lead to, some response such as some 'pay-back' or 'traditional punishment' by other Aborigines involved. Tensions may have been created within an Aboriginal community as a result of an offence and members of the community will have views on how the offender should be dealt with. What principles should the courts apply in such cases, and is legislation desirable to reinforce or vary present sentencing practices? These questions, important though they are, represent only one aspect of a broader range of issues relating to the sentencing of Aborigines. In Chapter 17 some of the evidence of the disproportionate imprisonment of Aborigines was outlined.[1943] But it is clear that most offences for which Aborigines are imprisoned involve few or no traditional elements — whether these are alcohol-related crimes of violence, or 'victimless' offences for which short sentences of imprisonment are (often unnecessarily) imposed, or which result in imprisonment in default of payment of a fine. These broader sentencing issues are at the heart of much of the disquiet about the Australian criminal justice system's apparently discriminatory impact on Aborigines.[1944] The problems cannot be dealt with comprehensively within the present Terms of Reference.[1945] But they do need to be taken into account in considering what can be done to recognise Aboriginal customary laws in sentencing, and they are accordingly discussed briefly later in this Chapter.[1946]

## Aboriginal Customary Laws and Sentencing: Existing Law and Practice

491. ***Some Case Studies***. In discussing the relevance of Aboriginal customary laws in sentencing, an essential first step is to assess how judges actually deal with it in particular cases under the present law. A few such cases have become well-known, notably the decision of Justice Wells in the *Sydney Williams* case.[1947] But that is only one case — and by no means a typical one — among many. In order to give a clearer idea of the nature of the problem, and of how the courts are dealing with it in cases involving Aboriginal customary laws, some of the more important cases in the last decade are set out here in some detail.[1948]

492. ***R v Sydney Williams***.[1949] Williams, an initiated Pitjantjatjara man, had killed a woman with whom he had been drinking, at Nundroo near Yalata in the far west of South Australia. He was charged with murder and brought to Adelaide for trial. The victim was very drunk and had insulted Williams, mentioning what defence counsel claimed were tribal religious secrets which women are not supposed to know, let alone speak of.[1950] Williams told her to keep quiet but she continued to taunt him until, losing his self control, he hit her violently with a stick and a bottle and killed her. He made certain confessions which were challenged on various grounds at his trial for murder, but which, after a hearing on the *voir dire*, were admitted.[1951] Justice Wells, with the Crown's consent, then accepted a plea of guilty to manslaughter, taking the view that there was sufficient evidence of provocation to justify reducing the charge of murder to manslaughter. In his

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1943 See para 394-6.

1944 See further para 533-8.

1945 This is true also of this Commission's Reference into the sentencing of federal offenders: see ALRC 15 (Interim), *Sentencing of Federal Offenders*, AGPS, Canberra, 1980, para 10. Very few federal offenders are Aborigines, and this situation will not change even if the recommendations in the present Report are implemented: cf id, para 510. For an interesting brief discussion of somewhat similar issues involving Maori and Pacific Islander offenders in New Zealand see New Zealand, Penal Policy Review Committee, *Report*, Government Printer, Wellington, 1982, para 73-82, 396-404.

1946 See para 539-541.

1947 See para 492.

1948 The Commission prepared a Research Paper summarising nearly 50 such cases, all but one in the period 1974-1982: ALRC ACL RP 6A, J Crawford and P Hennessy, *Cases on Traditional Punishments and Sentencing*, September 1982.

1949 SA Supreme Court (Wells J), 14 May 1976; reported on another point (1976) 14 *SASR* 1. See ALRC DP 17, 39-40; A Ligertwood, 'The Trial of Sydney Williams' (1976) 2 *LSB* 136; A Ward, 'The Wholesome Precedent of Sydney Williams' (1976) 2 *LSB* 141; Note, 'The Sydney Williams Case' (1976) 50 *ALJ* 386.

1950 On defence counsel's application Wells J had an all-male jury empanelled, and excluded publication of these secrets. For this reason the transcript of the trial is not available for consultation.

1951 See (1976) 14 SASR 1.

Submission on sentence counsel for Williams emphasised the extreme nature of the provocation in mentioning tribal secrets. He added that tribal elders had taken up the matter and that Williams was due to be punished according to tribal law. This would involve taking him to sacred areas beyond the Musgrave Ranges for about a year where he would be instructed by the elders in tribal history. The exact punishment to be imposed was not mentioned. On completion of the plea, Justice Wells said, in effect, that tribal justice should be reinforced if possible rather than simply being replaced by the European conceptions of justice, and that this would not represent an abdication of the role of the Supreme Court.[1952] In sentencing Williams, he said:

> [Y]ou killed [the victim] and you broke the law. I know that she made you mad by the things she said to you. She spoke of forbidden things ... and you told her to sit down and keep quiet. She spoke again of more forbidden things and this time you got very angry and hit her with a stick and a bottle. You were a bit drunk and [the victim] was full drunk, but when you hit her you hit her very hard and killed her. That was wrong and forbidden by law. I must now deal with you. I am going to send you straight back to your tribe and have you handed over to the Old Men. You must behave yourself for two years and not get into any trouble. You must do what the Old Men tell you to do for one year. You must not drink wine or beer unless the Old Men allow you to. If you do any bad or wrong things or if you do not do what the Old Men tell you to do, you will go to gaol here in Adelaide for two years.
>
> The order of the Court is ... that [Williams] is sentenced to imprisonment with hard labour for two years (and I have taken into account the three months that he has already spent in custody). That sentence is suspended upon his entering into a bond in the sum of $10 which shall contain the following conditions:
>
> 1. He shall be of good behaviour for a term of two years from this date.
>
> 2. He shall return forthwith to his tribe, the Kokota tribe, and shall there submit himself to the Tribal Elders and shall, for a period of at least one year from this date, be ruled and governed by the Tribal Elders and shall in all things obey their lawful orders and directions.
>
> 3. In particular, he shall, while he is under the control of the Tribal Elders — and that means for at least that one year referred to — abstain from intoxicating liquor unless he is permitted to drink intoxicating liquor by the Tribal Elders and then only to the extent of any permission granted.[1953]

It should be noted that his Honour made no reference to traditional punishments of any kind (although the matter had been discussed by counsel), and that he required Williams to submit himself to the 'lawful orders and directions' of the tribal elders, by which he clearly meant orders and directions lawful under the general law.[1954] It is not clear what, if anything, Williams or the elders understood by the term 'lawful'. His Honour explained the sentence in the following terms, in correspondence with the Commission. After referring to the issue of traditional punishment and double jeopardy, he stated:

> the real reason why I was disinclined to impose an immediate custodial sentence was because I would almost have been committing the prisoner to a living death while he was in custody and he might very well have gone into a decline and, in fact, have died. The fact was that he had very little English: it would have been impossible for him to have communicated with the staff of the prison or with any fellow prisoners, or to have related to them in any way. He would, in effect, have been in solitary confinement. To condemn a tribal Aborigine to such a fate was something which I wished, if possible, to avoid. The question of punishment by the tribe was barely alluded to, as I recall it, in the Court and certainly no mention was made of what it was the tribal elders had in mind to do.[1955]

The decision was by no means novel, but it was widely misinterpreted in the press, and, perhaps as a result, by the community at Yalata as well. The Mission Superintendent at the time, Mr BG Lindner, explained the events that followed in these terms:

> The elders did not want a 'tribal' thing made of it. The death had not occurred in anything resembling tribal circumstances. The elders were perplexed by the defence counsel's aggressive intrusion into tribal matters ... [W]e heard on the radio that Williams was released on a two year bond, and that he would be returned to Yalata by police aeroplane that day. The elders were informed but had no interest at all in meeting the plane. The whole matter had become a white-fellow exercise. I met the plane, and was handed a copy of William's bond. Williams returned with me to the village. He did not go to the nearby aboriginal camp ... [Four days later] Williams agreed that it would be best for him to return to the camp. This he did. He was later ritually speared by an elder ... A thin, plain spear was used: He was speared either three or four times in the thigh. Penetration was not deep, and the spear was not barbed. Williams came to the clinic soon afterwards., and received very minor medical attention. He then returned to the

1952 Comments noted by Ligertwood, 139.
1953 Reasons for Judgment, 1-2; (1976) 50 *ALJ* 386-7.
1954 ibid, but cf Editorial, 'sentencing the Aborigine Offender' (1977) 10 *ANZJ Crim* 65-6.
1955 Letter to the Commission, 19 August 1980, 1.

> camp ... I have no reason to believe that the spearing was considered by the aboriginal people as being 'punishment' for the woman's death. Tradition demanded subjection to this practice prior to resumption of normal community association s. It is also signalled the end of the matter ... Williams was not taken 'to areas beyond the Musgraves for about a year'. I heard nothing to indicate that this suggestion came from the men. I gained the impression that Williams thought it a bit of a joke.[1956]

Regrettably the concern shown for Williams by the trial judge in this case was ineffective. Williams later committed a series of assaults on Aboriginal women, and was gaoled in 1978 and again in 1980. There is no indication these offences had any customary law elements. The Yalata elders refused to act as sureties for Williams to be released on bail pending trial in 1978.[1957]

493. ***R v Larry Colley***.[1958] Colley, a fully initiated man, 28 years of age, was charged with the murder of his traditional wife, and convicted by the jury of manslaughter. During a domestic argument at Jigalong (WA), Colley struck his wife many times with a large piece of wood. Her injuries were extremely severe and resulted in death. It was stated that he felt bound to punish her because of tribal law. Both had consumed a large amount of alcohol. Some evidence was presented at the trial that another man had stirred up some of the trouble by teasing the prisoner and telling him lies about his wife. Colley had no relevant previous convictions. He had worked for a time as a police aide. His work there had been extremely good for nine months but then began to disintegrate as a result of his wife's drinking habits and infidelity. He left his job to return to Jigalong in an attempt to keep his wife out of trouble. Evidence was given at the trial by two elders from the Jigalong community that he would be accepted back. There was the possibility of some traditional punishment but he was regarded as being a very good person and a job would be provided for him. Counsel for Colley relied on *R v Sydney Williams*, arguing that he should be released on probation to avoid what would effectively be a form of double jeopardy. His liability to tribal punishment was a special circumstance to be taken into account. Counsel for the Crown argued strongly that the sentence should be assessed 'without any consideration at all to tribal consequences', because these consequences would occur outside the law and probably contrary to it. He submitted that:

> For our law to be respected as distinct from the tribal law ... the consequences of [homicide] ought to be punishment by our law in the appropriate manner ... [otherwise] the respect for our law as such — which, it is clear, aboriginal people have; that our law does punish offenders appropriately — would be lost ... [T]hose factors which we say legitimately can be taken into account ... are his good character, his lack of record and his history with the police force. The fact of his behaviour in the tribal setting, where he has obviously been a model child and a very good tribesman, respected by his people, and the circumstances under which he committed the offence ... are proper factors for your Honour to take into account ... [But] so far as the consequences we are imagining might befall the prisoner are constituted by unlawful acts, as tribal spearings are according to our law, they ought not to be taken into account at all.[1959]

Counsel added that it was not clear what, if any, punishment would be inflicted. Justice Brinsden sentenced Colley to three years imprisonment and fixed a non-parole period of three months. He took into account the fact that Colley had been in custody for six and a half months. He said:

> I take into account that perhaps in your own tribal customs you would have been expected, as the pre-sentence report suggests, to have inflicted some punishment on [your wife] — but certainly not under their law or ours, the punishment which was in fact inflicted ... However, I must sentence you to a term of imprisonment because I think the law I have to enforce requires it at this stage. I believe it is possible that you will be punished also. I do not know the form of punishment. It is said by the Crown that I should not take it into account because it will most probably be unlawful. It may not be. I do not know. I have given some credit to that in fixing the minimum term.[1960]

494. ***R v William Davey***.[1961] Davey, a 34 year old Aborigine from Borroloola (NT), pleaded guilty to the manslaughter of another Aborigine. The victim had interfered during a fight between Davey and his wife and had made certain remarks to Davey which the Crown accepted were provocative. Davey picked up a large piece of timber and struck the victim once on the head. He died as a result of the blow, although it seems clear that Davey did not intend to kill him. All three persons were heavily intoxicated. Davey had only one

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1956 BG Lindner, *Submission 213* (10 February 1981) 2-3.
1957 *The Advertiser*, 10 August 1978, 9. And cf M Brady & K Palmer, *Alcohol in the Outback*. North Australia Research Unit, Darwin, 1984, 36.
1958 Unreported, WA Supreme Court (Brinsden J), 14 April 1978. Further information on this case was provided to the Commission by AD Fenbury, WA Aboriginal Legal Service, *Submission 75* (15 May 1978).
1959 Transcript of Proceedings, 31-2.
1960 id, 35-6.
1961 Unreported, NT Supreme Court (Gallop J), 30 June 1980; on appeal, unreported, Federal Court of Australia (Bowen CJ, Muirhead and Evatt JJ), 13 November 1980.

minor previous conviction. The community adviser gave evidence at the trial indicating that the victim's remarks. which referred to the fact that Davey's wife had earlier been promised to the victim, were regarded as improper. At first instance Justice Gallop in sentencing Davey referred to the seriousness of the offence of manslaughter, and continued:

> it seems to have been the sort of accident where you were forced to take some sort of an action according to your tribal customs and traditions, and that [the victim] ... should not have intervened in what was essentially an argument between you and your wife ... [O]ne of the things that I take account of always in a case like this, it being something which has happened within the Aboriginal community, is to pay close regard to what your community ... thinks about what you did. [I]t is a very important thing that your community has considered what you did and they have decided that mostly it was [the victim's] fault, that you hit him and killed him. It is very important to me that your community think that you should come back into the community. It is very important that there is not going to be any payback, so I am told, and that there will be no further trouble if you go back to your community at Borroloola.[1962]

Justice Gallop imposed a sentence of 3 years imprisonment but suspended it upon Davey entering into a 3 year good behaviour bond and submitting to the supervision of the Director of Correctional Services. The Crown appealed to the Federal Court against the sentence, on the grounds of manifest inadequacy, and on the ground that Justice Gallop erred in 'taking into account ... that the respondent seemed to have acted in accordance with tribal customs and traditions'. On this latter point, Justice Muirhead said:

> In the exercise of its criminal jurisdiction the Supreme Court of the Northern Territory concerns itself with many aboriginal people. Of these, a number live under tribal culture and tradition and come from areas remote from the court. The court has for many years now considered it should, if practicable, inform itself of the attitude of the aboriginal communities involved, not only on questions of payback and community attitudes to the crime, but at times to better inform itself as to the significance of words, gestures or situations which may give rise to sudden violence or which may explain situations which are otherwise incomprehensible. The information may be made available to the court in a somewhat informal and hearsay style. This is unavoidable as it will often depend on a consultation with aboriginal communities in remote areas. In this case the Crown Prosecutor did not object to the presentation of the submissions, the evidence in mitigation of sentence, nor the manner in which the evidence was submitted.[1963]

On the general issue of the inadequacy of sentence Justice Muirhead said:

> The evidence which led his Honour to conclude there was some type of traditional provocation which resulted in the fatal blow was meagre, but it was not then challenged by the Crown and was ... a hypothesis reasonably open to him upon the evidence. It was proper to take it into account in considering why the respondent had suddenly acted in such a manner. This evidence also weighed with his Honour as he commented that he paid 'close regard to what the community thought' and he regarded the view that the respondent 'should come back into that community' as important. These must be relevant considerations especially when dealing with offences which take place within aboriginal communities, and involving only those people. [Counsel] for the Crown, emphasised that the respondent had much past contact with the European community having spent some years in a leprosarium, and later having worked consistently as a stockman. But association with white people does not necessarily erase deep-rooted customary fears or beliefs, nor does it eradicate the sense of what is, or what is not, acceptable or appropriate. I do not consider this court should interfere on the basis that the trial judge erred in attaching weight to these matters.[1964]

His Honour stressed the seriousness of the offence and the leniency of the sentence, but noted on the other hand the doubtful deterrent effect of sentencing, especially in respect of alcohol-related offences, the 'devastating effects of liquor, especially upon aboriginal society', and the need to promote reformation of offenders in appropriate cases, as the best form of protection to society. He concluded that the sentence was 'within the proper exercise of [the trial judge's] very wide sentencing discretion'.[1965] Chief Judge Bowen and Justice Evatt agreed in the result.[1966]

495. ***R v Joseph Murphy Jungarai***.[1967] Jungarai was charged with murder after he stabbed another Aboriginal man in Tennant Creek. He was drunk at the time, so much so that he could not afterwards recall what happened: medical evidence suggested that he was suffering from alcohol-induced amnesia. The attack

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1962 Transcript of Proceedings, 29-30.
1963 Reasons for Judgment, 5-6.
1964 id, 6-7. cf also id, 12 where Muirhead J commented that it 'is vital ... that the factors of "double jeopardy", and the advantages and responsibilities of the sentencing judge should be carefully heeded by this court in determination of appeals against leniency'.
1965 id, 17.
1966 id, 2, stating that 'the sentence although it appears to us to be lenient, was not to our mind so disproportionate as to afford evidence that in some way the exercise of the sentencing Judge's discretion was unsound'.
1967 Bail application reported (1981) 9 NTR 30 (NT Supreme Court, Forster CJ); reasons for sentence, unreported, 2 November 1981 (NT Supreme Court, Muirhead J); appeal from sentence, unreported, 4 June 1982 (Federal Court of Australia, Toohey, McGregor, Sheppard JJ).

on the victim apparently arose from resentment at attention Jungarai believed the victim had paid to one of his wives. Jungarai was committed for trial, bail being refused by the magistrate. On a further application to the Northern Territory Supreme Court, Chief Justice Forster ordered his release on bail. In giving his reasons for doing so, he said:

> Whatever may be the defences available to the accused under the law of the land and whether the appropriate verdict after the trial may be guilty of murder, guilty of manslaughter or not guilty, it is plain that according to Aboriginal law and custom the accused is held responsible for [the victim's] death and must accordingly be punished. The precise tribal punishment appropriate for the accused is not absolutely certain, but the strong probability is that it will consist of a single ceremonial spearing in the leg followed by banishment into the bush for a period to be fixed in order to remove from the community a possible focus for trouble ... The extended families of the deceased and the accused are in a state of mutual hostility which will only cease when the whole matter is 'finished up' by the accused suffering the appropriate tribal punishment. The accused is willing, indeed anxious, to undergo this punishment and feels deeply his inability to do so in order that peace between the families may be restored ... As a result of the court proceedings the accused will either be convicted of murder or manslaughter or will be acquitted. If he is convicted, it is likely that he will be in prison for a period which will satisfy the banishment requirement, even though this is a result of the court's action rather than the communities. If he is acquitted, or, having been convicted, is dealt with in such a way that he is not in prison. the accused will return to the community and may then be banished if it is thought necessary to do so to avoid trouble. Whatever may happen as to this aspect, it is almost certain that until the spearing has taken place the matter of retribution or pay back in Aboriginal terms will be unresolved and the community will be ill at ea se and serious trouble may flare up at any time. It is equally certain that once the spearing has occurred, the unease and the probability of serious trouble arising out of the killing will be at an end. In these circumstances and notwithstanding the fact that persons charged with murder are normally not allowed to be released on bail I considered it right to make the order which I did make. This should not be regarded as a precedent in the sense that the mere assertion of similar facts from the bar table will be sufficient ... to justify a similar order in every case. There must be credible evidence to support such a course being taken ... Aboriginal customs vary greatly from place to place and, of course, the circumstances of killings must differ ... I should also say that for the purpose of dealing with the application for bail I express neither approval nor disapproval of the course proposed to be taken by the family of the deceased, endorsed as it is by the community — including the family of the accused. Whether or not the proposed action constitutes an offence under the law of the land seems to me, for present purposes, to be irrelevant. The order for release on bail should not be interpreted as necessarily involving approval of what will happen nor, of course, should my failure to approve it be interpreted as disapproval. What will almost certainly happen is simply, for present purposes, an important fact to be considered.[1968]

At his subsequent trial, the Crown accepted a plea of guilty to manslaughter, no doubt taking into account the defendant's intoxication. In giving his reasons for sentence, Justice Muirhead said:

> The killing, naturally enough, caused a furore in your own community to the extent that after your arrest you were released on bail by the Chief Justice of this court to undergo tribal punishment. This was apparently necessary to protect your family from pay-back. This took place, and I am told you have been beaten with nulla-nullas and boomerangs until you were unconscious. I am also told there is no likelihood of further pay-back or trouble in the community ... Your counsel has urged me to release you under a suspended sentence of imprisonment on the basis that you are unlikely to offend again, on the basis that the Aboriginal community's anger has been quelled by tribal punishment, but I am afraid I cannot accede to that request. This court pays regard ... to tribal lore and customary punishments but the Australian law is designed to protect all Australians and I fear, if I ignore matters such as this — matters which occur between Aboriginal people — it can be said that the law does not extend to the protection of the black people. Furthermore you have illustrated you can be very dangerous in liquor and this crime was committed in a principal centre of the Northern Territory. There was no cultural tinge to the offence itself. It was simply a drunken stabbing which I am afraid is an offence far too prevalent amongst all sections in this Territory. You were carrying a very little, lethal knife and whilst you told the police you did not recognise it clearly you were carrying it for the purpose of violence.[1969]

He imposed a sentence of 6 years and 6 months, with a non-parole period of 2 years and 6 months.[1970] Jungarai appealed from this sentence to the Federal Court of Australia, but his appeal failed. Justice Toohey, delivering the judgment of the Court, said:

> There is no doubt that, in sentencing the appellant, his Honour had regard to the fact that, after his release on bail, the appellant returned to All Curung where he was beaten by members of the community with nulla nullas and boomerangs until he was unconscious ... Counsel expressly conceded that if the matter were viewed without any of the overtones arising from the notion of tribal punishment, neither the head sentence nor the non-parole period would be open to challenge. His Honour was urged to release the appellant on a suspended sentence of imprisonment, because he was unlikely to offend again and because 'the Aboriginal community's anger has been quelled by tribal

1968 (1981) 9 NTR 30, 31-2.
1969 Transcript of Proceedings, 2-3.
1970 Jungarai had already been in custody for 5 months on the charge: this was taken into account. He had a substantial record of previous convictions, including some of violence (though not since 1979).

> punishment'. His Honour was not prepared to accede to this request because of the seriousness of the offence and the circumstances in which it was committed. However he was willing to take those facts into account in deciding upon an appropriate term of imprisonment. Nothing that has been said by the appellant's counsel has demonstrated any error on the part of the learned trial Judge. The question whether courts may and should have regard to forms of punishment imposed or likely to be imposed against Aboriginal people by their own communities is a difficult one. But in the present case the Crown made no submission that the learned trial Judge should not have regard to the actions of the community. Nothing that his Honour said suggests that he gave any question of tribal punishment insufficient weight. We are of the opinion that he gave all matters before him due weight and that the sentence and the non-parole period were each well within the exercise of a sound discretion.[1971]

496. ***R v Moses Mamarika***.[1972] Moses Mamarika stabbed and killed his brother in a fight at Umbakumba, Groote Eylandt. The causes of the fight are not clear from the evidence, but it seems that there was some resentment between him and his brother over certain promised marriages. Moses Mamarika had three wives; the victim, the younger brother, was unmarried. They had both been drinking but it is not clear whether Moses was drunk at the time of the killing. The Crown accepted a plea of guilty to manslaughter, on the ground that provocation may have been available as a defence. Justice Muirhead described the 'pay back' that occurred immediately after the killing:

> You anticipated that what you had done would result in payback. You armed yourself with a tomahawk and a spear, and soon you were defending yourself against 3 men armed with spears, intent on traditional payback and no doubt intent on killing you. You were left severely wounded by several spear thrusts, one of which penetrated your abdomen. You survived after surgery at Gove, but it is evident that the anger caused by the slaying of your brother has not yet subsided.[1973]

He continued:

> By consent of counsel I have received and read a letter signed by the President of the Umbakumba Council[1974] and members of the community, and written on behalf of the Council and on behalf of your family. I am asked to ensure you do not return to your home for 3 years or more. They also ask that you be not further imprisoned, and suggest you be required to remain on a mainland outstation. In accordance with the practice of this court, which welcomes demonstration of the wishes of the Aboriginal communities when the crime concerns these people, I have given full consideration to the request ... But I take the view that you must first serve further time in prison, both by way of punishment and as a warning to that community, before you can be released. The reasons are these. There are too many cases involving killing of Aboriginals by Aboriginals coming before this court. Most are liquor induced killings. People who have been drinking become careless of each other and lose tolerance to insult or wrong doings. Only in exceptional circumstances, so far as I am concerned can a sentence for manslaughter result in immediate conditional release. Your community may regard what is virtual temporary banishment from your home land as adequate sanction and that I understand. I doubt whether imprisonment has ever made much sense to your people. Traditional punishment methods were probably far more effective ... But imprisonment is now well understood as a punishment handed out by the courts of this Territory and my experience is that an order for conditional release is too often misunderstood or ignored and your own recent record may illustrate this.[1975]

The defendant was sentenced to 7 years and 6 months hard labour, with a 2 year non-parole period. On appeal it was argued that the trial judge had not sufficiently taken account of the traditional punishment, or the community's view, in sentencing. The Crown did not argue that these factors were irrelevant, only that they had been sufficiently taken into account. Having referred to the letter expressing the Umbakumba community's views, the Court said:

> On a proper analysis of the appellant's case, it was not his submission that the wishes of the community should prevail over what might otherwise be seen to be a proper sentence. Nor in truth was it suggested that the Court should simply substitute a method of punishment known to and accepted by Aboriginal communities in lieu of a more conventional sentence. Rather it was the appellant's case that he had already, because of the injuries he received and the time he has spent in custody, been severely punished. To release him now from custody but to place him under supervision and exclude him from his community for a period of say three years would, in all the circumstances, constitute a penalty appropriate to the offence. Anything more would be excessive. We find this submission persuasive in its general approach.[1976]

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1971 Reasons for Judgment, 3, 4-5.

1972 Reasons for Sentence, unreported, 22 December 1981, Northern Territory Supreme Court, Muirhead J); appeal from sentence, (1982) 42 ALR 94, Federal Court of Australia (Northrop, Toohey, Sheppard JJ).

1973 Transcript of Proceedings, 3.

1974 Moses Mamarika's brother and one of his assailants in the pay-back incident.

1975 Transcript of Proceedings, 4-5. Moses had previous convictions for assault and aggravated assault.

1976 (1982) 42 ALR 94, 99. *Mamarika's* case was followed by a differently constituted Federal Court in *Jacky Anzac Jadurin v R* (1982) 44 ALR 424, 429, although in that case the appeal was dismissed.

In the event, the Federal Court, while not varying the length of the sentence', suspended it subject to his giving security to be of good behaviour for 4 years and to be subject to probation. The Court suggested that he should spend at least 3 years away from his home community, at the direction of the probation officer.

497. ***An Overview***. These cases, and a considerable number of other similar decisions collected by the Commission,[1977] reveal common features, including:

- the influence of alcohol as a factor in many offences:
- the fact that many of the offences involved only members of the particular Aboriginal community; and
- the significance of domestic violence.

At a more general level, several things may be noted:

- the relative frequency with which the issues have arisen, especially in the Northern Territory, in the last decade:
- the frequency with which defendants were convicted of lesser offences (especially manslaughter):
- the relative infrequency with which a complete Aboriginal customary law defence (had one been available as a matter of law) would have exonerated the defendant.

It may also be significant that most of the cases have been decisions of Supreme Courts, (although there are also instances of significant customary law issues arising before magistrates).[1978] This reflects the fact that customary law issues tend to be argued in the more serious cases (for example, aggravated assaults, homicides), and to a much lesser extent in the case of minor property and public order offences dealt with in courts of summary .jurisdiction.

## The Recognition of Aboriginal Customary Laws in Sentencing

498. ***Issues for Consideration***. In discussing whether and to what extent Aboriginal customary laws should be recognised in sentencing, this Chapter necessarily deals with several more specific issues. These are:

- the characteristics of what the courts term 'traditional punishments', and in particular their legality or otherwise (para 499-503);
- the extent to which Aboriginal customary laws should be taken into account in sentencing, whether in reducing or increasing the severity of sentences (para 504-51 1);
- whether a distinction can be maintained between taking Aboriginal customary laws into account in sentencing, and incorporating aspects of Aboriginal customary laws in sentencing orders. and to what extent such 'incorporation' (eg of traditional punishment, of ceremonies or of traditional supervisory authority) is desirable or workable (para 512-515);
- whether the conclusions arrived at on these questions should be reinforced by legislation (para 516-517);

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1977 In Research Paper 6A nearly 50 such cases were summarized, and a number of others have since been reported or otherwise drawn to the Commission's attention. See eg *Jadurin v R* (1982) 44 ALR 424; *R v Jacky Jagamara* unreported, NT Supreme Court (O'Leary J) 24 May 1984 (SCC No 292 of 1979); *R v Charlie Limbiari Jagamara*, unreported, NT Supreme Court (Muirhead J) 28 May 1984 (SCC No 22 of 1984), noted (1985) 12 ALB 1.1; *R v Sammy Jabarula*, unreported, NT Supreme Court (Forster CJ) 10 January 1985 (SCC No 134 of 1983). Other Western Australian cases include *R v Ferguson*, unreported, WA Supreme Court (Burt J) 8 April 1970; *R v Burton*, unreported, WA Supreme Court (Smith J) 19 November 1979. A number of other cases were instanced by Justice ARA Wallace in a letter to the Commission of 3 June 1983. See also the cases cited elsewhere in this Chapter. It is unfortunate that relatively few of the judgments are reported. Some cases are now noted in the Aboriginal Law Bulletin. Proposals have been made for more regular reporting of cases of this kind: see eg National Police Working Party, *Submission 350* (18 September 1984); South Australian Customary Law Committee, *Preliminary Report*, Adelaide, 1979, 57-8.

1978 But for significant customary law cases before magistrates see para 511, n 88, para 625, 648.

- whether a special sentencing discretion to take Aboriginal customary laws into account is desirable in cases where there is no general sentencing discretion under the relevant law (para 518-522).

Thereafter this Chapter considers several related or subsidiary questions, specifically:

- whether ancillary evidentiary provisions are desirable to assist courts in making informed decisions in these cases (para 523-531);

- the relevance of the broader range of sentencing questions referred to in para 490, including alternative sentencing options in cases involving Aborigines (para 532-541).

## Aboriginal Customary Laws and the Notion of 'Punishment'

499. ***Aboriginal Customary Laws: Offences and Responses***. It is difficult to give an account of the range of 'offences', and of responses to them, under Aboriginal customary laws. The subject is only dealt with incidentally or indirectly in the literature. Difficulties arise from the variations in customs and practices throughout Australia, and from the differing degrees to which communities have responded to outside influences. They also arise from the perceptions which many non-Aboriginal Australians have about law and punishment, with which traditional Aborigines may disagree. For example, it is commonly assumed that punishment is a response to wrongful acts, that it is a response closely regulated by rules, and that it is activated by some form of collective decision, ie, by a person or body authorized to act in the name of the general community. But in small, 'acephalous' communities[1979] these assumptions are unlikely to apply. In such communities, 'punishment' may be a response to acts which were not perceived so much as 'unlawful', as requiring a response from the affected party or group (and the 'punishment' may itself provoke a further response). The response may not be specifically laid down or stipulated, but may be chosen from a range of alternatives as a result of a process of argument, mediation or agreement;[1980] and it may follow not from any collective decision but from the (authorized or expected) reactions of the parties concerned in or injured by the original act. In short, punishment may be one of a range of possible outcomes of a process of dispute-settlement, with little resemblance to the impartial, and impersonal, application of defined sanctions in accordance with general rules, which is the model assumed by Anglo-Australian law. This point was forcefully made by Dr von Sturmer:

> I am struck by the extent to which western cultural blinkers are imposing a certain view on the nature of law and order in Aboriginal settlements ... Discussing Aboriginal customary law in the context of the general criminal law deflects attention right aw ay from the notion of how disputes arise in Aboriginal societies, the issues and interests which underly them, and the ways in which they are resolved.[1981]

But it does not follow that traditional Aboriginal punishments and dispute-resolving machinery generally[1982] are not the product of something properly called 'law', or that they should be ignored or discounted because they do not reflect a particular conception of the administration of justice.

500. ***Traditional Punishments or Responses***. Aboriginal traditional punishments can take a wide variety of forms, depending on factors such as the locality, the sex, status and previous history of the wrongdoer, the sex, status and conduct of the victim and of the person(s) required or expected to respond, the community's perceptions of the seriousness of the offence and the surrounding circumstances, and the extent of (and concern about) external intervention.[1983] Traditionally they might have included:

- death (either directly inflicted or by 'sorcery' or incantation[1984])

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1979 The technical term 'acephalous' refers to 'social systems which operate cohesively as political entities without there being any centralized state organization': E Leach, *Social Anthropology*, Fontana, London, 1982, 226.

1980 H Wilson *Transcript of Public Hearings*, Peppimenarti (6 April 1981) 1021-2.

1981 J von Sturmer, *Submission 383* (25 July 1983) 1. See J Biendurry, *Transcript*, Derby (27 March 1981) 578.

1982 See ch 28 for descriptions of forms of local settlement mechanism.

1983 For eg see H Wilson, *Transcript*, Peppimenarti (6 April 1981) 1021-2; H Parker, *Transcript*, Strelley (23 March 1981) 319; C Cameron and SN Vose, *Transcript*, Pt Hedland (24 March 1981) 388-90.

1984 C Yirrwala and ors, *Transcript*, Maningrida (7 April 1981) 1051-3; J Biendurry and K Ackerman, *Transcript*, Derby (27 March 1981) 587; F Chulung, *Transcript*, (31 March 1981) 766-7, F Yunkaporta and ors, *Transcript*, Aurukun (30 April 1981) 2027-8. On sorcery see further para 433.

- spearing (of greater or less severity) or other forms of corporal punishment (eg, burning the hair from the wrongdoer's body)
- individual 'duelling' with spears, boomerangs or fighting sticks
- collective 'duelling' (including specially structured encounters such as the *makarrata* or *minungudawada*)[1985]
- shaming or public ridicule
- more rigorous forms of initiation or teaching
- certain arrangements for compensation (eg through adoption or marriage)
- exclusion from the community (eg to a particular outstation or another community, or more rarely, total exclusion).[1986]

Some of these punishments are harsh and may be thought repugnant, although it should be said that they occurred within communities with few other means of disciplining their members (such as community work, fines or gaol), in which there were well-established means of moderating conflict or deterring excessive violence, and in which the ability to withstand pain and hardship was both a necessity and an acknowledged virtue.[1987]

501. ***Modifications to Aboriginal Punishments***. As a result, in part, of outside influences, including disapproval of many of these punishments by police and missions, and also changing economic and social conditions (so that the function or purpose of some forms of punishment has changed or disappeared), a number of traditional Aboriginal punishments (eg traditional killings[1988]) are either not practiced at all or are practiced only covertly. Such punishments were not defended, or regarded as appropriate for recognition by the general law, in submissions or evidence to the Commission. There has been some tendency to develop or modify punishments of lesser degree, which are thought more 'acceptable'. Such punishments may include:

- public discussion, negotiation, 'growling' and 'shaming'[1989]
- informal 'fines' and monetary compensation[1990]
- forms of community work or supervision[1991]
- exclusion from use of facilities[1992]
- exile to an outstation or another community.[1993]

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1985 For a case involving a minungadawada or 'trial by spears' on Groote Eylandt see *R v Andy Mamarika*, unreported, NT Supreme Court (Gallop J) 9 August 1978 (SCC No 23 of 1978); ACL RP6A, 14-15. Minungudawada is the local term for what is referred to in parts of North-East Arnhem land as a makarrata. See L Joshua, *Transcript*, Nhulunbuy (9 April 1981) 1170-1; J Roberts, *Transcript*, Darwin (3 April 1981) 903-4; T Evans, *Transcript*, Yirrkala (10 November 1981) 2833-6. It appears that the institution continues on Groote Eylandt, to a greater extent than elsewhere. The term makarrata, of course, has become current in another context. See Senate Standing Committee on Constitutional and Legal Affairs, *Two Hundred Years Later ... Report on the Feasibility of a Compact or 'Makarrata' between the Commonwealth and Aboriginal People*, AGPS, Canberra, 1983, para 2.32-2.35.

1986 And see A Woosup, *Transcript*, Weipa (1 May 1981) 2107; F Yunkaporta, *Transcript*, Aurukun (30 April 1981) 2025. There is some dispute in the literature over whether 'mass rape' was also used as a punishment in certain cases. cf *R v Banjo Anglitchi & ors*, unreported, NT Supreme Court (Muirhead J), 1 December 1980 (SCC Nos 316-322 of 1980) citing WEH Stanner; ACL RP6A, 32-3.

1987 eg RM Berndt & CH Berndt, *The World of the First Australians*, 4th rev edn, Rigby, Adelaide, 1985, 170-6, 342-3, 457.

1988 eg id, 343-4, 346-53.

1989 J Bucknall, *Transcript*, Strelley (24 March 1981) 338-9; J Oberdoo, *Transcript*, Strelley (24 March 1981) 336; SF Davey, *Transcript*, Darwin (3 April 1981) 918.

1990 J Oberdoo, *Transcript*, Strelley (23 March 1981) 297; L Joshua, *Transcript*, Nhulunbuy (9 April 1981) 1163; T Lewis, *Transcript*, Darwin (3 April 1981) 893; D Mirrawana, *Transcript* Maningrida (7 April 1981) 1058; G Brown, *Transcript* Alice Springs, (13 April 1981) 1308.

1991 A Tigan *Transcript* One Arm Point (28 March 1981) 648; D Featherstone, *Transcript*, Aurukun (30 April 1981) 2063; N Junior, *Transcript*, Kowanyama (27 April 1981) 1864.

1992 H Gregory, *Transcript*, Kowanyama (27 April 1981) 1851-2; B Paterson, *Transcript*, Kowanyama (28 April 1981) 1991.

1993 S Martin Jambajimba *Transcript*, Willowra (21 April 1981) 1523; S Coffin, *Transcript*, Strelley (24 March 1981) 338; P Springvale, *Transcript*, Fitzroy Crossing (1 April 1981) 787; N Brumby, *Transcript*, Kowanyama (27 April 1981) 1856-9.

However some Aboriginal communities continue to practice, and strongly defend their right to practice, certain punishments, such as thigh spearing,[1994] forms of corporal punishment[1995] and initiation or putting young offenders 'through the law'.[1996]

502. ***The Legality of Traditional Punishment Under the General Law***. Where a particular way of settling disputes is lawful under the general law, it appears that a court may, at least with the defendant's consent, incorporate it in its sentencing order (eg as a condition attached to a bond).[1997] It is sometimes suggested that certain forms of punishments (such as spearing) may be legal under the general law if consented to by the 'victim', since the existence of consent negatives an assault (or any more serious offence based upon the notion of assault). At common law, the extent to which consent may justify an assault (ie render it lawful) remains unclear. It has never been the law that the victim's consent excuses homicide. Generally speaking, the definition of 'assault' and cognate offences includes the absence of consent on the part of the victim. A person may consent to what would otherwise be an assault: in some contexts, to quite serious forms of assault (including contact sports such as ice-hockey, football and boxing). Even the deliberate infliction of 'injury' with the victim's consent may not constitute an assault if some social purpose is thereby fulfilled (eg cosmetic and other surgery, some contact sports).[1998] On the other hand, the courts do not accept consent as a defence in other contexts, where a breach of the peace is involved,[1999] where 'a spirit of anger or a hostile spirit' is shown,[2000] or where they can see no 'redeeming social purpose' in the act.[2001] The distinction between these cases and those where consent may be effective remains obscure and uncertain, and the courts retain a considerable degree of flexibility. The English Court of Appeal has summarized the position in the following way:

> It is not in the public interest that people should try to cause, or should cause, each other actual bodily harm for no good reason. Minor struggles are another matter. So, in our judgment, it is immaterial whether the act occurs in private or in public: it is an assault if actual bodily harm is intended and/or caused. This means that most fights will be unlawful regardless of consent. Nothing which we have said is intended to cast doubt upon the accepted legality of properly conducted games and sports, lawful chastisement or correction, reasonable surgical interference, dangerous exhibitions, etc. These apparent exceptions can be justified as involving the exercise of a legal right, in the case of chastisement or correction, or as needed in the public interest, in the other cases.[2002]

503. ***Consent to Traditional Punishments***. If this view is accepted by the Australian courts, then virtually no case of consensual traditional punishment involving wounding or beating (except corporal punishment imposed by a parent or a person *in loco parentis*) will be lawful at common law.[2003] It is not clear whether the Australian common law goes as far in the direction of discounting consent as the English Court of Appeal has done. But (with the exception of surgical procedures) consent will not justify the deliberate infliction of grievous bodily harm, or of any permanent or serious injury. This was the view taken by Justice

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1994 J Roberts, *Transcript*, Darwin (3 April 1981) 902-4; H Wilson, *Transcript*, Peppimenarti (6 April 1981) 997-8, 1021-2; and see para 516 n 124 and cf para 448.

1995 See for eg G Brown *Transcript* Amata (13 April 1981) 1308; S Martin Jambajimba *Transcript* Willowra (21 April 1981) 1522; A Andrew *Transcript*, Fitzroy Crossing (1 April 1981) 845-6. And for such punishment for women see J Roberts *Transcript*, Darwin (3 April 1981) 906-11; H Wilson, *Transcript*, Peppimenarti (6 April 1981) 1029.

1996 A Tigan *Transcript*, One Arm Point (28 March 1981) 642; D Turner, *Transcript*, Fitzroy Crossing (31 March 1981) 690; H Wilson, *Transcript*, Peppimenarti (6 April 1981) 1012-3.

1997 How far the court's power to attach conditions to a bond extends is however not clear, and there are relatively few decisions on the point. See K Warner, 'Bail Conditions and Civil Liberties' (1983) 8 *LSB* 124.

1998 cf *R v Maki* (1970) 14 DLR (3d) 164; *R v Green* (1970) 16 DLR (3d) 137; *Pallante v Stadiums Pty Ltd (No 1)* [1976] VR 331.

1999 *R v Coney* (1882) 8 QBD 535 ('prize fights').

2000 cf *Pallante v Stadiums Pty Ltd (No 1)* [1976] VR 331, 343 (McInerney J). *R v Billinghurst* [1978] Crim L Rev 553 seems to have been based on absence of consent only.

2001 cf *R v Donovan* [1934] 2 KB 498, 509 (Swift J); *Bravery v Bravery* [1954] 1 WLR 1169. There has been controversy in the UK over the legality of 'female circumcision' (ie clitoridectomy) performed on consenting adults according to beliefs and practices which are widespread in Muslim countries in Africa and the Middle East. Specific legislation outlawing the practice has been proposed in the UK, but its legality under the general law (especially for minors but also for adults) has been doubted by Lord Hailsham LC. See RD Mackay, 'Is Female Circumcision Unlawful?' [1983] *Crim L Rev* 717; K Hayter, 'Female Circumcision Is There a Legal Solution?' [1984] J *Soc Welfare L* 323. The nearest analogy in Aboriginal cultures is subincision (as to which see Berndt & Berndt (1985) 166-80). But this is performed only on consenting adult males, and, far from being a form of sexual and social repression, has no direct effect on sexual functioning, and is regarded as a 'promotion' or advancement into a male adult world of ritual and knowledge.

2002 *Attorney-General's Reference No 6 of 1980* [1981] 1 QB 715, 719 (Lord Lane CJ). For criticism see RD McKay, 'The Conundrum of Consensual Combat' (1982) 98 *LQR* 356; Glanville Williams, 'Consent and Public Policy' [1962] *Crim L Rev* 74 154. Glanville Williams, *Textbook of Criminal Law*, Stevens, London, 1978, 534-44 argues that consent should be effective to any assault short of a maim (ie a serious and permanent injury). If the Court of Appeal is right, this is no longer the law.

2003 cf C Howard, *Criminal Law*, 4th edn, Law Book Co, Sydney, 1982, 130-4. The position under the Codes is probably the same: Qld, s 223; WA, s 223. But the Tasmanian provision may go further in allowing consent to legitimize what would otherwise be an assault: Tas, ss 53, 182(4). Under the NT Code absence of consent is a definitional element of assault and cognate offences (s 187), but there are other offences not involving 'assault', where consent is apparently irrelevant, which would usually cover these kinds of case: s 154, 177, 186.

Nader in what is apparently in the only Australian case involving traditional punishment where consent has been expressly raised as a defence.[2004] It is difficult to avoid the conclusion that the common law has shown a measure of ethnocentricity in accepting the validity of consent to quite extreme forms of deliberate physical violence in some sports, while (probably) rejecting consent to the infliction of force in the course of indigenous traditional punishments.[2005] But the problem is not to be resolved by the application or reform of the law relating to consensual assaults. In some cases, the extent of traditional punishment is likely to go beyond anything that could be justified on the basis of the victim's consent. On the other hand consent is clearly relevant, in relation to bail,[2006] in sentencing, and in prosecution policy. The Commission has been informed of the policy of the South Australian police in relation to 'spearing' as a form of tribal punishment:

> Providing the spearing relates to strict tribal custom and no complaint is made to police by the victim, a prosecution is not pursued.[2007]

In fact there have been few, if any, prosecutions of a traditionally oriented Aborigine for inflicting a punishment such as spearing which did not lead to the death of or serious injury to the victim, and this is true not only of South Australia but elsewhere. The inference is that the process leading to such punishment is substantially a voluntary one, and that complaints to the police in such cases are not made or pursued. As was pointed out by the Commonwealth Department of Aboriginal Affairs:

> Traditional sanctions — spearing and other assaults — are still widely accepted in, for example, communities in Central Australia, and the use of these sanctions often does not result in charges being laid. In effect, the communities and the police give some de facto recognition to certain aspects of customary law. Those inflicting 'traditional punishments' generally know that they risk charges under Australian law but they and their communities have a reasonable expectation that only serious woundings are likely to result in court proceedings.[2008]

## Sentencing and Aboriginal Customary Laws: General Principles

504. ***Building on Existing Judicial Practice***. As the cases referred to earlier in this Chapter demonstrate, the courts, especially the Supreme Courts of the Northern Territory, South Australia and Western Australia, have had considerable experience in dealing with the problems involved in the recognition of Aboriginal customary laws in sentencing. This experience is a convenient starting point in considering the issue to what extent and in what ways Aboriginal customary laws should be recognised in the sentencing of Aboriginal offenders. The fact is that they are already recognised to a considerable degree. In considering reform, it is helpful to build on the existing experience in this field, if necessary reinforcing or elaborating on it. The courts have consistently recognised a distinction, which in the Commission's view is fundamental, between taking Aboriginal customary laws into account in sentencing, on the one hand, and incorporating aspects of Aboriginal customary laws in sentencing orders, on the other. The courts have consistently rejected arguments that Aboriginal customary laws, because they are not formally recognised by the general law and may in some respects contravene it, cannot be taken into account in sentencing. But they have, with some exceptions, been much more cautious about suggestions that aspects of Aboriginal customary laws (eg traditional punishments, initiation) should be incorporated into sentences (eg explicitly by being made a condition attached to a bond or as an implicit basis on which a lesser sentence is imposed). The following paragraphs spell out this distinction in more detail, in the light of the cases in which such issues have been raised, before going on to consider whether the principles which in the Commission's view ought to be

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2004 These three brothers inflicted severe injuries on their brother Moses, by way of payback: see para 496. They were subsequently charged with wounding with intent to kill and inflicting greivous bodily harm. Andy was acquitted outright on evidentiary grounds. Moses, asked by the trial judge whether he consented to the payback, stated that he 'didn't refuse'. He had previously stated that the payback was expected in accordance with the customary law of the local group. *R v Claude Mamarika, Raymond Mamarika & Andy Mamarika*, unreported, NT Supreme Court (Nader J) 17-19 August 1982, transcript of proceedings, 47-8, 51-2, 67-8. Nader J ruled that consent was no defence to the charge, approving the statement of the law by the Court of Appeal in Attorney-General's Reference No 6 of 1980: transcript of proceedings, 141-3, 150, 194-7. In fact the injuries inflicted on Moses were clearly in the nature of a maim. On no view of the law would consent be a defence in such a case. Claude and Raymond subsequently pleaded guilty to inflicting grievous bodily harm and were convicted on that charge. Nader J released them on 6 month good-behaviour bonds, in view of their lack of subjective criminality.

> I recognize the fact that what they did, was in accordance with the law that they believed they were bound by, and I do not think I could bring myself to inflict a punishment on a person who does that.
> (Transcript of proceedings, 164).

2005 cf *R v Adesanya*, The Times. 16 & 17 July 1974, where a Yoruba mother was convicted for inflicting a ritual scarification on the cheeks of her sons with their consent. Although the marks were permanent, the operation did not involve serious bodily harm even of a transient kind, much less a maim.

2006 See para 495.

2007 South Australia Police, *Submission 349* (24 September 1982). See para 472-8.

2008 JPM Long, *Submission 315* (21 January 1982) 1-2.

applied require legislative endorsement in some way (para 516-517), and whether the discretion to apply these principles ought also to be available in cases where no discretion otherwise exists (para 518-522).

## Taking Aboriginal Customary Laws into Account

505. ***Imprisonment as a Protection Against Customary Law Punishments***. In taking Aboriginal customary laws into account the courts have, first of all, rejected arguments that they should use their powers (whether to grant bail or in sentencing) to exclude the operation of customary laws altogether. Thus it is a basic principle of sentencing that a defendant is imprisoned only where this is necessary in all the circumstances as a punishment (taking into account the accepted justifications for imprisonment). Imprisonment is not to be used as a device for a paternalistic form of preventive detention.[2009] In *Jackie Jamieson v R* in 1965, Jamieson pleaded guilty to the manslaughter of his wife and was sentenced to 12 years imprisonment, with a 6 year non-parole period. The Full Court of the Western Australian Supreme Court, on appeal, substituted a 5 year sentence with a 3 year non-parole period. Delivering the judgment of the Full Court, Chief Justice Wolff said:

> In his report the [trial] Judge mentions that he had in mind that [the victim's] relatives would exact tribal vengeance and that the appellant would be protected for a time. These are kindly motives but are inappropriate in considering sentence.[2010]

In later cases this proposition has been generally accepted, As Justice Muirhead remarked in *Harry Gilmiri's* case:

> It is, upon [the] evidence, too early for you to return to Daly River and [counsel] has not had the opportunity of obtaining the views of [the victim's] relatives in the Port Keats area. When you are released, the feelings of your people will have to be considered before you return home. You are not of course being imprisoned merely to shield you from payback.[2011]

A defendant should not be sentenced to a longer term of imprisonment than would otherwise apply, merely to 'protect' the defendant from the application of customary laws including 'traditional punishment' (even if that punishment would or may be unlawful under the general law).

506. ***Refusing Bail to Prevent Customary Punishments***. Somewhat similar principles apply in the context of discretions with respect to bail. A court should not prevent a defendant from returning to his or her own community (with the possibility or even likelihood that the defendant will face some form of traditional punishment) if the defendant applies for bail, and if the other conditions for release on bail are met. In fact it is not unusual for bail to be granted by police or magistrates to enable a defendant to return to his or her community to resolve through traditional processes the dispute the offence has caused. A rare reported decision to this effect is that of Chief Justice Forster in *Joe Murphy Jungarai*.[2012] Of course, the other conditions for the grant of bail must be met: the defendant should not be a risk to the community and there must be sufficient assurance that he or she will not abscond to avoid trial.[2013] But, subject to these requirements, the courts will not necessarily decline bail in these kinds Of cases. To do so would be a form of paternalism and might, as Chief Justice Forster pointed out, exacerbate the situation in the defendant's community.[2014]

507. ***Taking Account of Customary Punishments***. The courts have gone further. Not only have they rejected arguments that they should exercise discretionary powers to prevent customary law processes from operating, but they have taken customary laws affirmatively into account in the exercise of sentencing discretions. That some 'traditional punishment' or response has occurred, or is likely to occur, is an indication of the local community's attitude to the defendant and the offence, and of the seriousness with which they regard them. Thus the fact that the defendant has been subjected to some traditional punishment under Aboriginal customary laws is relevant in sentencing, especially where the local community is thereby

2009 cf *Veen v R* (1979) 23 ALR 281.
2010 Unreported, WA Supreme Court (sitting as a Court of Criminal Appeal), 7 April 1965, transcript of judgment, 2. See ACL RP6A, 50.
2011 Unreported, NT Supreme Court, 21 March 1979, transcript of proceedings, 116; ACL RP6A, 16-17.
2012 See para 495. This was a fresh application for bail to the Supreme Court after bail had been refused by a magistrate.
2013 Bail will not normally be granted on a murder charge, but there is no rule that it cannot be granted if a sufficient case can be made. In many cases it will be likely that the accused will be convicted, if at all, only of manslaughter.
2014 *R v Joe Murphy Jungarai* (1981) 9 NTR 30, 31-2.

reconciled. This proposition has been frequently affirmed by the courts. Indeed, the Commission is not aware of any recent case where it has been denied.[2015] In most of the cases its relevance has been conceded by the Crown. The exception is *Colley's* case, described in para 493, where the court nonetheless took the possibility of future punishment into account. In the same way that the courts have regard to 'traditional punishments', or customary law processes more generally, where these have already been applied, they will also have regard to their possibility or likelihood in the future.[2016] One practical difficulty 'here is that it may not be clear what the community reaction, if any, will be to an offender', return. The courts, while aware of the uncertainty, do nonetheless take the likelihood of traditional punishment into account.

508. ***The Issue of Double Jeopardy***. One reason for this attitude derives from an important principle of the common law, that a person should not be punished twice for the same offence. This is a real issue for an Aborigine who commits an offence against the criminal law which is also contrary to Aboriginal customary laws. The defendant may be expected to pay compensation or undergo some punishment so that the matter is resolved within his community, but he or she may also be fined, ordered to pay compensation, given a good behaviour bond or sent to gaol. From the Aboriginal perspective two points need to be made. First, it may be inappropriate to regard an Aboriginal offender as being 'punished' in accordance with customary law. It may be more accurate to describe it as a 'resolution of a dispute' or a 'return of peace' than punishment in the strict sense.[2017] Secondly, there is an inevitability about Aboriginal customary processes taking their course regardless of what the courts might do. Thus a physical 'punishment' may be imposed on an of fender without any account being given to what the courts have done or might do. Although in practice it appears that some balancing of punishments is done within both systems. Within Aboriginal communities account will usually be taken of the fact that the courts have imposed, or are likely to impose, a penalty.[2018] In some cases a gaol sentence can resolve local problems, because it removes the offender from the community (in a way analogous to banishment) and allows tempers to cool. In *Desmond Gorey's* case, evidence was given by the superintendent at Hermannsburg of the interaction between imprisonment and local reaction to the offence.

> It does make a difference if a person receives a substantial gaol sentence. That satisfies most of the traditional people and at the end of this period, when they are calm and rational, the second part of the system can come into effect where a person like that is expected, or required by tradition to present himself for punishment to certain people of that relationship and when he does that he is wounded in various ways. He might be speared, but never seriously and once that has been accomplished, then nobody can bring the matter up again. The whole case is settled ... [I]f there isn't a gaol sentence, for argument's sake, then [there is a risk] ... of some of the rougher element within the wider relationship taking some drastic measures immediately.[2019]

On the other hand, a judge required to pass sentence should take account of Aboriginal customary laws and processes. In *Gorey's* case, Justice Gallop sentenced Gorey, who had pleaded guilty to manslaughter, to 3 years imprisonment with hard labour, with a non-parole period of 14 months. He said, in part:

> I take account of the fact that you ... have brought great shame upon your family and that you feel that shame. I try to take account of the fact that probably you will have to present yourself for punishment after you have served the gaol sentence which I propose to impose upon you.[2020]

509. ***Aboriginal Customary Laws as a Factor of Aggravation***. The judges have generally taken the view that the existence of Aboriginal customary laws as an element in an offence should not be a factor leading to an increased penalty. It has been implied that Aboriginal customary law processes, including the possibility or likelihood of traditional punishment of some kind, should be taken into account only as a factor of mitigation in determining an appropriate sentence for an Aboriginal offender. Justice Gallop when sentencing three Aborigines convicted of rape commented that:

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2015 See ACL RP6A, Cases 7, 8, 10, 27, 31, 32, 36, 41 for examples. See also the cases cited in para 482 n 37.

2016 This was so in many of the cases in ACL RP 6A. See Cases 6, 8, 11, 14, 15, 21, 23, 25, 37, 38, 44, 47.

2017 See para 499-500.

2018 See D Rose, *Dingo Makes us Human: Being and Purpose in Australian Aboriginal Culture*, Ph D thesis, Bryn Mawr College, Bryn Mawr, 1984 for a description of how this occurred in a particular case, from an Aboriginal perspective. See eg M Liddle *Transcript*, Alice Springs (13April 1981) 1340; C Cameron and SN Vose, *Transcript*, Pt Hedland (24 March 1981) 388-90; H Parker, *Transcript*, Strelley (23 March 1981) 318-9.

2019 Unreported, NT Supreme Court (Gallop J) 20 June 1978, transcript of proceedings, 36; ACL RP 6A, 14.

2020 Transcript of proceedings, 39-40. See also *R v Reggie Goodwin*, unreported, NT Supreme Court (Forster J), 8 September 1975; ACL RP 6A, 9.

> Some sections of the community may think that it is my duty to impose an exemplary sentence which will serve as a strong deterrent because these three Aboriginal people raped an Aboriginal woman and subsequently she died ... My function, as I see it ... is not only to punish the prisoners but to encourage acceptance of the criminal law by them and by the Aboriginal community as a step towards a more orderly and unified society. It would be inimical to this end if I imposed a harsher sentence because the prisoners are blacks ... The punishment which I impose must be seen to be a well-deserved punishment according to white man's community standard and also according to Aboriginal standards.[2021]

Throughout the 1950s Justice Kriewaldt in the Northern Territory Supreme Court consistently adopted the view that an Aborigine should never receive a more severe sentence than would be given to a non-Aborigine convicted of a similar crime.[2022] Given that only Aborigines (with very few exceptions) are subject to Aboriginal customary laws, only Aborigines will face the likelihood of a harsher sentence if customary law is an element in the offence. A court should not take the view that, because certain traditional punishments are undesirable or not approved of, a harsher penalty should be imposed in an attempt to eradicate such practices.[2023] But this does not mean that Aboriginal customary laws are relevant only in mitigation of sentence, even though this is the more usual case. They may sometimes be relevant in leading to the conclusion that a more severe penalty is appropriate. For example that a particular act was a breach both of the general law and of Aboriginal customary laws may be relevant in showing that the accused's conduct was blameworthy according to the values of his own community as much as those of the wider community. It may help to negate a plea in mitigation based on the accused's subjective blamelessness or on the argument that he did not realize that what he was doing was wrong.[2024] But these are essentially indirect ways in which customary laws may be relevant in aggravation of penalty. It remains basic that the sentence is imposed not for breach of Aboriginal customary laws but for breach of the general law. For this reason Aboriginal customary laws can only be relevant in fixing sentence within the general range (or 'tariff') of sentences applicable to the offence in question.[2025]

510. ***Relevance of Aboriginal Community Opinions in Sentencing***. It is often said that a sentencing judge or magistrate acts on behalf of the community. A sentence may to a degree reflect community views about the nature and seriousness of the offence committed. The courts consistently justify their sentencing functions as an expression of community views and values, while acknowledging the difficulties with these notions, and with ascertaining their content in any case. For example the Victorian Full Court commented that:

> it is not sufficient for a sentence to avoid subsequent review that it can be said of it that it is the product of what is admittedly a wide discretion conferred upon a judge who can be shown to have given some consideration to all relevant elements. There must be some recognition of and accord with 'the moral sense of the community' in the selection of the appropriate penalty. No matter how ephemeral that phrase may be or how elusive the task of evaluation of such a concept may prove in a given case, the task must nevertheless be essayed.[2026]

Similarly in *R v Dixon*, Justice Fox stated:

> The views of the general public are important in a number of ways. Public confidence in the administration of justice is important, indeed vital, and if sentences do not have a general acceptance, that confidence will flag. From the court's point of view it is not easy to determine how the ordinary member of the public thinks on such matters. And, of course it is not possible to put him in possession of all relevant facts about a particular case or all relevant knowledge as it bears on the subject in hand. The court not infrequently learns of the view of particular people, and of the more vocal sections of the community, but these may not be representative, and may be ill-informed.[2027]

The difficulties are to some extent avoided by the rule that it is a matter for the judges themselves to express the 'community view' or 'expectation' in sentencing. Evidence as to the prevalence of a particular offence in

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2021 *R v Burt Lane, Ronald Hunt and Reggie Smith*, unreported, Northern Territory Supreme Court (Gallop J), 29 May 1980 (SCC Nos 16-17, 18-19, 20-21 of 1980) 99-100.

2022 eg *R v Anderson*, unreported, Northern Territory Court (Kriewaldt J), 11 and 17 May 1954, 33.

2023 See para 505-6.

2024 See eg the cases discussed in para 510.

2025 On the notion of a 'tariff' see DA Thomas, *Principles of Sentencing*, 2nd edn, Heinemann, London, 1979, 14-18.

2026 *R v Williscroft* [1975] VR 292, 301..

2027 (1975) 22 ACTR 13, 19, and cf id, 21. Writers on sentencing also use these notions, while expressing severe reservations about their reliability or verifiability: cg AJ Ashworth, *Sentencing and Penal Policy*, Weidenfeld & Nicolson, London, 1983, 24-5, 50, 201-2, 261-2; AJ Ashworth, 'Criminal Justice, Rights and Sentencing: A Review of Sentencing Policy and Problems'. Paper presented to a seminar on Sentencing, Australian Institute of Criminology, March 1986, 6; RG Fox & A Freiberg, *Sentencing. State and Federal Law in Victoria*, Oxford University Press, Melbourne, 1985, 66-7, 450-8.

a particular area or generally has been accepted and relied on,[2028] but evidence of actual community opinions or responses to a particular offence or class of offences has been held to be inadmissible. In *R v H*, a Crown appeal on the grounds of the inadequacy of a sentence for incest, the Crown was prevented from tendering 'a number of letters from various persons to the Attorney-General expressing opposing views and indeed outrage at the decision' of the trial judge. The President of the Court of Appeal, Justice Moffitt, commented that:

> the evaluation of the criminality of the offence and whether imprisonment is called for is for the judge to determine upon the relevant evidence in relation to the crime. It is not a matter to be determined by reference to the views of others given directly in evidence or as hearsay, which views in any event may be based on wrong facts or facts not in evidence .. [T]he extent of community abhorrence of a crime or type of crime is not a matter of evidence.[2029]

Justice Begg agreed:

> It is the judges' duty to reflect, in sentences passed by them, their beliefs as to the attitude of members of the public to the particular type of crime. They do this from their own experience and knowledge of human life. It is not a matter calling for inquiry on evidence.[2030]

But these views are based on the assumptions that the courts have the background knowledge to take judicial notice of community views or expectations, and that community values will be reflected through the legislative process. These assumptions are doubtful enough in relation to the general community, an issue which will be explored in more detail in this Commission's Final Report on *Sentencing*.[2031] But these assumptions are much less likely to be correct when a non-Aboriginal magistrate or judge has to pass sentence on a traditionally oriented Aborigine from a remote community, the members of which may regard a particular offence more or less seriously than members of the general community would be likely to do. Persons living within the Aboriginal community concerned can best inform the court about the relevance of Aboriginal customary laws in the particular case. There are more general reasons for taking local community opinion into account in passing sentence. It provides Aboriginal people with the opportunity to see how the criminal justice system functions and may lead to a greater readiness by members of a community to play a role in an offender's rehabilitation. Some judges place great weight on the views of members of Aboriginal communities concerned when deciding on an appropriate sentence for an offender from their community. A judge will often be influenced to impose a sentence towards the lower end of the scale of sentences that would be available for the offence. In *Gilmiri's* case, Justice Muirhead pointed out that:

> The crime of manslaughter is seen in many forms and degrees of seriousness. The courts of this territory, in finding an appropriate penalty when Aborigines and Aboriginal customs and emotions become involved, endeavour to pay regard to these factors and to the views of the Aboriginal communities. But of course, the law of the land must be applied, and in this case properly so, because your own people become most disturbed by such happenings ...[2032]

Justice Gallop made clear his views on the role of community opinion in *R v Andy Mamarika*,[2033] where he said:

> I take account of the impact on the accused himself, of his trial by ordeal that his clan was subjected to ... A very significant matter for a sentencing power is the attitude of the community, particularly the community in which the accused lives and works. I have abundant evidence here before me of the attitude of the community, and it is that, having considered the non-violent nature of this man and his good standing generally in that community and the fact that the trial by dispute has already been carried out, imprisonment is not expected by the community in relation to this offence and this accused.[2034]

But it should not be assumed that local opinions will generally, or even usually, favour reduced sentences.[2035] In *R v Diamond Turner (otherwise Tjana)*, Justice Gallop commented:

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2028 eg *R v Williscroft* [1975] VR 292 301-2. On prevalence as a factor in sentencing see Fox & Freiberg, 66-7, 458-9; *R v Elvin* [1976] Crim LR 204.

2029 *R v H* (1981) 3 A Crim R 53, 65.

2030 id, 75.

2031 For a preliminary view see ALRC, Sentencing Working Paper, K Boehringer & J Chan, 'Towards Rational Sentencing', Sydney, 1985.

2032 Unreported, NT Supreme Court, 21 March 1979, transcript of proceedings, 114-5.

2033 Unreported, Northern Territory Supreme Court (Gallop J), 9 August 1978 (SCC No 23 of 1978).

2034 Transcript of Proceedings, 43.

2035 A number of submissions pointed out that in relation to some classes of offence local community opinions would tend to favour longer sentences and a more punitive approach: eg Justice JF Toohey, *Submission 77* (7 June 1978); T Pauling SM, *Submission 18* (22 June 1977) 10.

> I have to inflict the sort of penalty which will be seen by the community to accord with the general moral sense of the community and which will reflect what the community will see as well-deserved punishment. The community in this sense includes other fringe-dwelling Aborigines in and around the Alice Springs district.[2036]

A number of local justice schemes which have been set up in Aboriginal communities may be said to reflect the aim of taking into account local community views in determining appropriate sentences. The Aboriginal courts in trust areas (formerly reserves) in Queensland, the Aboriginal justice of the peace scheme operating in the Kimberley region of Western Australia, and the Justice (Courts) Project at Galiwin'ku in the Northern Territory are examples, which are discussed further in Chapter 29.[2037]

511. ***Sentencing and the Wider Australian Community***. The attitude of the local community to the defendant and to the offence is relevant in sentencing (within the general range of sentences applicable), especially where the offence was committed within that community and the victim was from that community. But the courts cannot disregard the values and views of the wider Australian community. There may be general community concerns over the prevalence of certain offences. The gravity of the particular offence may be such that other considerations are secondary.[2038] In some cases courts may be, for these kinds of reasons, unable to accede to the wishes of the local Aboriginal communities or to take full account of local customary laws. This is a reflection of the established rule that Australian law applies to all persons within Australia, including traditionally oriented Aborigines in their dealings with each other.[2039] The general law may impose further punishments upon offenders even though their local community may be satisfied or reconciled through traditional processes. For example, in *R v Bobby Iginiwuni*, Iginiwuni pleaded guilty to the rape of a two and a half year old girl who suffered significant injuries as a result. Justice Muirhead sentenced him to 5 years and 8 months imprisonment with a non-parole period of 2 years, but ordered that he be released after 5 months on a 3 year good behaviour bond. He said:

> [Y]our community is involved with you as aggressor and the child as a victim. Having heard the sworn evidence of ... a member of the Council, I am influenced by the fact that you will eventually be accepted back amongst your people, who will no doubt give consideration to the order of this Court and the punishment you will already have suffered, and who will I hope, exercise some influence over you in the future. This is not the first time, and it will not be the last, [that] this Court gains some guidance from the views of the Aboriginal community, although there will be cases, especially where the crime goes beyond the particular community, that it is not possible to give full, or even partial effect to the views expressed ... [But] it would be a great mistake also for anyone to assume that the Court will regard violence or crime, be it in accordance with custom or otherwise, committed within an Aboriginal community as something less serious than, or different to what may occur elsewhere. That is not the case as to do so would tend to deprive that community of the law's protection.[2040]

In *Joe Murphy Jungarai's* case, which was described in para 495, the defendant was subjected to a form of traditional punishment, but was later sentenced to 6 years and 6 months imprisonment, with a non-parole period of 2 years and 6 months.[2041] Many similar examples could be given. In *R v Banto Banto*, Chief Justice Forster said:

> I take into account with respect to each of you, that you were caught up in a situation not of your own making, in which violence was inevitable, and as I have said, loyalties and tribal custom made your involvement inevitable ... These were, however, serious crimes, and without wishing to destroy your essential Aboriginality, with its social and

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2036 Unreported, Northern Territory Supreme Court (Gallop J), 28 November 1979 (SCC No 281 of 1979). To similar effect see the comments by Justice Gallop in *R v William Davey* (para 479) and Justice Muirhead in *R v Moses Mamarika* (para 487).

2037 See para 721-740, 747-758, 764 respectively.

2038 For emphasis on the need to protect the interests of victims of crime on Aboriginal communities see eg *R v Friday* (1984) 14 A Crim R 471 (Qld CCA).

2039 See para 39-40, 195, 401, 449-50.

2040 Unreported, NT Supreme Court (Muirhead J), 12 March 1975, transcript of proceedings, 24-5; ACL RP6A, 7-8. cf *Police v Bernard Wurramurra*, where the defendant assaulted his wife with a bayonet, causing her considerable injuries. He claimed to be acting in compliance with his customary law, in response to her infidelity. As a result he was struck and speared by his wife's family. This apparently resolved the dispute so far as the families and the community were concerned. In discharging him on a 12 month good behaviour bond, Mr T Pauling SM said, in part:

> I am satisfied in this case that the community regard the matter as at an end, and I do not proposed to take the matter further other than pursuant to s 5 of the Criminal Law (Conditional Release of Offenders) Ordinance ... I am not saying that because tribal law says you must do something that in every case it will be all right with this court. It may not. You may go too far, punish somebody too much and then I will step in and add on to what the community has done. But I am satisfied that you having been speared and hit and the matter being regarded by all the families as being finished, that I ought not to do anything more:

Unreported, NT Court of Summary Jurisdiction, Groote Eylandt (Mr T Pauling SM), 27 July 1977, 9; ACL RP6A, 9-11.

2041 See para 495. This may be compared with *Moses Mamarika's* case (para 496) where the evidence indicated that the community's response may have been more along traditional lines and did in fact substantially settle the matter. There was apparently doubt in both respects in *Joe Murphy Jungarai's* case. See also ACL Field Report 7, Central Australia, 1982, 17.

> cultural background, the court must do what it can to discourage the resort to dangerous violence to settle differences.[2042]

Obviously the courts are having to balance the expression of concern and deterrence on the part of the general law with respect for the offender's (and victim's) backgrounds and traditions, and the expectations of the community or communities from which they come. The relative weight attached to these considerations varies, as the cases show. But the fact that the dispute within the local community is resolved, by the infliction of 'traditional punishments' or otherwise through customary law processes, although relevant, does not preclude further punishment by the court. The Australian community has an interest in the maintenance of law and order in Aboriginal communities.

## Incorporating Aboriginal Customary Laws in Sentencing

512. ***The Distinction between 'Recognition' and 'Incorporation'***. As was pointed out in para 499-501, the range of 'traditional punishments' or 'responses' to violations of Aboriginal customary laws is extensive. Some such punishments would be illegal under the general law (whether or not the person at whom they were directed consented to them); others would be illegal in the absence of consent; some involve no illegality at all.[2043] Where a punishment would be illegal irrespective of the defendant's consent or any special power of the court to impose it, the punishment cannot be included in a sentencing order. Where the form of 'punishment' or settlement involved would not be illegal (eg community discussion and conciliation, supervision by parents or persons in loco parentis, exclusion from land to which a person has, in the circumstances no right of access), a court may incorporate such a proposal into its sentencing order (eg as a condition for conditional release or attached to a bond), provided that this is possible under the principles of the general law governing sentencing and (probably) that the defendant does not object. This was, in effect, what the Full Federal Court did in *Moses Mamarika*,[2044] subjecting Mamarika to 4 years probation, with the intention that Mamarika spend at least 3 years away from his community, as requested.[2045] This is only one of many such cases. A major problem is to ensure that the sentence does in fact reflect settled community opinion. The Commission has been told of cases where members of the particular community concerned were not consulted at all before an order of this kind was made, as well as of cases where the community changed its mind shortly after sentence. A court is likely to have little or no control over, and limited information about, the dynamics of any Aboriginal community to which such sentences are directed. This illustrates the need for care in making such orders and flexibility in their formulation. In particular it is important that any persons in whose care the offender is to be entrusted:

- are appropriate persons having regard to any applicable customary laws (eg are in a position of authority over him, and not subject to avoidance relationships);
- have been consulted and are prepared to undertake the responsibility.

513. ***Incorporating Traditional Punishments in Sentencing***. Where the suggested or proposed punishment would be unlawful under the general law greater difficulties arise. A court cannot order or sanction such punishments, although it can take them into account as a fact. Courts have properly been concerned not to appear to 'condone' or tacitly encourage such punishments, both because of their illegality and because to do so might well distort the Aboriginal community processes involved, leading to the imposition of punishment under the mistaken impression that this is what the court required or expected to happen.[2046] What constitutes 'condoning' is a difficult question, as the following judicial statements indicate:

> The precise origin of the inter-tribal hostility which erupted and the precise details of what occurred during the day in question are uncertain. All that is certain is that the hostilities still exist and that whatever the outcome of these

2042 Unreported NT Supreme Court (Forster CJ), 18 April 1979 (SCC Nos 45-49 of 1979) transcript of proceedings, 28; ACL RP6A 17-18. See also *R v Stott*, unreported, NT Supreme Court (Forster J), 24 November 1977, transcript of proceedings, 12-13; ACL RP6A, 12; *R v Wesley Nganjmirra*, unreported, NT Supreme Court (Muirhead J), 9 November 1979, transcript of proceedings, 223-4; ACL RP6A, 19-20; *R v Banjo Anglitchi*, unreported NT Supreme Court (Muirhead J), 1 December 1980, transcript of proceedings, 153-5; ACL RP6A, 32-3; *R v Pat Edwards*, unreported, NT Supreme Court (Muirhead J), 16 October 1981, transcript of proceedings, 23-4; ACL RP6A, 39-40.

2043 See para 502-3.

2044 See para 496 and for the scope of power to attach conditions see para 502 n 46.

2045 cf (1982) 42 ALR 94, 100.

2046 cf para 492. Something very close to a direct 'delegation' of traditional punishment of this kind occurred in *Police v Eric Jackson*, unreported, NT Court of Summary Jurisdiction (WPJ Towers SM) 22 November 1977; ACL RP6A, 11. The 'delegation' was, to say the least, unsuccessful.

> proceedings may be, the matter will not be settled and the hostilities will continue and will periodically lead to violence. This is, of course, not to say that the court approves of such things, but nevertheless it should be realistic and take notice of the position as it exists and will continue to exist for some time ... Whereas I am certain that crimes, if committed, should be punished, it would be unjust to take no account of social or other pressures which exist 'in aboriginal society. Whatever the outcome here it is virtually certain that if any of you return to Wattie Creek, at least for some time, you will be subjected to some form of payback.[2047]

> It is clear that your father was always the aggressor and said or, rather, shouted grossly indecent and provocative things to you just prior to the fight. You were urged to fight by your mother, who was also very drunk. Her involvement was such that the local community will see to it that retribution is exacted against her as well as against you. Her punishment will probably be a ritual facing of spears, and yours will probably be banishment for a period. The court neither approves nor disapproves these punishments, provided that they do not lead to any serious harm, but simply accepts that they will probably occur and takes them into account.[2048]

> I am told that you wish to be released and to be dealt with by your tribal elders and that whatever penalty I impose they will also punish you by spearing you for what you have done. I do not want to be understood as saying that I support any such action which is unlawful but I cannot overlook its probability and I must take it into account.[2049]

A judge who takes into account the likelihood or inevitability of future traditional punishment as a matter of fact does not thereby condone it, especially so when taking such punishment into account occurs at the defendant's request. As the Federal Court said in *Jacky Anzac Jadurin v R*:

> It is sometimes said that a court should not be seen to be giving its sanction to forms of punishment, particularly the infliction of physical harm, which it does not recognize itself. But to acknowledge that some form of retribution may be exacted by an offender's own community is not to sanction that retribution: it is to recognize certain facts which exist only by reason of that offender's membership of a particular group.[2050]

An accused's willingness to undergo such a process may indicate his contrition, or provide an avenue for his rehabilitation within his own community.[2051] But in the Commission's view, judges neither can nor should order or direct traditional punishments to take place. This is so quite apart from their illegality, in some cases, under the existing law. Judges simply do not have insight into or access to the dispute-resolving processes in Aboriginal communities in a way that would allow direct delegation or authorisation of traditional punishment. Such punishments are not 'rule-governed' in anything like the way that sentencing under the general law should be, but are the result of a community process of dispute, discussion and reconciliation. Attempts to join or merge the two are likely to end in confusion and cross-purposes.[2052] This view is supported by the (limited) Australian experience of attempt, to 'delegate' punishment in this way. With few exceptions, these attempts have been unsuccessful and, in some cases at least, counter-productive.[2053]

514. ***Relevance of Aboriginal Ceremonies***. Similar issues arise with respect to the relevance of Aboriginal ceremonies in sentencing. Here again a distinction needs to be drawn between taking Aboriginal ceremonial life and obligations into account in sentencing, and incorporating such obligations in sentencing orders. Ceremonial life is obviously an integral part of Aboriginal customary laws.[2054] In taking Aboriginal customary laws into account when sentencing an Aboriginal offender, the importance of forthcoming ceremonies may be a relevant consideration. Difficulties can however arise. The court needs to determine the importance of the ceremonies concerned, the role that the Aboriginal defendant is to play, and the defendant's attitude to the ceremonies, as the following cases illustrate:

- In *R v Peter Daniel Jagamara and others*[2055] 7 young Aborigines pleaded guilty to breaking and entering a supermarket. In determining sentence, Justice Gallop heard evidence from Mr Harry Nelson a community leader at Yuendumu, that the persons before the court were expected by the elders to

2047 *R v Banto Banto*, unreported, NT Supreme Court (Forster J) 21 September 1979, transcript of proceedings, 27.
2048 *R v James Yulidjirri*, unreported, NT Supreme Court (Forster CJ), 7 September 1981, transcript of proceedings, 2; ACL RP6A, 38-9.
2049 *R v Morris Alsop*, unreported, SA Supreme Court (Mathieson J), 14 July 1981 (No 66/1981), Reasons for Sentence, 2; ACL RP6A, 49.
2050 (1982) 44 ALR 424, 429.
2051 For examples see ACL RP6A, Cases 3, 12, 16, 19, 27.
2052 See para 99, 101, 204-5, 402, 499-500 & see generally ch 28. This view was strongly endorsed by NM Wallace, *Submission 51* (20 January 1978).
2053 cf *Sydney Williams'* case (para 492) (although it is not suggested that the trial judge intended his sentence to be understood in this way). See also n 94. For similar difficulties with a diversion scheme focussing on customary law cases (as distinct from a wider range of cases) see para 488.
2054 The literature on Aboriginal ceremonial life is extensive. For a summary and further references see eg Berndt & Berndt (1985).
2055 Unreported, NT Supreme Court (Gallop J) 18 November 1980 (SCC 11-15, 47 and 55 of 1980).

attend ceremonies commencing the following month as part of the next stage of their initiation. Justice Gallop sentenced 6 of the 7 offenders to 6 months imprisonment but suspended its execution until after the ceremonies had been completed, a period of 6 months. The seventh person was sentenced to immediate imprisonment because of his particularly bad record. Sentencing the 6 offenders, Justice Gallop said:

> Mr Nelson has urged upon me that if you go back to your tribe, back to Yuendumu, you will be participating in tribal ceremonies and you will be thereby increasing your status in the tribe and showing a degree of responsibility ... I am going to give you a chance to do that. I am going to sentence you to a term of imprisonment, but I am going to order that you not go to prison provided you behave yourself for a period of six months ... I have to have regard to what the community thinks, and if the people at Yuendumu are prepared to have you back, I am prepared to give you a chance to prove that you are worth being back there.[2056]

Justice Gallop's view in relation to the 6 he released appears to have been that imprisonment, despite the defendants' previous records, was likely to achieve little, and that depriving each of them of the opportunity of participating in the initiation ceremonies could have a detrimental effect. The evidence suggested that giving the accused the opportunity of attending the ceremonies might have some rehabilitative effect, might instil in them a greater sense of personal and community responsibility, and thus have important effects on their status within their community in the longer term.

- In *R v Jacob Ah Won*,[2057] Justice Forster in sentencing a 13 year old Aboriginal boy after he pleaded guilty to unlawful wounding commented:

  > It is argued, and I think I accept this, that you are unlikely to offend in this or any other manner again. It is hoped that if you are free to participate steps will be taken shortly to lead to your initiation and this may well be the best thing for you.[2058]

- On the other hand in *R v Wesley Nganjmirra*[2059] Justice Muirhead stated when sentencing the offender to a total of 2 years and 6 months imprisonment on charges of break, enter and steal and wounding with intent:

  > Since your arrest there has been much talk of you taking part in tribal ceremonies and in the pre-sentence report I have obtained fears have been expressed that your failure to do so in the near future may result in grave retribution to some other person. I am afraid there is little I can do about this. The law must take its course.[2060]

The importance of some ceremonies and the effect that a period of imprisonment may have on an Aboriginal offender are relevant factors, as these cases demonstrate. In some situations, imprisonment can have serious consequences:

> While frequent imprisonment for drunkenness or dishonesty may lead an Aboriginal to lose status and the approval of his people, prison may also be seen as an unwarranted interference with tribal life. Young men may miss important tribal initiation ceremonies through being in prison. Since an uninitiated man is considered immature and therefore irresponsible, tribal elders are thus frustrated in their own endeavour to 'make a man of him'. Lengthy postponement of the initiation process may lead to sexual problems and social ostracism since uninitiated men are not permitted to take a wife or engage in sexual activity.[2061]

On the other hand, young Aborigines may be reluctant to be 'put through the law', and there are suggestions that offences may sometimes be committed specifically to avoid this. However relevant they may sometimes be for other reasons, tribal ceremonies are not designed, nor do they operate, as a form of punishment for an offence. Mr Harry Nelson, giving evidence in *R v Peter Daniel Jagamara and Others*[2062] suggested that participation in ceremonies could be regarded as an indirect form of punishment. He put it in these terms:

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2056 id, 42-3.
2057 Unreported, NT Supreme Court (Forster J) 21 September 1979 (SCC No 228 of 1979).
2058 Transcript, 2.
2059 Unreported, NT Supreme Court (Muirhead J) 9 November 1979 (SCC No 212-3 1979).
2060 id, transcript, 23. It is unclear from the transcript what these ceremonies involved but it appears they may have related to a form of tribal punishment. There was no mention of them being related to initiation.
2061 P Lowe, 'Misfits: Aboriginal Culture and Prison' in B Swanton (ed) *Aborigines and Criminal Justice*, Australian Institute of Criminology, Canberra, 1984, 327, 332. SF Davey, *Transcript*, Darwin (3 April 1981) 919.
2062 See n 103.

> It is not only a matter of them participating in the ceremony; there will be a lot of rubbishing going on by the elders. Those kids will be rubbished just about every day during the period of time when the ceremony is on, so it will not be sort of a holiday for them.[2063]

He added that these offenders would be subjected to more of this treatment than usual because they had created such a nuisance of themselves and upset so many people in the community. In one sense this may be a form of punishment but it is not directed at isolated instances of wrongdoing, so much as at the role the individual is expected to play in the life of his people.

515. ***Incorporating Aboriginal Ceremonies in Sentencing***. It is sometimes suggested that participation in initiation or other aspects of ceremonial life can usefully be incorporated in sentences, whether as a condition to a bond, or indirectly by subjecting a convicted defendant to the supervision of 'elders', in the expectation that initiation will follow and will have a rehabilitative effect. One reason for such suggestions is the evident failure of the criminal justice system to deter young offenders, as well as the intractable problems of providing the normal range of sentencing options for such offenders in remote communities.[2064] The difficulty is that these are pre-eminently the areas of Aboriginal culture and tradition which are the special concern of Aboriginal people, and which function in ways which are essentially unrelated to punishment or sentencing. A Report of the South Australia Aboriginal Customary Law Committee, *Children and Authority in the North West*, concludes that tribal ceremonies such as initiations should not be regarded as a form of punishment for offences against the general law:

> The connection between initiation and a consequent return to socially acceptable behaviour, has given rise to a school of thought which would have child delinquents dealt with by the 'elders'. Yet initiation as an artifice of rehabilitation has not proved to be any answer since it cannot be arranged without extensive preliminaries, and in any case, it is riot guaranteed, nor was it ever designed as a 'cure'. Moreover, the evidence would suggest initiation to be counterproductive when conceived as a device for trans-cultural punishment ... [There] is a growing alarm at the medium-term consequences of forcing troublesome adolescents into early initiation to 'cure them'. It is a strategy which does not work.[2065]

An offender's opportunity to attend a ceremony which is important both to him and his community may be a relevant factor taken into account on sentencing, especially where there is evidence that the ceremony and its associated incorporation within the life of the community may have a rehabilitative effect.[2066] However, the Australian experience strongly supports the view of the South Australian Committee that initiation or other ceremonial matters cannot and should not be incorporated in sentencing orders under the general law.

## The Commission's View

516. ***Endorsement of Basic Principles Elaborated by Courts***. The Commission endorses the principles articulated in para 505-515, which have been worked out by Australian courts in cases involving traditional Aborigines, and which are set out in summary form in para 542. These principles, in the Commission's view, strike the right balance between what are, to some extent, conflicting requirements. On the one hand, for the reasons already given, the courts cannot incorporate or require traditional punishments or other customary law processes to occur as a condition to the release of offenders or of the mitigation of punishment. On the other hand, there would be no point in acknowledging the right of traditionally oriented Aborigines 'to retain their racial identity and traditional life-style' if no allowance were to be made for traditional forms of dispute-settlement. These do now exist in fact, and are now taken account of by police, prosecuting authorities and courts in a variety of ways. As has already been demonstrated, the law's continuing disapproval of some traditional punishments does not mean that these cannot be taken into account. Especially where the Aborigines concerned accept such punishments as an aspect of their traditional life-style, it is appropriate that account be taken of them in ways such as:

- non-prosecution

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2063 Transcript of proceedings, 31. See also para 501 n 54.

2064 cf Brady and Morice, 148-53; and cf para 537.

2065 South Australian Aboriginal Customary Law Committee (Chairman: Judge JM Lewis) Children and Authority in the North West, Adelaide, 1984, 29. Similarly, Brady & Morice, 149 comment that, at Yalata, initiation did not mean 'the end of a delinquent career ... [B]oys were selected for initiation on the basis of traditional matters associated with land-holding. The fact that a boy had been in trouble with the police and would possibly be in trouble again at some time in the future, seemed irrelevant'.

2066 Whether it is likely to do so will depend on the attitudes both of the individual and of the Aboriginal community, and if these factors are to be relevant in sentencing information will need to be provided or both.

- sentencing
- procedural decisions such as on bail applications.

This view, though with differences in emphasis, was widely supported in submissions[2067] to the Commission, and is generally accepted by judges and writers.[2068] The converse view that Aboriginal customary laws should be rejected as a relevant factor in sentencing was supported by no-one.

517. ***Legislative Support for the Exercise of Existing Sentencing Discretions***. The question is then whether these principles should be officially endorsed in some way as appropriate, and if so, at what level of specificity. If official endorsement is desirable, the only way this can be done is through legislation. It is not open to the executive government to instruct or guide judges in the exercise of their independent powers, including their sentencing powers.[2069] Virtually all offences involving Aboriginal customary laws are offences against State or Northern Territory law, in relation to which the Commonwealth has, at present, neither standing to appear in court nor prosecutorial responsibility.[2070] These considerations would appear to favour legislative guidance being given. In addition, this is a difficult and controversial area, one in which the judges might fairly expect guidance from Parliament if the conclusions expressed in the preceding paragraph, arrived at after lengthy inquiry, were to prove acceptable to Parliament. A danger in such legislative Guidance is that it may be regarded as fettering essential judicial discretions.[2071] A provision which required a judge to take Aboriginal customary laws into account in sentencing might be thought to create difficulties if in a particular case the judge decided that this was not appropriate. On the other hand such a provision would only require that a judge consider the relevance of Aboriginal customary laws in cases where, on the evidence, these have been an element in the offence. It would not require a judge automatically to give a lesser sentence, but it would be a direction from the legislature that Aboriginal

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2067 Submissions which supported the need for recognition of Aboriginal customary laws and traditional punishments included: C McDonald, *Submission 130* (28 August 1979); D Vachon, Pitjantjatjara Council, *Submission 166* (1 May 1981); Rev J Whitbourn on behalf of Warrabri men, *Submission 269* (5 May 1981) (in some cases); Judge J Lewis, *Submission 271* (May 1981) (stressing the Pitjantjatjara's support for leg spearing as a traditional punishment and the absence of complaints or police action regarding such activity); AJ Cannon SM, *Submission 274* (8 May 1981) 3-4; WJ Faulds, Crown Counsel (Tasmania), *Submission 175* (8 May 1981) 3-4; P Ditton, Central Australian Aboriginal Legal Aid Service, *Submission 308* (21 July 1981) (reporting the desire of Central Australian Aboriginal communities to retain traditional punishments). Early in the course of the Reference Professor WEH Stanner pointed out that 'the days of private payback or talion are declining or gone'; in his view, Aborigines would come to see this as in their best interests: *Submission 6* (20 February 1977). S Brumby opposed the retention of traditional punishments: *Submission 138* (11 April 1981). Both the Department of Aboriginal Affairs (para 503) and Dr HC Coombs pointed out the likelihood that some Aboriginal communities would wish to retain traditional punishments as an informal sanction and the need to take this into account, while agreeing that express incorporation of such punishments might present problems. Of the Yirrkala people, Dr Coombs said:

> *Spearing*: In the comments by the Garma Council at Yirrkala on the Commission's discussion paper they emphasised that they thought spearing more humane than prolonged imprisonment and a more effective means of 'closing off' a dispute which led to the original offence. At the same time they said that the practice was declining and being replaced by some other form of compensation — often money payments. They decided therefore that they would not press for the right for their community courts to impose spearing as a punishment. However, while I obviously cannot be sure, I felt that they were expecting that it would remain an `informal' component in the settlement of some disputes reached by the consensus seeking procedures contemplated by them by their courts. Certainly in some other Aboriginal communities the practice of 'commuting' 'pay-back' action and punishments into money compensation is less developed than it apparently As in Yirrkala. My own conviction is that in most cases, spearing is accepted by the person being punished, willingly in the sense that he accepts it as necessary in the light of social opinion and pressure. Accordingly I would recommend, if the Commission is concerned about allowing Courts to impose spearing that they do not preclude it but provide an appeal to a magistrate or judge against any punishment on the grounds that it is excessive or unconscionable. I believe appeals would be few but the provision would act as a protection against extreme forms of punishment without passing ethnocentric judgments on Aboriginal processes.

*Submission 306* (14 July 1981) 1. Many submissions supported the view that Aboriginal customary laws should be taken into account in sentencing (whether or not any special legislative provisions to this effect was thought necessary): eg Sgt M Gilroy, *Submission 8* (10 March 1977); Justice WAN Wells, *Submission 17* (28 March 1977); HA Wallwork, *Submission 35* (3 August 1977); Sir William Forster CJ, *Submission 163* (24 April 1980); Queensland Law Society Sub-Committee, *Submission 301* (22 June 1981); Department of Aboriginal Affairs, (JPM Long), *Submission 315* (21 January 1982) (pointing out that 'no legislative action may, however, be needed').

2068 In addition to the cases and literature cited in this Chapter see para 41-5, 56, 71. In *R v Larry Baker*, unreported, SA Supreme Court (Commissioner Burnett), 12 April 1985, the court in imposing a 4 year gaol sentence for manslaughter commented:

> As a matter of general principle, it should be understood very clearly that the law of the land applies equally to all people. Where there are facts or circumstances which can be taken into account properly in mitigation or indeed in aggravation of the sentence for a criminal offence, and those facts or circumstances arise from the race or culture or sometimes religion of an accused person, then courts will take them into account, not because of the person's race, culture or creed, but because they are relevant and admissible matters. It should also be understood that a court will not order or impose traditional punishment which is not in itself lawful under general law. Nor will courts condone or tolerate actions which are unlawful but in some way are sought to be justified because they are traditional or tribal punishments. Subject to these rules the court will take into account in sentencing such matters as the attitude of the offender's community towards him in consequence of the offence, the fact that traditional punishment has been administered or may be administered in the future, and inevitably in some cases what is called 'pay back', a practice which by no means is the exclusive preserve of Aboriginal communities.

Reasons for Sentence, 5.

2069 On the principle of judicial independence in sentencing and its limits see Ashworth (1983) 58-68; Fox & Freiberg, 15-20.

2070 For Federal/State issues in relation to the implementation of the Commission's proposals see ch 38.

2071 This view was strongly put to the Commission by Justice Gallop, *Minutes of Regional Consultants Meeting*, Canberra, 11 December 1982, 7.

customary laws are an element to be taken into account in sentencing. For these reasons the Commission concludes that at least a general endorsement of the practice of taking Aboriginal customary laws into account is appropriate. It is not necessary to spell out in terms the various propositions discussed in para 505-515, but it should be provided in legislation that, where a person who is or was at a relevant time a member of an Aboriginal community is convicted of an offence, the matters that the court shall have regard to in determining the sentence to be imposed on the person in respect of the offence include, so far as they are relevant, the customary laws of that Aboriginal community, and the customary laws of any other Aboriginal community of which some other person involved in the offence (including a victim of the offence) was a member at a relevant time. It should also be provided that, in determining whether to grant bail and in setting the conditions for bail, account shall be taken of the customary laws of any Aboriginal community to which the accused, or a victim of the offence, belonged.[2072] The recommended formulation makes no specific reference to the need to take account of the views or opinions of the defendant's or the victim's community, although it was suggested in para 510 that these may well be relevant. So far as the defendant's community's views are concerned, the matter is sufficiently dealt with by the reference to local customary laws, by the existing practice of taking these matters into account and by the procedural provision recommended in para 531. This applies also to the views of the victim's community (where this is a different community). At present the courts rarely take into account the views of the victim, or members of the victim's family, as to the appropriate sentence.[2073] But the fact that the accused has made restitution in some way to the victim or his or her family is undoubtedly relevant. For this reason, as well as in the interests of balance, evidence or submissions of the attitude of the victim or the victim's community towards the offence and its aftermath ought not to be excluded. But, for the reasons given, no substantive provision requiring these opinions to be taken into account is necessary.[2074]

## A Special Sentencing Discretion?

518. ***The Issue***. In Chapter 18 it was concluded that the creation of a defence based on Aboriginal customary laws exonerating an accused from criminal liability was not an appropriate way in which to recognise Aboriginal customary laws for the purpose of the general criminal law.[2075] It was however concluded that a partial defence which would have the effect of reducing murder to manslaughter was appropriate, where it was established that a person acted in accordance with Aboriginal customary laws in committing an offence.[2076] The effect would be to activate a sentencing discretion, avoiding a mandatory sentence of life imprisonment in those jurisdictions where this still applies. The question is whether, in addition to this 'partial defence', a specific sentencing discretion should be enacted, allowing a court to take account of Aboriginal customary laws in sentencing, in the case of offences which carry a mandatory sentence. In substance the question is whether in murder cases there should be a discretion available to a sentencing judge to impose a lesser sentence, if Aboriginal customary laws are a relevant factor in the offence.[2077]

519. ***The Northern Territory Experience before 1983***. Before the enactment of the Criminal Code 1983 (NT)[2078] a judge sentencing an Aboriginal person convicted of murder in the Northern Territory had a discretion as to penalty. This was set out in sections 6(1C) and 6A of the Criminal Law Consolidation Act:

> 6(1C). Where an aboriginal is convicted of murder, the judge may impose such penalty as, having regard to all the circumstances of the case, appears to him to be just and proper.
> 6A. For the purpose of determining the nature and extent of the penalty to be imposed where an aboriginal is convicted of murder, the court shall receive and consider any evidence which may be tendered as to any relevant native law or custom and its application to the facts of the case and any evidence which may be tendered in mitigation of penalty.

These provisions were used rarely because very few Aborigines were convicted of murder. One of the exceptional cases was *R v Gus Forbes*,[2079] where the accused was found guilty and sentenced to 12 years

2072 On the relevance of Aboriginal customary laws in bail applications see para 506.
2073 Fox & Freiberg, 458 citing *R v Bakker*, unreported, Vic Sup Ct (McInerney J) 27 February 1978. But see J Zambrowsky & DT Davies (ed) *Victim's Rights and the Judicial Process*, Canadian Criminal Justice Association, Toronto, 1985, 78-100.
2074 This issue will be discussed further in the Commission's Final Report on *Sentencing*.
2075 See para 442-50.
2076 See para 451-3.
2077 For a limited number of other offences mandatory sentences are prescribed, but Aboriginal customary laws will rarely if ever be relevant in such cases.
2078 See para 520.
2079 Unreported, NT Supreme Court (Gallop J) 29 August 1980 (SCC No 22, 23 of 1980).

imprisonment for murder and 8 years for rape, to be served concurrently, with a 6 year non-parole period. Justice Gallop, in sentencing Forbes, said:

> The view that 1 take of the facts of the offences and of the crime of murder in particular, prompts me to order life imprisonment and ordinarily I would order life imprisonment. But s 6A of the Criminal Law Consolidation Act and the other provisions of the law put Aborigines in a special position when convicted of the crime of murder and I am required to take account of native law and custom and its application to the facts of the offence and any evidence which may be tendered in mitigation of penalty. I cannot ignore the fact that whether the European society likes it or not, rape is not as seriously regarded in the Aboriginal community as it is in the European community. I must take that into account. I must take into account also that in relation to this accused, there is a strong probability of pay-back by the deceased's family and I suppose the most telling matter to take account on the question of penalty amounts to a banishment from his community and a banishment from the land with which he identifies himself. These factors cause me to mitigate the penalty that I think the crime of murder warrants and therefore I do not propose to inflict the statutory maximum, but it is a case in my view which comes very close to warranting the maximum.[2080]

The Criminal Law Consolidation Act provisions were considered in greater detail in *R v Herbert and Others*.[2081] In that case three Aboriginal women were convicted of the murder of a 58 year old man. Justice Gallop sentenced each to life imprisonment, declining to exercise the discretions available under s 6(1C) and 6A of the Criminal Law Consolidation Act. On a re-trial following a successful appeal to the Federal Court,[2082] the three women were again convicted of murder. Justice O'Leary discussed the scope of these sentencing discretions:

> It seems clear to me that, whilst fixing the sentence for murder in the Territory as mandatory life imprisonment, the intention of the legislature was that, where it was an Aboriginal who was convicted of murder, that penalty should not apply, but rather there should be such penalty as 'having regard to all the circumstances of the case, appears to, (the judge) to be just and proper'. The discretion there conferred on the sentencing judge is, I think, a wide and unfettered one. It is not, in my opinion, cut down by the provisions of s 6A. That section clearly refers back to s 6(1C), but in my view, is directory only. It requires the court to receive and consider evidence of any relevant native law or custom, if there be any involved, and its application to the facts of the case, as well as any evidence which may be tendered in mitigation of penalty.[2083]

Justice O'Leary held that there was no element of 'native law or custom' which could be said to have contributed to the offence. Nevertheless he was prepared to take into account other factors in mitigation:

> There must be many cases where an Aborigine would not be able to show that there is any relevant native law or custom involved. In those cases, I do not think that the sentencing judge is thereby precluded from considering evidence tendered in mitigation of penalty. In my view, he may, and, in particular, he may consider evidence as to the background and history of the Aboriginal concerned, the extent of which he has or has not adopted white ways or manners, the degree to which his Aboriginal inheritance predominates and any problems of a transcultural nature that he may have experienced.[2084]

Justice O'Leary sentenced each of the women to 12 years imprisonment with a non parole period of 5 years 6 months. These sentences were upheld by the Federal Court after appeals by both the Crown and the 3 accused.[2085]

520. ***The Criminal Code 1983 (NT)***. Despite the general trend in other jurisdictions to abolish mandatory life sentences for murder[2086] the Criminal Code 1983 (NT) repealed the Criminal Law Consolidation Act (NT) and abolished the special sentencing discretion for Aborigines. Section 164 of the Code simply provides:

> Any person who commits the crime of murder is liable to imprisonment for life which cannot be mitigated or varied under section 390.

Section 390 allows a shorter term of imprisonment to be imposed where life imprisonment is stipulated. Clearly it is intended that there should be no lesser sentence than life imprisonment following a conviction for murder. The view of the Northern Territory Government in relation to abolition was expressed in the following way:

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2080 Transcript of Proceedings, 10-11.
2081 (1983) 23 NTR 22.
2082 (1982) 42 ALR 631.
2083 (1983) 22 NTR 22, 24-5.
2084 id, 25.
2085 (1984) 53 ALR 542.
2086 See para 521.

> My Government's policy was that there was to be no distinction between the peoples of the Territory as regards the punishment for murder. A great deal of thought was given to considering whether a discretionary life sentence for murder should be introduced. Unfortunately, given the extremely high incidence of violent crime in the Territory, that approach could not be countenanced at this time. The decision was that murder was to be deeply stigmatised and set apart from all other offences.[2087]

The view taken was that other provisions of the Code, such as those dealing with coercion, diminished responsibility and sudden and extraordinary emergency, would be appropriate and sufficient to allow Aboriginal customary laws to be taken into account.[2088] Allowing Aboriginal customary laws to be taken into account as a matter of substance in establishing all the elements of the offence of murder, on this view, meant that it was unnecessary to preserve the discretion to take 'native law and custom' into account during sentence.

521. ***The Movement towards Sentencing Discretion in all Cases***. In other jurisdictions, in Australia and elsewhere, the tendency has been towards conferring a sentencing discretion even in the case of murder, to allow special mitigating factors to be taken into account in sentencing, to allow decisions about the length of sentence actually imposed to be made by judges subject to the safeguards of appeal, and to bring the system of parole into play. A sentencing discretion in murder cases now exists in the Australian Capital Territory,[2089] New South Wales[2090] and Papua New Guinea,[2091] and recommendations for such a discretion have been made in New Zealand,[2092] Victoria[2093] and elsewhere. In proposing a sentencing discretion in murder cases the Victorian Law Reform Commission commented that:

> The mandatory life sentence has been the subject of sustained criticism in Australia and elsewhere, because of both its absolute nature and its indeterminacy. In England, New Zealand and Australia there has been support for the replacement of the mandatory penalty with a discretionary sentence with a maximum of life. In New South Wales, the judge now has a limited discretion to impose a sentence less than life on a person convicted of murder, and in South Australia the judge, while still being required to impose a life sentence, can also set a minimum non-parole period. It is the view of the Commission that judges should be able to mark the specific blameworthiness of the offender by the sentence, which will be both public and appealable by defendants and by the Attorney-General, as they do in relation to almost every other offence.[2094]

522. ***The Commission's Conclusion***. In the Commission's view Aboriginal customary laws should be taken into account, where relevant, in murder cases as in other cases. There is little justification for allowing customary laws to be taken into account in some cases and not others, especially at the sentencing level. Clearly the best way of achieving this would be by way of a general sentencing discretion applicable to all persons, Aboriginal or non-Aboriginal. But no such discretion exists in the jurisdictions (Northern Territory, South Australia, Western Australia and Queensland) which are most relevant for the purposes of the present Report, and it would be beyond the present Terms of Reference (as well as beyond Commonwealth legislative power) to recommend or enact a general sentencing discretion for murder. The question is therefore whether a special sentencing discretion is desirable in murder cases allowing the court to take

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2087 Letter to the Commission from the Honourable P Everingham, Chief Minister Northern Territory, 6 December 1983.

2088 See para 418, 430, 433, 439, 440 for discussion of substantive provisions of the Code.

2089 Crimes Act 1900 (NSW) as it applies to the ACT, s 19 (amended 1983).

2090 Crimes Act 1900 (NSW) s 19 (inserted 1982). This is a restricted discretion, which applies only where the court is satisfied that the accused's 'culpability for the crime is significantly diminished by mitigating Circumstances'. See *R v Murray* [1982] 1 NSWLR 740; *R v Burke* [1983] 2 NSWLR 93; and for comment see GD Woods, 'The Sanctity of Murder: Reforming the Homicide Penalty in New South Wales' (1983) 57 *ALJ* 161, D Weisbrot 'Homicide Law Reform in New South Wales' (1982) 6 *Crim LJ* 248, 249-52.

2091 In its Report No 3, *Punishment for Wilful Murder*, Waigani, 1975, the PNGLRC recommended that the punishment for murder be in the discretion of the judge, with a maximum penalty of life imprisonment. This, they commented, would:

> allow the National Court to take into account ... whether peace negotiations have taken place between the clan of the killer and the clan of the person killed, whether compepsation has been or is about to be paid, and whether the people affected by the killing consider the matter settled. (id, 10).

This recommendation was implemented by the Criminal Code Amendment Act 1976 (PNG). More recently, however, minimum penalties legislation has been introduced on a broader basis in an attempt to combat a perceived 'crime wave', and has given rise to much conflict and disagreement. See D Weisbrot, 'The Disorder of Law in Papua New Guinea' (1985) 10 *LSB* 170; D Weisbrot, 'The Papua New Guinea Minimum Penalties Legislation' (1985) 18 *ANZ J Crim* 164. Offences carrying a minimum penalty under this legislation do not however include murder.

2092 Penal Policy Review Committee, *Report*, Government Printer, Wellington, 1982, para 164.

2093 Victoria, Law Reform Commissioner, WP 8 *Murder: Mental Element and Punishment*, Melbourne, 1984, 30-49; Victoria, Law Reform Commission, Report No 1, *The Sentence for Murder*, Melbourne, 1985.

2094 Victoria, Law Reform Commission, *Summary of Report No 1, The Sentence for Murder*, Melbourne, 1985, 2-3.

Aboriginal customary laws into account in sentencing.[2095] There are two main arguments against a special law of this kind.

- *Discrimination and Special Laws*. It can be argued that a special sentencing discretion of this kind would be discriminatory or divisive, since it would allow some Aboriginal defendants the possibility of mitigating their sentence in a way not available to other persons. This is a specific example of the general arguments based on discrimination and equality which were considered in Chapter 9. Indeed, the argument was put in precisely this context by counsel for the Northern Territory in appealing from the 12 year sentences for murder imposed by Justice O'Leary in *R v Herbert & others*.[2096] It was argued that s 10 of the Racial Discrimination Act 1975 (Cth) required a narrow interpretation of s 6(1C) of the Criminal Law Consolidation Act, restricting it to matters relevant in exercising the discretion under s 6A to mitigate a sentence on grounds of 'native law or custom'. The implication of the argument seems to have been that a special discretion to take Aboriginal customary laws into account would not have contravened s 10 (or perhaps s 10 combined with s 8(1)[2097]), but that a general sentencing discretion in murder cases applicable only to Aborigines would do so. No attack on the validity of either s 6(1C) or s 6A of the Criminal Law Consolidation Act was made. The Full Federal Court commented that it had difficulty in understanding the argument:

  > It is unnecessary to consider whether, because of ss 6(1C) and 6A, there was conflict between s 5 of the Criminal Law Consolidation Act and the Racial Discrimination Act. That issue does not fall for determination. There is no attack upon the validity of ss 6(1C) and 6A. There is no doubt that, on any view, the legislature by those two sections made special provision with respect to the sentencing of Aboriginals convicted of murder. The only question is as to the nature and extent of the special provision which they made. The Racial Discrimination Act provides no useful guidance whatever as to that question.[2098]

  To confer a sentencing discretion in murder cases just because the defendant is Aboriginal would, no doubt, be racially discriminatory within the meaning of the Racial Discrimination Act 1975 (Cth). But, as was concluded in Chapter 9, special measures for the recognition of Aboriginal customary laws will not be racially discriminatory if they are reasonable responses to the special and distinctive needs of those Aboriginal people affected, and are generally accepted by them.[2099] The first of these requirements is, in the Commission's view, met in the case of a special sentencing discretion. The second is, so far as the Commission is aware, on the basis of consultation so far carried out,[2100] also met, although further consultation will be necessary in the implementation of the Commission's recommendations.[2101]

- ***Overlap between a 'Partial Defence' and a Special Sentencing Discretion***. Alternatively, it can be argued that it is undesirable, or at least unnecessary, to have both a 'partial defence' capable of reducing murder to manslaughter where Aboriginal customary laws are involved (as recommended in Chapter 18) and a special sentencing discretion in murder cases. But there are a number of reasons why it is desirable to have both a partial defence and a sentencing discretion in cases of murder. It is likely to be more difficult to establish the partial defence, given the stricter proof requirements, than it may be to establish factors in mitigation of penalty. There may also be a reluctance by Aboriginal people to disclose aspects of their customary laws which would be necessary to establish the partial defence, a factor which may not be as crucial in relating to sentencing. But most importantly, the fact that an argument based on the partial defence has been unsuccessful does not necessarily mean that customary laws were not an element in the offence. Conduct which was not required or justified by Aboriginal customary laws may still be understandable or excusable to some degree by reference to customary law aspects.[2102]

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2095 The separate question whether such a discretion should be enacted by Commonwealth, or State or Territory, legislation is considered in ch 38.

2096 See para 519.

2097 For the text of these provisions see para 152. The case was argued and decided before the High Court's decision in *Gerhardy v Brown* (1985) 57 ALR 472, as to which see para 153-7.

2098 (1984) 53 ALR 542, 545-6.

2099 See para 165.

2100 See para 16-20.

2101 See para 20, and ch 39.

2102 The view that both the partial defence and the sentencing discretion were desirable was endorsed by D Hore-Lacy, *Submission 499* (14 November 1985) 9-10.

- ***Conclusion***. For these reasons the Commission concludes that the proposed sentencing discretion to take Aboriginal customary laws into account should apply even where the sentence which would otherwise be imposed is a mandatory sentence (in particular, a life sentence in murder cases).

## Related Questions of Evidence and Procedure

523. ***Evidentiary Issues***. In considering how Aboriginal customary laws should be taken into account in sentencing. a number of evidentiary and procedural issues arise, some of which are dealt with in Part V of this Report. Chapter 24 discusses the proof of Aboriginal customary laws, through outside experts and through the evidence of Aboriginal people themselves. Chapter 25 discusses some problems which arise in taking Aboriginal evidence, including the questions of who has authority to speak on Aboriginal customary law matters, the taking of group evidence, the protection of Aboriginal secrets and a possible privilege against disclosing confidential or incriminating certain information. In Chapter 26 other methods of proof, such as the use of assessors or court experts, are considered. However one matter of particular relevance to sentencing is how Aboriginal community opinions can be determined and presented to the court.

524. ***Determining Local Community Opinions***. In practice local Aboriginal community expectations, attitudes and opinions are taken into account to some degree in sentencing an offender from that community, and within certain limits this practice is desirable.[2103] But an obvious difficulty which arises is how to determine these community expectations or opinions. Only in rare cases will there be an overall consensus in a community on the offence or the offender. In many cases only a limited number of people within the community will have a direct interest in the matter. Others will regard it as none of their business and will not wish to become directly involved. However, family, friends and kin of the offender and the victim (if there is one) will have a very real interest in the outcome of any proceedings. It has also been argued that the presence in court of members of the offenders family and community has the added effect of bringing 'shame' to the offender.[2104] There may also be offences about which community leaders would wish to make their views known. Particular offences may have major repercussions for a community (for example if a community store or vehicle is vandalised or other important community facilities are interfered with in some way.[2105]) What is articulated as 'community opinion' in these sorts of cases may involve clan leaders speaking on behalf of their clan either for or against a particular offender, or it may be an expression of generally held concerns about particular offenders. In the former case especially conflicts of interest and of opinion may exist. This is not an argument against attending to the views of members of the community, but it does demonstrate the difficulty that can arise in ascertaining what weight should be given to views that are presented. It is important that in relation to particular offenders the appropriate persons are consulted. The Galiwin'ku scheme[2106] is an example of an attempt to ensure that the views of the different persons or groups concerned are presented to the court in an appropriate way. Clan leaders sit with the magistrate and give their views in court on the seriousness of the offence and the sentence that should be imposed. Background work is done by an anthropologist and Aboriginal field workers to ensure that the appropriate persons with the Aboriginal community have been consulted and are given the opportunity to come to court to present their views.

525. ***Adducing Evidence of Local Community Opinions***. In the absence of a worked-out scheme of this kind, how are relevant community opinions to be presented to the court? Possibilities include:

- a special role for the prosecution;
- the preparation of a pre-sentence report (a procedure already in use);
- separate community representation on sentencing;
- presentation of evidence by the defence; and
- statements made directly to the court by those concerned, at its request or by leave.

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2103 See para 510, 511, 516 for discussion of the principle and limits to it.
2104 See eg SF Davey, *Transcript*, Darwin (3 April 1981) 918.
2105 For problems caused by persons 'cursing' a store see para 459.
2106 See para 764.

526. ***The Prosecution's Role***. It was concluded in para 510 that Aboriginal community views may be relevant in sentencing, whether or not they favour mitigation of penalty in the particular case. Where a defendant is legally represented, the defence can be left to call evidence and to make submissions in the accuser's favour. But it can be argued that if Aboriginal community opinions are relevant more generally, then it should be a public responsibility to ensure that the appropriate material is presented. The prosecution is more likely to have the resources to be able to make enquiries. On the other hand it may be as difficult for the prosecution to present community views as for the defence to do so. The prosecution does not necessarily possess any special expertise to discover or represent local community opinions, and would need to acquire new skills and devote resources to carrying out this task. At a more general level there has been considerable controversy over the proper role of the prosecution in sentencing. The traditional view that only defence counsel should play an active role in making submissions on sentence is under challenge, and is inconsistent with the increasing scope of Crown rights of appeal on sentence. This general issue is a matter for this Commission's final Report on Sentencing.[2107] In the present context, it can at least be said that in appropriate cases the prosecution should call evidence and make submissions on sentence in relation to community opinion rather than stand mute in the face of assertions made by the defence.[2108] But given the difficulties that can occur, and the distance (both geographical and, often, social and cultural) between the prosecution and the local community, this should not be the only way in which such evidence and submissions are presented.

527. ***A Role for the Defence***. The possibility of conflict if defence counsel were to be required to present community opinions is much greater than for the prosecution. Defence counsel's role is to present and interpret evidence in the most favourable light for the accused. It has been a common practice in some jurisdictions for assertions about the relevance of Aboriginal customary laws to sentencing, or about community opinions towards a particular offender, to be made from the Bar table without supporting evidence.[2109] Such assertions would only be made if they were in the accused's favour. Some Aboriginal communities have become disillusioned with Aboriginal Legal Service solicitors, after their views, given for presentation to the court, have in the client's interests not been presented.[2110] Some communities have also taken the view that being represented by Aboriginal Legal Service solicitors gives accused persons too great an advantage in court, and have directed that solicitors not represent clients from their community in relation to particular offences (eg 'grog running' under dry area legislation).[2111] The reasons for maintaining the established role of the defence are, however, very strong. Defence counsel must, within the framework of the adversary system and the applicable ethical and legal rules, present the evidence which best supports the case of an accused person both in relation to the elements of the offence committed and on sentence. It is not appropriate to expect defence counsel to present community views which are adverse to their client's interests.[2112]

528. ***Separate Community Representation***. Another suggested approach to presenting community opinion to the court is to allow the community to be separately represented by legal counsel.[2113] This would avoid conflicts of interest for counsel representing the prosecution and the defence, and could assist in presenting community views to the court in a concise and orderly manner. However for most cases at least it is doubtful whether separate representation would work. The resources of Aboriginal legal services are already stretched in dealing with their ordinary defence role. It is questionable whether additional resources should be devoted to this new role, as distinct from other areas of need. Moreover a separate representative's role as advocate would require that he or she be adequately briefed by those represented, yet in relation to 'community opinion' it is precisely the identification of those concerned which is at issue. The role of the 'representative' would be more to identify the relevant persons and views, through discussion and inquiry, than to represent

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2107 On the importance of the Crown's role in sentencing see *R v Boyd* (1984) 12 A Crim R 20; AJ Ashworth, 'Prosecution and Procedure in Criminal Justice' [1979] *Crim L Rev* 480, 482-8; G Zellick, 'The Role of Prosecuting Counsel in Sentencing' [1979] *Crim L Rev* 493; IG Campbell, 'The Role of the Crown Prosecutor on Sentence' (1985) 9 *Crim LJ* 202. See also ALRC 15, para 514-6.

2108 On the need for proof of Aboriginal customary laws where these are relied on in court see para 614.

2109 See para 614.

2110 See eg Inquiry into Aboriginal Legal Aid (JP Harkins), *Report vol 1, General Issues*, AGPS, Canberra, 1985, 19-20, 88-90.

2111 eg at Hermannsberg: see ACL Field Report No 7, *Central Australia*, October 1982, 35, 50; Harkins Report vol 1, 88-9 and see para 111. S Martin Jambajimba, *Transcript*, Willowra (21 April 1981) 1548.

2112 As the Harkins Report concludes: id, 92-3. cf also T Pauling SM, *Submission 140* (9 November 1979) 2, pointing out that: Legal Aid face an impossible dilemma in deciding whether they can put forward community views adverse to their client and still honour their professional obligations in the solicitor/client relationship.

2113 This was proposed eg by ALC, Ligertwood *Submission 104*, (September 1978) 40; and see ALC Ligertwood, 'Aborigines in the Criminal Courts' in Hanks & Keon-Cohen, 191, 210.

them. Although there may be cases where separate representation, by leave of the court, is desirable,[2114] for the reasons given these would be exceptional.

529. ***The Use of Pre-Sentence Reports***.[2115] Pre-sentence reports are an accepted procedure for presenting material to the court which allows the judge to be better informed on factors relevant to sentence. Such reports are usually prepared by probation and parole officers, although in cases involving separate Aboriginal communities it may be appropriate for someone else with knowledge of the community (eg an anthropologist) to prepare the report. One aspect that should be, and to some extent is already, covered in such reports in the case of offenders from Aboriginal communities is an assessment of the views of relevant persons within the community to the offence and the offender, as well as a reference to any cultural or traditional factors involved.[2116] The advantage of this mechanism is that it already exists, and that its scope could be extended fairly readily. A pre-sentence report which expressed community attitudes would be a most useful adjunct to the views of witnesses from the community presented directly to the court. It may also provide insight into possible conflicts of interest among Aboriginal witnesses. One danger of presentence reports is that excessive weight may be attached to them. There may also be difficulties in seeking to distil into a short report the varied views within an Aboriginal community about the offender and the offence. These difficulties may be reduced if persons with appropriate anthropological or other training are recruited to carry out the task of preparing their reports.

530. ***Aboriginal Evidence or Submissions***. None of the procedures referred to in para 526-529 should be excluded, although none is a complete solution to the problem. Apart from, or in addition to, pre-sentence reports, there are advantages in the direct presentation of Aboriginal evidence or submissions as a means of presenting community expectations or opinions to a court. In practice at present, witnesses are called on (especially but not exclusively in magistrates' courts) to represent directly the views of their clan and other members of the community.[2117] It is common practice for witnesses to be called during the sentencing phase of the trial to present views to the court on likely rehabilitation procedures, and to give character evidence, or evidence of the likelihood of any further local responses to the offence and of the likelihood of community participation in assisting the person back into community life. Strictly speaking much of this evidence is inadmissible, both because of its hearsay character and because of the rule that determining community views or expectations is a matter for the court, not for inquiry on evidence.[2118] But the reasons for this exclusionary rule do not apply (or apply only to a very limited degree) in the case of separate Aboriginal communities,[2119] as many magistrates and judges, who have permitted or encouraged material of this kind to be presented, have realised. Another possibility is to create a procedure for receiving unsworn statements from relevant persons. The Galiwin'ku scheme[2120] in the Northern Territory is an example of this. Community views are not considered relevant in determining guilt but, as presented by persons directly in court, by community representatives sitting with the magistrate or as summarised in a pre-sentence anthropological report, they are taken into account when deciding on an appropriate sentence. This, like other examples of similar procedures, has been done administratively, without specific legislative provisions.[2121]

531. ***Conclusion***. As the Australian experience demonstrates, much can be done in this context through the use of existing powers and discretions. But to encourage these, and to reinforce the need for proper information as a basis for sentencing, in cases where Aboriginal customary laws or community opinions are relevant, it should be specifically provided that, where a member of an Aboriginal community has been convicted of an offence, the court may, on application made by some other member of the community or a member of the victim's family or community, give leave to the person to make a submission orally or in writing concerning the sentence to be imposed for the offence. The court should be able to give leave on

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2114 cf Harkins Report vol 1, 80: 'The Pitjantjatjara solution of ALRM representing the accused and PIT Council assisting the court in relation to the community's views seems to have been acceptable to all involved, including the magistrate'.

2115 On pre-sentence reports see Thomas, 375-7; Ashworth (1983) 414-23; Fox & Freiberg, 72-80. See also para 676.

2116 eg the social inquiry report relied on by the English Court of Appeal in *Bashir Begum Bibi v R* (1980) 71 Cr App R 360, and which described the accused as a woman 'well socialised into the Muslim traditions' of her family.

2117 See eg para 496. Cases where the community's views have not been presented have sometimes been unsatisfactory in the result for precisely that reason: eg para 492.

2118 *R v H* (1981) 3 A Crim R 53. See para 510, 638-642.

2119 See para 510.

2120 See para 764.

2121 For examples see para 700-2, 711, 716, 719, 721, 759. The only such scheme which has specific legislative backing is the WA scheme under the Aboriginal Communities Act 1979 (WA). The principal reason for legislation in that case was to allow local by-laws to be made. See para 747-8.

terms (eg as to matters to be dealt with in the statement). It should also be provided, as recommended in para 676, that the Court may adjourn to enable a pre-sentence report to be obtained from a person with special expertise or experience, in any case where Aboriginal customary laws or traditions are relevant in sentencing. These provisions should not limit other powers of the court.

## A Wider Range of Sentencing Issues

532. ***Prevalence of Non-traditional Elements in Sentencing***. As pointed out already[2122] the sentencing of Aboriginal offenders is likely to involve not only a consideration of the extent to which Aboriginal customary laws are relevant, but also other factors. Most offences committed by Aborigines, including even traditionally oriented Aborigines, do not directly involve Aboriginal customary laws.[2123] The need to take into account such factors as socio-economic conditions, ways of life, and the special disadvantages faced by many Aborigines, has often been recognised. As Justice Brennan stated in *R v Neal*:

> The fact that the incident was to be accounted for by the problems (whatever they are) of life on the Reserve was a material factor for consideration. It is erroneous to neglect consideration of emotional stress which explains criminal conduct. The same sentencing principles are to be applied, of course, in every case, irrespective of the identity of a particular offender or his membership of an ethnic or other group. But in imposing sentences courts are bound to take into account, in accordance with those principles, all material facts including those facts which exist only by reason of the offender's membership of an ethnic or other group. So much is essential to the even administration of criminal justice.[2124]

In *R v Alwyn Peter* the court, in sentencing a 22 year old Aboriginal from Weipa South Aboriginal community who had pleaded guilty to the manslaughter of his de facto wife, heard the evidence of a number of experts relating to the living conditions and the level of violence on Aboriginal reserves in Queensland. The court accepted that, while alcohol was often the trigger which released the violence, other factors had to be taken into account. Justice Dunn, in sentencing Peter, commented:

> The evidence showed in detail the correctness of a belief held by myself and other Judges, that ... the incidence of violent crime amongst Aboriginal communities in North Queensland is very high. The evidence also shows that, whilst alcohol is usually the trigger which releases violence, there are other factors to take into account. It is indeed because of those factors that so much uncontrolled drinking takes place ... The inclination of my brother judges and myself to recommend such offenders as you for consideration for parole results I think from the fact that without the assistance of expert evidence we have perceived and made allowance for the fact that special problems exist in Aboriginal communities.[2125]

533. ***Discriminatory Sentencing Practices?*** There is no clear evidence that Australian courts when sentencing Aborigines discriminate either for or against them. Unfortunately, much of the available evidence is anecdotal and little empirical work has been done, even at superior court level. The Com mission's own research into sentencing of Aborigines in Supreme Courts and District Courts does not demonstrate that Aborigines are more harshly treated in sentencing, having regard to the facts of particular cases. However, it has been asserted that Aborigines are treated more leniently than non-Aborigines for similar offences.[2126] There are certainly examples at least of treating Aborigines 'differently' to non-Aborigines. McCorquodale in a study which includes an examination of Aborigines appearing before the courts from 1788 to the present day, concluded that:

> an examination of the judgments ... suggests that there still persists in judicial minds a stereotyped impression of Aborigines as being not-quite-civilised, of being lesser persons in terms of inability to hold or resist drink, sexual morality, domestic abuse or neglect, capacity to seek out, obtain, and continue in responsible employment, and of

2122 See para 490.
2123 See para 399.
2124 (1982) 42 ALR 609 626. This was a dissenting judgment, but the passage cited was not contradicted by the majority. For other cases where Aboriginality was treated as a factor in mitigation see eg *R v McLeod*, unreported, NSW Supreme Court, Criminal Division, No 82/9/231 (Maxwell J) 21 March 1983; *R v Simpson*, unreported, Supreme Court of NSW (Nagle J) 15 December 1981.
2125 Unreported, Queensland Supreme Court (Dunn J) 18 September 1981, transcript, 1-2. See Wilson (1983). The Queensland Court of Criminal Appeal accepted this view in *Friday v R* (1985) 14 A Crim R 472, but commented that inadequate attention had sometimes been given in sentencing to the public interest in protecting the Aboriginal victim.
2126 *Centralian Advocate*, Wednesday 24 October 1984, 8, 24, 47, 49, setting out the view of Sgt Ian McKinlay, NT Police. cf *Friday v R* (1985) 14 A Crim R 471, 472 (Campbell CJ).

> public conduct. To that extent, the judges may simply be reflecting what is seen as a societal perspective, from which they could hardly be immune.[2127]

Even if McCorquodale's conclusion, that many judges appear to adopt a stereotyped view of Aborigines, is accepted, it does not follow that the actual sentences imposed are discriminatory. McCorquodale does not assert that the sentences given to the Aboriginal offenders in the cases he studied were inappropriate. The special circumstances of an offender, whatever the offender's race, are always capable of being taken into account in sentencing, which is (except where mandatory sentences apply) a more individualised process than any other in the criminal justice system. Quite apart from mitigation of sentence taking into account customary laws or local opinions, one factor which courts have taken into account in reducing sentences or imposing relatively short non-parole periods is the isolation that some traditional Aborigines with little knowledge of English would suffer if imprisoned for long periods in an urban gaol far from their own land and people.[2128] These special factors make any overall assessment of discrimination in sentencing particularly difficult.[2129] Detailed studies on this question which take into account all relevant variables have not yet been carried out. In the absence of such studies, it can only be said that the available information does not reveal the existence of discriminatory sentencing practices at Supreme Court or District Court level in the past 20 years.

534. ***Courts of Summary Jurisdiction***. However, several studies suggest that the situation may be different in courts of summary jurisdiction. For example a study by Martin and Newby of Aborigines in summary courts in Western Australia aimed to compare the way summary courts dealt with Aboriginal and non-Aboriginal defendants, focussing in particular on different regional areas and on justice as dispensed by either magistrates or justices of the peace. The initial study focused on seven towns. Its preliminary conclusion was that:

> The criminal justice process is characterized by lack of uniformity and inconsistency which tends overall to produce a more detrimental impact on Aboriginal than white defendants ... Our results indicate variations in Court processes involving a complex interplay of variables whose cumulative influence has a more negative impact on Aborigines than on other Australians. They were:
>
> - more likely to be charged
> - more likely to be charged with a nuisance offence against 'good order'
> - more likely to have their cases heard by Justices of the Peace.
>
> Justices Courts were associated with:
>
> - least likelihood of legal representation
> - more sentences of imprisonment.
>
> In addition, Aborigines are more likely to default on fine payments and further accentuate their imprisonment figures.[2130]

It appears that Aborigines appearing before justices of the peace, in rural areas in Western Australia and possibly elsewhere, are subjected to what could be termed an institutional form of discrimination.[2131] This raises the question whether justices of the peace should continue to hear criminal cases, especially those involving Aboriginal defendants. In particular it casts serious doubt on whether justices of the peace should

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2127 J McCorquodale, 'The Voice of the People: Aborigines, Judicial Determinism and the Criminal Justice System in Australia', in Swanton (1984) 272.

2128 eg *R v Morris Alsop*, unreported, SA Supreme Court (Mathieson J) 14 July 1981, reasons for sentence, 2. This was also a factor, the Commission has been told, in the suspension of sentence in the *Sydney Williams* case: see para 492.

2129 On the measurement of 'discrimination' in sentencing see M McConville & J Baldwin, 'The Influence of Race on Sentencing in Birmingham' [1982] *Crim LR* 652; I Crow & J Cove, 'Ethnic Minorities and the Court' [1984] *Crim LR* 413 (both on the UK), and cf the rather different though tentative conclusions for NZ reached by S Mugford & M Gronfors, 'Racial and Class Factors in the Sentencing of First Offenders' (1978) 14 *ANZJS* 58. Discrimination may also be present at other stages of the criminal justice system: see Anti-Discrimination Board, *Study of Street Offences by Aborigines*, Sydney, 1982.

2130 M Martin & L Newby, 'Aborigines in Summary Courts in Western Australia, A Regional Study: Preliminary Report on Selected Findings' in Swanton (1984) 305.

2131 On the differences in Aboriginal appearance rates before courts of summary jurisdiction and higher courts, and related questions, see eg T Milne, 'Aborigines and the Criminal Justice System' in M Findlay, SJ Egger & J Sutton (ed) *Issues in Criminal Justice Administration*, George Allen & Unwin, Sydney, 1983, 184, 185-193. cf Harkins Report, vol 1, 9-10. See also para 394-7 and works there cited.

continue to have the power to imprison. As soon as possible justices of the peace should be withdrawn from criminal cases, at least in areas with a high Aboriginal population, and be replaced by qualified magistrates. Justices of the peace sitting in ordinary courts of summary jurisdiction[2132] should be limited to hearing minor regulatory offences, minor traffic violations, and bail applications, together with other procedural matters. Alternatively, they should be empowered by law to impose only non-custodial sentences, with limited power to remand in custody accused persons whose offences may warrant more severe measures.[2133] Steps should also be taken to prevent default imprisonment being used as a device to imprison an accused, in cases where custodial sentences were not available.

535. ***Ineffectiveness of Gaol as a Deterrent***. The evidence of excessive rates of Aboriginal imprisonment, summarised already, raises even more serious questions when one takes into account the generally accepted view that imprisonment is, for many, of little or no deterrent value. In *R v Wesley Nganjmirra* Justice Muirhead said:

> Prison is seldom constructive, but the law provides imprisonment as a punishment for crime and courts, by whose authority I am bound, have emphasised very strongly that where crimes of violence are concerned the deterrent aspect of punishment becomes a powerful consideration, the law accepting that punishment by imprisonment may deter.[2134]

Little research has been done on Aboriginal perceptions of imprisonment, but there is a widely held view that for many Aborigines no stigma attaches to going to gaol. Ms Pat Lowe, a clinical psychologist with the Prisons Department in Western Australia, had this to say about the attitude of traditionally oriented Aborigines to imprisonment, at the Broome Prison to imprisonment:

> Long sentences are unpopular, and prisoners do chafe at them, particularly when they are sent to metropolitan prisons for extensive periods. But shorter sentences of three to six months are often welcomed as 'time out' from the rough and tumble of fringe dwelling. Some prisoners are candid about this. They appreciate the good food, the peace and quiet of a more orderly existence, the TV and cards, the spell away from alcohol, and the company of the friends they meet again. This is in contrast to the attitude of most white prisoners, and of course reflects most of all on the conditions under which the Aboriginal prisoners normally live. Some regular customers become dependent on prison: on one occasion a man, released one day, broke back into the prison the following night because he was hungry.[2135]

If this assessment is correct it strongly reinforces the conclusion reached in the Commission's Interim Report on *Sentencing* that imprisonment should not be used except in serious cases, and as a last resort.[2136] This issue will be discussed further in the Commission's Final Report on *Sentencing*.

536. ***The Groote Eylandt Studies***. A research report on Groote Eylandt prisoners by David Biles reached different conclusions, though from the same starting point. In Biles' view:

> Criminal justice services, in particular the use of imprisonment on the mainland, reinforces and rewards the criminal behaviour of some Groote Eylandters ... [Flor many Groote Eylandters there is no perceived physical hardship or social stigma associated with being sent to prison in Darwin or elsewhere on the mainland. In fact, for many of them, all of the evidence suggests that going to prison' may be an enjoyable experience! ...The formal process of punishment for Groote Eylandt offenders is counter-productive in that it encourages further criminal behaviour. It is also very expensive.[2137]

He therefore recommended 'that consideration be given to the establishment of a prison for up to 25 prisoners on Groote Eylandt'.[2138] Commenting on the Biles Report, Colin McDonald agreed that imprisonment on the mainland as well as being ineffective was no deterrent. But he did not consider that the answer was to build a prison:

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2132 The powers of Aboriginal justices of the peace appointed as part of a local Aboriginal justice scheme established in consultation with the local community raises wider questions and are considered in para 818.

2133 The Justices Act 1921 (SA) s 5(6)-(8) (inserted 1983) limits the imprisonment powers of courts of summary jurisdiction composed of JPs to sentences of 7 days, with a procedure for remanding for sentence before a magistrate in cases where a more severe penalty should be imposed. The provision has no application to default imprisonment.

2134 Unreported, NT Supreme Court (Muirhead J) 18 April 1983. See also *R v Douglas Wheeler Jabanunga*, unreported, NT Supreme Court (Muirhead J) 16 October 1980 (SCC No 45 of 1980).

2135 P Lowe, 'Misfits: Aboriginal Culture and Prison' in Swanton (1984) 327, 333. See further H Wilson, *Transcript* Peppimenarti (6 April 1981) 1001; C Dale, *Transcript*, Strelley (23 March 1981) 309.

2136 ALRC 15, para 67 & ch 6.

2137 D Biles, *Groote Island Prisoners. A Research Report*, Australian Institute of Criminology, Canberra, 1983, 17-18.

2138 id, 25.

> This ... will have implications for land rights, local social control, and for social harmony. While it might reduce costs to the governments, nothing Biles says convinces that it would help lower the unacceptably high imprisonment rate.[2139]

The Biles approach was also roundly criticised by other commentators:

> His [Biles] 'let's build another prison' solution to the complex problems of Aboriginal dispossession, inequality, poor living conditions, lack of employment and access to income maintenance, the effect of alcohol, acculturation, the destruction of natural and spiritual resources, and the historical legacy in the form of the criminal law, police practices and imprisonment, would be laughable were it not so tragic in its consequences.[2140]

The Biles Report and the comments it provoked led to the creation of the Groote Eylandt Aboriginal Task Force, consisting of 10 Aborigines appointed by the Commonwealth and Northern Territory Governments to look at the high rate of crime on Groote Eylandt. The Task Force Report rejected a number of conclusions in the Biles Report, as well as a number of aspects of the research supporting it. In particular the Task Force rejected the recommendation that a prison be built on Groote Eylandt:

> the conclusion that criminality would decrease if a prison was built on Groote Eylandt is an unjustifiable denial of the importance of [general] social conditions as causes of criminal activity.[2141]

In the Task Force's view, a wide range of social factors lead to the high imprisonment rate of Groote Eylandt Aborigines, and their Report made many recommendations directed at social, educational and other issues, in an attempt to alleviate this.

537. ***The South Australian Aboriginal Customary Law Committee***. As was pointed out in para 396, Aboriginal juveniles are disproportionately represented in criminal justice statistics. Indeed the statistics that are available indicate that Aboriginal juvenile offenders constitute a high percentage of all Aboriginal off enders. A study by the South Australian Aboriginal Customary Law Committee dealing with Aboriginal communities in the northwest and at Yalata in the west of the State showed that:

> By far the greatest number of offences and certainly the source of greatest concern both to the Pitjantjatjara and their European supporters — or detractors — is a high incidence of child delinquency.[2142]

The Committee commented that:

> While the data did not isolate petrol sniffing — since it is not at present an offence — there are *prima facie* grounds for believing that nearly all delinquency is associated with petrol sniffing.[2143]

The Report made a number of recommendations on the related problems of delinquency and petrol sniffing:

- The practice of remanding children to Adelaide from remote Aboriginal communities to have their cases heard should cease.

  > Apart from the logistical problems and time delays, children are inappropriately separated from kinsfolk, but then feather-bedded with handsome meals, colour television, the latest movies ... They return heroes, and provide the foundations of a notoriety that is perpetuated by their peers.[2144]

- Petrol sniffing should be made an offence, but parents should be held legally responsible for the actions of their children and thus liable for punishment.[2145]

The Committee's recommendation in relation to the remand of juveniles, though apparently appropriate, raises a number of practical questions. What is to be done with children living within the Pitjantjatjara lands who are remanded within the lands but have no other restraints placed upon them and who continue to

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2139 CMcDonald, 'Australia's Most Jailed Citizens' (1984) 3 *Australian Society* 6, 9.
2140 Letter to editor from D Brown, R Hogg, C Ronalds and D Weisbrot (1984) 5(3) *Reporter* 10.
2141 Groote Eylandt Aboriginal Task Force, *Report*, Angurugu, 1985, 22. The Task Force commented that the Biles Report produced no evidence to conclude that the existing criminal justice services actively reinforced criminal activity on Groote Eylandt: id, 21.
2142 South Australian Aboriginal Customary Law Committee (Chairman: Judge JM Lewis) *Children and Authority in the Northwest*, Adelaide, 1984, 20.
2143 id, 24.
2144 id, 29.
2145 id, 32-3, 83-4.

commit offences? How will presentence reports be delivered or other assessments be carried out on Aboriginal juvenile offenders within the Pitjantjatjara lands? Further alternatives need to be dev eloped to the provisions of the Childrens Protection and Young Offenders Act 1979 (SA) for young offenders in the Pitjantjatjara lands.[2146] The recommendation that parents be held responsible for the actions of their children also needs careful consideration. Petrol sniffing is a major problem is some communities.[2147] But increased legal penalties are not necessarily the answer.[2148] What is to be done in the case of a juvenile offender who proves to be beyond the powers of a parent to control? Is the parent to be held responsible regardless? Will the change in legal responsibility have the desired effect of encouraging Aboriginal parents to exert greater authority over their children with respect to offences against the general law?

538. ***Relevance for this Report***. The disproportionate representation of Aborigines at all levels of the Australian criminal justice system will not be avoided by providing greater discretions or setting out new rules for judges and magistrates in sentencing Aboriginal offenders. The primary reasons for this disproportionate representation lie outside the criminal justice system. But this is not to say that improvements cannot be made. Some limited impact can be made if action is taken at all levels (the police, the courts and the prisons). The extent to which improvements can be made at the general level, not just in relation to Aborigines, will be considered in the Commission's Final Report on *Sentencing*. In relation to Aborigines, apart from the recommendations made in this Chapter for the continued, and more formal, recognition of Aboriginal customary laws in sentencing, the issues raised in paragraphs 532-537, while they may not directly relate to Aboriginal customary laws, point clearly to a need for something to be done. Too many Aborigines are being imprisoned for minor offences or for non-payment of fines, and the practices and procedures of the criminal justice system in some areas do work to the detriment of Aboriginal people compared to the rest of the population. There is a need for more precise data on the impact of the criminal justice system on Aboriginal communities, and for detailed studies, carried out in consultation with the communities concerned, on what measures work, or do not work, in particular situations.

## Alternative Forms of Sentencing

539. ***Encouraging Alternative Forms of Sentencing***. Reassessment of the value of imprisonment is leading to a wider range of sentencing options being available in many Australian jurisdictions.[2149] These include:

- discharge with or without conviction.
- supervised or unsupervised bonds.
- community work orders.

More detailed discussion of alternative sentencing options will occur in the Commission's *Final Report on Sentencing*. For present purposes it is sufficient to refer to some of the difficulties that have arisen in more remote Aboriginal communities, and to some developments which need to be taken into account in any general sentencing regime.

540. ***Probation and Conditional Release***. A common sentence for an offender is release on a bond to which may be attached conditions, such as supervision for a specified period by a probation and parole officer.

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2146 In January 1980 the Department of Aboriginal Affairs proposed Policy Guidelines for Care and Treatment of Aboriginal Juveniles in State Corrective Institutions (Doc 13.10.4). These proposed, among other things, 'measures to support the Aboriginal child in the family and community environment', including:

> recognition for Aboriginal customs, marriage laws and community structure, particularly as these affect the care and control of children (id, 1).

The Proposed Guidelines supported the development of alternatives to institutionalisation, and in particular provided that:

> corrective programs for tribal and tradition-oriented Aboriginal juveniles requiring such treatment should to the maximum extent possible be developed and managed by their communities (id, 2).

In addition ...

> Aboriginal community representatives should be consulted in the sentencing of juveniles, particularly in tribal and tradition-oriented communities (id, 3).

Like the Policy Guidelines on Aboriginal Adoption and Fostering proposed by DAA at the same time (see para 352) the Guidelines for Aboriginal Juveniles were discussed by the Council of Social Welfare Ministers but were not formally adopted.

2147 See esp M Brady, *Children without Ears. Petrol Sniffing in Australia*, Drug & Alcohol Services Council, Adelaide, 1985.

2148 Brady argues for social and medical solutions, rather than legal ones: id, 30-40, esp 39-40.

2149 ALRC 15, ch 6, 10. See also Ashworth (1983) 379-439; Thomas, 225-256; Fox & Freiberg, chs 7, 8, 10.

Supervision can be a condition attached by the court, or can follow the grant of parole by a Parole Board after a period of imprisonment. Supervision of Aborigines placed on bonds creates special difficulties in remote communities. Apart from the practical problems remoteness creates for probation and parole officers in making regular visits and compiling reports on the progress of parolees, there may be difficulties for the officer in achieving a sufficient understanding of the community where the client lives. This may involve the officer spending a considerable period of time in the community to gain the level of understanding required. But this may not be possible, with the result that the supervision involved may be nominal. As well, Aboriginal communities tend not to fit within the accepted model for the operation of a probation and parole service. In a town or city a probation or parole service may be able to exercise some influence or control over where a person lives and works and over his or her associates. This may have little or no application to a small and remote Aboriginal community, where people may travel frequently, there may be no stable employment and no likelihood of it, and kinship and other family obligations may make it impossible to regulate who the offender associates with. The importance of kinship obligations must not be underestimated. The fact that a person is on a bond which if breached may result in a term of imprisonment may have no significance if kinship obligations require participation in, for example, a fight to help persons the offender is obligated to help. This problem was noted by the Northern Territory Department of Correctional Services:

> [F]ormal directions in accordance with bonds or parole orders to individuals not to associate with specific others or warnings not to become involved in specific activities are likely to be either ineffectual (as an individual's obligations towards others are well established) or detrimental to traditional structures.[2150]

541. ***Other Alternatives***. In addition to the established sentencing alternatives, attempts have been and are being made to develop new alternatives responsive to local needs.

- *Community Service Orders*. It is often suggested that community service orders should be given more prominence when dealing with Aboriginal offenders. Such orders require some form of local supervision, including a person within the community prepared to take on a supervisory role. Even if the leaders of an Aboriginal community are prepared to accept an Aboriginal offender back, the direct supervision regarded as a prerequisite in an urban context may not be appropriate.

- *Local Gaols and Lock-ups*. Most police stations in Australia have a lock-up in which accused persons may be held for short periods pending an appearance in court, or where a convicted person may be held for short periods of time. Aboriginal reserves in Queensland have also had lock-ups used for this purpose, (until recently head Aboriginal justices had the power to imprison offenders for up to 14 days). These lock-ups were changed in 1984 to police lock-ups.[2151] There is no doubt that local police lock-ups are required, and custodial sentences of up to 28 days may appropriately be served locally. However there are serious problems with suggestions that local gaols be built to house longer-term offenders.[2152]

- *Locally-Developed Alternatives*. Some Aboriginal communities have developed their own sentencing alternatives. One example is the banishment of offenders to outstations. At Aurukun, the Local Court run by Aboriginal Justices of the Peace regularly sentences offenders to spend a period of time on one of the outstations. Offenders are usually given a choice, so that they may choose a place where they have kin or relations.[2153] Judges and magistrates may take into account in sentencing a request that an offender not be permitted to return to the community for a period of time.[2154] Conditions may be imposed on a bond so as to restrict residence or movement. A number of these local alternatives have been developed in conjunction with local justice mechanisms, and it is essential to their effective operation that the magistrate should hold court in the local community[2155] (rather than in a near or distant town centre), and with adequate preparation through presentence consultation and reporting. These questions are referred to again in the discussion of local justice mechanisms in Part VI of this Report.

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2150 Correctional Services Division, Northern Territory, 'Aboriginals and the Supervision Process' in Swanton (1984) 308.
2151 See para 732, 738.
2152 See para 536. See also ALRC 15, para 175-6.
2153 See para 740, & cf para 702.
2154 See eg para 465.
2155 On the need for courts including Supreme Courts, to sit locally see the comments of Gallop J in *R v Mark Djanjdjomeer and others*, unreported, NT Supreme Court, 14 February 1980, 29.

## Summary

542. ***Recommendations in this Part***. Accordingly, the Commission makes the following recommendations on the recognition of Aboriginal customary laws in the area of the criminal law and sentencing.

*Intent and Criminal Law Defences*

- In the context of the present Reference, there is no special justification for changing existing criminal law 'defences' which contain an objective element (eg provocation, duress, self-defence and excessive self-defence) so as to eliminate the objective test, provided that the courts can take Aboriginal customary laws into account in determining what the response of a 'reasonable' person would have been in the circumstances (para 426, 429, 431).

- Neither duress, coercion, mistake nor the defence of claim of right are generally applicable defences which would exonerate Aborigines who commit offences under the influence of their customary laws (para 430, 433, 435). Whether there should be such a direct defence is a separate question.

- No special provision dealing with intoxication as an element in criminal liability is justified in the context of this Reference. However, the fact that a defendant was intoxicated should not necessarily exclude the application of other provisions recommended in this Part for the recognition of Aboriginal customary laws, in determining criminal liability (para 438).

- Section 7(1)(b) of the Criminal Code 1983 (NT) should be kept under review, to ensure that it is not construed so as to bring about the conviction for murder of persons who lacked any intention to kill or do serious bodily harm at the relevant time (para 439).

- Legislation should provide that Aboriginal customary laws and traditions should be able to be taken into account, so far as they are relevant, in determining whether the defendant had a particular intent or state of mind, and in determining the reasonableness of any act, omission, or belief of the defendant. Evidence to prove these questions should be admissible, a result which would be achieved by the general provisions proposed in this Report for the proof of Aboriginal customary laws (para 441).

*An Aboriginal Customary Law Defence?*

- There is a distinction between a customary law defence applicable generally to offences of whatever kind, and a customary law defence to specific offences which are themselves a form of recognition of Aboriginal customary laws or of Aboriginal community authority. For example if it is sought to recognise land rights based on traditional Aboriginal occupation, it may also be appropriate to allow other persons to use the land provided their use is in accordance with or consistent with those traditions, and a specific customary law defence is one way of achieving this (para 446).

- A customary law defence should not be available in cases of homicide or of life-threatening assault (para 447). Nor should a general customary law defence be available in other, lesser, cases. Problems of conflicts between the two laws are best dealt with in other ways (para 450).

- A partial customary law defence should be created, similar to diminished responsibility, reducing murder to manslaughter. It should provide that, where the defendant is found to have done the act that caused the death of the victim in the well-founded belief that the customary laws of the Aboriginal community to which the defendant belonged required the act to be done, the defendant should be convicted of manslaughter rather than murder. The onus of proof in establishing these matters should lie on the defendant on the balance of probabilities (para 453).

*Aboriginal Customary Law Offences*

- It is undesirable in principle, as well as impractical, to seek to codify Aboriginal customary laws as a basis for criminal liability (para 461) or to enforce those laws by way of a general mandate to the criminal courts (para 462).

- In particular cases the 'incorporation' of Aboriginal customary laws as the basis for a particular offence may be desirable, especially to protect traditions, rules or sites from outside invasion or violation. Where problems arise, it is necessary to ask three questions:

    - whether the matter can be adequately dealt with by the community under any by-law making powers, and whether any amendment or extension of these powers is needed;

    - whether resort can or should be made to existing provisions under the general legal system;

    - whether some additional specific measures of protection are required (para 462, 465)

- Consideration should be given to amending legislation such as the Cemeteries Act (NT) s 21 to allow for burials in accordance with Aboriginal customary laws, particularly in relation to burials on Aboriginal land, but possibly elsewhere also (for example on pastoral land), provided relevant permissions are obtained (para 466).

- Consideration should be given to enacting special measures to protect distinctive traditional designs and artwork (para 470).

*Procedural Alternatives*

- Attention should be given by prosecuting authorities to the appropriateness of declining to proceed in certain cases involving customary laws (para 475). But the use of prosecution discretions is not a principal way in which Aboriginal customary laws should be recognised in the criminal justice system (para 478).

- Prosecutorial discretions may be relevant in those cases where Aboriginal customary laws, without necessarily justifying or excusing criminal conduct, are a significant mitigating factor, and where the Aboriginal community in question has through its own processes resolved the matter and reconciled those involved. Factors relevant in such cases would include the following:

    - that an offence has been committed against the general law in circumstances where there is no doubt that the offence had a customary law basis;

    - whether the offender was aware he or she was breaking the law;

    - that the matter has been resolved locally in a satisfactory way in accordance with customary law processes;

    - that the victim of the offence does not wish the matter to proceed;

    - that the relevant Aboriginal community's expectations (or the expectations of each community, if there is more than one) are that the matter has been resolved and should not be pursued further;

    - that alternatives to prosecution are available, eg a diversion procedure;

    - that the broader public interest would not be served by engaging in legal proceedings (para 478).

- These factors should be taken into account by police and prosecuting authorities in deciding whether to bring or maintain prosecutions in such cases, and they should be incorporated in prosecution guidelines at State and Territory level (para 478).

- Formal diversion machinery, to divert offenders from the criminal justice system, is of limited relevance in customary law' cases (para 488), though it may well be of value in the case of many minor offences occurring in or involving members of Aboriginal communities (para 489).

- Careful attention should be given, in the design and operation of any diversion or mediation schemes which exist or which may be established, to make those schemes as relevant as possible to Aboriginal offenders.

- Consideration should also be given to a trial diversion scheme specifically involving Aboriginal offenders, in particular, young offenders, if such a scheme is sought by an Aboriginal group or community (para 489).

*Relevance of Aboriginal Customary Laws in Sentencing*

- Although the defendant's (or the victim's) consent to traditional Aboriginal dispute-resolving processes (eg spearing) is relevant in relation to bail, in sentencing and in prosecution policy, the recognition of Aboriginal dispute resolution processes involving physical punishments is not to be achieved through the existing law relating to consensual assault or through changes to that law (para 503).

- The courts do already recognise Aboriginal customary laws in the sentencing of Aboriginal offenders, to a considerable degree. In considering reform, it is helpful to build on the existing experience in this field, where necessary reinforcing or elaborating on it (para 491-7, 504).

- The courts have recognised a distinction, which in the Commission's view is fundamental, between taking Aboriginal customary laws into account in sentencing, on the one hand, and incorporating aspects of Aboriginal customary laws in sentencing orders, on the other (para 504). In applying that distinction, the following propositions have been recognised:

    - A defendant should not be sentenced to a longer term of imprisonment than would otherwise apply, merely to 'protect' the defendant from the application of customary laws including 'traditional punishment' (even if that punishment would or may be unlawful under the general law) (para 505).

    - Similar principles apply to discretions with respect to bail. A court should not prevent a defendant from returning to the defendant's community (with the possibility or even likelihood that the defendant will face some' form of traditional punishment) if the defendant applies for bail, and if the other conditions for release are met (para 506).

    - Aboriginal customary laws are a relevant factor in mitigation of sentence, both in cases where customary law processes have already occurred and where they are likely to occur in the future (para 507-8).

    - Aboriginal customary laws may also be relevant in aggravation of penalty, in some cases, but only within the generally applicable sentencing limits (the 'tariff') applicable to the offence (para 509).

    - Within certain limits the views of the local Aboriginal community about the seriousness of the offence, and the offender, are also relevant in sentencing (para 510).

    - But the courts cannot disregard the values and views of the wider Australian community, which may have to be reflected in custodial or other sentences notwithstanding the mitigating force of Aboriginal customary laws or local community opinions (para 511).

    - Nor can the courts incorporate in sentencing orders Aboriginal customary law penalties or sanctions which are contrary to the general law (para 512-13).

- In some circumstances, where the form of traditional settlement involved would not be illegal (eg community discussion and conciliation, supervision by parents or persons in loco parentis, exclusion from land) a court may incorporate such a proposal into its sentencing order (eg as a condition for conditional release or attached to a bond), provided that this is possible under the principles of the general law governing sentencing. Care is needed to ensure appropriate local consultation in making such orders, and flexibility in their formulation. In particular it is important that anyone into whose care the offender is to be entrusted, is an appropriate person, having regard to any applicable customary laws (eg is in a position of authority over him, and not subject to avoidance relationships), has been consulted and is prepared to undertake the responsibility (para 512).

- An offender's opportunity to attend a ceremony which is important both to him and his community may be a relevant factor to be taken into account on sentencing, especially where there is evidence that the ceremony and its associated incorporation within the life of the community may have a rehabilitative effect. However initiation or other ceremonial matters cannot and should not be incorporated in sentencing orders under the general law (para 515).

- The Commission endorses these principles which strike the right balance between the requirement that the courts cannot incorporate or require traditional punishments or other customary law processes to occur as a condition to the release of offenders or for the mitigation of punishment, and the need to take account of traditional Aboriginal dispute-settlement procedures and customary laws (para 516).

- A general legislative endorsement of the practice of taking Aboriginal customary laws into account is appropriate. It should be provided in legislation that, where a person who is or was at a relevant time a member of an Aboriginal community is convicted of an offence, the matters that the court shall have regard to in determining the sentence to be imposed on the person in respect of the offence include, so far as they are relevant, the customary laws of that Aboriginal community, and the customary laws of any other Aboriginal community of which some other person involved in the offence (including a victim of the offence) was a member at a relevant time (para 517).

- In addition it should be provided that, in determining whether to grant bail and in setting the conditions for bail, account shall be taken of the customary laws of any Aboriginal community to which the accused, or a victim of the offence, belonged (para 517).

- A sentencing discretion to take Aboriginal customary laws into account should exist even where a mandatory sentence would otherwise have to be imposed (in particular, in murder cases) (para 522).

*Related Evidentiary and Procedural Questions*

- Existing powers and procedures to call evidence or adduce material relevant to sentencing in Aboriginal customary law cases should be more fully used. These include in particular:

  - the prosecution's power to call evidence and make submissions on sentence (para 526):

  - the use of pre-sentence reports (para 529).

- Defence counsel should not be expected to represent the views of the local Aboriginal community or to make submissions on the relevance of Aboriginal customary laws contrary to the interests of or otherwise than as instructed by the accused (para 527).

- Separate community representation is, in most cases, not appropriate (para 528).

- To reinforce the need for proper information as a basis for sentencing, in cases where Aboriginal customary laws or community opinions are relevant, legislation should specifically provide that, where a member of an Aboriginal community has been convicted of an offence, the court may, on application made by some other member of the community or a member of the victim's community, give leave to the applicant or applicants to make a submission orally or in writing concerning the sentence to be

imposed for the offence. The court should be able to give leave on terms (eg as to matters to be dealt with, or not dealt with in the statement) (para 531).

*Other Sentencing Issues*

- There is no reliable evidence of discriminatory sentencing practices in cases involving Aborigines at Supreme Court or District Court level in recent years although more detailed studies, properly controlled for the many variables, are needed (para 533).

- However the situation in some courts of summary jurisdiction (especially those staffed by justices of the peace) is different (para 534). Steps should be taken to ensure that justices of the peace sitting in ordinary courts of summary jurisdiction should no longer have power to imprison offenders, and that default imprisonment is not used as a device where imprisonment itself is not an available sentencing option (para 534).

- Further attention needs to be given to associated problems of juvenile offending, and petrol-sniffing. However these are largely social problems, beyond the power of the criminal justice system to resolve (para 537).

- Alternative sentencing options for Aboriginal communities need to be developed, taking into account local circumstances and needs, and especially in conjunction with local justice mechanisms presently in existence or established in the future (para 539-41). But extended gaol sentences should not be served in local lock-ups, nor should local longer-term gaols be built in an attempt to deter local offenders (para 536, 641).

# PART V:

# PROBLEMS OF EVIDENCE AND PROCEDURE

# 22. Criminal Investigation and Police Interrogation of Aborigines

## Introduction

543. ***Relationship between Substantive Law, Evidence and Procedure***. In Chapters 17-21 the general issue of the application of Aboriginal customary laws in criminal cases was discussed. The general conclusion reached in those Chapters is that, while Aboriginal customary laws should be taken into account in various ways — in the substantive law, in various aspects of criminal procedure and in sentencing — this should occur within the confines of, and not to the exclusion of, the general criminal law. But if it is right that the criminal law should continue to be applied to Aborigines, including traditionally oriented Aborigines, it may be necessary for procedural and evidentiary rules to be modified or reinforced to ensure that justice is done. The question of procedural safeguards is thus a related matter within the Commission's Terms of Reference. Indeed, procedural safeguards of various kinds may themselves be a way of recognising Aboriginal customary laws.[2156] Many of the difficulties experienced by Aborigines, and especially traditionally-oriented Aborigines. arise from problems of language, of comprehension of the criminal justice system and of conflicting cultural and legal assumptions and values. For example, the criminal justice system assumes that a defendant has a right to remain silent, that is, a right not to incriminate oneself. But in the case of traditionally oriented Aborigines under police interrogation, this right will often be quite illusory. Special protection may be required to avoid discrimination against such Aborigines charged with offences against the general criminal law. Similar problems have occurred in such areas as:

- comprehension of the trial and fitness to plead;
- oaths and unsworn statements;
- dying declarations;
- jury trial;
- provision of interpreters;
- the taking of Aboriginal evidence; and
- the proof of Aboriginal customary laws.

This part of the Report will discuss the extent to which difficulties have arisen in practice, and the desirability of general or particular reforms in the law or its administration. Because the problems arise in a variety of areas, the topics dealt with are inevitably diverse and rather miscellaneous. In some cases the extent to which proposals for reform can be made in the context of the present Reference is limited. The Commission has however made a number of specific recommendations for reform. In doing so, the problems that arise and the possible solutions that have been suggested to the Commission in the course of its work on the Reference have been outlined. This Chapter deals with the first, and one of the most important, of these problems, that of police interrogation of Aboriginal suspects, and the admissibility in evidence of any resulting admission or confession.

2156 See para 101, 206-9, 393.

## The Law relating to Interrogation and Confessions

544. ***The General Law***. Before considering the special problems which arise in the investigation and interrogation of Aboriginal suspects, it is necessary to describe briefly the general law regulating police questioning of suspects and the right to silence. Three basic statements can be made. First, police have the right to question any person at any time when investigating a crime.[2157] Second, a person cannot be compelled to answer such questions: a suspect has the right to remain silent and no adverse inference may be drawn from the exercise of this right.[2158] Third, two distinct rules apply to the admissibility in evidence of any confession or admission made to the police: (1) to be admissible the statement must be voluntary and not the result of 'duress, intimidation, persistent importunity, or sustained or undue insistence or pressure'[2159]; (2) even if a statement is found to be voluntary it may still be excluded in the exercise of the judge's discretion if it is considered that it would be unfair to the accused to receive it in evidence.[2160] A relevant factor in determining unfairness is whether the Judges Rules have been adhered to by the police when questioning the accused person, although non-compliance with the Judges Rules does not result in automatic exclusion of the evidence obtained.[2161] These principles have been restated by Chief Justice Gibbs:

> The principles governing the admissibility of confessional evidence are not in doubt ... A confession will not be admitted unless it was made voluntarily, that is in the exercise of a free choice to speak or be silent. But even if the statement was voluntary, and therefore admissible, the trial judge has a discretion to reject it if he considers that it was obtained in circumstances that would render it unfair to use it against the accused.[2162]

545. ***The Judges Rules***. In 1912 the Judges of the Kings Bench in England laid down a set of guidelines for the police when questioning suspects. Various amendments have been made to the rules since that time and a complete revision was published in 1964.[2163] Versions of the Judges Rules in their pre-1964 form apply in most Australian jurisdictions either by incorporation in police standing orders or by adoption by the relevant court as guidelines in exercising its discretion to exclude confessions.[2164] The Judges Rules attempt to balance the competing principles of the protection of the rights and liberties of the individual citizen and the interest of the community in bringing offenders to justice, which requires that the police be granted sufficient powers to investigate crime. Their principal requirement is that a person who is to be subjected to police questioning by the police be told of his right to remain silent: this is to be done by the police issuing a caution to this effect at various stages of the investigation. Other rules regulate the extent to which questions may be asked, especially where a person is making a voluntary statement. The rationale for the rules was well expressed by the Royal Commission on Criminal Procedure (UK) in 1981:

> The presumption behind the Judges Rules is that the circumstances of police questioning are of their very nature coercive, that this can affect the freedom of choice and judgement of the suspect (and his ability to exercise his right of silence), and that in consequence the reliability (the truth) of statements made in custody has to be most rigorously tested.[2165]

## The Need for Special Protection of Aboriginal Suspects

546. ***Special Problems for Aborigines***. Despite these rules and safeguards, some Aborigines experience particular difficulties in understanding their legal rights, in particular the right to remain silent and not to incriminate oneself. These problems can arise in all parts of Australia, but are perhaps most acute in relation to 'fringe-dwelling' and traditionally-oriented Aborigines,[2166] for a number of reasons.

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2157 *R v Smith* [1964] VR 95, 97.

2158 ALRC 26, *Evidence (Interim)*, AGPS, Canberra, 1985, vol 1 para 367-70; *Rice v Connolly* [1966] 2 All ER 649, 652; *R v Ryan* (1966) 50 Cr App R 144, 148; SJ Odgers, 'Police Interrogation and the Right to Silence' (1985) 59 *ALJ* 78.

2159 *McDermott v R* (1948) 76 CLR 501, 511 (Dixon J).

2160 *R v Lee* (1950) 82 CLR 133. For discussion see ALRC 2, *Criminal Investigation*, AGPS, Canberra, 1975, para 287-98; ALRC 26, vol 1 para 138-53, 364-84, 759-770, Appendix C para 112-150; MH Yeo, 'The Discretion to Exclude Illegally and Improperly Obtained Evidence: A Choice of Approaches' (1981) 13 *Melb UL Rev* 31; MD Kirby & SJ Odgers, 'The Dilemma of Unlawfully Obtained Evidence', in *Proceedings of the Institute of Criminology*, University of Sydney, No 62, 1984, 11.

2161 *R v Jeffries* (1947) 47 SR (NSW) 284, 312-3 (Street J).

2162 *Cleland v R* (1983) 57 ALJR 15.

2163 Practice note, [1964] 1 All ER 237.

2164 See ALRC 26, vol 1, para 148 for details.

2165 United Kingdom, Royal Commission on Criminal Procedure, *Report*, HMSO, London, 1981, 91-2.

2166 See para 34-6 for these (indistinct) categories.

- *Language*. Difficulties of communication and comprehension are very real for many Aborigines, especially those with little or no understanding of English. For a great many traditionally-oriented Aborigines, English is a second or third language. This can lead to significant problems when they come into contact with the criminal justice system. This is not simply a matter of translating words.[2167] There is the additional complication of having to explain legal concepts such as the caution (ie the right to remain silent) to a person to whom such ideas may be completely foreign. One result of these difficulties is that few Aborigines exercise the right to remain silent, or understand their legal rights other than in a very limited way. Justice Forster (as he then was) in *R v Anunga*[2168] commented on the linguistic and conceptual problems faced by traditional Aborigines when being interrogated by the police. His comments were based 'partly upon my own knowledge and observation and partly by evidence ... heard in numerous cases'.[2169] These problems have been mentioned to the Commission on a number of occasions.[2170] It is worth repeating the words, quoted in the Commission's Report on *Criminal Investigation* (1975), of Mr Yami Lester, Director of the Institute for Aboriginal Development in Alice Springs, who has had extensive experience as an interpreter of the Pitjantjatjara language in the courts:

  > Aboriginal people are severely limited in their understanding of English. Court language is very hard to understand, and most of the people don't understand the charges against them. Sometimes it is hard even for the interpreter to understand, or to put in the Aboriginal language. The same problem applies in the police station. This lack of understanding of what is going on leads to considerable fear. Aboriginal languages are very different from English. It makes it very hard for the people to understand the English. They use the negative differently. If they are asked 'Did you or did you not do that' they will say 'Yes' meaning 'Yes, I did not do it'. The people have no understanding of connecting or qualifying words like 'if', 'but', 'because', 'or'. In our languages these are part of another word, or they don't exist. We have no word for 'because'. The same with words like 'in', 'at', 'on', 'by', 'with', 'over', 'under' and so on. For these there is one ending that goes on other words. Most of the people when they speak English leave out these words. When they hear them they don't understand their meaning. We have a different idea of time, and people just don't understand when they are asked 'how long were you there?' 'Was it about one hour?' 'Was it ten minutes'. The same applies to number. The Aboriginal people have a different idea of number, they don't understand 20, or 50, or 100, or 1000. They are confused about place. If asked 'Did you go into his house?' they will say 'yes'. It may have been only in the driveway, or inside the fence, but that means 'in the house' to them.[2171]

  Some words used by Aborigines have developed a different meaning:

  > I think it is fairly common knowledge among those who deal regularly with Aborigines that the word 'kill' or any equivalent word — although 'kill is the most common one is used in a variety of senses. It does not have the narrow meaning that it has in English. A phrase 'kill him finished' or 'kill him proper dead' is a way of saying that someone is killed in the English sense, but 'kill him little bit' or some other phrase means inflicting an injury that is less than death causing, and in fact it may be only a slight injury.[2172]

  There may also be considerable difficulty with the legal meaning of a plea of 'guilty' or 'not guilty'.[2173] Other language-related difficulties arise. Many Aborigines speak non-standard English[2174] so that the way in which questions are asked, especially direct questions, may often lead to misunderstanding and incorrect answers being given. Kinship terms such as 'father', 'mother', 'sister' can often have a much wider meaning than is usual in English.

- *Deference to Authority*. A further difficulty is Aboriginal deference to authority, which can lead to a propensity to give answers thought to be expected rather than to state what actually occurred. This is a

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2167 See K Liberman, 'Ambiguity and concurrence in Inter-cultural Communication' (1980) 3 *Human Studies* 65; P Lowe, 'Misfits: Aboriginal Culture and Prison' in B Swanton (ed) *Aborigines and Criminal Justice*, AIAS, Canberra, 1984, 327; M Foley, 'Aborigines and the police' in P Hanks and B Keon-Cohen (ed) *Aborigines and the Law*, George Allen and Unwin, Sydney, 1984, 160, 164-170.

2168 (1976) 11 ALR 412.

2169 id, 414.

2170 eg M Stracke, *Transcript of Public Hearings* Broome (25 March 1981) 506-7; W Snowden, *Transcript* Darwin (3 April 1981) 959; A Stobbart, R Collins, *Transcript* Maningrida (9 April 1981) 1123.

2171 In G Nettheim (ed) A*borigines, Human Rights and the Law*, ANZ Book Co, Sydney, 1970, 47-8, cited in ALRC 2, para 121. To similar effect, *R v Anunga* (1976) 11 ALR 412, 413-14 (Forster J).

2172 P Tiffin, Crown Prosecutor in *R v Claude, Raymond and Andy Mamarika*, unreported, NT Supreme Court (Nader J) August 1982, transcript, 25-6.

2173 For example, see A Nelson Napururla and B Nabarula, *Submission 497* (7 October 1985) 7. See para 579-82, 598.

2174 D Eades, *English as an Aboriginal Language in South-east Queensland*, PhD Thesis, University of Queensland, 1983, esp ch 4-7.

result both of Aboriginal courtesy and custom , but also of the long history of many Aborigines living and working in subservient situations.[2175] As Justice Forster pointed out in *R v Anunga*:

> [M]ost Aboriginal people are basically courteous and polite and will answer questions by white people in the way in which they think the questioner wants. Even if they are not courteous and polite there is the same reaction when they are dealing with an authority figure such as a policeman. Indeed, their action is probably a combination of natural politeness and their attitude to someone in authority. Some Aboriginal people find the standard caution quite bewildering, even if they understand that they do not have to answer questions, because, if they do not have to answer questions, then why are the questions being asked?[2176]

An Aboriginal suspect may also experience shame for things done which are the subject of the police interrogation, and may be placed in a vulnerable position as a result.

- *Concepts of Time and Distance*. Different concepts of time and distance may also lead to misunderstandings when a police officer is attempting to determine precise details:

> If a person is asked how long ago did something happen he will say: 'Five days ago' when he could mean five weeks or five months, or: 'How far were you standing from the police car?' 'Eight yards'. He could mean 80 yards. That is a defect of the system in that whereas European people and lawyers like everything measured and put in logical sequence, to a person who has never thought with reference to those criteria it is just a meaningless question: 'How long ago did something happen?' 'I know it happened a while ago. I don't know how long ago', but when that sort of vague expression is conveyed to the tribunal it makes it look as if the person does not know what he is talking about.[2177]

- *Health Problems*. The severe health problems suffered by many Aborigines have been well documented.[2178] These problems can often lead to behavioural patterns which could place an Aboriginal person at a distinct disadvantage in an interview or interrogation:

> Chronic ear infection has resulted in a large number of Aborigines being made partly deaf. An interrogation might well proceed with the Aborigine hearing only part of the words addressed to him. Having lived with the disability the greater part of his life and having learned to supplement auditory signals with other signals such as the movement of lips and gestures, the disability may be masked and the interrogator may remain unaware of it. If signs of it do not appear they may be misinterpreted as surliness, or worse still, the hesitations and the silences of guilt.[2179]

Alcoholism and alcohol-related diseases are also factors to be considered during interrogation. Many Aboriginal offences are alcohol related and the interrogation of Aborigines while under the influence of alcohol may lead to real difficulties of comprehension.

- *Customary Law Inhibitions*. In some cases there may be inhibitions arising directly from customary law. For example the suspect may be unwilling to disclose secret matters, or matters which are 'someone else's business'.[2180] There may be an avoidance relationship with a translator or someone else involved in the interrogation.[2181]

- *Treatment by the Police*. It has also been suggested that Aborigines are often treated differently by the police. Poor Aboriginal-police relations in some areas, and the disproportionate representation of Aborigines in the criminal justice system, are probably both symptoms and continuing causes of difficulty.[2182] As the Lucas Report noted:

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2175 For examples of this see ALRC 2, para 251-2; J Coldrey & F Vincent, 'Tales from the frontier: White laws — black people' (1980) 5 *LSB* 221; LL Davies, *Submission 5* (17 February 1977); C Loorham, 'Kumajay's Case' (1982) 3 ALB 3; J Lemaire, *Legal Education, Legal Aid and Confessional Evidence in Respect of Aborigines of the Northern Territory*, A Special Report to the Council of the Office of Aboriginal Affairs, July 1972, 16.

2176 (1976) 11 ALR 412, 414.

2177 P Segal, *Transcript* Moree (13 May 1981) 2590. cf Lowe (1984) 330-2; *R v Anunga* (1976) 11 ALR 412, 414 (Forster J).

2178 eg Senate Select Committee on Aborigines and Torres Islanders, *The Environmental Conditions of Aborigines and Torres Strait Islanders and the Preservation of their Sacred Sites*, AGPS, Canberra, 1976, 71-138; House of Representatives Standing Committee on Aboriginal Affairs, *Aboriginal Health*, AGPS, Canberra, 1979.

2179 Queensland, *Report of Committee of Inquiry into the Enforcement of Criminal Law in Queensland*, Brisbane, Government Printer, 1977 (Lucas Report) para 114. See also Foley, 170-1.

2180 See para 644, 649-50.

2181 See para 598.

2182 N Rees, 'Police Interrogation of Aborigines' in J Basten M Richardson, C Ronalds, G Zdenkowski (ed) *The Criminal Injustice System*, Australian Legal Workers Group, Clayton, 1982, 36, 39; ALRC 2, para 258; Lemaire, 18; Foley, 171-2.

> Frequently to the police officer called to deal with these situations and to the Aborigines involved in them, prejudice seems confirmed by experience.[2183]

All these factors suggest that special problems do exist for many Aborigines involved in police investigations.

547. ***Previous Proposals for Change***. Many recommendations to safeguard the rights of Aborigines in police interrogation have been made by State and Commonwealth government inquiries and by judges in cases involving Aborigines. It is significant that all of these have recommended, subject to various qualifications, that an Aborigine should only be interrogated by the police in the presence of a 'prisoner's friend'. There have also been recommendations that whenever an Aborigine is arrested for an offence the local Aboriginal Legal Service should be notified. The principal recommendations in relation to police interrogation of Aborigines are set out below:

- *ALRC 2, Criminal Investigation (1975)*. The Report recommended that:

  — Aboriginals and Torres Strait Islanders, when under restraint or in a pre-custodial questioning situation for serious offences, or any offences against the person or property, should be entitled to the presence during any questioning or other investigative procedures of a 'prisoner's friend', ie a lawyer, welfare officer, relative or other person, Aboriginal or not, who is able to interpret if necessary, and who is chosen by the person in custody of his own volition, either directly or from a list of appropriate persons supplied.

  — Where an Aboriginal or Torres Strait Islander is in custody for an offence, police should be required to notify forthwith the appropriate Aboriginal Legal Service of that fact, unless the prisoner objects to such notification.

  — The onus of proving that an Aboriginal waived his right to the presence of a prisoner's friend, or objected to the notification of an Aboriginal Legal Service, should rest upon the police.

  — Persons unable to speak or understand English with reasonable facility should not be questioned except in the presence, and with the assistance, of a competent interpreter.[2184]

- *Australian Government Commission of Inquiry into Poverty (1975)*. The Report recommended that:

  > If 'unsophisticated' Aboriginals of a tribal or semi-tribal background continue to be subject to the orthodox criminal law they should not be interrogated without a 'prisoner's friend' being present wherever possible. The 'prisoner's friend' should be a person with whom the prisoner can identify, such as a Field Officer of an Aboriginal Legal Service. The duties of a 'prisoner's friend' and interpreter should not be performed by the same person.[2185]

- *Report of Committee of Inquiry into the Enforcement of Criminal Law in Queensland (April, 1977)*. The Lucas Report set out guidelines applicable to the police when interrogating a person, especially a person under a disability.[2186] Most Aborigines and Torres Strait Islanders were to be regarded as persons under a disability, not because of pigmentation of skin, but rather 'educational and language disadvantages, cultural differences and, in some cases, an excessive deference to authority or physical disability'.[2187] The guidelines stated:

  > In the case of less sophisticated Aborigines and Islanders, unless it is impracticable so to do, interrogation should only be conducted when there is also present a person who is not a police officer in whom the suspect will have confidence.[2188]

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2183 Lucas Report, 87. See also *McKellar v Smith* [1982] 2 NSWLR 950, 962 (Miles 1), cited in para 552.
2184 ALRC 2, para 371-5.
2185 Commission of Inquiry into Poverty, Second Main Report (Commissioner: R Sackville), *Law and Poverty in Australia*, AGPS, Canberra, 1975, 275-6.
2186 Lucas Report, Appendix E, 271-81.
2187 id, 272.
2188 id, 278.

The Report also recommended that all police interrogations should be tape-recorded, preferably with a video tape recorder.

- *House of Representatives Standing Committee on Aboriginal Affairs, Aboriginal Legal Aid (1980)*. The Committee recommended that:

  > the Government urge those States which have not implemented notification systems to introduce police procedures which require the presence of a 'prisoner's friend' or Aboriginal legal service representative following the arrest of Aboriginals by police for all offences except drunkenness and during interrogation and any other investigative procedures.[2189]

- *Aborigines and Islanders (Admissibility of Confessions) Bill 1981 (Cth)*. On a number of occasions Senator Neville Bonner introduced a private member's bill,[2190] the most recent version of which was the Aborigines and Islanders (Admissibility of Confessions) Bill 1981 (Cth). The Bill incorporated many of the safeguards recommended by this Commission in its Report on *Criminal Investigation*. Clause 9 required an Aboriginal legal aid organisation to be notified whenever an Aborigine or Islander was in custody for a serious offence. Clause 10 specified the need for a prisoner's friend to be present whenever an Aborigine or Islander was interrogated by the police.[2191] The Bill was never debated, although some of its provisions were incorporated in the Criminal Investigation Bill 1981 (Cth).

- *Anti-Discrimination Board (NSW), A Study of Street Offences by Aborigines (1982)*. The focus for this study was the Offences in Public Places Act 1979 (NSW) and its effect on Aborigines in 10 'Aboriginal towns'. The Report made a number of recommendations on ways to improve Aboriginal/police relations, including the need for a notification system:

  > The Commissioner of Police direct all officers in charge of police stations and special squads that when an Aboriginal person is detained for questioning or is arrested that the closest Aboriginal legal service should be notified, unless the Aboriginal person requests that some other notification be given.[2192]

- *ALRC 26, Evidence (Interim) (1985)*. This Commission's interim Report on Evidence noted the difficulties experienced by Aborigines and others with police interrogation,[2193] and the differences in the law and practice throughout Australia. However its concern was with proposals of general application, and it recommended various procedural safeguards before a confession obtained by 'official questioning' would be admitted in criminal cases. These safeguards, which are part of a comprehensive code of evidence law, include:

  — either the recording of the interview and admission, or that it took place in the presence of a magistrate, the defendant's lawyer or a prisoner's friend,[2194] and

  — a requirement that the court determine that, having regard to various matters,[2195] the circumstances in which the admission was made makes it unlikely that its truth was adversely affected.[2196]

548. ***Criminal Investigation Bill 1981 (Cth)***. The Criminal Investigation Bill 1981 (Cth), based in large part on this Commission's Report on *Criminal Investigation*, sought to specify the rights and duties of the Australian Federal Police when investigating offences against laws of the Commonwealth or of the Australian Capital Territory. It was first introduced into the Federal Parliament in 1977 and circulated for public comment. A redrafted Bill was introduced in 1981 and again circulated for comment. The 1981 Bill contained a number of provisions regulating the powers and duties of police officers when interviewing

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2189 House of Representatives Standing Committee on Aboriginal Affairs, *Aboriginal Legal Aid*, AGPS, Canberra, 1980, 83.
2190 This Bill was first introduced on 15 September 1976, again on 26 October 1978 and again on 5 March 1981.
2191 The Lucas Report expressed doubts about the scope of the Bonner Bill because it placed too onerous a burden on the police and made no distinction between fairly sophisticated city dwellers and illiterate Aborigines living a more or less traditional life: Lucas Report, 92-100.
2192 New South Wales Anti-Discrimination Board, *A Study of Street Offences by Aborigines*, Government Printer, Sydney, 1982, para 6.38.
2193 ALRC 26, vol 1 para 144, vol 2 App C para 135, 139.
2194 Draft Evidence Bill, cl 72(2). These requirements do not apply if it was not reasonably practicable to comply with them.
2195 These include 'any relevant condition or characteristic of the person who made the admission, including the age, personality and education of the person and any mental, intellectual or physical ability to which the person is or appears to be subject': cl 72(5)(a).
2196 id, cl 72(4)-(6). See further ALRC 26, vol 1 para 762-70, 965-7.

suspects: these set out the Judges Rules in legislative form, with some modifications. The general requirement that a police officer inform a person of his rights was contained in cl 19( 2):

> Where an interview of a person in connection with an offence is being conducted ... the Police Officer shall not:
>
> > (a) ask him any questions ... unless a Police Officer has, at or since the commencement of the interview, cautioned the person, or caused the person to be cautioned, in a language in which the person is reasonably fluent, that he is not obliged to answer any questions, or to do anything asked of him, that anything said by him may be used in evidence and that he may at any time, consult a lawyer or communicate with a relative or friend if he wishes to do so.

After a person had been charged with an offence more stringent requirements were imposed. A police officer must give a caution in the following manner (cl 20):

> (a) by handing to him a document, in accordance with the prescribed form and written in a language in which the person is reasonably fluent, informing him to the following effect:
>
> > (i) that he is not obliged to answer any questions, or to do anything, asked of him by a Police Officer and that anything said by him may be used in evidence;
> >
> > (ii) that he may communicate with a lawyer, and have, as provided by this Act, the assistance of a lawyer while he is being questioned; and
> >
> > (iii) that he may, as provided by this Act, communicate with a relative or friend; and
>
> (b) by reading a copy of the document, or causing a copy of the document to be read, to him in the language in which it is written, unless it is impracticable for the document to be read to him.

The Bill imposed special safeguards with respect to persons not fluent in English. A person in custody unable to communicate orally with reasonable fluency in English must not be asked any questions by a police officer unless:

- in a language in which both the police officer and suspect are reasonably fluent or by other means of communication;
- an interpreter is present; or
- it is necessary to avoid danger of death, serious injury or serious damage to property (cl 28).

In addition, cl 26 set out the duties of an investigating officer who believes on reasonable grounds that the person in custody is an Aborigine or Torres Strait Islander. The police officer is required:

- to notify a specified legal aid organisation (ie one for Aborigines and Torres Strait Islanders) that a person is in custody, unless the person objects to this being done (cl 26(1), (2)):
- if the person is suspected of committing a serious offence or an offence against the person or property, not to interview the person unless a prisoner's friend (eg relative, lawyer, representative of a legal aid organization) is present (unless this rig ht is expressly and voluntarily waived). A prisoner's friend is not required if the police officer reasonably believes that tile suspect is not at a disadvantage having regard to the suspect's level of education and understanding (cl 26(3), (4), (9)).

Clauses 31 and 32 of the Bill set out the rules for admissibility of confessional evidence and cl 69 provided for the exclusion of evidence illegally obtained. To be admissible a confession must have been made voluntarily and not as a result of:

> (a) the use of physical violence, or a threat of physical violence, to any person; or
>
> (b) the making of a promise, threat or other inducement (not being physical violence or a threat of physical violence) likely to cause the person to make a confession that is untrue (cl 31(2)).

Evidence obtained in contravention of a provision of the Bill is not to be admitted as evidence unless:

> in the opinion of the court, admission of the evidence would substantially benefit the public interest in the administration of criminal justice without unduly prejudicing the rights and freedoms of any person (cl 69(1)).

## Judicial Regulation of Aboriginal Confessional Evidence

549. ***Northern Territory Supreme Court***. Judges in different States and the Northern Territory have on a number of occasions drawn attention to the special difficulties faced by Aborigines, and especially traditionally oriented Aborigines, under police interrogation.[2197] In several cases, these comments were the catalyst for amendments to police instructions, described below. The best known and most comprehensive judicial comment is that of Justice Forster (as he then was) in the Northern Territory Supreme Court in *R v Anunga*.[2198] This was the culmination of a number of similar cases involving police interrogation of Aborigines. In rejecting typewritten records of interview between a number of Aborigines and investigating police officers, Justice Forster laid down guidelines to be observed by the police when interrogating Aborigines (the so-called Anunga Rules). The Rules have been followed and applied in a considerable number of cases since 1976, but their application has not been without controversy. These issues are discussed later in this Chap ter.[2199]

550. ***South Australian Supreme Court***. In South Australia, Justice Bright in *R v Gibson* formulated principles and made suggestions relating to the interrogation of Aborigines. He said:

> The Commissioner of Police might well consider issuing an instruction which would bring home to investigating officers the desirability, in the case of Aborigines at least, of affording them an opportunity of obtaining independent and impartial advice from someone not in a position of authority.[2200]

This suggestion was taken up and guidelines were prepared and appeared as Police Circular No 354 (1975).[2201] Justice Wells in *R v Sydney Williams* observed:

> The questioning of aboriginal natives has always presented difficulties to police officers. The former find it difficult to speak and understand English and to comprehend certain kinds of concepts and reasoning: most white Australians do not speak and understand any dialect of the aboriginal native or comprehend his intuitive reasoning about his own life and affairs. Furthermore, many aboriginal natives — more especially full blooded tribal aboriginals — show a tendency to defer to persons in positions of authority, including police officers, that is far more pronounced and enduring than the average white Australian.[2202]

In *Grantham v Thomas*[2203] the appellant was an Aborigine who had been convicted for driving whilst under suspension. He had been unrepresented at first instance. Justice Jacobs said:

> ... there is much to be said for the practice instituted by the Chief Commissioner of the Australian Federal Police, at the request of the Department of Aboriginal Affairs, 'that when an Aborigine is arrested, the police will forthwith notify the nearest office of Aboriginal Legal Services by the most direct means', a practice which is said to have been agreed to by the South Australian Police Department ... No such steps appear to have been taken in the present case. This practice is all the more desirable when an Aborigine has been arrested for an offence which renders him liable to imprisonment upon conviction.[2204]

551. ***Western Australian Supreme Court***. Chief Justice Burr in *Abdullah v O'Meara*[2205] went a step further and suggested that the Aboriginal Legal Services should also be notified of all convictions of Aborigines which may result in imprisonment. He upheld an appeal against a sentence of 6 months imprisonment imposed by Justices of the Peace on an Aborigine who had pleaded guilty to a charge of 'break, enter and steal'. He reduced the sentence to 3 months (Abdullah had already been in gaol for 4 months) and commented that the lack of any notification system could often result in injustice. He added:

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2197 For earlier discussions of these issues see para 53, 54, 56.
2198 (1976) 11 ALR 412. See para 554 for details.
2199 See para 561-73.
2200 Unreported, SA Supreme Court, 12 November 1973.
2201 They are now contained in General Order 3015 (as amended in 1985). For further discussion see para 555.
2202 (1976) 14 SASR 1, 6. See para 477.
2203 Unreported, SA Supreme Court, No 2808 of 1980.
2204 id, 6. Alleged admissions were ruled inadmissible on the grounds of non-adherence to the police requirements in *R v Haseldine*, unreported, SA District Court (Ligertwood J) Pt Augusta Circuit (30 September 1983).
2205 Unreported, WA Supreme Court, Appeal No 44 of 1979.

> I can only express the hope that some procedure can be devised whereby this information gets through to [the Aboriginal Legal Service] quicker than it presently does.

552. ***New South Wales Supreme Court***. While no special guidelines for police interrogation of Aborigines have been formulated by either the courts or the New South Wales Police, Justice Miles in *McKellar v Smith* commented on the particular difficulties faced by Aborigines:

> While the position of the Aboriginal people in New South Wales has not been regarded as such that it requires the formulation of a particular body of guidelines, like those enunciated in Anunga, the history of relations between Aboriginals and law enforcement authorities, particularly in the western parts of the State, should put a tribunal on notice that an Aboriginal person may be at a substantial disadvantage in the interrogation process... In this connection, too, lawyers should not continue to ignore the provisions of the Racial Discrimination Act 1975 nor to overlook the possibility that courts may take judicial notice of the ratification by this country of the International Covenant on Civil and Political Rights, the Declaration of the Rights of the Child and other international instruments which contain provisions and establish standards which may be relevant to the exercise of judicial discretion.[2206]

## Safeguards for Aboriginal Suspects in Legislation and Police Standing Orders

553. ***Extent of Safeguards***. Although many recommendations have been made for specific protection for Aborigines under police interrogation,[2207] few have been implemented. In those jurisdictions where specific safeguards have been introduced they have come principally through judicial intervention following repeated efforts by legal counsel to illustrate the extent of the problem. At present police departments in Victoria,[2208] the Northern Territory,[2209] South Australia[2210] and the Australian Capital Territory[2211] have some system for notifying the local Aboriginal Legal Service after an Aborigine is arrested. In Queensland, South Australia, Northern Territory and the Australian Capital Territory there are guidelines for the police when questioning Aboriginal suspects. A departure from the guidelines without sufficient reason may result in any statement obtained being ruled inadmissible in evidence, through the exercise of a discretion to exclude such evidence. The position in each Australian jurisdiction with respect both to notification of Aboriginal arrests and the interrogation of Aboriginal suspects is different, and it is necessary to examine briefly the current position in each State and Territory to assess the adequacy of protections available under present law and practice.

554. ***Northern Territory***. The guidelines enunciated in Anunga's Case were, according to Justice Forster:

> designed simply to remove or obviate some of the disadvantages from which Aboriginal people suffer in their dealings with police.[2212]

The guidelines are now incorporated in Police Circular-Memorandum No 13 of 1979, issued by the Northern Territory Police Commissioner. The guidelines require:

- an interpreter to be present if the suspect is not fluent in English;
- the presence of a 'prisoner's friend' (someone in whom the Aboriginal has apparent confidence);
- great care in administering the caution (right to silence) and ensuring it is understood;
- the provision of basic refreshments and substitute clothing if needed;
- no questioning while the person is ill, drunk or tired;
- reasonable steps to obtain legal assistance if requested.

No requirement was specified in the Anunga Rules for the Aboriginal Legal Service to be notified following the arrest of an Aborigine. Such a requirement is set out in the Police Circular, but the general terms in which

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2206 [1982] 2 NSWLR 950, 962; noted (1983) 7 ALB 8. But cf *Dixon v McCarthy* [1975] 1 NSWLR 617, 641 (Yeldham J).
2207 See para 547-8.
2208 Victoria Police Manual, Amendment No 1293.
2209 NT Police, Circular Memorandum No 13 of 1979.
2210 Summary Offences Act 1953 (SA) s 79A, combined with General Order 3015, 'Aboriginals', para 11-12 (amended 1985).
2211 Australian Federal Police, General Instruction 1 (27 February 1984).
2212 *R v Anunga* (1976) 11 ALR 412, 414. See para 516.

it is expressed often mean in practice that (unless a solicitor or field officer of the Service is sought as a prisoner's friend) the Aboriginal Legal Service is not notified until after a person has been interrogated and charged. The guidelines are regarded as equivalent in status to the Judge's Rules. Although they impose more stringent obligations on police when interrogating Aborigines than the Judge's Rules, the legal principles relating to admissibility of confessions (voluntariness and the discretion to exclude) are unchanged.[2213] The Supreme Court has strongly supported the Rules, and it is not uncommon for the Court to exclude confessions if there has been non-compliance.[2214] A degree of reluctance on the part of some magistrates to apply the Rules in the way intended was sternly re proved by the Supreme Court.[2215] But the Anunga Rules were considered, and in some respects restrictively interpreted, by the Federal Court on appeal from the Supreme Court of the Northern Territory in *Gudabi v R*,[2216] Gudabi had appealed to the Federal Court from a conviction for rape on the ground that the trial judge had erred in admitting in evidence admissions allegedly made to the police. It was argued that the statements had not been made voluntarily or alternatively that as a matter of the judge's discretion they should have been excluded. One ground relied on for such exclusion was that a number of the Anunga guidelines had not been met. A particular point at issue was the suitability of the person used to fulfil the role of prisoner's friend:

> Counsel for the appellant sought to draw from the examples given in the guidelines of the type of person who might act as prisoner's friend the concept that the prisoner's friend had to be a person who had the capacity and ability not only to assist the person being interviewed to appreciate fully his right to remain silent in the face of questioning by a police officer, but also to guide him, and perhaps even speak for him, in exercising that right ... The submission went so far as to place a duty on the investigating police to ensure that an appropriate person capable of fulfilling such a role was chosen as prisoner's friend.[2217]

The Court rejected both arguments. In its view there was 'no principal role for the investigating officer to play in the choice of prisoner's friend ...'. That choice 'must be left entirely to the person about to be interviewed'.[2218] The Court reaffirmed that the Anunga guidelines are not rules of law and added:

> It would be wrong to treat what was said in *R v Anunga* as laying down principles or rules the breach of which in any respect will result in confessional material being rejected or inadmissible ... The legal question will always be whether the confessional statement was voluntary in the sense in which that expression is used in the relevant authorities.[2219]

555. ***South Australia***. In South Australia, General Order 3015, entitled 'Aborigines',[2220] sets out provisions for Aboriginal-police liaison, and procedures to be followed by police when interrogating Aborigines for serious offences. The Circular distinguishes between tribal or se mi-tribal and other Aborigines. In relation to the interrogation of tribal or semi-tribal Aborigines 'every effort [must be] made to have an independent third party present at the interrogation' (cl 12); if practicable this should be a solicitor or field officer. Also, if practicable, the person attending should have some understanding of the native language of the person being interrogated. If a child is being interrogated a parent, guardian or Aboriginal field officer is present, if practicable or if the child is under the care of the Department of Community Welfare a representative of the Department is advised and given the opportunity to 'attend. Special recognition is given to Aboriginal Field Officers attached to the Aboriginal Legal Rights Movement (ALRM), who are issued with identification cards (cl 11). There is provision for information prepared by the ALRM to be made available to an arrested Aborigine and for a field officer to be notified, provided the offender has no objection (cl 13).[2221] The ALRM

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2213 *Coulthard v Steer* (1981) 12 NTR 13; *Collins v R* (1980) 31 ALR 257; *Gudabi v R* (1984) 52 ALR 133; *MD (a child) v McKinlay* (1984) 31 NTR 1.

2214 *R v Jungala and Jagamara*, unreported, NT Supreme Court (Forster CJ) (Nos 434-439 of 1979); *R v Hoosen and Nelson*, unreported, NT Supreme Court, 10 April 1978; *Rockman v Stevens*, unreported, NT Supreme Court (Muirhead J), 12 October 1980; *R v Bob Dixon Jabarula* (1984) 11 A Crim R 131 (MuirheadJ). For the procedure on a voir dire examination where the issue of voluntariness is raised in relation to the Anunga guidelines see *Fry v Jennings* (1983) 25 NTR 19.

2215 *Coulthard v Steer* (1981) 12 NTR 13 (Muirhead J).

2216 (1984) 52 ALR 133 (Woodward, Sheppard & Neaves JJ). For comment see F Bates, 'Interrogation of Australian Aborigines' (1984) 8 *Crim LJ* 373.

2217 (1984) 52 ALR 133, 144.

2218 id, 145-6. In the Court's view 'the overriding consideration must always be that the prisoner's friend is a person selected by the Aboriginal suspect in the exercise of a free choice': ibid.

2219 ibid. For criticism of the Court's view that the 'social climate' in the Northern Territory had changed markedly and materially since 1976 see n 78.

2220 This originally appeared as PCO Circular 354 issued by the Deputy Commissioner of Police on 24 March 1975, and was the culmination of long consultations between the Aboriginal Legal Rights Movement (ALRM) and the Police Department. It was further amended in 1985.

2221 There are also now general requirements in the Summary Offences Act 1953 (SA) s 79A, under which an apprehended person may make a phone-call and have a third person present during any police interrogation, and an interpreter if English is not his or her native language. A police officer must inform a suspect of these rights. The requirements of General Order 3015 are stated to be additional to those imposed with respect to all suspects by s 79A.

supp lies the Police Department with a 24 hour duty roster, which covers the Adelaide metropolitan area, to enable prompt attendance at least in the case of more serious offences. As in the Northern Territory, the status accorded General Order 3015 is similar to that of the Judges Rules.[2222] The Supreme Court has rejected confessions where the General Order (or its predecessor, Police Circular No 354) has not been complied with.[2223] But the General Order is an adjunct to the Judge's Rules, not a substitute. In *R v McKenzie*[2224] Justice Jacobs exercised his discretion to exclude the confession of a 23 year old, well educated and articulate Aborigine who had been charged with murder. McKenzie had not been given the option of a prisoner's friend until after he had be en cautioned. Justice Jacobs held that the Police Circular had not been breached, because McKenzie was articulate and well-educated. However, quite apart from the Circular, it would have been prudent to offer the assistance of an independent third party given McKenzie's state of distress and the length of time he had been detained.

556. ***Queensland***. The Queensland Police Manual contains specific provisions for police interrogation of children, and of Aborigines and Torres Strait Islanders. General Instruction 4.54A states:

> (1) When a child or Aborigine or Torres Strait Islander is being questioned by a member of the Police Force about his implication in an offence for which he may be apprehended or detained in custody, the member of the Force interrogating the child or other person, will question any one of them in the presence of-
>
> > (i) in the case of a child, the parents or guardian of that child, or in the absence of the parents or guardian, an adult person nominated by them or him, or if not nominated, an independent adult person, preferably of the same sex as the child;
> >
> > (ii) in the case of an Aborigine or Torres Strait Islander in circumstances of language, educational, cultural or ethnic handicaps or differences, an independent adult person concerned with the welfare of those races in whom the person being questioned has confidence and by whom he feels supported, and who can act as an interpreter during the period of interrogation, if necessary, and in either instance described above, in the presence of a person by whom and under circumstances where the child, Aborigine or Torres Strait Islander will not be overborne or oppressed in any way.

General Instruction 4.54A incorporates the main proposals with respect to Aborigines and Torres Strait Islanders contained in the Lucas Report,[2225] although it does not include all the Report's recommendations. There is, in particular, no general requirement for notification of the Aboriginal and Torres Strait Islanders Legal Service whenever an Aborigine is arrested. It would seem notification need only occur if the police consider that the Aborigine or Islander is under a 'disability' as a result of 'language, educational, cultural or ethnic handicaps or differences'.

557. ***Australian Capital Territory***. The General Instructions (1984 revision) of the Australian Federal Police apply both to offences committed in the Australian Capital Territory and federal offences committed anywhere in Australia. General Instruction 1, para 2 requires the Aboriginal legal service to be notified that an Aboriginal or Torres Strait Islander is in custody unless the person objects. Paragraph 3 requires the presence of a prisoner's friend:

> if the suspect is an Aboriginal or a Torres Strait Islander, the member shall not, subject to this section, interview or permit another member to interview him unless -
>
> (e) a prisoner's friend, a lawyer or a representative of a specified organization is present while he is being interviewed; or
>
> (f) he has, in writing, expressly or voluntarily waived his right to have such a person present.

This requirement may however be excluded in certain circumstances. A member is not required to comply with para (1)(e) in respect of a suspect in custody if the member has reasonable grounds for believing that having regard to the suspect's level of education and understanding, he is not at a disadvantage, in respect of the investigation of the relevant offence for which he is being interviewed, in comparison with members of the Australian community generally. In addition the General Instruction sets out what it calls 'exceptional circumstances' in which para 2 and 3 may be overridden. These include:

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2222 *R v Williams* (1976) 14 SASR 1, 6 (Wells J).
2223 *R v Ajax and Davey* (1977) 17 SASR 88; *Walker v Marklew* (1976) 14 SASR 463; *R v Williams* (1976) 14 SASR 1.
2224 (1977) 17 SASR 304.
2225 See para 547.

- to avoid danger or death or serious injury to any person or serious damage to property (para 4(1)):

- if a prisoner's friend cannot be located or refuses to attend or does not attend within 1 hour of being informed (in which case a senior police officer must be present during the interview);

- if, in the opinion of the member, the presence of a prisoner's friend is likely to obstruct or hinder the conduct of an investigation, enhance the escape of an accomplice, lead to loss or fabrication of evidence, allow a witness to be intimidated, or place substantial property in jeopardy. If a decision is made by a member to restrict access a Commissioned Officer must be notified and he has the power to overrule (para 5 and 6).

558. ***Western Australia***. In Western Australia, there is no requirement for the presence of a 'prisoner's friend' during the interrogation of an Aborigine, nor for the Aboriginal Legal Service to be notified when an Aborigine is arrested.[2226] However, the admissibility of any confession obtained is regulated by s 49 of the Aboriginal Affairs Planning Authority Act 1972.[2227] This provides that in the case of an offence punishable by 6 months imprisonment or more the court:

> shall refuse to accept or admit a plea of guilt at a trial or admission of guilt or confession before any trial in any case where the court is satisfied upon examination of the accused person that he is a person of Aboriginal descent who from want of comprehension of the nature of the circumstances alleged or of the proceedings, is or was not capable of understanding that plea of guilt or that admission of guilt or confession.

The section clearly has limited application. It does not provide any specific protection for an Aborigine during a police interrogation. It does, however, provide for certain admissions or confessions to be inadmissible depending on the defendant's level of comprehension. In addition, s 631 of the Criminal Code (WA) provides for a jury to be empanelled to determine whether an accused person is capable of understanding the proceedings at the trial. These provisions are discussed in the next Chapter.[2228]

559. ***Victoria***. A notification system in Victoria has operated for many years. Originally this was done pursuant to the Aboriginal Affairs Act 1967 (Vic) which required the courts and later the police to notify the Director of Aboriginal Affairs when an Aborigine was charged. Following the repeal of the 1967 Act,[2229] similar provision was made in Police Standing Orders. A new notification system was established in 1980 with the insertion of a new para 1A in Police Standing Orders:

> Where a person who is of Aboriginal ancestry or whose appearance indicates Aboriginal ancestry, or who claims to be of Aboriginal ancestry is arrested for any offence (other than for drunkenness) or is the subject of a care application, the arresting member shall promptly telephone or telex particulars of the case to the Missing Persons Bureau.

In practice the Missing Persons Bureau telephones the Victorian Aboriginal Legal Service (VALS) with name, location and principal charges preferred against the offender as soon as the Bureau has been notified. All offences, regardless of degree of seriousness, are notified. The name and rank of the informant are also notified. It has been said that the system does not work very satisfactorily because the Missing Persons Bureau is not always notified by Police Stations that they have arrested an Aborigine. This means that VALS is not in a position to provide legal advice at an early stage in the legal process:

> Other problems still exist which I believe will not finally be overcome until the system is given some legislative backing and clout. Whilst there are instances where legal advice is able to be given to Aboriginal persons prior to the conducting of a record of interview, it would certainly be true to say that in most situations, the notification system simply operates as a means of enabling us to know the forthcoming court dates of Aboriginal clients.[2230]

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2226 The Supreme Court has commented that the Anunga rules are not law in WA: *Gibson v Brooking* [1983] WAR 70, 75 (Pidgeon J).

2227 The original version of this provision was inserted in 1936 and was numbered s 60 in the 1936 reprint of the Native Administration Act 1905-1936 (WA). It made all admissions of guilt or confessions by all Aborigines in WA inadmissible in evidence. Renumbered as s 61 in a later reprint, this provision was amended by s 57 of the Native Welfare Act 1954 (WA) to exclude Aborigines living in the south-west of the State. In this form the provision was reenacted as s 31 of the Native Welfare Act 1963 (WA). It eventually disappeared with the repeal of the 1963 Act by the Aboriginal Affairs Planning Authority Act 1972 (WA).

2228 See para 581.

2229 Aboriginal Affairs (Transfer of Functions) Act 1974 (Vic).

2230 B Kissane, Victorian Aboriginal Legal Service, *Submission 415* (9 May 1984). See also I Gray, 'Breakdown' (1982) 6 *ALB* 3.

560. ***New South Wales and Tasmania***. There is no notification system in either New South Wales or Tasmania, nor are there special rules for police to follow when interrogating Aborigines. The New South Wales Police Submission expressed the view that no notification system is necessary except in the case of children, where special rules already exist:

> I feel there is ample communication between Police and the Aboriginal Legal Service of this State.[2231]

## Special Protection for Aboriginal Suspects?

561. ***Support for Interrogation Guidelines.*** Different approaches to the interrogation of Aborigines are taken in each of the States and Territories. Guidelines exist, and have been in operation long enough in the Northern Territory and South Australia, for some assessment to be made of their appropriateness, workability, and of ways of improving them. The Commission has received submissions from Aboriginal Legal Services, State and Territory Police Forces, a National Police Working Party and interested individuals relating to interrogation guidelines. It has had extensive discussions both formally[2232] and informally on the issue. It seems that there is strong support, in those jurisdictions where they already exist, for interrogation guidelines, although, as will be noted, some practical problems do arise for the police. The guidelines have become an accepted part of police operations and the Courts have, with some (mostly minor) exceptions, supported and applied them.[2233] In jurisdictions such as Tasmania and New South Wales where there are no guide lines, there is resistance to their introduction on the part of the police, and requests for their introduction by Aboriginal Legal Services have so far produced no result. It is necessary to consider the range of these views under a number of headings.

562. ***Need for Special Protection for Traditionally Oriented Aborigines***. Of all Aborigines in Australia, those who are traditionally oriented appear to be the most vulnerable when involved in police interrogation. Interrogation in such cases also creates the most difficulties for police seeking conscientiously to perform their proper functions. Given their degree of contact with the criminal justice system and their history of social and economic disadvantages, it is safe to say that as a group the problems of traditionally arrested Aborigines with police interrogation are significantly greater than those of any other group in Australia. They often have limited understanding of the English language, as well as very limited understanding of the general legal system and its operation.[2234] They understand little of the nature of police interrogations and in particular of the right not to answer police questions. Traditionally oriented Aborigines may also feel under significant pressure to make a statement to the police, not necessarily as the result of police interrogation techniques, but rather for strong cultural reasons. This is the view of Mr G Eames, a lawyer with extensive experience in Central Australia:

> In many cases with tribal Aborigines, there is great cultural pressure ... to make a statement. Whatever requirements there are concerning cautions in the police rules or wherever, there is nevertheless quite significant compulsion on them for their own sake and that of the community to make a statement to announce what their role was in the whole affair. It seems to me there is a real danger for lawyers working with Aborigines accused of murder or manslaughter to not quite appreciate that sort of pressure and then to think it can be overcome with legal advice ... In some ways the great danger, a greater danger than verbals or breaches of Judges' Rules, is that the person who does in fact make a statement, for whatever reasons of pressure from the community, in making the statement does not do justice to what really occurred in the situation.[2235]

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2231 New South Wales Police, *Submission 234* (2 April 1981). See para 552. For a Tasmanian Aboriginal view that a notification system is needed there see M Mansell, 'Police/Aboriginal Relations: A Tasmanian Perspective' in Swanton (1984) 112, 114-6.

2232 During March, April and May 1981 the Commission held Public Hearings at over 35 venues throughout Australia discussing aspects of the Reference and in particular the proposals contained in ALRC DP 17 (1980). In para 152, 158 of the Discussion Paper it was proposed that the Police be required to notify the nearest ALS when an Aborigine was arrested for a more serious offence, and that the Anunga Rules should continue to apply to traditional Aborigines. See also ALRC DP 20 (1984) para 31-3.

2233 In *Gudabi v R* (1984) 52 ALR 133, 145 the Full Federal Court, in dealing with a case of rape by sorcery, commented that:

> the Anunga guidelines were formulated in 1976 in a social climate which differed markedly, in many respects, from that which has prevailed in the Northern Territory for the last two or three years at least. Social conditions and values, and community standards and expectations, have changed and are continuing to change and, while the basic principles underlying the Anunga guidelines remain valid, their application must reflect the changes in society.

This comment was made in the context of the choice of a prisoner's friend, and it is the case that changes in many Aboriginal communities since 1976 have led to changes in the personnel who are likely to be chosen as 'prisoner's friends'. But it is difficult to accept that the situation described in para 546, of problems more traditional Aborigines often have with police interrogation, has changed 'markedly' in less than a decade. For comment to similar effect see Bates (1984) 383-4.

2234 See para 546.

2235 Comment by G Eames in Basten, Richardson, Ronalds and Zdenkowski, 65. For a further illustration of this difficulty see Lucas Report, 89-91 which recounts a PNG experience.

The susceptibility of traditionally oriented Aborigines to make a statement of some kind is a strong reason for specific procedures to ensure, as far as possible, that any statement made is accurate. Guidelines such as the Anunga rules may be one way of achieving this. It is recognised that it may not always be easy for the police to comply with the terms of the Anunga guidelines,[2236] but this must be weighed against the peculiar difficulties faced by many traditionally oriented Aborigines and the need to ensure that their basic rights are not undermined. The Anunga guidelines as they have been applied in the Northern Territory appear to work with reasonable success.[2237] If this was not the case and the guidelines did little to ensure the reliability of confessional statements, the only option might be to provide that all confessional statements by traditionally oriented Aborigines were inadmissible. This was the position in Western Australia under the Native Welfare Act 1936 (WA).[2238] But such an approach places significant constraints upon the proper investigation of offences. There is accordingly a strong case for the police to be required to comply with guidelines or rules of this kind when dealing with traditionally oriented Aborigines, wherever they may live. Of course, the status and content of such rules remain to be examined.[2239]

563. ***Need for Special Protection for Other Aborigines***. While there is fairly general support for the notion of specific interrogation guidelines applying to traditionally oriented or tribal Aborigines, a question arises whether such guidelines should apply more generally, either to all Aborigines or at least to a wider class. The difficulty is to determine to whom the guidelines would apply. On this point the Lucas Report expressed the view that:

> It is absurd to think of imposing the same constraints upon investigators in the case of a, say, fairly sophisticated, city dweller of mixed descent as it would be in the case of the illiterate Aborigine living according to his tribal customs.[2240]

The existing guidelines for police interrogation of Aborigines vary in their scope. The Anunga Rules were not specifically stated to apply only to tribal Aborigines, though clearly they envisaged persons with difficulties of language and comprehension, and there does not appear to have been any decision of the Northern Territory Supreme Court clarifying this point. There has, however, been judicial comment to this effect in other jurisdictions. For example, in a case before the Australian Capital Territory Supreme Court, Justice Kelly commented:

> It is clear that these rules ... need not be confined to aboriginals resident in the Northern Territory but I was not persuaded that they had to be followed strictly in the present case. The accused gave evidence that he was aware of his right to seek a solicitor when being interrogated on being arrested. This indicated a degree of relative sophistication which does not appear to be that of those for whom Forster J was concerned.[2241]

The South Australian guidelines draw a distinction between tribal or semi-tribal and other Aborigines, whereas in Queensland the basis for distinction is 'language, educational, cultural or ethnic handicaps'. The Criminal Investigation Bill 1981 (Cth) adopted an approach similar to that used in Queensland, and which was proposed in the Lucas Report. It would have allowed a police officer to dispense with the prisoner's friend requirement if:

> the Police Officer has reasonable grounds for believing that, having regard to the person's level of education and understanding, he is not at a disadvantage ... in comparison with members of the Australian community generally.[2242]

There are clearly advantages in this approach. It avoids the need to draw difficult and often arbitrary distinctions between tribal, semi-tribal and other Aborigines. It also considerably simplifies the task of drafting legislation implementing the rules. However it does not overcome all objections. It has been argued that very few Aborigines are not 'at a disadvantage' and that such a provision gives the police too much

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2236 This issue is discussed in para 566.

2237 In *R v Bob Dixon Jabarula* (1984) 11 A Crim R 131, 132, Muirhead J commented that: my own experience is that [the Anunga rules] have served as a guide to promote a high level of fairness and efficiency in the course of police investigation in this Territory. Understanding of the guidelines and general adherence to them has promoted the interests of justice in this Territory, where the courts are continually dealing with Aboriginal people of varying degrees of sophistication.

2238 See n 72.

2239 See para 566-73.

2240 Lucas Report, para 124.

2241 *R v Clevens*, unreported, ACT Supreme Court (Kelly J), SCC No 53 of 1980. Rees, 53, refers to occasions when the Victorian courts have, in his view erroneously, dismissed the rules as only applicable to tribal Aborigines. See also the different approaches of Yeldham J and Miles J in the NSW Supreme Court: para 552 n 51.

2242 Criminal Investigation Bill 1981 (Cth) cl 26(4).

discretion.[2243] The House of Representatives Standing Committee on Aboriginal Affairs, in its Report on *Aboriginal Legal Aid*, was concerned that distinguishing between tribal, semi-tribal and other Aborigines could see the 'police administering a subjective "sophistication" test based on their notion of tribalism and their judgment of an Aboriginal's comprehension of English'.[2244] This same problem might arise with respect to clause 26(4) of the Criminal Investigation Bill 1981 (Cth).[2245] Another problem is that clause 26(4) is directed not at the question of the suspect's actual level of education and understanding but at the police officer's reasonable belief as to that level of education and understanding, at the time of the interrogation. A confession could be admissible, although it was obtained without the interrogation rules being complied with and although it had since become clear that the defendant did not understand the right not to answer.

564. ***Submissions on the Application of Interrogation Rules***. The Commission received a number of submissions on this issue. The Victorian Police in their submission opposed the general application of the Anunga guidelines. In their view the guidelines were 'specifically intended for tribal Aborigines who have inadequate linguistic skills and who generally do not comprehend their situation'. They did not dispute the need for special protection for traditionally oriented Aborigines but took the view that there were no such Aborigines in Victoria and hence no need for the introduction of the Anunga guidelines there.[2246] The New South Wales Police also considered that the Anunga guidelines are, and should be, only applicable to tribal Aborigines.[2247] A submission from the Tasmania Police stated that the police follow the English Judge's Rules which are considered adequate for the Tasmanian situation:

> Tasmania Police Force can see no reason, having regard to the level of education and integration of the aboriginal descendants in Tasmania, why they should be treated more favourably than other citizens.[2248]

The National Police Working Party, formed in 1983 to provide a police view on the Aboriginal Customary Law Reference, submitted that:

> In the light of principles of equality and discrimination constraints, any special rules for the interview of Aborigines by police should only apply in cases involving traditionist Aboriginals whose first language is an Aboriginal tongue and who are not well versed in English.[2249]

On the other hand, different views have been expressed, for example, by the Victorian Aboriginal Legal Service which stated that the problems identified in *Anunga's* case do exist in Victoria:

> The police officer is seen as the most direct, and indeed powerful, white authority figure and many of our clients experience enormous difficulty in exercising their rights not to make admissions even when they have elected to adopt this course.[2250]

As a consequence, the Victorian Aboriginal Legal Service argued for the inclusion of the Anunga rules in police standing orders. During the Public Hearings on this Reference much support for this view was expressed, particularly by Aboriginal Legal Service representatives.[2251] The Tasmanian Aboriginal Centre pointed out that the aim of the Anunga rules was not to give Aborigines rights greater than any other person but rather, because of the disadvantaged position in which Aborigines often find themselves when arrested by the police, to give them equality.[2252]

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2243 N Rees, 'The Criminal Investigation Bill and Aboriginal Suspects: Fewer safeguards' (1982) 3 *ALB* 1, 6; N Rees, P Ditton and J Terry, Representation made to Senator P Durack, Attorney-General (Cth), 27 April 1982.

2244 *Aboriginal Legal Aid Report*, 81.

2245 The former President of the Australian Council of Civil Liberties (Mr Malcolm Ramage) proposed, for these reasons, that clauses 26(4) and 26(5) of the 1981 Bill be deleted: Both of these sub-clauses provide easy and obvious ways to avoid the spirit and intention of the other clauses ... [T]hese rights are too important to be so qualified. Seminar on the Criminal Investigation Bill 1981 (Cth), Australian Institute of Criminology, Canberra, 1982.

2246 Victoria Police, *Submission 186* (18 August 1980).

2247 New South Wales Police, *Submission 234* (2 April 1981).

2248 Tasmania Police, *Submission 296* (16 June 1981). This view was also presented at the Public Hearing in Launceston (21 May 1981) by Mr Stephen Carey, Legal Officer with the Tasmania Police: *Transcript*, 2792.

2249 National Police Working Party, *Submission 459* (18 September 1984) 11. This view was reiterated by the National Police Working Party in *Submission 502* (31 January 1986) 2.

2250 Victorian Aboriginal Legal Service, *Submission 283* (20 May 1981). See also W Morgan-Payler and M Tucker, *Transcript* Melbourne (20 May 1981) 2754-68.

2251 S Vose, *Transcript* Pt Hedland (24 March 1981) 392; F Chulung, *Transcript* Fitzroy Crossing (31 March 1981) 775-6; W Snowden, *Transcript* Darwin (3 April 1981) 958-9; A McDonald, *Transcript* Mt Isa (23 April 1981) 1656-7; J Morgan, *Transcript* Cairns (5 May 1981) 2200; J Terry, *Transcript* Lismore (11 May 1981) 2506-7; P Coe, *Transcript* Sydney (15 May 1981) 2680.

2252 Tasmanian Aboriginal Centre, *Submission 237* (10 April 1981) 9-10.

565. ***Conclusion***. The interrogation rules or guidelines should apply to all Aborigines whose difficulties of comprehension of their rights under interrogation, and of the meaning of what is said, warrant such protection. This should be so whether these difficulties arise from lack of education, or lack of understanding based on different conceptions of law, or undue deference to authority. This conclusion accords with those reached in this Commission's Report on *Criminal Investigation*, and in the Lucas Report, and it is consistent with the provisions in the Criminal Investigation Bill 1981 (Cth), although some improvements can be made to the way in which the 1981 Bill achieves this aim.[2253] In the absence of appropriate changes in the general law of criminal investigation,[2254] special protection needs to be provided for disadvantaged Aboriginal suspects under police interrogation.[2255] The question is how to achieve this agreed result. The test proposed by the Commission in its interim Report on *Evidence* contains a number of elements, which in the context of an Evidence Code are able to be legislated for separately.[2256] However any special rules for Aboriginal suspects will operate principally in States and Territory Courts and against the background of the common law, which focusses on the notion of voluntariness, a composite notion combining elements of fairness (specifically the right not to incriminate oneself) with a test directed at the reliability of the evidence obtained. In the context of a special law seeking to remedy the problems with Aboriginal suspects which are identified in this chapter,[2257] the question of reliability of admissions should not be divorced from the questions of non-self-incrimination and procedural fairness.[2258] Accordingly the test for the admissibility of a confession made by an Aboriginal suspect without compliance with the interrogation rules should focus on whether the suspect understood that he or she need not answer any questions, understood the nature of any questions put or statements made in the course of the interrogation, and did not make the admissions merely through a desire to comply with the perceived wishes of a person in authority. Where these conditions are met, it is unnecessary to consider whether the difficulties referred to in para 546 (for example, language, concepts of time and distance) have operated to produce a confession which it would be unsafe or unfair to admit in evidence. Where these conditions are not met, the special protections outlined above, and discussed in the following paragraphs, are necessary. A majority of the Commission[2259] believes that no further restrictions on the application of the interrogation rules are necessary or desirable. The test for admissibility itself incorporates the various elements (.comprehension, capacity to choose whether to speak or be silent) relevant to limiting the class of persons who need legal protection. The application of the interrogation rules to Aboriginal suspects generally[2260] carries some risk of over-inclusiveness, but this is substantially reduced by the nature of the test for admissibility, which will exclude most, if not, all suspects who do not need the special protection of the interrogation rules. In this area it is better to be over-inclusive than under-inclusive, and it is also better to avoid subjective, question-begging formulas based on the suspect's perceived disadvantages. However two members of the Commission[2261] would spell out the category of persons to whom the interrogation rules should apply. This should be done in broadly the same way as the Criminal Investigation Bill 1981 (Cth) did, but through the use of more precise language, and with a test phrased in

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2253 See para 547-8.

2254 As proposed by this Commission in ALRC 26 (see para 547), so far as federal courts are concerned. On the general issue of police interrogation see eg M McConville and J Baldwin 'Questioning Police Interrogation' (1982) 132 *New LJ* 673; Odgers (1985).

2255 This matter is within the Commission's Terms of Reference as an aspect of the adjustment or accommodation of the general law to meet the problems presented by its interaction with Aboriginal customary laws. Any other view would involve the proposition that the Terms of Reference allow recommendations wholly excluding the general Australian law in cases involving Aborigines, but do not allow recommendations adjusting or modifying the general law or its administration to cope with difficulties characteristic of traditional Aborigines. Yet, at least so far as the criminal law is concerned, it is precisely the latter forms of 'recognition' which are most needed. The Terms of Reference do not require the Commission to prefer extreme solutions, at the expense of appropriate ones. This argument is reinforced by the fact that the Terms of Reference specifically direct the Commission to have regard, among other things, to:

- the difficulties that have at times emerged in the application of the existing criminal justice system to members of the Aboriginal race; and
- the need to ensure equitable, humane and fair treatment under the criminal justice system to all members of the Australian community.

The Anunga rules are a reflection of difficulties experienced in the application of the criminal justice system to Aborigines, and of the fact that the provision of equitable and fair treatment to all members of the Australian community under the criminal justice system may require special rules applicable to a certain class of persons because of the special difficulties they face.

2256 So far as admissions by the accused in criminal cases are concerned, the Draft Evidence Bill set out in ALRC26 includes 4 relevant elements: a provision excluding admissions induced by coercion, violence etc (cl 71), a test based on whether the circumstances were such that the truth of the admission was unlikely to have been adversely affected (cl 72(4)-(6)), certain minimum procedural guarantees for official questioning (cl 72(2)-(3)), and a discretion to exclude improperly obtained evidence: cl 116. See ALRC 26, vol 1, para 371-84, 759-70.

2257 See para 546, 561-3.

2258 This point was strongly made eg by D Hore-Lacy, *Submission 499* (14 November 1985) 1-6; C Loorham, CAALAS, *Submission 500* (19 November 1985).

2259 The President (the Hon FX Connor QC), Professor Tay, Justice Wilcox.

2260 More specifically, to those who the police officer has reasonable grounds for believing are Aboriginal. For the application of the interrogation rules to Torres Strait Islanders see ch 38.

2261 Professor MR Chesterman, Professor JR Crawford.

terms of the court's, rather than the investigating police officer's, judgment of disadvantage.[2262] If it is accepted that the interrogation rules should not include Aborigines who are relevantly indistinguishable from the general community, so far as the capacity to understand and deal with police interrogation is concerned, then it is desirable, in the interests of clarity and for the benefit of those who will have to apply the rules, to specify the persons intended to be protected. These members of the Commission accordingly recommend that. the rules should specify that they apply only to those suspects who are specially disadvantaged in relation to police interrogation, having regard to their level of education, fluency in the English language, or other relevant characteristics.[2263]

## Difficulties of Application: The Status and Scope of the Interrogation Rules

566. ***Difficulties Experienced by the Police in Applying the Anunga Rules***. A number of police officers have told the Commission that the Anunga rules create undue problems for the police. In particular, it is said that the prisoner's friend requirement frequently creates delays which result in lost opportunities to obtain confessional evidence, that Aboriginal deference to authority is over-emphasised, and that they are criticised for failure to provide an interpreter in cases where none was really needed. A police officer stationed at an Aboriginal community in the Northern Territory[2264] pointed to some real difficulties in the application of the Anunga rules to Aborigines with very little understanding of English. The restrictions on who should fulfil the position of prisoner's friend make it difficult to find anyone who could communicate properly, and a police officer could spend all his time at an interview trying to ensure that the Aboriginal person understood the caution because of the way in which it has to be put. Such practical problems must not be overlooked. However, these problems must be balanced against the rights of the individual, and in particular the problems faced by such Aborigines. It is basic that a person who is to undergo interrogation must be informed of the right to remain silent.[2265] Clearly this may create difficulties for a police officer when he seeks to interrogate an inarticulate Aborigine with little knowledge of English. But the existence of such a difficulty is no ground for denying the individual's rights. Ensuring that a person is cautioned and understands the caution is an important aspect of the Anunga guidelines, one that is essential if the guidelines are to have any real meaning. This was a shortcoming in the Criminal Investigation Bill 1981 (Cth), which went no further than requiring the standard caution to be given (cl 19). It is worth noting in this regard the words of Justice Muirhead in *Coulthard v Steer*:

> The traditional caution administered to the majority of Aboriginal people in this Territory proved to be inadequate to establish voluntariness. The affirmative answers — so often the monosyllabic 'yes' — to the cautionary questions were found deceptive; it was not safe to assume from simple acknowledgment that the accused truly understood his right of silence, let alone had the capacity to exercise it if he wished. More was needed to ensure the words and meaning of the caution were understood by Aboriginal people. Hence the Anunga Rules which were directed to police officers, not to stifle or impede the police function but to promote efficiency of investigation.[2266]

In relation to the South Australian guidelines for the interrogation of Aborigines, Sergeant Frank Warner, then field officer for Police-Aboriginal liaison in South Australia, stated at the Adelaide Public Hearing that in general there are no problems with compliance. Where difficulties did arise it was more likely to be in semi-tribal areas and involve problems in finding a 'prisoner's friend'.[2267]

567. ***The Requirement of a Prisoner's Friend***. The question who should perform the role of prisoner's friend is an important one and has been the subject of comment in a number of cases, both in relation to the absence of a prisoner's friend and the inappropriateness of a 'friend' who was present.[2268] For example, in *Rockman v Stevens*,[2269] an Aboriginal boy of uncertain age who was implicated in the offence acted as the

2262 See para 563 for the text of cl 26(4) of the 1981 Bill and some of the difficulties with it.
2263 See Appendix A for the text of a provision incorporating this view.
2264 Acting Senior Constable Alan Stobbart, *Transcript* Maningrida (8 April 1981) 1121-4.
2265 International Covenant on Civil and Political Rights 1966 (Australian Treaty Series 1980 No 23), Art 14(3)(g), requiring that a defendant not be compelled 'to testify against himself or to confess guilt'. See para 180.
2266 (1981) 12 NTR 13, 15-16. cf *R v Bob Dixon Jabarula* (1984) 11 A Crim R 131, 134-5, 137 (Muirhead J).
2267 F Warner, *Transcript* Adelaide (17 March 1981) 78. The South Australian guidelines are not, however, as stringent with regard to the suspect's understanding the caution as the Anunga Rules. For a critique of the SA guidelines see C Tatz, 'Aborigines: Legal Aid and Law Reform' (1980) 5 *LSB* 91, 92-4.
2268 For earlier cases see *R v Kennedy*, unreported, NT Supreme Court, Nov 1978; *R v Ajax and Davey* (1977) 17 SASR 88; *R v Hoosen and Nelson*, unreported, NT Supreme Court, April 1978.
2269 Unreported, NT Supreme Court (October 1980); see note in (1981) 1 ALB 6.

prisoner's friend. On this basis the defendant's appeal against conviction succeeded. Justice Muirhead commented:

> I would only say that it would be unusual that a person in trouble with the police in the police cells, in the custody of the police for the purposes of questioning, would be found appropriate. It would be even more unusual when that person was in the custody or presence of the police for reasons associated with the offence for which the person involved is being questioned. It would be, I would say, extremely rare that a person with those qualifications could be utilised when he had not reached the age of maturity, when he was 12-15 years of age.

This and similar cases demonstrate clearly the need for better guidance on who can be a prisoner's friend. Justice Brennan, dissenting, in *R v Collins* considered that one role of the prisoner's friend was 'to enhance the suspect's ability to choose freely whether to speak or to be silent'.[2270] Similarly, Rees has argued:

> There is no point in having a prisoner's friend when that person may be just as bewildered and overborne by the experience of police interrogation as the suspect.[2271]

The question is whether an Aboriginal suspect should have the right to choose a 'friend' even if that person will not be able to assist him. Such a choice may have some psychological advantages and make the suspect more at ease, but the chosen 'friend' may be able to do little or nothing to prevent him being overborne. A person who is better able to protect a suspect's legal rights may be of greater benefit to a suspect even though unknown to him.

568. ***A Free Choice of Prisoner's Friend?*** On the other hand there has been considerable support for the view that a prisoner's friend should be freely chosen by the suspect, and that no restrictions on that freedom of choice are desirable. The Criminal Investigation Bill 1981 (Cth) proposed a broad category of persons who would qualify as prisoner's friend: these included a relative or other person chosen by the suspect, a lawyer, a representative of an Aboriginal legal aid organisation and a statutory list of prisoner's friends.[2272] In *Gudabi v R* the Full Federal Court held that there should be no specified qualification, other than the free choice of the suspect, for a prisoner's friend. The Court held that:

> If it be accepted, as we think it must, that the guideline as formulated in 1976 provided no principal role for the investigating officer to play in the choice of the prisoner's friend, it would seem to us to be a retrograde step in 1983 to re-formulate the guideline so as to provide the kind of role for the investigating officer that would necessarily be involved in [a requirement that the prisoner's friend be genuinely independent of the police and able to give active assistance to the suspect] ... In our view the choice of prisoner's friend must be left entirely to the person about to be interviewed, once it has been explained to him that the purpose of the friend's presence is to give support or help. We think it would be useful if the person to be interviewed were told, before making his choice, that he will be free to talk to his friend, and ask advice, in the course of the interview. What we have said about police officers not trying to influence the choice of prisoner's friend does not mean that an investigating officer should not give such assistance as he is able to an Aboriginal suspect in securing the services of a prisoner's friend, provided he gives that assistance at the express request of the suspect. The overriding consideration must always be that the prisoner's friend is a person selected by the Aboriginal suspect in the exercise of a free choice.[2273]

It is true that there are dangers, as well as potential inconvenience to the investigation of offences, in police vetting a proposed 'friend' for independence, suitability, and so on. There are also practical problems in having as a prisoner's friend an Aboriginal Legal Service solicitor, as was pointed out at the Public Hearing in Moree. Proposals that the ALS solicitor be present during interrogation in order to protect the client's interest, as well as imposing demands on the solicitor's time, also meant that the solicitor could become a compellable prosecution witness as to what the client said. For this reason, it was thought wise to avoid direct involvement in police interrogations.[2274] On the other hand, despite this risk many Aboriginal legal service solicitors attend police interviews of their clients because they consider it the most appropriate way to protect their client's interests. Resolving this problem is by no means easy. A defendant who is at a disadvantage, in respect of the interrogation, in comparison with members of the Australian community

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2270 (1980) 31 ALR 257, 322.

2271 Rees, 7. An alternative proposal was that there be two classes of prisoner's friends:
- wherever possible a lawyer or accredited Aboriginal Legal Service representative, or
- if such a person is not available within a reasonable period of time, and there is good reason for prompt police investigative action, the prisoner's friend should be drawn from a list of persons agreed upon between the responsible Minister and the Aboriginal Legal Service.

Rees, Ditton and Terry (above n 88).

2272 In the context of federal offences, this Commission in ALRC 26 adopted a similar approach: Draft Evidence Bill, cl 72(2)(b) ('a relative or friend nominated by the person'). See para 547.

2273 (1984) 52 ALR 133, 145-6.

2274 P Segal, *Transcript* Moree (13 May 1981) 2596.

generally, is just as likely to be overborne in respect of his choice of a prisoner's friend (even if he knows of an appropriate and available person) as he is to be overborne in respect of the interrogation itself. It may be argued that these problems with the prisoner's friend are an inevitable consequence of giving the suspect the right to choose. But, as with waiver of the interrogation rules generally, the difficulty is that a person who can make a genuine choice is, almost by definition, one to whom compliance with the rules is not necessary, since the person will in that case be responding to questions voluntarily, in the sense explained in para 565. The question is not whether rights have been waived, but whether in the circumstances they could genuinely have been waived. If so, the reason for the rights themselves has, substantially, disappeared.[2275] Where the interrogation rules do apply, the Commission believes that the function of a prisoner's friend is 'to enhance the suspect's ability to choose freely whether to speak or to be silent'.[2276] This function will not be fulfilled if the prisoner's friend is merely 'part of the furniture'. Accordingly there should be a preference for a prisoner's friend who has been nominated by the local Aboriginal legal aid organisation or who is a barrister or solicitor. If no such person is reasonably available, then resort will have to be made to a friend or relative chosen by the suspect. The prisoner's friend should not be a police officer, an accomplice in the suspected offence, or a person the police reasonably believe should be prevented from communicating with the suspect (eg with a view to destroying evidence or intimidating a witness).[2277]

569. ***Notification of the Aboriginal Legal Service***. An important consideration, relevant both to the provision of prisoner's friends and legal advice, is whether there should be a requirement of notification to an Aboriginal legal service when Aborigines are questioned or taken into custody in respect of an offence. Such systems exist, though often informally and inconsistently, in the Northern Territory, South Australia, Victoria, the Australian Capital Territory and Queensland, and a provision requiring notification was contained in the Criminal Investigation Bill 1981 (Cth).[2278] No such requirements exist in New South Wales or Western Australia, where a large proportion of the Aboriginal population in Australia lives. In evidence and submissions to the Commission, few objections were made to the suggest ion that the local Aboriginal legal service be notified whenever an Aborigine is arrested, at least for more serious offences.[2279] Such a requirement is essential. It should apply throughout Australia in cases where the suspect is actually in police custody in respect of an offence. Where the suspect (though not in custody) is being interrogated by the police in respect of an offence, a requirement of notification might be thought unnecessary. If not in custody the suspect is by definition free to contact a lawyer or the local Aboriginal Legal Service Office. But this freedom may be illusory, and in any event for an admission or confession relating to a serious offence to be admissible in these circumstances a prisoner's friend will have to be present (unless the admission or confession is freely made under the test proposed in para 570). Where the prisoner's friend is a lawyer or Aboriginal Legal Service nominee, no separate requirement to contact a legal service is necessary. Where, however, a friend of the suspect is chosen (other classes of prisoner's friend being unavailable) it is important that a legal service be notified, and the requirement should accordingly extend to that situation also, in respect of serious offences (ie those punishable by six months imprisonment or more).

570. ***Excusing Non-Compliance with the Guidelines***. An important question concerns the status to be given by the courts to the guidelines. These may take a number of different forms: police standing orders or instructions, judicial pronouncements or legislation. In South Australia, the Northern Territory and the Australian Capital Territory the courts have given the guidelines a status similar to the Judge's Rules. Any confession obtained where the guidelines have not been complied with may lead to exclusion in the exercise of the court's discretion.[2280] The leading case is the decision of the Full Federal Court in *Collins v R*,[2281] where Justice Muirhead adopted remarks he made in an unreported Northern Territory Supreme Court decision, *Stevens v Lewis*:[2282]

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2275 See para 572.

2276 In the words of Brennan J (nl 15).

2277 These requirements essentially accord with the Commission's recommendations in ALRC 2, para 253-4.

2278 See para 548, 554-60.

2279 The House of Representatives Standing Committee referred to an objection made by the New South Wales Police Commissioner that if police were directed to inform the Aboriginal Legal Services of all arrests of Aborigines, it could be suggested they were touting for service. This argument has little substance, as the Report concluded: *Aboriginal Legal Aid Report*, 82-3.

2280 For discussion on this point see *R v Williams* (1976) 14 SASR 1; *Walker v Marklew* (1976) 14 SASR 463; *R v Ajax and Davey* (1977) 17 SASR 88; *R v McKenzie* (1977) 17 SASR 304; *R v Jungala and Jagamara*, unreported, NT Supreme Court (Nos 434-439 of 1979); *R v Clevens*, unreported, ACT Supreme Court (Kelly J) (SCC No 53 of 1980).

2281 (1980) 31 ALR 257.

2282 Unreported, NT Supreme Court (SCC No 872 of 1979), cited at (1980) 31 ALR 257, 281.

> The primary questions ... for the court in considering admissibility of admissions allegedly made by Aborigines or, indeed, by any other person in our community are three — relevance, voluntariness and the question of fairness. Each case must be assessed in the circumstances with regard to the individuals involved. The court, in considering the issues, should take into account the guidelines... The guidelines do not alter or constitute a departure from the general law relating to the admissibility of confessions or the matters to be taken into account in the exercise of the court's discretion. Slavish or unnecessary adherence to the guidelines, technical adherence to the guidelines, technical adherence for the sake of form or apparent compliance was never, in my opinion, intended ...

In its Report on *Criminal Investigation* this Commission made the following recommendation with regard to evidence obtained during interrogations:

> A reverse-onus discretionary exclusionary rule of evidence should be introduced. This should provide that evidence obtained by or in consequence of any contravention of any statutory or common law rule — including all the various rules of procedure propos ed in this report should not be admissible in any criminal proceedings for any purpose unless the court decides in the exercise of its discretion that the admission of such evidence would specifically and substantially benefit the public interest without unduly derogating from the rights and liberties of any individual. The burden of satisfying the court that any such illegally obtained evidence should be admitted should rest with the party seeking to have it admitted, ie normally, the prosecution. Certain criteria should be incorporated in the legislation to signpost to the court its obligation to weigh the gravity of the contravention of the procedural rules against the gravity of the offence charged in the context of the total circumstances of the particular case.[2283]

This proposal was incorporated in cl 69 of the Criminal Investigation Bill 1981 (Cth), but it has not been free from criticism. The Tasmanian Aboriginal Centre argued that the Anunga rules should be adopted for all Aborigines and that there should be no discretion as to the admissibility of evidence obtained in violation of the rules.[2284] The main reason given for this strict requirement was continuing poor relations between police and Aborigines.[2285] A more restricted rule was proposed by Davies:

> All confessional evidence obtained from interrogations of tribal or semi-tribal Aborigines not conducted with the aid of an interpreter should be rejected unless there is clear proof that the accused in each case has a good command of the English language.[2286]

A difficulty with a discretionary exclusionary rule is that it requires the court to weigh up what are essentially different matters: on the one hand, the desirability of ensuring compliance with the interrogation rules and of ensuring that the suspect understood the questions and that they need not be answered; on the other hand, the importance of the evidence in the proceeding. So stated the discretion would presumably lead to the confession always being admitted in serious cases where it was a key element in the prosecution's case, yet it is in just such cases that the reliability of Aboriginal confessional evidence needs most to be assured.[2287] Consistently with the test proposed in para 565, the only questions should be whether the suspect understood the right to silence, and the questions put, and whether the answers given were not given merely out of the suspect's suggestibility or deference to authority, irrespective of the suspect's own belief as to the facts. This test, which is reflected in the proposed legislation set out in Appendix l, thus performs the dual functions of delimiting the class of suspects to whom the interrogation rules effectively apply, and establishing a test for the admissibility of confessions where the rules were not complied with, a test which has regard only to relevant matters.[2288]

571. ***Application to Other Investigatory Steps***. The principles underlying the interrogation rules — that a person should not be required to incriminate himself, and that admissions should be excluded if obtained in circumstances such that its reliability is as doubtful as its voluntariness — apply equally to admissions made in the course of other investigatory steps where the presence or cooperation of a suspect is required. In particular, the interrogation rules should also apply to admissions given, expressly or by implication, in the course of re-enactments or identity parades involving a suspect.[2289] On the other hand material evidence uncovered in the course of investigation presents no special problems in the context of this Reference, and its admissibility can be left to be governed by the general law.

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2283 ALRC 2, para 382.

2284 Tasmanian Aboriginal Centre, *Submission 137* (10 April 1981). Oral submissions to similar effect were also made at the Public Hearings. M Mansell and H Derkley, *Transcript* Launceston (21 May 1981) 2800-26.

2285 Similar representations have been made in relation to cl 69 of the Criminal Investigation Bill 1981 (Cth): Rees, Ditton and Terry (1982).

2286 LL Davies, 'The Yupupu Case' (1976) 2 *LSB* 133.

2287 cf ALRC 26, vol 1 para 958-9, 960. See also Canada LRC, Report, *Evidence*, Ottawa, 1975, 22, 61-2, and the Canadian Charter of Rights and Freedoms 1982, s 24(2).

2288 No special provision is needed under this test for trivial violations of the interrogation rules, since these are inherently unlikely to lead to the exclusion of admissions otherwise fulfilling the requirements of the test.

2289 *R v Collins* (1980) 31 ALR 257 itself involved a re-enactment.

572. ***Right to Waive Protection***. Whether or not interrogation guidelines or rules are contained in legislation, in police instructions or take some other form, the question arises whether the protection they provide should be able to be waived by the suspect, or whether they should apply whatever the suspect's wishes. The problem has some common features with that of choice of a prisoner's friend. On the one hand, if the suspect is at a disadvantage in the situation, the reality of any 'choice' is doubtful in terms of waiver. On the other hand an Aborigine who (if necessary with the aid of a interpreter) understands the right not to answer and the nature of the questions may decide to do without the protection of the rules: if the suspect's decision is a real one (that is, made freely and voluntarily), the basic test for admissibility will already have been satisfied.[2290] Accordingly the Commission does not believe that waiver ought to be a separate aspect of the rules. In appropriate cases, evidence that free consent was given to dispense with the rules will help to satisfy the court that in the circumstances the suspect had the necessary understanding of the situation for the confession to be admissible.[2291] In circumstances where this is not so, however, waiver is, and should be, irrelevant.

573. ***The Vehicle for Protection: Legislation or Guidelines***. On the basis that special guidelines of this kind are desirable, a further important question relates to the most appropriate method of implementation. Existing provisions relating to the interrogation of Aborigines by the police where they exist are incorporated, in various forms, in police standing orders.[2292] Some were either instigated or formulated by the courts and later incorporated into police standing orders. As yet no such provisions have been given legislative effect, although if the Criminal Investigation Bill 1981 (Cth) were to be enacted it would specify the rules to be applied by the Australian Federal Police. The Commission has received very few submissions dealing with the question of the most appropriate way of implementing the guidelines. Is it, for example, preferable to rely on provisions in police standing orders or should they be given legislative effect? The Beach Report, which investigated allegations against members of the Victorian Police Force, recommended that many of the police standing orders should be enacted in legislation, or if this were not done, that the standing orders should at least be prepared in simplified form and be available to all members of the public.[2293] The Queensland Police Union in a published response to the Lucas Report accepted that Report's recommendations almost entirely, and argued that the recommendations be incorporated in legislation. However they ma de one exception — the 'interrogation guidelines':

> Another major recommendation contained in the Report was the abolition of the 'Judges Rules' and their replacement with a series of administrative directions ... We should all clearly realise that these are not law and would not be written into legislation. They are guidelines set down by the Department which police would be expected to follow during the course of their investigations and subsequent arrests.[2294]

One problem with legislative rules is that it may be difficult to draft them in sufficient detail to cover the various situations that can arise. Justice Nader of the Northern Territory Supreme Court has suggested that the Anunga rules need to be redrafted to remove some of the uncertainties about their application:

> If it is at all possible I would regard it as very desirable that discretion as to what should be done should be removed from the police constable. He should be able to follow a set of rules laid down for him literally.[2295]

However, the National Police Working Party argued for retention of the current system:

> The current system which relies on courts exercising their discretion to exclude evidence based on the facts in a given case allows courts to be fluid in their approach to current standards. If that discretion is removed and replaced with rigid legislation, it will lead to evidence being excluded for relatively minor breaches, which were perhaps

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2290 The non-existence in practice of a 'gap' between the need for the rules to apply and the effective capacity to waive them is shown by *R v Edith Dawn Watson*, Queensland District Court, Townsville (Ambrose J) 5, 6 December 1983, 16-20, 24 July 1984. The defendant, a Palm Island resident, was charged with unlawful wounding, and a confession was tendered. After a 4-day voir dire, Judge Ambrose held that the defendant was not under a disability by reason of gross cultural differences within the meaning of the Police Instruction (see para 556). Accordingly he did not have to decide whether the prisoner's friend requirement could be, and had been, waived: transcript of proceedings (24 July 1984) 283. In the event the prosecution failed for lack of sufficient evidence of a wounding. But see National Police Working Party, *Submission 504* (31 January 1986) 4, arguing for a right to waive.

2291 If, however, waiver is allowed, appropriate alternative protections (eg tape or video recording) should apply, and in any event waiver should have no application to suspects aged 16 or less. See N Rees, 'The Rules Governing Police Interrogation of Children' in Basten, Richardson, Ronalds & Zdenkowski, 68.

2292 These may be termed Police Instructions, General Instructions, Circular Memoranda, the Police Manual.

2293 Board of Inquiry into Allegations against Members of the Victoria Police Force (Chairman: B Beach), *Report*, Melbourne, Government Printer, 1976, 113.

2294 Queensland Police Employees Union, *Report of Sub-Committee's Examination of Report of Inquiry into the Enforcement of Criminal Law in Queensland*, Brisbane, 1982, 5.

2295 *Submission 366* (17 December 1982).

> occasioned through unusual or emergency situations, while on other occasions, evidence which was obtained oppressively might be admitted because it was obtained in strict compliance with the legislation.[2296]

In the Commission's view it is desirable that the basic principles underlying the guidelines be enacted in legislation, to make it clear both to the police and to the courts that the interrogation rules, to the extent that they are applicable in particular cases, are to be taken seriously. Moreover the primary purpose of the interrogation rules is not to regulate, still less to penalise, police misconduct but to regulate the admissibility of certain forms of evidence. Like other aspects of the law of evidence, the rules should be stated in clear and binding form. More detailed requirements can be laid down, if this is thought desirable, in police standing orders or rules of similar status. Accordingly the Commission recommends that the basic interrogation guidelines be set out in legislation. Whether legislation implementing the Commission's recommendations should be federal, or should be enacted by each State and Territory, is a separate issue. It is discussed in Chapter 38 of this Report.[2297]

2296 National Police Working Party, *Submission 504* (31 January 1986) 4-5.
2297 See para 677 for a summary of the recommendations in this chapter.

# 23. General Issues of Evidence and Procedure

574. ***Scope of this Chapter***. In addition to the common problem of testing the admissibility of Aboriginal confessional evidence, discussed in Chapter 22, a variety of other problems of evidence and procedure (in particular, of criminal procedure) have arisen in Australia in cases involving Aborigines. The problems fall into two classes: first, the problem of proving Aboriginal customary laws and traditions, and of taking evidence on these questions from traditionally oriented Aborigines themselves; secondly, a range of miscellaneous problems of evidence and procedure faced by the courts in dealing with Aborigines. The former group of questions will be dealt with in Chapters 24-26; the latter in this Chapter. The latter group of problems needs to be addressed as part of the attempt to ensure procedural fairness and equality in the application of the law to traditionally oriented Aborigines.[2298] They include the following:

- the comprehensibility, and suitability, of committal proceedings in some cases (para 575-578);
- issues of fitness to plead (para 579-585);
- Aborigines and juries (para 586-595);
- the provision of interpreters (para 596-600);
- unsworn statements (para 601-605);
- dying declarations (para 606-611);
- compellability of traditionally married Aboriginal spouses (para 612); and
- issues of identification evidence (para 613).

These issues cover a wide range, although some are more in the nature of historical problems with only residual effects today (eg dying declarations), while others continue to present real difficulties (eg the provision of interpreters). Important changes have occurred in the last 15 years in the access of Aborigines to legal services — in particular the provision of more adequate legal aid in criminal cases. A review of this range of questions is nonetheless essential, whether or not specific recommendations can usefully be made in the light of these changed circumstances.

## Committal Proceedings

575. ***The Purpose of Committal Proceedings***. Committal proceedings are held to determine whether, in the case of more serious criminal offences, there is sufficient, evidence to require the defendant to stand trial. Committal proceedings are generally held before a magistrate, who hears evidence from the prosecution which is recorded and can be used at the trial. After hearing the evidence the magistrate must determine if there is sufficient evidence to justify the defendant being committed for trial. If there is insufficient evidence, the magistrate may discharge the accused person. This does not amount to an acquittal: it is still open for the prosecution to obtain further evidence and bring subsequent committal proceedings, or proceed direct to trial by way of an *ex officio* indictment.

576. ***Committal Proceedings and Traditionally Oriented Aborigines***. It is not necessary to consider in detail the procedures involved in committal proceedings[2299] But it is clear that the nature of committal proceedings, where the accused appears in the court before a magistrate who hears the evidence and then refers the matter to another court, can cause confusion. For many traditionally oriented Aborigines, having to appear in court for any reason at all can be an unsettling and alien experience. Few would be unaware of the reason for the court appearance, but the uncertainty of the outcome and the strangeness of the proceedings, together with the later realisation that the court has not dealt with their case as they assumed was to occur, compounds

2298 See para 543 for the link between substance and procedure in the context of this Report.

2299 See J Seymour, *Committal for Trial*, AIC, Canberra, 1978; EF Frohlich, 'Committal Procedures in England and Australia' (1975) 49 ALJ 561; KJ McKimm, *Criminal Procedure and Practice in New South Wales*, Butterworths, Sydney, 1972, 15-22. For a brief summary of the more important features see J Crawford, *Australian Courts of Law*, OUP, Melbourne, 1982, 80-4.

their confusion. Traditionally oriented Aborigines are familiar with summary justice. Transgressions requiring punishment or disputes between families are usually dealt with quickly. For persons familiar with this experience, the process of a preliminary hearing, with then a wait of some months (perhaps even a year) before the trial, is mystifying and unsatisfactory.[2300] In addition to the confusion of the accused in committal proceedings there is the confusion of the witnesses. They query why they should have to return to the court and tell the same story about an event which is now long gone and which, if it led to any dispute within the Aboriginal community, has most likely been resolved. It is a common problem in the more remote parts of Australia for Aboriginal witnesses, and sometimes the accused if on bail, not to reappear at the court at the appointed time. To some extent this may be due to lack of transport and the difficulty of travelling large distances, but it may also reflect a lack of understanding of the need to return to the court.

577. ***Arguments for Abolition of Committal Proceedings***. For reasons such as these, some commentators have recommended that committal proceedings for Aborigines should be abolished. According to Kriewaldt:

> There are certain formal steps which the law at present requires to be taken to bring a person accused of crime to trial These formal preliminary steps should be abolished entirely where the accused is an Aborigine The present procedure works well in a fully civilised community, but is quite useless, and to some extent harmful, where aborigines come into the picture.[2301]

Circumstances have changed to some extent since Kriewaldt wrote. One of the grounds for his proposal was the fact that Aborigines were invariably unrepresented by counsel. Since the establishment of the Aboriginal legal services the opposite is much more likely to be true, at least in cases involving more serious offences.[2302] Furthermore, there is no longer any real equivalent to the old Native Welfare Department which often played a significant role in the investigation of offences by Aborigines. The few submissions to the Commission which have touched on committal proceedings have tended to support their retention, principally because the safeguards they provide are thought to outweigh any disadvantages:

> In [relation to] the proposition that the committal hearing in indictable offences should be waived and proceedings commenced at the one hearing by way of ex officio indictment ... [I]it is submitted that this is not appropriate and any difficulties which a rise in this area can be overcome by endeavouring to explain the nature of the committal or preliminary hearing to the defendant.[2303]

On this view, although some difficulties exist, for traditionally oriented Aborigines in particular, in relation to committal proceedings, these difficulties are not such as to justify abolition.[2304] Committal proceedings provide the defence with the opportunity of being better informed of the nature and strength of the prosecution case. They also enable some testing of the evidence. For these reasons, there should be no abolition of committals for traditional Aborigines, while they remain the normal procedure for other accused persons.

578. ***Other Administrative Problems***. However, where administrative and practical problems do arise, especially in remote areas, attempts should be made to overcome them where possible. For example, the jurisdiction of magistrates in remote areas might be expanded to allow the trial locally, with the defendant's

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2300 The defendant will often have been in custody during the committal proceedings: this period of custody is quite often mistaken for the sentence being served for the offence. In *R v Jacky Jagamara* unreported, NT Supreme Court (O'Leary J) 24 May 1984, for example, the defendant thought the committal proceeding was the trial, and went away afterwards, thereby failing to appear. See para 488.

2301 MC Kriewaldt, 'The Application of the Criminal Law to the Aborigines of the Northern Territory of Australia' (1960) 5 *UWAL Rev* 1, 31. As an alternative he suggested a procedure similar to ex officio indictment. Decisions to prosecute should rest with a Crown Law Officer who should act on a detailed report by an experienced police officer and also preferably, an independent inquiry by the Welfare Department, bypassing committal altogether. id, 35-7.

2302 A survey of Aborigines in New South Wales prisons found the usual disproportionate rate of Aboriginal imprisonment (cf para 394-7) but that relatively fewer Aboriginal than non-Aboriginal prisoners were not legally aided (2% compared with 3% for non-Aborigines): A Gorta & R Hunter, 'Aborigines in NSW Prisons' (1985) 18 *ANZJ Crim* 25, 29. These proportions are not necessarily representative: cf M Martin & L Newby, 'Aborigines in Summary Courts in Western Australia', in Swanton (ed) *Aborigines and Criminal Justice*, AIC, Canberra, 1984, 295, 301 (25% Aborigines represented (most by ALS field officers) compared with 11.6% non-Aborigines). But there is no doubt that the situation in the last decade has substantially improved as a result of the introduction of Aboriginal Legal Services throughout Australia, as the Harkins Report concluded. See Inquiry into Aboriginal Legal Aid (JP Harkins) *Report* vol 1, *General Issues*, AGPS, Canberra, 1985, 9-11.

2303 W Goss and B Harrison, *Submission 273* (7 May 1981). See also *Transcript of Public Hearings* Brisbane (7 May 1981) 2409-10.

2304 Some law reform agencies have recommended abolition of committal proceedings in all cases: Law Reform Commission of PNG, Report No 10, *Committal Proceedings*, Waigani, 1980; Canada LRC, WP No 4 *Criminal Procedure — Discovery*, Ottawa, 1974; see also UK Royal Commission on Criminal Procedure, *Report*, Cmnd 8092, 1981.

consent, of cases which would otherwise have to be tried on indictment at a distant centre.[2305] Alternatively, in appropriate cases a lesser charge, within the magistrate's jurisdiction, may be preferred, as is the practice in South Australia.[2306] A third possibility would be to dispense with committal proceedings by the use of an *ex officio* indictment. Although this is a device which should in general be sparingly used,[2307] in particular cases it may be an appropriate course of action, especially with the consent of the defendant's counsel. Similarly, the use of hand up briefs or paper committals without a hearing, if available in the particular jurisdiction, may be desirable in particular cases, again with the defendant's consent.

## Fitness to Plead

579. ***Fitness to Plead and Problems of Comprehension***. A difficulty that has arisen in a number of cases concerning Aborigines relates to their fitness to plead (and thus to be tried) because of their inability to understand the charge or the nature and course of the court proceedings to which they are being subjected. This difficulty may result in part from language problems, which can be addressed, if not overcome, by the provision of an interpreter.[2308] However such problems may still occur, because it may be difficult, perhaps impossible, to explain even basic legal concepts to an Aborigine who has no knowledge or experience of the criminal justice system (eg the concepts of 'guilty' or 'not guilty').[2309] Both the court room and the personnel and procedures of a criminal trial may be intimidating for a person who may be illiterate or who has had little or no formal education. Justice Kriewaldt, assessing his experience in the Northern Territory Supreme Court in the 1950s, clearly thought that many Aborigines were not fit to plead:

> So far as I have been able to ascertain, the point has never been taken in the Northern Territory that an accused aborigine did not have sufficient education or intelligence or background of civilisation to understand the proceedings. So far as my experience goes, if the point had been taken, the correct decision in many instances would have been that the accused did not understand, and could not have been made to understand, what was going on ... I am certain that no aborigine who has appeared before me has understood the respective functions of judge, jury or witnesses, or has appreciated that the proceedings were directed to ascertain whether the evidence sufficed to establish beyond reasonable doubt that he was guilty of the crime alleged against him.[2310]

580. ***The Present Law***. The legal issue of fitness to plead arises principally in the context of a person's mental or physical capacity. At common law a person suffering from a mental or physical incapacity may be unfit to plead: if so, no plea can be taken, and the trial cannot proceed.[2311] This can be done at the court's instigation if neither the prosecution nor the defence seek such an inquiry. The issue normally arises in the context of a person suffering some mental incapacity. A person found unable to plead on grounds of insanity may then be dealt with under the relevant mental health legislation.

581. ***Fitness to Plead and the Trial of Traditionally Oriented Aborigines***. Different considerations arise in relation to those Aborigines whose unfitness to plead is not the result of mental incapacity but rather of lack of comprehension due to massive cultural barriers. Most state legislation relating to unfitness to plead refers to insanity or mental incapacity. However, in some jurisdictions the relevant provisions are expressed more generally, so that they are capable of applying to such problems.[2312] The Criminal Codes of Western Australia, Queensland and the Northern Territory have specific provisions dealing with the situation of a person unable to understand the proceedings at his trial. The position in Western Australia is of particular interest. Section 631 of the Criminal Code (WA) states:

> If, when the accused person is called upon to plead to the indictment, it appears to be uncertain, for any reason, whether he is capable of understanding the proceedings at the trial, so as to be able to make a proper defence, a jury of twelve men, to be chosen from the panel of jurors, are to be empanelled forthwith, who are to be sworn to find whether he is so capable or no ... If the jury find that he is not so capable, the finding is to be recorded, and the Court

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2305 It has also been suggested that on occasion the Supreme Court should sit locally: Gallop J in *R v Mark Djanjdjomeer*, unreported, NT Supreme Court, 14 February 1980, 29. For further details of a local scheme which attempts to solve problems administratively see Galiwinku Scheme in para 764.

2306 See para 451.

2307 cf *Barton v R* (1980) 32 ALR 449.

2308 See para 546 and see further para 596-600.

2309 For a discussion of some of these language problems see para 546. See also para 598.

2310 Kriewaldt (1960) 22.

2311 *R v Podola* [1959] 3 All ER 418; *R v Presser* [1958] VR 45; *R v Webb* [1969] 2 QB 279.

2312 Of course, if an Aborigine is unfit to plead because of mental incapacity the ordinary rules will apply. See *R v Bennie Goonringer*, unreported, NT Supreme Court, Nos 306-307 of 1979; *R v Bennie Goonringer*, unreported NT Supreme Court, No 8 of 1983. For further discussion see I Potas, *Just Deserts for the Mad*, Australian Institute of Criminology, Canberra, 1981, 46-9; *Jabanardi v R* (1983) 22 NTR 1.

> may order the accused person to be discharged, or may order him to be kept in custody in such place and in such manner as the Court thinks fit, until he can be dealt with according to law ...[2313]

To some extent overlapping with the Code provision is s 49(1) of the Aboriginal Affairs Planning Authority Act 1972 (WA):

> In any proceeding in respect of an offence which is punishable in the first instance by a term of imprisonment for a period of six months or more the court hearing the charge shall refuse to accept or admit a plea of guilty at trial or an admission of guilt or confession before trial in any case where the court is satisfied upon examination of the accused person that he is a person of Aboriginal descent who from want of comprehension of the nature of the circumstances alleged, or of the proceedings is or was not capable of understanding that plea of guilt or that admission of guilt or confession.[2314]

Section 49 has been considered by the Western Australian Supreme Court on a number of occasions. In *Smith v Grieve*[2315] Justice Burt held that the procedure was mandatory. Once the Court was satisfied that the defendant was an Aborigine (as defined), it had no discretion with respect to compliance. Justice Jones in *Munro v Sefton* agreed:

> It follows that in all but the very simplest and most obvious cases the only safe course — the proper course — for justices — is to examine such an accused person, in open Court, to ascertain whether he does or does not understand 'the nature of the proceedings ...' and if there is any substantial doubt as to whether he does or does not, then not to accept a plea of guilty.[2316]

In *R v Grant*[2317] the Supreme Court had to consider the meaning both of s 631 of the Criminal Code (WA) and of s 49(1). Grant, a tribal Aborigine who could not understand English, was charged with murder. There was great difficulty in communicating even with the aid of an interpreter. When asked the question 'How say you are guilty or not guilty?' Grant had replied 'yes'. There was great difficulty in explaining in his language the meaning of 'unlawful', 'guilty' or 'not guilty'. The accused, however, indicated that 'he had a general idea of where he was, that it was wrong both in his law and ours, to kill, and that he could go to prison':

> He said enough which if believed and if the interpretation was accepted as correct, was when added to other evidence which could be available, sufficient, subject to any questions of law, to enable a jury lawfully to convict him of manslaughter.[2318]

Justice Wickham set out what he considered the correct procedure:

> The issue then of the capacity of the accused to plead and to be tried must first itself be tried as a separate issue by a jury empanelled for that purpose. If the answer is in the affirmative then if nothing more appears, a plea of not guilty could then be entered under s 619. It would only be then upon his trial that other questions would arise in relation to s 49 of the Aboriginal Affairs Planning Authority Act and the questions of whether any admissions or confessions said to have been made by the acc used person would be admissible in evidence.[2319]

Justice Wickham thought that the consequential provision in s 631, for a person found unfit to plead to be kept in custody at the Governor's pleasure, would only apply to a person suffering 'some defect of mind', rather than some 'lack of comprehension' as in the case of a tribal Aborigine.[2320]

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2313 cf Criminal Code (Qld) s 613; Criminal Code (NT) s 357.

2314 Like the aspect of s 49(1) dealing with admissions and confessions (as to which see para 558), the provision dealing with guilty pleas had a somewhat complex history in earlier WA legislation. It was first introduced as s 59A of the Aborigines Act 1905 in 1911. But this provision (by now renumbered as s 61 (2)-(4)) was repealed by the Native Welfare Act 1954 (WA) s 57 (unlike the counterpart provision dealing with confessions). Thus there was no provision dealing specifically with Aboriginal guilty pleas in WA between 1954 and 1972, although s 631 of the Criminal Code was a general provision which continued to apply.

2315 [1974] WAR 193.

2316 Unreported, WA Supreme Court (No 38 of 1974).

2317 [1975] WAR 163.

2318 id, 164 (Wickham J).

2319 id, 166.

2320 id, 165-6. A similar problem arose in *R v Jambajimba Yupupu*, unreported, WA District Court (No 128 of 1976). Yupupu, a Pintubi, was charged that with intent to alarm he behaved in a threatening manner and uttered threatening words. He spoke very little English and, although an interpreter was sworn, O'Connor J was not satisfied after attempting to obtain a plea that Yupupu was capable of understanding the proceedings so as to be able to make a proper defence. In order to determine this preliminary question he empanelled a jury (without allowing a right of challenge) pursuant to s 631 of the Criminal Code. Evidence was called and the jury was directed that the onus was on the Crown to prove beyond reasonable doubt that Yupupu was fit to plead. The jury returned a verdict of 'inability to plead' and Judge O'Connor discharged him. The Crown later indicated that it would not take further proceedings against Yupupu, but sought a statement from Yupupu in relation to charges pending against another person. For discussion see LL Davies, 'The Yupupu Case' (1976) 2 *LSB* 133.

582. *Ngatayi's Case*. Further light was shed on s 631 by the High Court in *Ngatayi v R*, which had a number of similar features to *Grant*. Ngatayi, a tribal Aborigine with little or no understanding of English, was charged with murder. When he was called upon to plead to the charge through an interpreter, his counsel had sought a jury under s 631, on the basis that Ngatayi was incapable. of understanding that it was a defence to a charge of wilful murder that he was drunk and had not formed an intention to kill:

> he does not understand white men's law. In his law a man who kills is guilty and there is no amelioration ...[2321]

The trial judge declined to apply s 631. He also refused to accept Ngatayi's plea of guilty (pursuant, it seems, to s 49 of the 1972 Act), and ordered a plea of not guilty to be entered. The case proceeded and Ngatayi eventually gave evidence through an interpreter and made certain admissions. He was found guilty of wilful murder by the jury. Special leave to appeal to the High Court was sought on the sole ground that the procedure in s 631 should have been followed. The High Court granted special leave but dismissed the appeal. In doing so the Court commented that s 631:

> does not mean that an accused can only be tried if he is capable, unaided, of understanding the proceedings so as to be able to make a proper defence. This is self-evident when the incapacity to understand the proceedings is due to an inability to understand the language in which the proceedings are conducted. In such a case, if an interpreter is available the incapacity is removed. Similarly, in deciding whether an accused is capable of understanding the proceedings so as to be able to make a proper defence it is relevant that he is defended by counsel. If the accused is able to understand the evidence, and to instruct his counsel as to the facts of the case, no unfairness or injustice will generally be occasioned by the fact that the accused does not know, and cannot understand, the law. With the assistance of counsel he will usually be able to make a proper defence. That of course is the test which s 631 provides' is the accused capable of understanding the proceedings at the trial, so as to be able to make a proper defence? The section does not require that an accused, before he can be tried, must be capable of understanding the law which governs his case, if that lack of capacity does not render him unable to make a proper defence.[2322]

The correctness of the assumption, made by the Court, that the presence of an interpreter would remove any incapacity resulting from language difficulties, would be a matter of fact in each case. It is well known that there is a shortage of skilled interpreters in Aboriginal languages, especially for court work,[2323] and in many cases interpreters will have no training at all. It is one thing to be able to speak an Aboriginal language but quite another to be able to explain even basic legal concepts and the nature of court proceedings.[2324] In addition, the difficulties of interpreting Aboriginal languages and the strong link between language and culture have been noted by a number of writers over a considerable period of time.[2325] The majority in *Ngatayi* also emphasised the value of legal representation in avoiding any unfairness which might result from the accused being unable to understand the proceedings. This places a heavy burden on counsel to inform an accused of the process to which he is being subjected. It also assumes that counsel can be adequately instructed by the client. Of course, ignorance or misunderstanding of the law is not itself a defence to a criminal charge,[2326] and s 631 does not require that an accused be able to understand the law. But as the High Court pointed out, such incomprehension would be relevant if it meant that the accused was unable to give relevant instructions or information to his counsel.

583. ***Treatment of Persons Found Unfit to Plead***. Another, and perhaps equally basic, point raises doubts as to whether the law relating to fitness to plead is an adequate way of dealing with traditional Aborigines. If fitness to plead is to be argued in relation to traditional Aborigines (other than on grounds of mental disability or insanity), appropriate alternative procedures would need to be introduced to deal with them. At present a person found unfit to plead due to physical or mental disability may be detained (usually in an institution for the mentally ill) pursuant to mental health legislation. But in the case of a person found unfit to plead because of lack o£ comprehension there appears to be no legislation providing for detention.[2327] It is not appropriate to detain someone incapable of comprehending proceedings, but not clinically insane, for an indefinite period or until it is considered that he will be capable of understanding the proceedings and so fit to stand trial. The fitness to plead provisions as they apply in the majority of cases, that is to mentally ill persons, have also been criticised for this reason. Persons found unfit to plead may be ordered to be detained

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2321 (1980) 54 AUR 401, 402, citing counsel's submission. cf para 431.
2322 id, 404 (Gibbs, Mason and Wilson JJ). Murphy J dissented on the ground that the 'statutory procedure intended for the applicant's protection ha[d] not been followed': id, 406.
2323 See para 599.
2324 See para 598-9.
2325 See para 598.
2326 cf para 432-5.
2327 cf *R v Ngatayi* (1980) 54 ALJR 401, 403 (Gibbs, Mason & Wilson JJ): 'In such case no doubt he should be discharged'.

indefinitely without any consideration being given to the merits of the case against them, and without their having been tried. It has been argued that determination of fitness to plead should be postponed until the general issue of guilt or innocence is determined. This would mean that if a person was acquitted, fitness to plead would not arise as an issue.[2328]

584. ***Proposals for Change***. So far as the general law is concerned, the Criminal Law and Penal Methods Reform Committee of South Australia recommended that the plea of unfitness for trial be abolished and that a person's fitness only be a ground for an adjournment not exceeding six months. This would be determined by a judge alone rather than by a jury empanelled for the purpose. After six months the trial should proceed with a plea of not guilty entered if the accused appears unable to plead. The jury should be informed if the accused has been unable to properly instruct his solicitor, and may take this into account in deciding whether a reasonable doubt exists as to the guilt of the accused.[2329] These recommendations, which have not been implemented, were directed at the problems that arise for mentally ill persons, and not at the specific problem of traditional Aborigines with no comprehension of the general law or the system of criminal trial. The same procedure could also, however, be applied to such Aborigines. In the absence of changes in the general law on the point, the few cases involving traditional Aborigines whose comprehension of the trial process is (despite legal and translation assistance) slight or non-existent may still present problems, and the existing provisions, framed to deal with the quite distinct questions of mental illness, are inappropriate in such cases. It is true that the range of prosecutorial discretions, discussed in Chapter 20, will also be available and may sometimes be used.[2330] But there can be no guarantee that they will be so used, and the court has — and rightly has — little or no control over their use.[2331]

585. ***Conclusion***. The problems created by incomprehension of the nature of a guilty plea and of the trial that some traditional Aborigines suffer from are no reason for applying a procedure designed for mentally ill persons, which may result in detention without trial. Nor are they a reason for in effect exempting such a person, through a pre-trial procedure, from the application of the criminal law.[2332] But such incomprehension is a good reason for requiring the prosecution case to be made out. By definition, in such cases a plea of guilty is likely to be unreliable, even meaningless. Accordingly it should be provided that, in a criminal proceeding against an Aboriginal defendant who appears to the court not to be fluent in the English language, the court should not accept a plea of guilt unless it is satisfied that the defendant sufficiently understands the effect of the plea, and the nature of the proceedings. If necessary, the court should adjourn the proceedings to allow legal advice or an interpreter to be provided, to assist in explaining the plea and its effect. This does not mean that the defendant needs to have a lawyer's understanding of the plea or the proceeding, only that the level of understanding should be sufficient to justify the trial proceeding on the basis of a guilty plea.[2333] If this does not exist, a plea of not guilty should be entered. This provision should apply even where the defendant is represented, although the existence of legal representation will assist in ensuring that the basic level of understanding required for a guilty plea exists.[2334]

## Aborigines and Juries

586. ***Trial by Jury for Aborigines***. From time to time, questions relating to trial by jury of Aboriginal offenders have been controversial,[2335] and a number of distinct issues need to be discussed. These are, first, whether trial by jury is appropriate at all for traditionally oriented Aborigines, secondly, whether steps should be taken to ensure greater representativeness of juries hearing cases involving Aboriginal defendants,

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2328 M Aronson, N Reaburn & M Weinberg, *Litigation: Evidence and Procedure*, Butterworths, Sydney, 1982, 401.

2329 Criminal Law and Penal Methods Reform Committee of South Australia (Chairman: Justice RF Mitchell), Third Report, *Court Procedure and Evidence*, Adelaide, 1975, 36-38. Several commentators have also recommended alterations to the law relating to fitness to plead. See RA Burt & N Morris, 'A Proposal for the Abolition of the Incompetency Plea' (1972) 40 *U Chicago L Rev* 66; A Frieberg, 'Out of Mind, Out of Sight' (1976) 3 *Monash UL Rev* 134; AA Bartholomew, KL Milte and WC Canning, 'Unfitness to Plead and the Admissibility of Confessions' (1980) 13 *ANZJ Crim* 37. See also R Hayes and S Hayes, *Mental Retardation, Law Policy and Administration*, Law Book Co, Sydney, 1982, 398-400; I Potas, *Just Deserts for the Mad*, Australian Institute of Criminology, Canberra, 1982, regarding fitness to plead of mentally retarded persons.

2330 See para 472-478, and cf *R v Grant* [1975] WAR 163, 166 (Wickham J).

2331 See para 478, 488.

2332 If this is to be done, it should be done through a customary law defence, not through the mechanism of fitness to plead.

2333 It is unnecessary to apply this provision to defendants who are fluent in the English language. In the trial situation this is a useful indication of the likelihood of problem of comprehension existing, and therefore the best way of limiting the provision to those Aboriginal accuseds who are likely to need protection.

2334 However to avoid subsequent appeals on the ground that this power was not exercised, it should be provided that failure to do so is not a ground for challenging a verdict or finding in a criminal proceeding.

2335 See para 42, 45, 46, 50, 52, 54 for the early history.

and, finally, the particular problems that can arise in some cases with customary law elements where members of the jury are disqualified under the relevant customary laws from hearing certain evidence. Earlier commentators, at least, were agreed on the undesirability of jury trial for traditional Aborigines. Elkin gave a number of reasons for this view:

> The jurymen ... are white, never Aboriginal, and, with the best will in the world, they find it difficult to act impartially in cases in which white and native are involved: white prestige and the maintenance of the white man's superior position are felt to be at stake, and while it might sometimes be possible to acquit an accused native, it is almost never likely that an accused white will be convicted. A survey-of trials in the marginal regions of Australia during the past forty years bears out this generalization.[2336]

He concluded:

> ... bearing in mind the conditions in the Northern Territory and experience elsewhere ... it seems irrefutable that all cases involving Aborigines should be removed from the jurisdiction of justices of the peace and from trial by jury.[2337]

Kriewaldt in assessing his experience as a judge of the Northern Territory Supreme Court agreed with Elkin, but for quite different reasons. His concern was that injustice occurred because too many Aborigines were acquitted, rather than because whites were acquitted for offences against Aborigines:

> The factor which makes a jury a good tribunal in an ordinary run of cases, the ability to discern whether a witness is speaking truly, vanishes when the jury is confronted with witnesses of whose thought processes they are ignorant. It was the consciousness of my own defects in this respect which made me adopt the view that the average person called on for jury duty, where the accused is an aborigine, is faced with a task which is beyond his powers. In addition many of the older residents of the Territory were conditioned by their past experiences to accept the view that the criminal law should not be applied to aborigines. I would therefore support the abolition of the use of juries in cases where the accused is an aborigine.[2338]

His solution was that the jury should be replaced by assessors, an idea also suggested by Elkin.[2339] Eggleston's more recent study of Aborigines involved in the criminal justice systems in Victoria, South Australia and Western Australia also supported abolition of juries in certain cases, for similar reasons to those given by Elkin:

> It certainly appears that the jury system operates unjustly, particularly in 'mixed cases', that is, those where complainant and defendant are of different races. I agree that there is a strong case for the abolition of juries in cases where whites are charged with offences against Aborigines, unless racially mixed juries are stipulated.[2340]

587. ***Problems of Jury Trial in 'Mixed' Cases***. Eggleston's research was done in the 1960s, but there is more recent evidence, at least of an anecdotal kind, of difficulties of juries in 'mixed' cases. Support for this view comes from LL Davies, counsel for the accused in *R v Jambajimba Yupupu*.[2341] The case involved 8 Aborigines and two whites (a station owner and his manager). All Aborigines were charged and 6 convicted of various offences: one had the charges dropped and Yupupu was discharged after being found unfit to plead. The station manager, who had shot and seriously injured Yupupu, was charged with doing grievous bodily harm. At the initial committal proceedings a Magistrate in Hall's Creek (in the north west of Western Australia) found there was no prima facie case, but the Crown later revived the charge by ex officio indictment. The trial took place at Wyndham (also in the north-west of Western Australia) and the station-manager was acquitted. Yupupu, the principal Crown witness, failed to appear at the trial. Davies concluded:

> It is clearly farcical to conduct a Jury trial in a locality where there is overwhelming bias amongst the majority of potential Jurors.[2342]

588. ***Submissions to the Commission***. There has been little or no support, in submissions or evidence to the Commission, for the exclusion of jury trial. One reason may be that juries, even if unrepresentative in terms

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2336 AP Elkin, 'Aboriginal Evidence and Justice in North Australia', (1947) 17 *Oceania* 173, 195.
2337 id, 197.
2338 Kriewaldt, 43.
2339 id, 48. cf Elkin (1947) 197-8, 203; and see para 51-2, 53-4 for the earlier history.
2340 Eggleston (1976) 168.
2341 Unreported, WA District Court (No 128 of 1976); discussed on another point at para 581 fn 22.
2342 Davies, 135. On the other hand a review of jury trials involving Canadian Indians revealed no particular evidence of bias against Indian defendants even in mixed cases, though there was 'an unwillingness to convict of murder'. See HG Morrow, 'A Survey of Jury Verdicts in the Northwest Territories' (1970) 8 *Alberta L Rev* 50, 52. For a later study see WG Morrow, 'Women on Juries' (1974) 12 *Alberta L Rev* 321.

of the number of Aboriginal jurors, have shown in recent times no demonstrable tendency to return unfair verdicts in cases involving Aboriginal defendants. However detailed statistics are not available and the Commission has no evidence from which it can conclude that a problem exists in relation to jury trial of Aborigines requiring legislative change.

589. ***Retention of Jury Trial***. However there are practical concerns about the use of juries in sparsely populated areas, and in particular cases problems can arise with strong local feeling against a particular accused. One solution is the already existing power of the court to order a change of venue of the trial away from a particular locality. Another possibility would be to allow a defendant to elect trial by judge alone. Justice Kearney, the Aboriginal Land Commissioner and a member of the Northern Territory Supreme Court, has suggested that:

> Where prejudice is feared, a mere change of venue may not suffice to overcome it. I have always thought there was much to be said for giving an accused person the option to apply for trial by Judge alone. I believe this has been the position in Canada under its Criminal Code for nearly 100 years and I understand that it has worked well particularly in relation to criminal trials in smaller and remote locations where the problem of getting an unbiased jury is particularly acute.[2343]

This proposal deserves further consideration. However any such change to jury trials should apply generally and could not properly be limited to Aborigines. The Commission has received no evidence to justify the conclusion that jury trials involving Aborigines are, in any regular or recurring way, biased or otherwise unsatisfactory. Unless a real need can be demonstrated no special measures excluding jury trial are justified.

590. ***Composition of Juries***. The strength of the concerns outlined in the previous paragraphs depends to some extent on the composition of juries. These concerns might perhaps be reduced if there was some assurance of Aboriginal representation on juries where the defendant was an Aborigine. But the representation of Aborigines on juries has changed little in recent years. In those parts of Australia where Aborigines represent a sizable proportion of the population, it is still rare for an Aborigine to sit on a jury. Aborigines may be excluded due to their inability to understand English, or because, not being on State or Territory electoral rolls, their names are not on jury lists. Other factors (such as challenges by prosecution or defence counsel) also play a part. It is a matter for concern that Aborigines are so disproportionately represented in the criminal justice system, but so seldom appear on juries.

591. ***The Present Law***. In Australia a jury generally consists of 12 persons, with the usual requirement for eligibility as a juror being that a person is enrolled as an elector in the State or Territory. Certain persons are ineligible for jury service[2344] or may claim exemption. The composition of a jury in any case is primarily, and deliberately, one of chance. Potential jurors are chosen at random from the jury roll. The parties in criminal proceedings may challenge the jury in one of two ways. The first is by a 'challenge to the array', which questions the whole panel of persons from whom the jury is chosen, alleging, for example, that some bias is evident on the part of the person with responsibility for selection[2345] or that statutory procedures have not been complied with.[2346] The second involves a challenge directed at a particular prospective juror before being sworn. Both the defence and the Crown are permitted a specified number of peremptory challenges, for which no reason need be given. In addition any number of challenges 'for cause' may be made (eg, if a juror is related to or knows personally the defendant or one of the witnesses). These forms of challenge provide only a limited means of influencing the composition of a jury.

592. ***Representativeness of Juries in Cases involving Aboriginal Defendants***. It has long been claimed that one of the fundamental concepts of trial by jury is that the accused is tried by a 'jury of his peers'. Whether a group actually constitutes 'the peers' of the accused will usually be far from clear, but the idea that the jury should be reasonably representative of the 'country' or community by which the defendant is being judged is relevant in considering what rights exist to affect the composition of juries. Except for the right of peremptory challenge, a defendant's power to ensure a 'representative' jury is very restricted.[2347] In *R v*

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2343 Sir William Kearney, *Submission 411* (1 May 1984). cf the comments of Morrow J (n 44).
2344 eg persons with criminal convictions, barristers and solicitors, members of the police force, persons unable to read or understand English.
2345 See S Forgie, 'Challenge to the Array' (1975) 49 *ALJ* 528.
2346 *R v Diack* (1983) 19 NTR 13 (imbalance between sexes due to non-compliance with the Act).
2347 See A Dashwood 'Juries in a Multi-Racial Society' [1972] *Crim LRev* 85; AF Dickey, 'The Jury and Trial by One's Peers' (1974) 11 *UWAL Rev* 205.

*Grant and Lovett*[2348] a challenge was made to the composition of the jury on the ground that no one of the occupation of each accused (who were labourers) was represented on the jury, nor were there any Aborigines on the jury (Lovett was an Aborigine). Justice McInerney considered that the challenge was in effect a 'challenge to the array'. Since the Sheriff had not failed in any way to carry out his responsibilities under the Juries Act 1967 (Vic) the challenge failed.[2349] A similar unsuccessful challenge to the array was made in South Australia in 1973 by Harry Gibson, a Pitjantjatjara man charged with murder. Evidence was received from several Aborigines that, although eligible, they had never been called for jury service, nor had they heard of any person of Aboriginal descent being called. This evidence was countered by the Sheriff who gave evidence that Aborigines had in fact been summoned. Justice Bright concluded that the Sheriff in calling a jury for Gibson had made no attempt to exclude Aborigines who were qualified to serve. Accordingly the challenge to the array failed.[2350]

593. ***Exercise of the Court's Inherent Powers***. It is clear that the rule applied in these cases[2351] represents the present Australian law, and is a major inhibition on seeking particular representation on juries. On the other hand, the court has an inherent power to ensure that a fair trial is achieved, and direct or indirect attempts at 'jury vetting' may bring this power into play. For example, in *R v Smith*,[2352] involving an Aboriginal accused, Judge Martin sitting in the Bourke District Court discharged an all-white jury and adjourned the case for a later hearing, after the Crown had challenged all Aborigines on the jury panel.[2353] Similarly, several English judges have indicated a willingness to ensure that coloured persons were included as jurors. In *R v Broderick*[2354] and in the *Mangrove Restaurant Case*,[2355] claims made for an all-black jury were disallowed, but some attempt was made to ensure that there were some coloured jurors. In *R v Binns*[2356] in the Bristol Crown Court, 11 defendants of West Indian descent were tried for riotous assembly. A claim was made that the jury should include members of the black communities in the area, who would have a better understanding of black youth and their relationships with the predominantly white police force. Justice Stocker accepted that this was desirable, and suggested that the Crown use its power of 'standing by' jurors to ensure that some non-whites were selected. Counsel for the Crown was not prepared to do this unless all defence counsel agreed, but one did not.[2357] In the event the jury included a young man and two middle-aged women of West Indian descent and a young Asian man, a result achieved by the use of peremptory challenges. Obviously this was only possible because the array from which the jury was chosen included a number of West Indians.[2358] On the other hand, in *R v Danvers* in the Nottingham Crown Court, the West Indian defendant sought some representation of black people on the jury, and a challenge to the array was made on the basis that it did not reflect the ethnic composition of the community. It was also argued that an 'all-white jury could not comprehend the mental and emotional atmosphere in which black families live and that a black accused could not have unreserved confidence in an all white jury'.[2359] The Court rejected the claim, confirming that in law there exists no requirement that there should be a black member of a jury or jury panel.

594. ***Broader Issues of Representation on Juries***. There may be considerable resentment among ethnic minorities if juries do not truly reflect the whole community.[2360] There have been claims that minority group members, including Aborigines, should be entitled to a jury of members of their own race or group.[2361] This issue is plainly much wider than the recognition of Aboriginal customary laws, or indeed of Aboriginality in general. At least, better selection procedures need to be adopted to ensure that a multi-racial society is better reflected in the composition of juries. In addition, the courts do have some powers to ensure a fair trial (and the appearance of one), by the use of their inherent powers, as evidenced in cases such as *Smith*.[2362] The

2348 [1972] VR 423.
2349 id, 425.
2350 *R v Gibson*, unreported, SA Supreme Court, 12 November 1973.
2351 See also *R v Diack* (1983) 19 NTR 13.
2352 Unreported, District Court (NSW) 19 October 1981.
2353 There have apparently been other cases of apparently systematic Crown challenges of this kind.
2354 [1970] *Crim L Rev* 155.
2355 Cited by Dashwood, 85.
2356 [1982] *Crim L Rev* 522, 823.
2357 See [1982] *Crim L Rev* 823, correcting the account given at id, 522.
2358 cf also *R v Bansal* [1985] *Crim L Rev* 151, where Woolf J ordered the jury panel to be drawn from an area with a large Asian population, rather than an area with little or none, while declining to order that any particular racial group constitute a specific population of the panel.
2359 [1982] *Crim L Rev* 681, 687.
2360 cf GW Hoon, [1982] *Crim L Rev* 681. See also para 163-4.
2361 Such a proposition was put to the Commission during its Public Hearings: K Arnold, *Transcript* Brisbane (7 May 1981), 2418-9; P Coe, *Transcript* Sydney (15 May 1981) 2628-9.
2362 See para 593.

broader issue of special requirements of group representation on juries raises issues going beyond the present Terms of Reference.

595. ***Selection of Juries in Cases involving Aboriginal Customary Laws***. Accordingly, the Commission expresses no view on whether or not any special legal remedy to the problem of representativeness of juries is desirable and practicable. However the Commission's Terms of Reference do include consideration of the particular question of the composition of juries in cases involving Aboriginal customary laws. In several cases in recent years,[2363] juries composed of persons of a particular sex have been empanelled because it was submitted that evidence to be called in the trial about Aboriginal customary laws relevant to the offence could not be disclosed to persons of the other sex. In those cases this could only be done by the use of peremptory or other challenges, and in each case it was in fact done by agreement between prosecution and defence with the court's consent. The question is whether there should be a specific provision allowing single-sex juries to be empanelled in such cases.[2364]

- *Desirability of a Special Provision*. Some knowledge about Aboriginal traditions, rituals and customary laws is regarded as falling within the domain of a particular sex (male or female).[2365] It may be that a witness will be unwilling to give evidence, or will be reticent or evasive in the evidence given, where giving the evidence to persons of the opposite sex would infringe the witness's customary laws. The court would need to be satisfied that this was indeed the case, and that some lesser restriction (eg prohibiting publication of the evidence in question[2366]) would not suffice.[2367] It would also be necessary to ensure that no similar restrictions applied (with respect to persons of the other sex) to evidence of other witnesses, including especially the victim of the offence.[2368] But these matters go to the exercise of a discretion to make an order, not to its existence. On balance, and although the problem may not arise often, it is desirable that the court have power to make appropriate orders so that a jury of a particular sex is empanelled in such cases. This should be done on application by a party before the jury is empanelled, and only in cases where it is necessary to enable all the relevant evidence to be given. It could be argued that a power of this kind should extend to cover cases of jurors disqualified under relevant customary laws from hearing certain evidence on grounds other than their sex. However that broader problem does not seem to have arisen in practice, and it might be difficult to distinguish such claims from claims to 'representativeness' of juries generally. Accordingly the Commission's recommendation is limited to the specific situation of jurors of a specified sex.

- *Consistency with Sex Discrimination Act 1984 (Cth)*. The general scheme of the Sex Discrimination Act 1984, with its prohibition on formal discrimination on grounds of sex in specified fields combined with a series of statutory exemptions or provisions for exemption, was outlined in para 182. The provision proposed in this paragraph for single sex juries would not violate the Convention on the Elimination of all Forms of Discrimination against Women of 1980, on which the 1984 Act is partly based.[2369] The position with the 1984 Act is more complicated. An order made under the proposed power would appear to constitute, or more probably authorise, an act amounting to sex discrimination as defined in s 5(1). However the 1984 Act appears to contain no provision prohibiting sex discrimination in this situation.[2370] Even if it did, s 40(1)(d) creates a specific exemption for acts done

2363 See *R v Sydney Williams* (1976) 14 SASR 1 (Wells J) (para 492); *R v Gudabi*, unreported, NT Supreme Court (Foster CJ) 30 May 1983. See further para 654.

2364 In both *Sydney Williams* and *Gudabi* the defendant was male and all-male juries were empanelled. There is however no reason why evidence under Aboriginal customary laws might not be restricted to women only. For a case before the Aboriginal Land Commissioner where this was so see para 650.

2365 On the separateness of men's and women's domains in Aboriginal societies see eg RM Berndt & CH Berndt, *The World of the First Australians*, 4th rev edn, Rigby, Adelaide, 1985, 119-21, 148-9, 180-7, 233, 256-8, and the works cited in ch 12.

2366 See para 656.

2367 In some cases it may be sufficient that no persons of the opposite sex from the particular locality or community are present. So far as jury selection is concerned, this could usually be achieved by challenging the particular jurors.

2368 D Bell, *Submission 491* (16 September 1985) 7 agreed that a power of this kind is desirable, but commented that, where the victim was of the other sex, convening a jury of the defendant's sex could make matters worse rather than better. This should be specified as a matter to be taken into account in the exercise of the court's discretion.

2369 Since the proposed provision applies equally to both sexes, and since it would only be applied where necessary in the circumstances to do justice to the defendant, it would not constitute discrimination against women as defined in Art 1 of the 1980 Convention.

2370 The only possible provision is s 26 ('Administration of Commonwealth laws and programs'). It is by no means clear that a judge acting as such is a 'person' within s 26.

by a person in direct compliance with an order of a court. Accordingly there is no question of inconsistency between the proposed provision and the 1984 Act.[2371]

## Interpreters

596. ***A Recurring Theme***. A recurring theme in a number of Chapters in this Report is the difficulty of comprehension, both conceptual and linguistic, experienced by many Aborigines, especially traditionally oriented Aborigines, in their contact with the criminal justice system. These problems can occur at any time: at first contact with the police, during police interrogation, while being interviewed by legal counsel and during the trial. They may cast doubt on the truth or voluntariness of a confession; they may be the basis for a claim of unfitness to plead; they may create problems with taking the oath or making an affirmation; or inhibit the making of an unsworn statement, and they prevent many Aborigines from sitting on juries. In a variety of ways the legal system has been attempting to cope with these problems but, as has been seen, with only varying success. One obvious, and very important, way of dealing with them is through the provision of a competent trained interpreter with an understanding both of the relevant Aboriginal language and concepts, and with the nature and procedures of the trial.[2372]

597. ***The Right to an Interpreter***. The common law does not entitle a person to an interpreter, but the court may in its discretion allow an interpreter to be used.[2373] Justice Brereton in *Filios v Morland* commented that the use of interpreters does not always achieve full, accurate and fair presentation of the evidence:

> ... even today it is all too common an experience to hear the interpreter giving the effect instead of giving the literal translation of the questions and answers and of his own accord interpreting questions and eliciting explanations.[2374]

Such statements raise doubts about how well some courts understand the difficulties inherent in interpreting many languages. A literal translation may be meaningless, or even impossible. But views such as those of Justice Brereton are one reason why, it has been suggested, there is some reluctance to allow interpreters:

> Some judges and magistrates are very reluctant to allow the evidence to be given through an interpreter. Apparently they fear that a person giving evidence through an interpreter has some advantage over other people. Nothing is further from the truth. Even a good interpreter, and they are few and far between, can only give an approximate meaning, without the nuances and without the stress contained in the original ... In reality, a person who has to use an interpreter is extremely handicapped.[2375]

598. ***Interpreting Aboriginal Languages***. There are many accounts of difficulties that have occurred in the trial of Aborigines through difficulties of translation and inadequate grasp of English. For example:

> In the lower court proceedings of the Ti-Tree case the presiding magistrate considered an interpreter was needed for one of the Aboriginal witnesses who appeared in difficulty relating his evidence in English. The witness had been confused between "baton" and "nulla nulla" and had been using the two interchangeably. Clarification, through an interpreter, changed the testimony markedly.[2376]

A good illustration of the problem of interpreting Aboriginal languages, and an illustration with some legal consequences, was provided during the Commission's Public Hearing in Port Augusta:

> Question: When the policeman says: 'Do you plead guilty or not guilty?' what do you ask the Aboriginal person you are doing the interpreting for?
>
> Mr Reid: You done that thing or you did not do that thing?' They only got to say yes or no. That will have to stand for guilty ...[2377]

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2371 However the Commission proposes, in para 656, a further exemption to the 1984 Act allowing restrictions which are necessary to ensure compliance with Aboriginal customary laws relating to access to information (where access is confined to members of one sex).

2372 For discussion of United States experience see WBC Chang & MU Araujo, 'Interpreters for the Defense: Due Process for the Non-English Speaking Defendant' (1975) 63 *California L Rev* 801; AJ Cronheim & AH Schwartz, 'Non-English Speaking Persons in the Criminal Justice System: Current State of the Law' (1976) 61 *Cornell LRev* 289.

2373 *Dairy Farmers Co-operative Milk Co v Acquilina* (1963) 109 CLR 458, 464.

2374 (1963) 63 SR (NSW) 331, 332-3. These comments were approved by the High Court in *Acquilina's* case.

2375 NSW Law Reform Commission, Working Paper, *Course of the Trial*, Sydney, 1978, 156 citing a submission from V Menart.

2376 Ian McLeod, 'Law and Social Welfare' *Seminar Paper* (Service Delivery to Remote Communities Seminar, Darwin 1-3 December 1981).

2377 R Reid, *Transcript*, Pt Augusta (18 March 1981) 148.

The legal concept of pleading 'guilty' or 'not guilty' has been altered in this translation. Legally a plea of 'not guilty' need not involve a denial of the facts alleged: it might be a denial of *mens rea*, the assertion of a relevant defence, or simply an exercise of the defendant's right to have the Crown prove its case. Because neither the terms nor the concepts exist in Pitjantjatjara, the only usable translation significantly distorts the meaning of the plea.[2378] This shows the fallacy behind simple reliance on an interpreter to solve all the problems of the defendant's comprehension of the trial. As the same witness said:

> When white fellow talk in big words there is no way of putting that across to him in the language because Pitjantjatjara is only a straightforward language ... [W]hen they come with big words and make a big sentence out of it you have got no way of trying to talk to them in the language.[2379]

These linguistic problems are well documented,[2380] and raise a fundamental concern. Can it be said that a person has received a fair trial who has been unable to understand the proceedings in any real way? Other problems may also occur in seeking to provide interpreter services in such cases; eg there may be an avoidance relationship between witness and interpreter.[2381]

599. ***The Need for Aboriginal Interpreters***. Speaking of the 1950s, Justice Kriewaldt commented that:

> in the Northern Territory the trial of an aborigine in most cases proceeds, and so far as I could gather, has always proceeded, as if the accused were not present. If he were physically absent no one would notice this fact. The accused, so far as I could judge, in most cases takes no interest in the proceedings. He certainly does not understand that portion of the evidence which is of the greatest importance in most cases, namely, the account a police constable gives of the confession made by the accused. No attempt is made to translate any of the evidence to him.[2382]

The position has improved since then. The creation of the Aboriginal legal services is the most significant of these improvements, and the general level of understanding of English among Aborigines has also risen. But considerable problems remain with respect to the provision of interpreters. In *R v Banjo Anglitchi and others*, Justice Muirhead commented that depositions taken from the girl principally involved in the case:

> illustrate graphically what has been known for so long, namely that without the aid of trained and skilled court interpreters in Aboriginal languages, the administration of justice in this Territory remains sadly impeded.[2383]

In 1981 a Central Australian Aboriginal Legal Aid Service lawyer commented that:

> ... the new and impressive court building in Alice Springs [announces] the fact that interpreters can be obtained on request in about nine languages including two Chinese dialects. A notable omission is ... any reference whatsoever to any Aboriginal language. This is despite the fact that Aboriginal people comprise between 60% and 70% of all Defendants in the Summary Courts held at Alice Springs and Tennant Creek, as well as virtually all Defendants listed in the bush courts and as much as 90% of all matters listed in the Supreme Court Criminal Sittings.[2384]

In May 1983 the Federal Minister for Aboriginal Affairs announced a grant to the Institute for Aboriginal Development in Alice Springs to establish a pilot Aboriginal interpreter service.[2385] The pilot scheme has now been fully implemented. The Institute has 114 accredited Aboriginal interpreters, 43 of whom have had over 200 hours of training, and they cover 12 languages.[2386] The need for such schemes, and for trained interpreters, is clear, as Mr Yami Lester, a skilled interpreter in the Pitjantjatjara language, pointed out:

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2378 For another example see *R v Jacky Jagamara*, unreported, NT Supreme Court (O'Leary J) 24 May 1984, noted (1985) 12 *ALB* 12. See para 456. There the defendant's guilty plea was translated as 'a desire that they will not rewitness again': transcript, 2-3.

2379 id, 149.

2380 SA Wurm, 'Aboriginal Languages and the Law' (1963) 6 *UWAL Rev* 1; TGH Strehlow, 'Notes on Native Evidence and its Value' (1936) 6 *Oceania* 323; AP Elkin (1947) 173. Neate has pointed to the language difficulties which arise in the context of land claims under the Aboriginal Land Rights (Northern Territory) Act 1976 (Cth): G Neate, 'Legal Language Across Cultures: Finding the Traditional Aboriginal Owners of Land' (1981) 12 *Fed L Rev* 187. See also JE Newton 'Aborigines and the Criminal Justice System' in D Biles (ed) *Crime and Justice in Australia*, AIC, Canberra, 1977, 135, 137; J Coldrey & F Vincent, 'Tales from the frontier: White laws — black people' (1980) 5 *LSB* 221; RMW Dixon, A Hogan & A Wierzbicka, 'Interpreters: Some Basic Problems' (1980) 5 *LSB* 162; K Liberman, 'Understanding Aborigines in Australian Courts of Law' (1981) 40 *Human Organization* 247; D Nash, 'Foreigners in their Own Land: Aborigines in Court' (1979) 4 *LSB* 105; E Fesl, *Bala Bala*, AGPS, Canberra, 1982.

2381 In *R v Gudabi*, NT Supreme Court (Foster CJ), reported on appeal on another point (1982) 52 *ALR* 133, a prosecution witness was uncomfortable because of an avoidance relationship with the interpreter, and another interpreter had to be sworn.

2382 Kriewaldt (1960) 23.

2383 Unreported, NT Supreme Court (Muirhead J) No 316-322 of 1980.

2384 P Ditton, CAALAS, *Submission 308* (21 July 1981).

2385 Hon C Holding MP, (1983) 8 *Commonwealth Record* 677.

2386 In 1985-6 the institute for Aboriginal Development has a grant of $43100 to train interpreters. Information supplied by IAD, Alice Springs, 20 December 1985.

> For untrained interpreters in the court it is very hard work. It is not good enough to get any Aboriginal person to interpret just because it is his language, he must have a good understanding of English. The court language is difficult and also people who have had a university education speak strong English. They can't realise that many people do not understand words and sentences which seem very simple to them. Even the interpreters cannot understand much of their English.[2387]

600. ***Proposals for Reform***. In this context, a number of separate problems may be identified:

- the current law relating to interpreters, which relies on the court's discretion rather than conferring a right to an interpreter in appropriate cases, is unsatisfactory;
- the role that interpreters are currently permitted to perform in the courts needs reconsideration;
- there is a clear need for interpreting services to be available for traditionally oriented Aborigines, but there is a lack of trained interpreters in many localities.

Although they impinge particularly upon Aborigines coming before courts on criminal charges, the first two problems are general problems relating to interpretation in legal proceedings. In this context, in the Commission's *Evidence* Report (Interim) it is recommended that there be a right to an interpreter 'unless the witness can understand and speak the English language sufficiently to make an adequate reply to questions'.[2388] Furthermore Art 14(3)(f) of the International Covenant on Civil and Political Rights of 1966 guarantees the *right* to a defendant 'to have the free assistance of an interpreter if he cannot understand or speak the language used in court'.[2389] So far as the third problem is concerned, this is at least as much related to resources as to the law. Guaranteeing rights to translation will achieve little if there are no competent interpreters available. Some steps have been taken in this direction but it remains an urgent need. Existing programs for the training and accreditation of Aboriginal interpreters should be supported and extended. The aim should be to ensure that interpreters are available as needed at all stages of the criminal justice process (ie during police interrogation, as well as in the courts).[2390]

## Unsworn Statements

601. ***The Present Law***. An unsworn statement is a statement made by an accused person, setting out the accused's version of the facts, but which is not on oath and not subject to cross-examination.[2391] Retention of the right to make an unsworn statement continues to be a matter of considerable controversy.[2392] It has been abolished in Western Australia, Queensland, the Northern Territory (1984) and South Australia (1985), but it is retained in the other States and the Australian Capital Territory. Whether or not unsworn statements are retained generally, there is a question whether special provision needs to be made for unsworn evidence in the case of Aboriginal defendants with difficulties of language and comprehension, who experience special difficulties in giving evidence and in cross-examination.

602. ***Unsworn Statements and Traditionally Oriented Aborigines***. Aborigines may be particularly disadvantaged in the courts either as defendants or as witnesses.[2393] These difficulties may prevent an Aborigine adequately presenting his or her version of the facts to the court both in evidence in chief and in cross-examination. In particular, problems arise with cross examination through incomprehension of

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2387 Y Lester, *Aborigines and the Courts and Interpreting in the Court*, Institute for Aboriginal Development, Alice Springs, 1974, 7. See also Gloria Brennan, *The Need for Interpreting and Translation Services for Australian Aboriginals, with Special Reference to the Northern Territory — A Research Report*, DAA, Canberra, 1979, 19-27.

2388 ALRC 26, *Evidence* (Interim) AGPS, Canberra, 1985 vol 1, para 610-11; Draft Evidence Bill cl 27.

2389 cf Human Rights Bill 1985 (Cth) cl 8 (art 27(h)). See also para 180.

2390 On the general need for more interpreters see Federation of Ethnic Communities Councils of Australia, *National Language Policy Conference Report*, Sydney, October 1982, 40-6; Australian Institute of Multicultural Affairs, *Evaluation of Post Arrival Programs and Services*, Melbourne, 1982, ch 8. For this Commission's recommendations see para 597 n 76.

2391 See ALRC 26 vol 1 para 202, 270-8; M Cohen, 'The Unsworn Statement from the Dock' [1981] *Crim L Rev* 224.

2392 Abolition has been proposed by a number of law reform agencies: Criminal Law Revision Committee of England, 11th Report, *Evidence* (General Cmnd 4991, 65; Royal Commission on Criminal Procedure, *Report*, Cmnd 8092, 1981, 91; Criminal Law and Penal Methods Reform Committee of South Australia (Chairman: Justice RF Mitchell), Third Report, *Court Procedure and Evidence*, Adelaide, 1975, 124; Tasmanian Law Reform Committee, *Recommendations for Revision of the Criminal Code (No 1)*, Government Printer, Hobart, 1972, 1-2. On the other hand its retention (subject to various reforms) has been recommended by this Commission: ALRC 26, vol 1 para 592; and by the NSW and Victorian Law Reform Commission: NSWLRC, *Unsworn Statements of Accused Persons*, LRC 45, Sydney, 1980; VLRC, Report No 2, *Unsworn Statements in Criminal Trials*, Melbourne, 1985.

2393 See para 546, 598, and cf *Fry v Jennings* (1983) 25 NTR 19, 26-7 (Muirhead J).

questions or reluctance to reject suggestions or propositions put by persons in authority.[2394] The option of an unsworn statement may assist in resolving this problem. A Select Committee of the Legislative Council (SA) investigating these questions reported that:

> The Aboriginal Legal Rights Movement, supported by three Adelaide counsel ... submitted ... that a special case could be made out for Aboriginal defendants in particular for whom the unsworn statement ought to be retained. They referred to a number of judgments in which it had been recognised that Aboriginal persons faced special problems in relation to the administration of justice. In oral submissions to the Committee, the Aboriginal Legal Rights Movement emphasised that, because of these particular difficulties, cross-examination was not necessarily a tool which could always be used effectively to establish veracity. Consequently the abolition of the unsworn statement would help neither the Aboriginal accused nor the interest of society as a whole.[2395]

The Report referred to information from Aboriginal legal services in Western Australia and Queensland which generally supported these arguments. Both organisations considered that Aboriginal defendants were at a disadvantage in not being able to make unsworn statements as a result of the abolition of the right in both States.[2396] This was a significant factor influencing the Committee's conclusion that the unsworn statement should be retained.[2397] Similar submissions, including one from the Commonwealth Government, were also made to the Northern. Territory government during discussions on the new Criminal Code (NT). These were unsuccessful in convincing the Northern Territory Government to retain the unsworn statement.[2398]

603. ***Assistance with an Unsworn Statement***. A particular issue which has arisen is whether an illiterate person should be able to have an unsworn statement read for him. As usual, the position throughout Australia is not uniform. In Tasmania, Victoria and possibly New South Wales[2399] an accused may prepare and read a written statement. However, even where an accused is permitted to prepare a statement, usually with the assistance of counsel, it is not clear whether some one else can read the statement to the court. This is permitted in Tasmania[2400] but it appears unlikely to be allowed in Victoria or New South Wales. In *R v Stuart*[2401] the accused, an illiterate Aborigine on trial for murder, sought to have a prepared statement read for him. The trial judge refused after objection from the prosecutor, a decision which was upheld on appeal.[2402] Defence counsel was, however, permitted to prompt the accused and assist him, but not actually to read the statement for him.[2403] This approach disadvantages one section of the Australian community, namely ill iterate persons, Aboriginal or non-Aboriginal. There may be advantages during a trial for the jury to hear the accused and ascertain his demeanour in reading his statement, but it appears unfair for those unable to read and write not to have a prepared text presented for them. This is especially so where literate persons are able to read their own statement. The difficulties arising from illiteracy could be exacerbated by the additional inability to speak English to a standard that would be understood in the Court.[2404]

604. ***Special Provision for Unsworn Statements: The Commission's View***. This Commission in its *Evidence* Report (Interim) recommended that the right to make an unsworn statement should be retained.[2405] It also recommended that the accused should be able to receive assistance in the preparation of a statement and, with leave of the court, have the statement read by counsel. As with the law on admissibility of evidence on

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2394 See para 546.

2395 *Final Report, Unsworn Statements and Related Matters*, Adelaide, September 1981, 3.

2396 id, 6-7. Whether this brought an increase in conviction rates is not clear.

2397 However unsworn statements were later abolished in SA: Evidence Act 1929 (SA) s 18a (substituted 1985).

2398 The Criminal Code (NT) 360 specifically provides that an accused person 'is not entitled to make a statement from the dock'. In a letter of 17 November 1983 to the Northern Territory Chief Minister, the Prime Minister commented that, although 'the original reason for retaining dock statements may no longer exist in many societies, abolition of dock statements would appear to have the potential to operate harshly against Aboriginal people generally and tradition-orientated Aboriginal people in particular'. In reply the Chief Minister argued that few Aborigines in fact made unsworn statements, that the right to make such statements could be abused by defendants who are fully capable of expressing themselves clearly, and that they had been abolished in other Australian jurisdictions: letter of 15 December 1983. In the event the Commonwealth and Northern Territory Governments reached agreement on several amendments to the Code, but not on the dock statement. s 360 was retained as originally enacted. See para 439.

2399 See ALRC 26, vol 2 App C para 19-20.

2400 Criminal Code 1924 (Tas) s 371.

2401 (1959) 101 CLR 1.

2402 The SA Court of Criminal Appeal specifically approved the ruling of the trial judge: *R v Stuart* [1959] SASR 133, 148. The High Court refused special leave to appeal and agreed with the Full Court that 'the applicant had no legal right to have his prepared statement read for him': *R v Stuart* (1959) 101 CLR 1, 8.

2403 An illiterate Aborigine was allowed to have a prepared 'statement' read to the jury by the Clerk of Arraigns with the consent of the Crown in *R v Gibson*, unreported, SA Supreme Court, 12 November 1973; cited in Criminal Law and Penal Methods Reform Commission of South Australia, Third Report, *Court Procedure and Evidence*, Adelaide, 1975, 125.

2404 In its draft Evidence Bill, cl 21(4) the Commission recommends that where a defendant is unable to read from a written statement, the defendant's legal practitioner may, with leave of the court, read the statement. See ALRC 26, vol 1 para 592.

2405 ibid. An accused would not be liable to cross-examination but would be liable to prosecution for any false testimony.

oath,[2406] the scope of the right to make an unsworn statement is an aspect of the general law of evidence, and it is not the function of the Commission in this Reference to reform the law of evidence in relation to Aborigines generally.[2407] But the difficulties in giving evidence experienced by many Aborigines, in particular by traditionally oriented Aborigines, are a powerful reason for permitting them to make an unsworn statement. In proceedings where unsworn statements may be made under the general law no special provisions need to be made. However, the special difficulties faced by many Aborigines are such that the option for them to give unsworn evidence should exist, whether or not it exists generally. This is the unanimous view of the Commission. However there is disagreement as to the precise test which should be applied to give effect to this conclusion. A majority of the Commission[2408] takes the view that an Aboriginal defendant should be permitted to give unsworn evidence unless he or she is found by the court not to be disadvantaged in relation to the giving of evidence in the proceeding. Two members of the Division, on the other hand,[2409] would ext end the right only to those Aborigines who the court positively finds to be disadvantaged in relation to the giving of evidence in the proceeding. The difference between the two views is essentially one of onus. On the majority view, the onus will be on the prosecution to establish that the defendant's situation in terms of education, language, comprehension, etc is relevantly indistinguishable from that of members of the general community. This is not an unfair burden to place on the Crown because there will nearly always be members of the police force who will have spoken at some length to the defendant in the course of investigating the offence. This view also avoids putting the defendant's counsel in the position of having, in effect, to denigrate the defendant in order to persuade the court to allow an unsworn statement to be made. On the other hand the minority view emphasises that the right to make an unsworn statement is exceptional since the question only arises when that right has been abolished generally, and that a special case needs to be made before a special right should be conferred. Whichever view is adopted, the Commission recommends that, in considering whether disadvantage exists, the court should have regard to any relevant characteristic of the defendant (including traditional beliefs and fluency in the English language) and any relevant mental or physical disability, and whether by reason of such a characteristic or disability the defendant is likely to be unfairly prejudiced by cross-examination. Where the defendant is unable to read, the unsworn statement should be able to be read to the court, with leave, by counsel. Counsel should also be able to remind the defendant of any other matter which should be referred to in the statement, and to ask supplementary questions to elaborate the defendant's case.[2410]

605. ***Comment on Unsworn Statements***. Whether and in what ways, the judge, the prosecution and a co-defendant can comment on a defendant's election to make an unsworn statement varies from State to State. There have been considerable difficulties, in States where comment is allowed, in drawing the line between permissible explanations of the procedure and its legal consequences, on the one hand, and impermissible suggestions that the defendant gave unsworn evidence out of a sense of guilt or because there was something to hide, on the other.[2411] In its *Evidence* Report (Interim) this Commission concluded that the prosecutor should not be allowed to comment, and that any comment made by the judge or a co-accused should not suggest that the defendant gave unsworn evidence because of a belief in his or her guilt, or that unsworn evidence is necessarily less persuasive than sworn evidence.[2412] In the context of a special right to give

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2406 There were early problems with the admissibility of Aboriginal evidence on oath: see para 46, and cf *R v Smith* (1872) 11 SCR (NSW)(L) 69; *R v Paddy* (1876) 14 SCR (NSW) 440; *R v Mary Ann Lewis* [1877] Knox 8. The legal problems were, not without dispute and difficulty, eventually overcome by legislation, enacted pursuant to an Imperial Act of 1843 (6 & 7 Vic c22). See further *R v Smith* (1906) 6 SR (NSW) 85, and the Evidence Acts or Oaths Acts in each State and Territory. There is accordingly now no difference in the legal position of Aborigines and non-Aborigines in relation to sworn evidence. However insensitive administration of the law can still cause problems, as the Central Australian Aboriginal Legal Aid Service pointed out:

> One of the most embarrassing experiences suffered daily by Legal Aid lawyers is watching the Bible thrust into the hand of traditionally oriented Aboriginals without making any enquiry whatsoever as to whether or not they are Christians, and then having read to them the formal words of the Oath and finally asking them to articulate in reply 'so help me God'. This usually produces total bewilderment on the part of dignified Aboriginal people, who are trying their best to to-operate with the Court, and frequent titters on the part of unsympathetic spectators with what they perceive as an example of Aboriginal stupidity. Even when the Oath is administered through an interpreter the Defendant is still required to try and articulate 'So help me God' in English.

*Submission 308* (21 July 1981). cf also Liberman, 251-2. Care needs to be taken in such cases to ensure that Aborigines (and other persons) with limited command of English understand their right to affirm rather than give evidence on oath, and the procedures involved in each case.

2407 See para 165.

2408 The President, Professors Crawford and Chesterman.

2409 Justice MR Wilcox and Professor Tay.

2410 Other aspects of the Commission's recommendations on unsworn statements in its Evidence Report (Interim) should also be included in the recommended provision. A defendant should only be able to give both sworn and unsworn evidence by leave of the court. The laws of evidence and of perjury should apply, and unsworn statements should not be able to be used in relation to the case of another defendant.

2411 See ALRC 26, vol 1 para 278-9, vol 2 Appendix C para 20.

2412 ALRC 26, vol 1 para 592; draft Evidence Bill, cl 22(2).

unsworn evidence, as proposed in para 604, the Commission concludes that the provisions in the *Evidence* Report (Interim) should be adopted. In particular, comments suggesting that unsworn evidence is necessarily less persuasive than sworn evidence should be prohibited. The whole point of the special provision proposed, applying as it does only to Aboriginal defendants who are found to be disadvantaged in relation to the giving of evidence, is that these persons are unfairly disadvantaged, through difficulties of language and comprehension and for other reasons, in the adversary system. With such defendants it is especially the case that their sworn evidence would not be more persuasive than their unsworn evidence: by definition, it would reveal only their disadvantage in giving evidence in the alien environment of a court. However, one member of the Division (Justice MR Wilcox) dissents on the exclusion of comment by the prosecution. In his view there is no good reason to exclude the prosecution from commenting. It is inherently desirable that the jury should understand what is happening in the trial. The greater the extension of the rights of an accused person in making an unsworn statement, for example by permitting prompting by counsel, the more difficult it will be for the jury to appreciate that this material is of a different nature to sworn evidence because it is immune from challenge by cross-examination. The majority proposal would allow the judge to comment but no guidance is offered as to the circumstances under which that discretion should be exercised, so that practice would probably vary. Under these circumstances it is wrong to prohibit the opposing party from informing the jury of the true situation. Any comments which go too far — like any other erroneous comment of counsel — will be corrected by the judge. Justice Wilcox also disagrees with the limitation on what may be said by way of comment. In his view sworn evidence is necessarily more persuasive than unsworn evidence given by the same person, even where that person is disadvantaged in some way. This is so, not so much because of the absence of an oath or affirmation, but because the evidence is not susceptible of challenge by way of cross-examination if it is false. In observing a defendant's demeanour and responses in cross-examination, the jury can gain insight into the defendant's state of mind, and the circumstances of the case, insight which, in the case of disadvantaged Aboriginal defendants, may well assist the defence. It can however be said that unsworn evidence is not necessarily less persuasive than sworn evidence given by other witnesses (with which there can be no generalized comparison). Accordingly any comment suggesting the contrary should, in Justice Wilcox' view, be prohibited. All members of the Division are of the view that it is appropriate for the presiding judge to tell the jury that it is open to them, when assessing the value of unsworn evidence, to take into account that it was not given on oath or subject to cross examination, as was the evidence of other witnesses.

## Aboriginal Dying Declarations

606. ***General Rule: Exception to Hearsay***. One of the basic common law rules of evidence is the rule against hearsay, which in general terms requires that persons giving evidence may only relate their own first hand accounts about matters in dispute and not statements made by someone else out of court about them. Cross states the rule in the following way:

> Oral or written assertions of persons other than the witness who is testifying are inadmissible as evidence of the truth of that which was asserted.[2413]

The rule is hedged around by a large number of exceptions developed for a variety of reasons. The proliferation of exceptions has been such that the validity of the rule against hearsay is increasingly questioned, with alternative formulations put forward to regulate the admissibility of such evidence.[2414] This Report is not, of course, concerned with this fundamental issue. It is, however, necessary to discuss the specific exception relating to dying declarations, and the application of that exception to traditional Aborigines.

607. ***Development of the Rules Relating to Dying Declarations***. Words uttered by dying persons will constitute a dying declaration and thus be admissible as evidence only in very limited circumstances:

> The oral or written declaration of a deceased person is admissible evidence of the cause of the death at a trial for his murder or manslaughter provided he was under a settled hopeless expectation of death when the statement was made and provided he would have been a competent witness if called to give evidence at that time.[2415]

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2413 JA Gobbo, D Byrne & JD Heydon (ed) *Cross on Evidence*, 2nd Aust ed, Butterworths, Sydney, 1979, 6.
2414 For full discussion see ALRC 26, vol 1, ch 13, 32; NSWLRC, *Report on the Rule Against Hearsay*, LRC 29, Sydney, 1978.
2415 Cross, 487.

The justification usually given for the admission of dying declarations was theological.[2416] For example, in *R v Osman* Justice Lush stated:

> A dying declaration is admitted in evidence because it is presumed that no person, who is inevitably going into the presence of his Maker, will do so with a lie on his lips.[2417]

Other courts also adopted this approach. In 1909 Chief Justice Madden in the Victorian Supreme Court set out his view of the general principle for admitting dying declarations:

> The general principle on which courts of justice act is that testimony should be given on oath and with all the solemnity that an oath suggests. In the case of a person who is actually dying, however, and who must be conscious of the cumulative responsibility which comes upon every human being of speaking the truth in the same Presence as if on oath administered in the box, it is thought highly probable that he will tell the truth. Such a person has no motive to tell a lie. All resentment and vindictiveness will probably have faded down, for before many moments that judgment must be faced which we are all taught to expect. It is thought that the sanction upon the conscience in such circumstances to tell the truth will be at least as great as taking the oath in the witness-box.[2418]

Such statements of the basis for admitting dying declarations have created difficulties in dealing with declarations made by persons thought to lack the requisite belief in a 'Maker', a 'final judgment' or a 'life hereafter'. The problem has been consider ed by the courts in a number of contexts, including agnostics,[2419] non-Christian religions,[2420] and (most relevant for present purposes) Aborigines and natives of Papua New Guinea.

608. ***Dying Declarations of Traditional Aborigines***. In *R v Wadderwarri*,[2421] Justice Kriewaldt sitting in the Northern Territory Supreme Court had to consider the dying declaration of a traditional Aborigine. He summed up to the jury in the following words:

> If the accused had been a white person, and if the deceased had been a white person, it is almost certain that the evidence ... of what the deceased had said when he was about to die would have been admitted, but because I have to apply the same rules to Aboriginals and whites I did not admit that evidence on the basis that the reason for admitting the evidence in the case of a white person is that he has a belief that God will punish him if he tells a lie just as he is about to die. So far as the Aboriginals are concerned, we know that they have not that type of belief in the hereafter and therefore ... I excluded any statement the deceased might have made shortly before his death.[2422]

It should be noted that Justice Kriewaldt did not hear any evidence to determine what were in fact the religious beliefs of the deceased, or of Aborigines generally. Rather he took judicial notice of (what he perceived to be) the absence of the requisite belief. Neate argues that Justice Kriewaldt was probably correct in his assessment of Aboriginal religious beliefs even though he did not determine them in the particular case.[2423] Even if it were the case that traditional Aboriginal religious beliefs would not pass the 'religious test' supposed to underlie the dying declarations rule, many Aborigines are sincere Christians; many combine Christianity with adherence to Aboriginal traditions and laws.[2424] If the 'same rule' that Justice Kriewaldt purported to apply required investigation of the beliefs of the particular deceased, then it was wrong not to investigate those beliefs in *Wadderwarri*. If it did not require such an individual investigation, then either the dying declaration should have been admitted, or the rule relating to the admissibility of Aboriginal dying declarations was different, and not 'the same rule' at all.

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2416 An additional and, it may be thought, more cogent basis for the rule was the principle of necessity, ie, the 'necessity for taking the only available trustworthy statements his dying declaration'. This was, however, seldom referred to. cf JW Chadbourn, *Wigmore on Evidence*, rev ed, Little Brown, Boston, 1974, 3rd ed, para 1431-6.

2417 (1881) 15 Cox CC 1, 3. See also *R v Woodcock* (1789) 1 Leach 500, 502 (Eyre CB); *R v Pike* (1829) 3 C & P 598 (Park J); *R v Perry* [1909] 2 KB 697.

2418 *R v Hope* [1909] VLR 149, 157.

2419 *R v Savage* [1970] Tas LR 137.

2420 *R v Kuruwara* (1901) 10 QLJ 139.

2421 [1951-76] NTJ 516.

2422 id, 517.

2423 G Neate, *Dying Declarations and Customary Marriages of Australian Aborigines and Rules of Criminal Evidence*, LLB Honours Thesis, ANU, 1979, 54: '... there probably was no belief in punishment by a God in the hereafter to render the dying declaration admissible and the taking of judicial notice of this may well have produced the same result as that achieved by a thorough inquiry'. See also AP Elkin, *The Australian Aborigines*, rev edn, Angus & Robertson, Sydney, 1979, 220-61, 336-61; Berndt & Berndt (1985) 453-85.

2424 In addition, as Dr D Bell pointed out, there is a traditional analogue to dying declarations. Traditionally an Aborigine dying in the presence of certain persons would be bound to tell the truth: *Submission 491* (16 September 1985) 8.

609. ***Application in Subsequent Cases***. Despite its internal inconsistencies, the approach taken by Justice Kriewaldt was followed by the Papua and New Guinea Supreme Court. In *R v Madobi* Justice Ollerenshaw said:

> It may well be that the principle would apply, also, in the case of members of other faiths, holding beliefs materially similar to those of Christianity. I imagine that it would be applicable to some natives of this Territory, particularly those who have been admitted, with understanding, into the Christian faith: but, what little I do know about the expectations for their illimitable future of the natives of this community here in Kiriwina does not lead me to think that they anticipate anything like a judgment upon their sins that would create a solemn sanction to speak truthfully upon the eve of such a judgment. I understand that their traditional belief was in some sort of existence, after this life, upon those uninhabited islands which may be seen from the wharf and its approaches.[2425]

However, more recent decisions cast doubt on whether *Wadderwarri* would still be followed in Australia. Certainly *Madobi* appears to have been overruled in Papua New Guinea. Two more recent decisions of the Papua New Guinea Supreme Court clearly indicate a change of approach. In *R v Kipali-Ikarum*[2426] Justice Clarkson had to determine whether a woman who had received some Christian teaching and attended Christian churches had acquired the requisite beliefs so that her dying declaration could be admissible. Despite finding that he was not satisfied that 'the deceased had been admitted with understanding into the Christian faith'[2427] Justice Clarkson determined that the declaration was admissible:

> If, as appears to be the case, the personal beliefs of a declarant are not examined in England or Australia, where it can safely be assumed that a sensible part of the community hold no religious beliefs and no belief in divine punishment ... it is difficult to see on what basis such an examination should be undertaken in the Territory. The stage may well have been reached when this court should not embark on the necessary enquiries ... This view was apparently followed in South Africa where I have already noted the common law rule was wholly adopted.[2428]

This statement does not however exclude, so much as side-step, the supposedly theological rationale for admissibility. In the later case of *R v Peagui Ambimb*,[2429] Justice Raine admitted the dying declaration of an indigenous person after refusing to accept any evidence relating to the deceased's Christian beliefs. In doing so he clearly rejected any requirement of a belief in God or a 'hereafter':

> References to considerations affecting the minds of religious people about to meet their God in earlier judgments delivered in times that were less scientific and when the influence of the churches was truly significant must surely now be treated with reserve. It seems to me that there is now no distinction, in the case of a person who appreciates that death is near, between the man who wants to make his peace with the world and the Christian who wants to make peace with his God .... In my view it now matters not whether a dying declarant was a religionist or a secularist in his lifetime.[2430]

Chief Justice Burbury in a case before the Tasmanian Supreme Court continued the trend of admitting dying declarations regardless of the deceased's religious views.[2431] The deceased had been seriously ill in hospital when she made her statement but had declined to swear on the Bible because she did not believe in it, although she agreed to swear 'By Almighty God'. Chief Justice Burbury noted that *Madobi* had not been followed in *Kipali Ikarum*. He went further and held that *Madobi* had been wrongly decided. He said:

> The notion that the court should embark on an enquiry into the religious beliefs of a declarant in the life hereafter before admitting a dying declaration should in my view be wholly rejected ... If the proper inference from the evidence is that the girl was an agnostic or even an atheist I think her dying declaration is nevertheless admissible.[2432]

610. ***The Present Law***. The trend of these cases is clear although not necessarily conclusive. There has been no decision of a higher court in Australia on this question, especially with respect to the dying declaration of an Aborigine. It follows from Chief Justice Burbury's view in Savage that not only *Madobi* but also *Wadderwarri* (which was relied on in *Madobi*) were wrongly decided, unless, other grounds can be found for distinguishing the two cases. O'Regan has argued that the basis of Mr Justice Kriewaldt's decision in *Wadderwarri* was not that theological belief was a condition of admissibility but rather that 'a common law rule of evidence founded in England on the existence of a special kind of theological belief could not apply

2425 *R v Madobi* (1963) 6 FLR 1, 3.
2426 [1967] PNGLR 119.
2427 id, 130.
2428 ibid.
2429 [1971-72] PNGLR 258.
2430 id, 263.
2431 *R v Savage* [1970] Tas SR 137.
2432 id, 145-6.

to the very different circumstances of the Northern Territory, in a case where the declarant was an Aborigine' because in 'the Northern Territory the common law was received only so far as applicable to local circumstances'.[2433] But Justice Kriewaldt did not hold that the dying declarations rule had no application in the Territory, only that it had no application to persons such as the deceased. The trend of later cases is to the effect that the rule applies to persons irrespective of their own personal belief in a supernatural judgment after death. If the rule was received at all, and if these cases represent the modern law, the rule must be taken to apply to all persons within the jurisdiction, irrespective of their personal beliefs or background. It would appear that more recent judicial statements in Australia and Papua New Guinea favour the view that theological belief is not a condition of admissibility of dying declarations. This is certainly the better approach.[2434] This means that the dying declaration of a traditional Aborigine would be admissible without any requirement for proof or investigation of any personal religious belief.[2435]

611. ***Proposals for Change***. To exclude Aborigines (or traditionally oriented Aborigines) as a class from the scope of the dying declarations rule is indefensible. To presume lack of relevant religious beliefs on the part of a traditional Aborigine is indefensible. Moreover in many Aboriginal communities statements made by persons or the point of death have particular significance, especially made in the presence of appropriate relatives or family members.[2436] It is true that this area of law is unsatisfactory for other reasons. As Cross expresses it, 'dying declarations are an anomalous exception to the hearsay rule, and there is something to be said in favour of strict conditions of admissibility'.[2437] It may be that reform of this area of the law of evidence will see the category 'dying declarations' disappear completely,[2438] with the result that problems which might arise with respect to the dying declarations of Aborigines would disappear. However, while the dying declarations rule continues, it is impossible to defend such categorical assumptions about Aboriginal religious belief as were made in cases such as *Wadderwarri*. In the absence of further clarification of the law, and for the avoidance of doubt, it should be declared that dying declarations made by Aborigines shall not, by reason of their adherence to traditional beliefs, be held inadmissible on grounds of any lack of belief in a religious sanction or supernatural judgment.

## Other Evidentiary Issues

612. ***Compellability of an Aboriginal Spouse***. Two further miscellaneous issues arise within the scope of this Chapter. The first relates to the compellability of an Aboriginal traditional spouse. Chapter 14 deals with the recognition of Aboriginal traditional marriages for particular purposes, including spousal compellability in the law of evidence. It recommends that the parties to an Aboriginal traditional marriage, appropriately defined, should only be compelled to give evidence for and against each other in criminal cases to the same extent as persons married under the general law.[2439]

613. ***Identification Evidence***. Identification evidence is often important, especially in criminal cases. It may take several forms, but the most common is eye-witness identification. The trial judge has a discretion to exclude identification evidence that would otherwise be admissible, for example because its prejudicial effect outweighs its probative value. He may warn the jury of the dangers of identification evidence, and he may order an acquittal where the identification is suspect and there is no other supporting evidence for the identification. The general question of identification evidence is considered in this Commission's Report on *Evidence* (Interim), where proposals for reform are put forward, on the basis that more stringent controls on

2433 RS O'Regan, 'Aborigines, Melanesians and Dying Declarations' (1972) 21 *ICLQ* 176.

2434 It is supported by Cross, 487-8; JH Buzzard, R May, MN Howard, *Phipson on Evidence*, 13th edn, Sweet and Maxwell, London, 1982, para 24-71.

2435 In some of the earlier cases which considered the question of dying declarations it appeared that a de facto presumption had developed of accepting dying declarations by assuming religious beliefs unless it was obvious that they were non-existent (for example a professed atheist or a tribal Aborigine). This is clearly an undesirable approach, as a fictional assumption about the general community's religious views. See P Brazil, 'A Matter of Theology' (1960) 34 *ALJ* 195. The common law rules relating to dying declarations have in some Australian jurisdictions been modified by statute. The Crimes Act 1900 (NSW) s 408 and the Evidence Act 1910 (Tas) s 81K both provide that a declaration is admissible if the person making the declaration was aware of his danger and believed he would shortly die, even though he may have entertained some hope of recovery.

2436 As pointed out by D Bell, *Submission 491* (16 September 1985) 8.

2437 Cross, 491.

2438 cf Tas LRC, *The Hearsay Rule*, Hobart, Government Printer, 1972; SA, Criminal Law and Penal Methods Reform Committee (Chairman: Justice RF Mitchell) Third Report, *Court Procedure and Evidence*, Adelaide, 1975; ALRC 26, vol 1 para 691; vol 2 App C para 80.

2439 See para 313-5, and see also para 316 (marital communications).

the admissibility of identification evidence are needed.[2440] The Department of Aboriginal Affairs in a submission to the Commission made the following comments:

> We would endorse any proposal that the court retain power to exclude identification evidence if necessary, and would also support a mandatory judicial warning about the dangers of identification evidence. It is especially important in Aboriginal cases to ensure that any identification parades have been carefully conducted because of the danger of witnesses depending primarily on skin colour as an identifying feature. This applies to witnesses who may use skin colour as a primary feature when identifying a person of whom they have only had a 'fleeting glimpse'. We are also concerned that court identification of Aboriginals without prior out-of court identification could be similarly biased.[2441]

Plainly, this is an argument about reform of the general law, not directed to the present Terms of Reference. However the interrogation requirements discussed in Chapter 22, in particular the requirement of notification of a lawyer or Aboriginal legal service and the requirement of a prisoner's friend to be present during an identification parade,[2442] will help in overcoming the difficulties referred to. No further recommendation with respect to identification evidence involving Aborigines is required.

2440 ALRC 26, vol 1, ch 18.

2441 Submission to Evidence Reference, 23 December 1982. Particular care should also be taken where there are avoidance relationships between Aboriginal participants in identification parades.

2442 See para 571.

# 24. The Proof of Aboriginal Customary Laws

> It is of course a fact, and one that cannot and should not be disregarded, that the appellant did suffer serious injuries at the hands of other members of the community. But, if it is to be asserted that conduct of this sort should be seen as a reflection of the customary law of an Aboriginal community or tribal group ... there should be evidence before the Court to show that this was indeed the case and that what happened was not simply the angry reactions of friends of the deceased, particularly when the killing of the deceased and the injuring of the appellant occurred at a time when some, if not all, of those participating had been drinking.[2443]

> The question of customary compensation to be taken into account on sentence must be clearly identified in each case ... The concept of customary payment must be clearly proven and its relationship to the concept of penalty ... There must be a proper evidentiary basis upon which the Courts can develop the law. This is significant in this country where there are many different customs. General statements by counsel can no longer be considered sufficient.[2444]

614. ***The Importance of Proof***. Under the present law the existence and content of Aboriginal customary laws, where these are relevant for any purpose, are essentially questions of fact and not of law.[2445] Similarly under the Commission's proposals it will be necessary for a party to a case who relies upon Aboriginal customary laws in some way to prove the relevant rule or proposition. This and the succeeding chapters of this Part examine whether the rules of evidence relating to proof of Aboriginal customary laws are satisfactory, or whether amendment or clarification of those rules is desirable. This question is of considerable importance. If the recognition of Aboriginal customary laws in any field is to be successful, information about those laws must be available. Decisions based on assertions or assumptions about Aboriginal customary laws which are unproven may lead to mistaken or ill-informed decisions, which can do considerable harm.

615. ***Problems with the Common Law***. The common law rules concerning proof of local customary laws are dealt with in this Chapter. The central difficulty they present arises from the distinction between matters of fact and matters of opinion and from the courts' insistence on first-hand evidence based on personal knowledge of matters of fact. Matters of opinion, as distinct from fact or personal experience, can only be testified to by 'experts' and it is not clear whether persons lacking formal educational qualifications in a relevant discipline can be regarded as experts. If the common law rules were to be strictly applied to the proof of oral traditions and customs (which are usually classified as matters of opinion rather than fact) then it could be that the evidence of Aborigines initiated into and familiar with their laws and traditions would be inadmissible. In the leading Australian case on the point, *Milirrpum v Nabalco Pty Ltd*,[2446] this result was avoided, but only by applying the rule about reputation evidence, an exception to the common law rules applicable in the special circumstances of that case, but one which would not be generally applicable.[2447]

616. ***Other Issues Distinguished***. It is necessary to distinguish the proof of Aboriginal customary laws in Australian courts from several related problems, which are dealt with elsewhere:

- the expression of Aboriginal community opinions or sentiments in sentencing, discussed in Chapter 21;[2448]
- the application of Aboriginal customary laws and community views in the settlement of disputes through local justice mechanisms, if these are established in some form, discussed in Part VI of this Report;
- the proof of facts relating to standards of living (eg health or housing) in Aboriginal communities, where this is relevant, eg in custody cases or in sentencing.[2449]

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2443 *Mamarika v R* (1982) 42 ALR 94, 99 (Northrop, Toohey, Sheppard JJ).
2444 *Acting Public Prosecutor v Nitak Manglilonde Taganis of Tampitanis* [1982] PNGLR 299, 302 (Kapi DCJ).
2445 See para 70-82 for examples of the need to prove Aboriginal customary laws under the general law at present.
2446 (1971) 17 FLR 141.
2447 See para 641 for this aspect of the decision.
2448 See para 510, 524-31.
2449 See para 365, 523.

## Proof of Customary Laws: The Overseas Experience

617. ***Relevance of Overseas Experience***. Many overseas jurisdictions have been presented with the problems, including evidentiary problems, of reconciling the imported common law with indigenous custom recognized as law for various purposes. This is so, for example, in India and many former British African territories. Their experience with proof of local customary laws is therefore instructive.[2450]

618. ***India***. There is a very long history of recognition of local customary law in civil matters in India, in particular in matters of family law and succession. As a result, proof of local custom has been a matter of considerable importance, litigated in many cases.[2451] Proof of custom has been aided by the provisions of the Indian Evidence Act 1872, drafted by James Fitzjames Stephen and still in force. It was intended to be a simplified and improved statement of the common law of evidence appropriate for local needs. For present purposes its more important provisions are:

- *Section 32(4)*: statements by persons deceased or who cannot be found as to any public right or custom are admissible. The term 'public right or custom' is stated to include local customs adhered to by any substantial number or class of people,[2452] but in fact the requirement of a substantial number of persons is not strictly applied.[2453]

- *Section 48*: in determining the existence of any general custom or right, 'the opinions, as to the existence of such custom or right, of persons who would be likely to know of its existence if it existed' are admissible. Thus 'a tribal or family custom may be proved by general evidence as to its existence by members of the tribe or family who would naturally be cognizant of its existence'.[2454] The effect of s 48, in cases involving the proof of local custom, is to dispense with the requirement in s 45 that opinion evidence be given only by experts, that is, persons specially skilled in the relevant 'science or art'. Opinion evidence as to the existence of a custom or rule can be given by members of the customary group who, though they lack formal training, 'would be likely to know of its existence if it existed'. This does not exclude evidence by outside experts as to local custom. Though not specifically mentioned in section 45, a person skilled in local custom may be an expert for this purpose: 'the study of customs and manners of tribes and castes, the areas occupied by them and other connected matters come within the meaning of "science or art"'.[2455]

- *Section 49*: 'When the court has to form an opinion as to the usages and tenets of any body of men or family ... the opinions of persons having special means of knowledge thereon are relevant facts'. Section 49 has been held to apply to proof of customary adoption, to family customs of primogeniture, and so on.[2456] Between them, s 48 and 49 provide a flexible and comprehensive basis for admitting evidence of customary law, even though that witness is not formally qualified as an expert.

- *Section 57*: the courts may take judicial notice of frequently proved or notorious customs, and many refer to appropriate books or documents of reference.[2457] In this way judicial notice is frequently taken of established custom.[2458]

To summarise, the courts have been aware of 'the difficulty of applying all the strict rules that govern the establishment of custom in [England] to circumstances which find no analogy' there.[2459] Local custom 'must

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2450 Only common law jurisdictions will be dealt with here, since the problem is essentially one of reconciling the need to prove indigenous or local customary law with the common law rules of evidence (and, to a degree, the common law adversarial system).

2451 See MP Jain, 'Custom as a Source of Law in India' (1963) 3 *Jaipur LJ* 96, 118-23, and the cases cited in the *All India Reports Manual* (AIR Manual), 3rd edn, ed DV Chitaley & SA Rao, Nagpur, 1971, vol 10, sv 'Indian Evidence Act, 1872'; JF Stephen, *A Digest of the Law of Evidence*, London, 1876; repr Garland, NY, 1978, which reproduces most of the 1872 Act. cf PC Sarkar, *Sarkar's Law of Evidence*, SC Sarkar & Sons Private Ltd, Bombay, 1980.

2452 *AIR Manual*, 31-3, 157. cf Sarkar, 402-6.

2453 *AIR Manual*, 157.

2454 ibid; Sarkar 555-7.

2455 *AIR Manual*, 135. On the other hand certain general customs are simply the law of the land:

> The Hindu law on marriage is the law of the land and it is the duty of the Courts themselves to interpret the law of the land and apply it and not to depend on the opinion of the witnesses however learned they may be. (ibid.)

2456 id, 158-9; Sarkar, 558-60.

2457 *AIR Manual*, 179-80; Sarkar, 604.

2458 Jain, 120; Sarkar 606-9. On documentation of custom see Jain, 120-3.

2459 *Abdul Hussein Khan v Bibi Sona Dero* (1917) 45 IA 10, 14 (Lord Buckmaster).

be proved by satisfactory evidence, but without insisting ... on the rigorous and technical rules which would be applicable to such a case in England'.[2460] The effect of the Indian Evidence Act provisions is that local or family custom 'may be proved by general evidence as to its existence by members of the tribe or family who would naturally be cognisant of its existence and its exercise without controversy'.[2461] On the other hand, the rules of evidence are not dispensed with entirely. To be admissible the evidence of custom must be clear and not speculative. In particular the courts distinguish for this purpose between expressions of concluded opinion and the mere repetition of hearsay.[2462]

619. ***African Commonwealth Countries***. Problems of ascertainment and proof of local customary law in Commonwealth countries in Africa have been the subject of much writing and many decisions, and in a number of countries the rules and procedures have undergone a degree of change. What follows is a brief summary only.[2463]

- The Indian Evidence Act has had a considerable influence in a number of these countries. Its provisions were adopted, and with some variation still apply, in many East African countries and in Nigeria.[2464] In consequence, a similar degree of flexibility in the laws of evidence with respect to proof of local custom exists as in India.

- Whether or not a local Evidence Act was adopted, the basic principle applied by the superior courts has been that customary law has to be proved by evidence, unless it has by frequent proof become sufficiently well-known to be judicially noticed. Thus customary law is treated substantially as if it were a question of fact, for the purpose of proof. The Privy Council in *Angu v Attah* in 1916 stated the rule in authoritative terms:

  > As is the case with all customary law, it has to be proved in the first instance by calling witnesses acquainted with the native customs until the particular customs have, by frequent proof in the court, become so notorious that the courts will take judicial notice of them.[2465]

  The rule has been widely applied.[2466] Disputes have for the most part concerned the circumstances in which judicial notice of custom could be taken, and the relative weight of evidence compared with previous judicial decisions on custom, rather than the basic rule that unwritten customary law has to be proved by satisfactory evidence.

- On the other hand, native courts and judges were assumed to know their own customary rules and practices, and formal evidence of them was not taken.[2467] For some time local administrative officers sitting as magistrates adopted the same practice, but the rule that evidence of custom was required eventually prevailed.[2468]

- As in India, the practical requirements of proof of custom by those familiar with it prevailed over technical rules of expert evidence and (though to a lesser extent) hearsay. As the Privy Council observed in 1931, in considering the possible modification of older customary rules:

  > It is the assent of the native community that gives a custom its validity, and, therefore ... it must be shown to be recognised by the native community whose conduct it is supposed to regulate.[2469]

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2460 *Rosan Ali Khan v Chaudri Asghar Ali* (1929) 57 IA 29, 33.
2461 *Ahmad Khan v Channi Bibi* (1925) 52 IA 379, 383-4.
2462 *AIR Manual*, 32.
2463 See esp A Allott, *New Essays in African Law*, Butterworths, London, 1970, 255. See also A Allott, 'The Judicial Ascertainment of Customary Law in British Africa' (1957) 20 *Mod L Rev* 244; JS Read, 'Customary Law under Colonial Rule' in HF Morris & JS Read, *Indirect Rule and the Search for Justice. Essays in East African Legal History*, Clarendon Press, Oxford, 1972, 167 esp 187-99; HF Morris, *Evidence in East Africa*, Sweet & Maxwell, London, 1968, 112-18; A St J Hannigan, 'Native custom, its similarity to English conventional custom and its mode of proof (1958) 2 *JAfL* 101; J Lewin, 'The Recognition of Native Law and Custom in British Africa' (1938) 20 *J Comp Leg IL* (3rd ser) 16; AJ Kerr, 'The Application of Native Law in the Supreme Court' (1957) 74 *SAfLJ* 131.
2464 See also Evidence Ordinance 1955 (Singapore) s 45ff as in force in the Christmas and Cocos (Keeling) Islands.
2465 (1916) Gold Coast Privy Council Judgments (1874-1928) 43, 44; Allott (1970) 259-60.
2466 id, 260-1.
2467 NA Ollennus, 'The Structure of African Judicial Authority and Problems of Evidence and Proof in Traditional Courts' in M Gluckman (ed) *Ideas and Procedures in African Customary Law*, Oxford, Clarendon Press, 1969, 110; Allott (1970) 280-3.
2468 HF Morris, 'English Law in East Africa: A Hardy Plant in Alien Soil', in Morris & Read, 73, 98.
2469 *Eshugbayi Eleko v Officer Administering the Government of Nigeria* [1931] AC 662, 673 (Lord Atkin).

This assent could best be proved by members of that community themselves, although expert evidence was also admissible.

- The Nigerian Evidence Act 1945 makes this clear. It provides in part:

> 14. (1) A custom may be adopted as part of the law governing a particular set of circumstances if it can be noticed judicially or can be proved to exist by evidence. The burden of proving a custom shall lie upon the person alleging its existence.
>
> (3) Where a custom cannot be established as one judicially noticed it may be adopted as part of the law governing particular circumstances by calling evidence to show that persons or the class of persons concerned in the particular area regard the alleged custom as binding upon them ...
>
> 56. (1) When the court has to form an opinion upon a point of foreign law, native law or custom, or of science or art ... the opinions upon that point of persons specially skilled in such foreign law, native law or custom, or science of art ... are relevant facts.
>
> 58. In deciding questions of native law and custom the opinions of native chiefs or other persons having special knowledge of native law and custom and any book or manuscript recognised by natives as a legal authority are relevant.[2470]

These provisions facilitate proof of customary law, where judicial notice of it cannot be taken. But no proof of customary law is required in customary and Sharia (Muslim) courts.[2471]

- Apart from formal evidence and judicial notice, a number of other techniques have been widely used to ascertain customary law in Africa. These include assessors and various written sources including attempts at codification.[2472] These are discussed later in this Part.[2473]

- In more recent times there has been a reaction against the equation of customary law with fact, supposed to underlie the rule in *Angu v Attah*.[2474] A number of countries (including Ghana, the jurisdiction from which the appeal in *Angu v Attah* was brought), have reversed the rule by statute, providing that customary law is to be determined as a matter of law.[2475] Thus s 11 of the Customary Law (Application and Ascertainment) Act 1969 of Botswana provides that:

> If any court entertains any doubt as to the existence or content of a rule of customary law relevant to any proceedings, after having considered such submissions thereon as may be made by or on behalf of the parties, it may consult reported cases, textbooks and other sources, and may receive opinions either orally or in writing to enable it to arrive at a decision in the matter:
>
> Provided that:
>
> (i) the decision as to the persons whose opinions are to be consulted shall be one for the court, after hearing such submissions thereon as may be made by or on behalf of the parties;
>
> (ii) any cases, textbooks, sources and opinions consulted by the courts shall be made available to the parties;
>
> (iii) any such oral opinion shall be given to the court in the same manner as oral evidence.[2476]

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2470 See TA Aguda, *Law and Practice Relating to Evidence in Nigeria*, London, Sweet & Maxwell, 1980 for text and commentary. 'Custom' is defined in s 2 as 'a rule which, in a particular district, has, from long usage, obtained the force of law'. Section 14(2) regulates judicial notice of custom: this applies if the custom 'has been acted upon by a court of superior or co-ordinate jurisdiction in the same area to an extent which justifies the court asked to apply it in assuming that the persons or the class of persons concerned in the area look upon the same as binding in relation to circumstances similar to those under consideration': id, 41-3. See also s 15 (facts showing how a custom was understood and applied, relevant), 33(d) (reputation evidence), 62 (opinions as to usages and tenets). The Nigerian Act is based to a considerable extent on the Indian Evidence Act 1872, but with the addition of express references to native law and custom in these provisions.

2471 Aguda, 119-22.

2472 Allott (1970) 266-70, 283-90.

2473 See ch 26.

2474 See Allott (1970) 271-4.

2475 Courts Decree 1966 (Ghana) para 65. See Allott (1970) 295.

2476 id, 297. And see CMG Hinsworth, 'The Botswana Customary Law Act 1969' (1972) 16 *JAfL* 4.

Apart from ensuring procedural regularity, such a provision increases the scope for judicial ascertainment and control over the content of customary law, possibly at the expense of oral evidence from the local community. However such evidence, remains relevant and admissible.

620. ***Papua New Guinea: The Present Law***. The common law rules of evidence received in Papua New Guinea apparently created uncertainty about the ascertainment of customary law.[2477] In 1063 the Native Customs (Recognition) Ordinance was passed. It is now called the Customs Recognition Act. Section 2, entitled 'proof of custom', provides:

> (1) Subject to this section, questions of the existence and nature of custom in relation to a matter, and its application in or relevance to any particular circumstances, shall be ascertained as though they were matters of fact.
>
> (2) In considering a question referred to in Subsection (1), a court -
>
> (a) is not bound to observe strict legal procedure or apply technical rules of evidence; and
>
> (b) shall-
>
> (i) admit and consider such relevant evidence as is available (including hearsay evidence and expressions of opinion); and
>
> (ii) otherwise inform itself as it thinks proper.
>
> (3) For the purposes of the decision on a question referred to in Subsection (1) a court may -
>
> (a) refer to books, treatises, reports or other works of reference, or statements by Local Government Councils or committees of Local Government Councils (whether published or not); and
>
> (b) accept any matter or thing in such works as evidence on the question; and
>
> (c) of its own motion, call such evidence or require the opinions of such persons as it thinks fit,
>
> but this subsection does not limit in any way the discretion of the court in obtaining evidence or informing itself on the question.
>
> (4) Notwithstanding Subsection (1), where an appeal is made from a decision of a court, the court that hears the appeal may consider *de novo* a question referred to in that subsection that arises in the appeal.[2478]

Section 2 does not say that questions of custom are matters of fact, only that they are to be ascertained as if they were. Indeed, under s 20 and schedule 2.1 of the Constitution (1975), 'custom is adopted, and shall be applied and enforced, as part of the underlying law': once ascertained, custom is applied as law (unless inconsistent with statute or 'repugnant to the general principles of humanity').[2479] The Parliament is empowered to pass a law to 'provide for the proof and pleading of custom for any purpose', but no such law has yet been passed.[2480] Under these provisions, custom constitutes part of the underlying law, to be applied as such in appropriate cases. Village courts take 'judicial notice' of custom in the sense of applying it without specific evidence: this is consistent with the theory of village courts as local, relatively informal, courts applying custom.[2481] On the other hand, the Supreme Court has apparently been reluctant to take judicial notice of custom and is increasingly insisting on regular proof of custom rather than mere assertion.[2482] So, while there is no requirement that custom be specifically pleaded,[2483] it is still ascertained

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2477 CJ Lynch, 'A Description of Aspects of Political and Constitutional Development and Allied Topics' in BJ Brown (ed) *Fashion of Law in New Guinea*, Butterworths, Sydney, 1969, 39, 62-3, referring to the 'unsolved problem of whether the state of custom should be proved as a matter of fact or of law, or simply given judicial recognition'.

2478 *Revised Edition of the Laws of Papua New Guinea* vol 1 ch 19. s 7 provides that if a question of conflict of custom arises and 'the court is not satisfied on the evidence before it as to that question', the court 'may adopt the system that it is satisfied the justice of the case requires'.

2479 Constitution, Schedule 2.1(2). See para 407.

2480 id Sch 2.1(3)(a). For the PNG Law Reform Commission's proposal see para 621.

2481 Village Courts Act (Revised Laws ch 44) s 26, requiring a village court to apply any relevant custom ascertained under the Customs Recognition Act in all matters before it, whether or not inconsistent with any Act. s 26(3) allows local government councils to declare local customs, with binding effect on Village Courts. There have been no such declarations. On the theory of Village Courts as customary local courts see DRC Chalmers, 'A History of the Role of Traditional Dispute Settlement Procedures in the Courts of Papua New Guinea' ind Weisbrot, A Paliwala, A Sawyerr (ed) *Law and Social Change in Papua New Guinea*, Butterworths Sydney, 1982, 169, 183-5. For the practice see A Paliwala, 'Law and Order in the Village: The Village Courts', id, 191, 202-8, esp 205, 208. See further para 770-5.

2482 See *Acting Public Prosecutor v Nitak Mangdonde Taganis of Tampitanis* [1982] PNGLR 299; see para 405.

and applied by way of exception from the general law, despite its position under the Constitution as part of the 'underlying law'. Custom is ascertained by adducing evidence in each case, but 'technical rules of evidence' such as those excluding hearsay or non-expert opinion evidence are excluded (Customs Recognition Act s 2(2)). Assessors are also sometimes used, despite an uncertain statutory basis for them.[2484] Little has been done so far to provide documentary proof of custom,[2485] or to restate or codify it.[2486]

621. ***The PNG Law Reform Commission's Proposals***. In its Report No 7 (1977), the Papua New Guinea Law Reform Commission made proposals for ascertainment of the underlying law, including custom. These were intended to assist Parliament in fulfilling the Constitutional mandate to develop the underlying law. The Report envisages that the courts will take an active role in developing the underlying law, incorporating elements of custom or common law and reasoning by analogy from these and other sources.[2487] Section 11 of the proposed legislation deals with the problems of evidence and information:

> (1) If in any matter a question of underlying law is involved and a court is considering whether
>
> (a) to apply a rule of customary law ...
>
> the parties in the proceedings shall be permitted to bring evidence or information to help the court decide the matter.
>
> (2) Counsel appearing in any matter are under a duty to assist the court by calling evidence and obtaining information and opinions that would assist the court in determining
>
> (a) the nature of the relevant rule of customary law ... and
>
> (b) whether or not to apply [that rule].
>
> (4) When determining a question as to the existence or content of a rule of customary law, the court may take judicial notice of customary law and shall consider the submission made by or on behalf of the parties and may -
>
> (a) refer to statements, declarations and records of customary law made by local, provincial or other authorities; and
>
> (b) consider evidence and information concerning the customary law relevant to the matter before it by a person who the court is satisfied has knowledge of the customary law relevant to the proceedings; and
>
> (c) refer to cases, books, treaties, reports, or other works of reference; and
>
> (d) of its own motion obtain evidence and information and obtain the opinions of persons as it thinks fit.
>
> (5) Notwithstanding any provision in any other law, when a court ... is considering a question of customary law, the court may make further enquiries into any of the matters set out in Subsection (4).

Section 11 is clearly intended to assist the court in an active (to some extent inquisitorial) task of developing the underlying law: the proof of existing custom is only one aspect of this. But the effect of s 11(4) is in practice to avoid most or all of the restraints imposed by the law of evidence on proof of customary law. The PNG Commission said of s 11(4) that:

> It allows the court to take judicial notice of customary law. This is different from the *Native Customs (Recognition) Act* 1963, Section 5, under which proof of customary law is a matter of fact. However, it is unrealistic to expect that all the courts will have knowledge of, or ready access to knowledge of, customary law. Therefore, the section provides a variety of ways of ascertaining customary law.[2488]

If the PNG Law Reform Commission's recommendations are accepted and the courts do in fact adopt the active law-developing role envisaged for them, it may well be that local custom will be superseded by a 'customised' form of general law, different from any single system of customary law in Papua New Guinea.

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2483 cf d Weisbrot, 'Interpretation of Laws in Papua New Guinea: Custom and the Criminal Law in Conflict' in Weisbrot, Paliwala & Sawyerr, 59, 90.

2484 Weisbrot, 91-2.

2485 id, 93-4. However the PNGLRC's Customary Law Project is continuing: see R Scaglion (ed) *Homicide Compensation in Papua New Guinea Problems and Prospects*, PNGLRC Monograph No 1, 1981.

2486 Weisbrot, 95-6.

2487 See PNGLRC Report No 7, *The Role of Customary Law in the Legal System*, Waigani, 1977, 22-5.

2488 id, 24.

Indeed, it has been suggested that this is desirable.[2489] Whether this development will occur, or whether the existing situation of custom being taken into account in particular ways when its content has been proved or agreed will continue, remains to be seen. The PNG Law Reform Commission's Report No 7 has not been tabled in Parliament, and no decision on its implementation has been taken. in the meantime, the judges have not been particularly receptive to new and creative uses of customary law, or indeed to developing new ways of ascertaining it.[2490]

## Proof of Aboriginal Customary Laws: The Australian Experience

622. ***The Need for Proof of Aboriginal Customary Laws***. This brief review of the overseas experience supports the need for examination of the laws of evidence and procedure in Australia so far as they affect proof of Aboriginal customary laws. It is perhaps significant that modifications to the common law have been found necessary in many jurisdictions. There is also a need to examine alternative forms of proof, including the use of assessors and documentary sources, and related procedural changes.[2491] On the other hand, the developments, which have occurred in some African countries and are proposed for Papua New Guinea, where the courts take judicial notice of custom in many cases and play a more active role in its application, are not necessarily appropriate for Australia. Such developments would require the courts to identify with and assist in developing customary law. In a country such as Australia, where the relevant customary laws are those of a small indigenous minority, this is not appropriate. On the contrary, there is a real risk of Aborigines losing control over their own customary laws, a matter which was referred to in Part II of this Report, and which is of understandable concern to many Aborigines.[2492] There is only very limited scope in Australia for courts to take judicial notice of particular Aboriginal rules or customs, or to rely on previous decisions on these matters. The reasons for this include:

- the variability of Aboriginal customary laws between different groups;
- their differing application depending on the circumstances of each case;
- the court's incapacity directly to develop or control them;
- the need for flexibility; and
- the fact that they are generally not recorded in writing.

Suggestions for greater involvement by Australian courts in developing and systemarising customary law through precedent or judicial notice are, for these reasons, misplaced. As Allott points out, 'once customary law has been codified or settled by judicial decision, its binding force depends on the statute or the doctrines of precedent; in short, it ceases to be customary law'.[2493] Even if possible this is, in the Australian context and for reasons given already, certainly not desirable.

623. ***Codification of Aboriginal Customary Laws Rejected***. For the same reasons, while there is merit (for anthropological as well as legal reasons) in unofficial attempts to record customary law, its codification is not desirable. This point has been made both in submissions and evidence to the Commission.[2494] Overseas attempts at codification of customary law have not been successful, and are now generally regarded as misconceived.[2495] Aboriginal customary laws should be proved in particular cases, rather than being codified or subject to a regime of judicial notice. Aborigines themselves will necessarily play a central role in the proof of their laws' common law rules of evidence which might impede this are examined later in this Chapter.

624. ***Judicial Insistence on Proof***. It appears that Australian courts are increasingly insisting upon proof of Aboriginal customary laws or traditions in cases where they are relevant, rather than relying upon statements

2489 Weisbrot, 97.
2490 cf B Narakobi, 'History and Movement in Law Reform in Papua New Guinea', in Weisbrot, Paliwala & Sawyerr, 13, 22.
2491 See ch 26 where these alternatives are discussed.
2492 See para 199-208.
2493 Allott (1970) 278. cf AN Allott, AL Epstein and M Gluckman, 'Introduction' in Gluckman, 31-3.
2494 eg HC Coombs, *Submission 157* (28 May 1980); N Williams & R Marika, *Submission 41* (15 October 1977) 25.
2495 TW Bennett & T Vermuelen, 'Codification of Customary Law' (1980) 24 *JAfL* 206, 207. cf Allott (1970) 289-90.

of counsel which may be vague, unsubstantiated or poorly informed. In granting an application for bail in *R v Joe Murphy Jungarai*, Chief Justice Forster commented:

> In these circumstances and notwithstanding the fact that persons charged with murder are normally not allowed to be released on bail I considered it right to make the order which I did make. This should not be regarded as a precedent in the sense that the mere assertion of similar facts from the bar table will be sufficient, in my view at least, to justify a similar order in every case. There must be credible evidence to support such a course being taken. As is well known at least to the people of the Northern Territory, Aboriginal customs vary greatly from place to place and, of course, the circumstances of killings must differ. What may be almost certain to occur in one place with respect to the circumstances of one killing may be unlikely to happen in another with respect to the circumstances of another killing.[2496]

In *Moses Mamarika v R* the Federal Court declined to hold that injuries inflicted on the defendant by way of 'payback' were a reflection of Aboriginal customary law in the absence of evidence to that effect (although the Court nonetheless took the payback into account sentencing).[2497] And in *Jacky Anzac Jadurin v R* the Federal Court declined to hold that Aboriginal customary law allowed the accused to beat his wife in the circumstances of the case, in the absence of clear evidence to that effect. The Court said:

> There was a suggestion made on behalf of the appellant, not by way of justification but by way of explanation, that in Aboriginal society it is not unusual for women to be beaten if they do not obey their husbands. In response to a question along those lines ... a relative of the appellant who gave evidence in mitigation of sentence, answered 'yes, that happens sometimes, yes ...'. In our opinion that answer goes no further than to describe something which may occur from time to time; it goes no distance towards establishing that such conduct is an accepted facet of Aboriginal society. The suggestion overlooks the fact that, at least in the experience of the courts, when such beatings take place it is usually after a great deal of alcohol has been consumed. It also ignores the very complex web of relationships between men and women in Aboriginal society. In the present case we are of the opinion that the Court should approach the matter on the basis that the appellant beat his wife in anger when they were drunk, and that this brought about her death.[2498]

Obviously much will depend on the facts of each case, and there can be practical and logistic difficulties in marshalling and presenting appropriate formal evidence in some cases. But this insistence on evidentiary support for assertions of Aboriginal custom or tradition is salutary. It avoids the risk of accepting uncontested assertions of counsel based on instructions from his client. Experience in a number of cases has shown that such assertions may be without foundation.[2499] However evidence has often been presented and acted on although given in an informal way by persons who would not qualify as experts for this purpose. Admittedly this evidence is often presented as part of a submission on sentence. There has always been greater informality and flexibility in applying the rules of evidence in relation to sentencing, and judges have sometimes been prepared to accept statements from the bar table, for example, as to the nature of any 'traditional punishment' the accused was likely to receive.[2500] However similar evidence from persons who would not qualify as experts may have to be given on issues of substantive liability, both under the present law and under the Commission's proposals, and in such cases the rules of evidence are likely to be applied more strictly.

625. ***Some Australian Cases***. Before examining in more detail the present Australian rules regulating the proof of Aboriginal customary laws it is helpful to set out some cases in which such proof was given. The best known of these, *Milirrpum v Nabalco Pty Ltd*,[2501] is discussed later in this Chapter. But other significant examples include the following:

- *Police v Ralph Campbell*.[2502] The accused was charged before a magistrate with unlawful wounding. The victim was, he claimed, his traditional wife. The police prosecutor sought to call her, claiming that she was merely a *de facto* spouse, and that in any event she was a compellable witness because the law does not recognize traditional Aboriginal marriage for this purpose. Thus apart from the dispute as to

2496 (1981) 9 NTR 30, 31-2. See para 495.
2497 (1982) 42 ALR 94, 99. See para 496.
2498 (1982) 44 ALR 424, 425-6.
2499 See eg *R v Sydney Williams*, unreported, SA Supreme Court (Wells J), 14 May 1976. See para 492 for an account of the case. It should be pointed out that Wells J did not directly rely on counsel's assertions in that case. Nonetheless, had evidence of the real situation and views of the community been available, the defendant's situation would have appeared in a quite different light.
2500 See eg *R v Patrick Nagorili (known as Nuguwalli)*, unreported, NT Supreme Court, 6 March 1984, transcript, 13. On evidence on sentence see also para 523-31.
2501 (1971) 17 FLR 141 (NT Supreme Court, Blackburn J).
2502 Unreported, NT Court of Summary Jurisdiction (J Murphy SM) 8 June 1982. For proof of traditional marriage see further para 228, 265-9.

the law of compellability,[2503] there was a dispute between prosecution and defence over whether the victim and defendant were married under their customary laws. Evidence was given by the victim that they were married under the customary law of the Aranda. They were not promised to each other, and the Aranda have no ceremonial marriage. But they were 'right skin for each other', and their marriage was accepted by her parents and the Hermannsburg community.[2504] On the other hand the victim's father's evidence was confused: this seemed to result in part from a confusion between 'church marriage' and 'bush marriage', and in part from opposition to their relationship in view of the defendant's violence towards the victim. Thus he said that 'bush marriage was no good', that they were not 'really married from church'.[2505] The confusion was reduced to some extent by the victim's mother who stated that her daughter and the defendant were 'bush married' and that they were allowed to live together in Aboriginal law. In response to a question whether the marriage was a 'good marriage' (presumably in the sense of a valid one), she replied that it was not, because of the fighting between the victim and the defendant.[2506] A local Lutheran Pastor then gave evidence that a second marriage (such as this was for the defendant) was possible under Aranda tradition after the break down of the former marriage.[2507] The defendant himself denied the relevance of a marriage ceremony and asserted that they were married: 'our marriage is a marriage in the tribal way as the white and white'.[2508] On this evidence Mr Murphy SM found that the victim was 'the tribal wife of the defendant'.[2509]

- *R v Andy Marnarika*.[2510] The defendant, 34 years old, was charged with murder at Groote Eylandt. He pleaded not guilty to murder but the Crown accepted a guilty plea to manslaughter, on the basis that he did not intend to kill or do grievous bodily harm. The defendant arid the victim had been drinking separately at the local club. No-one saw them speaking during the evening and they did not leave the club at the same time. Later in the evening the defendant walked to the victim's house, went into the bed room and without any conversation speared the deceased once in the chest with a shovel-nose spear, killing him. He claimed that he did not intend to inflict any serious harm but 'to spear him a bit, not to finish him'. The apparent motive was an argument the previous night: the police investigation failed to uncover any other motive. The defendant's counsel, in a successful submission in mitigation of sentence, called as witnesses the community adviser at the time of the offence, the current community adviser, a leading member of the defendant's clan (who was the defendant's brother and Council President at Umbakumba), two members of the victim's clan (both of whom were leaders at Angurugu, the other Aboriginal community on Groote Eylandt, and also participants in the subsequent settlement of the dispute), and a member of another related clan. The evidence indicated that, while the defendant was in police custody awaiting trial, a large meeting was held at Umbakumba between the different clans. As a result a full-scale *minungudawada* or trial by spears was held forthwith. A large number of spears were thrown at the defendant's brothers and family.[2511] Only one person was struck, causing minor bruising. The trial by spears removed the tension and disturbance in the community, and especially among the victim's relatives, allowing the defendant to return. As a member of the victim's clan said, 'we settled this business'.[2512] Justice Gallop sentenced the defendant to 3 years imprisonment with hard labour, with a 12 month non-parole period. This, however, was suspended on the defendant's entering into a recognisance in the sum of $500 to be of good behaviour for a period of 3 years. Justice Gallop said, in part:

> I take account of the impact on the accused himself, of this trial by ordeal that his clan was subjected to and I accept the evidence which has been put to me about that by Mr Josif and the other witnesses. A very significant matter for a sentencing power is the attitude of the community, particularly the community in which the accused lives and works. I have abundant evidence here before me of the attitude of the community

2503 As to which see para 313-15.
2504 Transcript of proceedings, 68-70, esp 70.
2505 id, 72-8, esp 77-8. He conceded that the defendant was a 'real man'; ie fully initiated and therefore competent to marry.
2506 id, 80-1.
2507 id, 86.
2508 id, 91-2.
2509 id, 130. She was however held to be compellable because the law does not yet recognise traditional marriages for this purpose: id, 132-3. See para 313-15.
2510 Unreported, Northern Territory Supreme Court (Gallop J) 9 August 1978.
2511 For details see transcript of proceedings 16-19 (P Josif, then community adviser, who witnessed the *minungudawada* but spoke more generally about relevant local custom). Counsel indicated that a 'large number' of other witnesses were available to be called, and that their evidence would be to the same effect: id, 29-30. He did not call more than four Aboriginal witnesses because the evidence was not really disputed, and because these were 'not matters that tribal people wish to talk about directly' (id, 29).
2512 id, 28.

> and it is that having considered the non-violent nature of this man and his good standing generally in that community and the fact that the trial by spears has already been carried out, imprisonment is not expected by the community in relation to this offence and this accused.[2513]

No objection was made by the Crown to the admissibility of any of the evidence led for the defence, despite the fact that some of it at least was probably strictly inadmissible. Some of the community adviser's evidence, relating to the consequences of the *minungudawada*, may well have been inadmissible as hearsay; some of it was clearly opinion evidence, although the qualifications of the witness to speak about the community as an expert may have made this admissible.[2514] On the other hand this witness observed, and all 4 Aboriginal witnesses participated in the settlement process, and under ordinary rules of evidence all could testify as to what they saw and did and as to their understanding of its significance. Beyond that, the Aboriginal witnesses gave some evidence about customary law and gave their opinions about the resolution of conflict within the community. Whether such evidence is technically admissible is unclear,[2515] but it was admitted without any difficulty and, indeed, acted upon by the judge in sentencing the defendant.

626. ***The Work of the Aboriginal Land Commissioner***.[2516] The work of the Aboriginal Land Commissioner under the Aboriginal Land Rights (Northern Territory) Act 1976 (Cth) is also relevant, as the most extensive formal inquiry yet held into matters of Aboriginal customary laws. The Commissioner, though a judge,[2517] does not act in a strictly judicial capacity in hearing land claims. His function is to determine the traditional Aboriginal owners of certain Crown land in the Northern Territory on an application by or on behalf of Aborigines claiming to be tradition al owners, and to recommend to the Minister, in appropriate cases, the granting of such land under the Act. The Commissioner conducts an administrative inquiry, not a judicial proceeding, and he is not bound by the laws of evidence. On the other hand, he can take evidence on oath or affirmation,[2518] can compel attendance of witnesses and the production of documents,[2519] and in exercising his functions is clearly bound by the rules of natural justice. He has to determine the existence of traditional owners and the strength of their attachment and then, applying the principles stated in s 50(4), to make recommendations for the granting of the land claimed or any part of it.[2520] Obviously a crucial part of his role is to hear and assess evidence of traditional attachment to land:

> each land claim involves a particular group of people claiming traditional ownership of a particular area of land. Naturally, as claims proceed, some general body of principle emerges and in a real sense each claim builds upon the knowledge and experience gained in earlier ones. But in the end findings and recommendations must have regard to the material presented. Hence decisions about the identity of traditional Aboriginal owners may vary.[2521]

In a number of respects land claim hearings have been conducted rather like court proceedings. The Commissioner's Practice Directions for hearings, as revised in 1979, stated:

> The hearing of an application will be conducted broadly along the lines of conventional court proceedings although with less formality ...
>
> Witnesses will be asked to take an oath or make an affirmation before giving evidence and ordinarily will be subject to cross-examination.[2522]

To this extent the hearings provide useful guidance on the evidentiary problems of proof of Aboriginal customary law.

- *Admissibility of Evidence*. Practice Direction 25 (1979) stated:

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2513 id, 43.
2514 For the witness' qualifications (approx 3 years work experience and some limited formal training) see id, 13-14 (examination), 24-5 (cross-examination). On the qualification of expert witnqsses in this area see par& 632.
2515 See para 641-2.
2516 See also G Neate, 'Legal Language across Cultures: Finding the Traditional Aboriginal Owners of Land' (1981) 12 *Fed L Rev* 187.
2517 Aboriginal Land Rights (Northern Territory) Act 1976 (Cth) s 53.
2518 ss 54(5), 54A(1).
2519 ss 54(1), (3), (6), 54A(2), (3).
2520 *In re Toohey: ex parte Meneling Station Pty Ltd* (1982) 44 ALR 63, 80 (Wilson J).
2521 *Anmatijirra & Alyawarra Land Claim to Utopia Pastoral Lease*, AGPS, Canberra, 1980, para 89.
2522 See Aboriginal Land Commissioner, *Annual Report 1978-1979*, AGPS, Canberra, 1980, 13 (Practice Directions 21, 24). These directions were apparently revoked by the issue of a new set of directions in 1985, which do not deal with this question: Aboriginal Land Commissioner, Practice Directions, Darwin, 22 May 1985.

> There will be no strict adherence to the ordinary rules of evidence. In particular as a general proposition hearsay evidence will be admitted, the weight to be attached to it to be a matter for submission and determination. Relevancy will be the controlling test for the admissibility of evidence.[2523]

In the *Borroloola Land Claim*, the first claim heard, counsel for two Northern Territory primary producers' organizations argued that evidence given by witnesses Avery and McLaughlin was hearsay. Counsel for the claimants denied this. The Commissioner, Justice Toohey, commented that in his view:

> ... both counsel were half right. When Mr Avery described the nature of the landowning group, the concept of clans and territories, the attributes of ownership of land and the nature of semi-moieties and sub-sections, he was speaking as an expert dealing with general anthropological propositions. The fact that his opinions were to some, perhaps to a large, extent based upon what he had been told by Aboriginals did not make that evidence hearsay any more than it would be right to describe as such the opinion of a physician based in part upon what he had been told by patients over a number of years. At the same time, when Mr Avery and Mr McLaughlin recounted what Aboriginals had said regarding the whereabouts of their own country, they were in my opinion giving evidence of a hearsay nature. But as I indicated in the practice directions I do not adhere strictly to the rules of evidence; indeed there would be serious difficulties for all concerned if I did. In my opinion the issue is more one of the weight to be attached to that sort of evidence. This depends to some extent upon the degree to which it is corroborated. What Mr Avery and Mr McLaughlin were told was substantially supported by the testimony of Aboriginals given at Borroloola.[2524]

More recently the Commissioner has re-emphasised both the hearsay character of much of the evidence, but also its value. In his reasons for decision of 1 October 1985 in the *Warumungu Land Claim*, Justice Maurice commented that:

> what an anthropologist is told, at least in the context of gathering materials for the purposes of a land claim, is hearsay through and through.[2525]

However he also stated that:

> Statements spontaneously volunteered by Aboriginal informants may be of great value in assessing a claim. No doubt this is why they are so often cited when anthropologists and others give evidence. Ordinarily, self-serving statements made out of court are excluded because of the ease with which they can be manufactured. However, in land claims the value of and place for such materials has been clearly demonstrated.[2526]

- *Informality in Presentation of Evidence*. Considerable informality has been allowed in the presentation of evidence. For example videotaped discussions and meetings have been presented, although these would not be admissible under the ordinary rules of evidence in establishing the truth of things said.[2527] Evidence has been taken from persons (especially women) in groups, although the Commissioner has observed that care needs to be taken in ensuring that what is said really does represent the view of the group and not only vocal individuals within it.[2528] Considerable leeway has been shown in allowing interpreters to discover what is being said and to express it clearly[2529]: this contrasts with the sometimes pedantic insistence of the ordinary courts on 'literal' interpretation. As the Commissioner commented, 'it is important to retain flexibility in the way in which evidence is presented'.[2530]

- *Importance of Anthropological Evidence*. From the first, the evidence of anthropologists has been of great importance, and not merely in giving form and better expression to that of the Aboriginal claimants. As the then Commissioner (Justice Toohey) said in an early Report:

> In the course of the Warlpiri hearing it was said by those called on behalf of the claimants: 'We would emphasise however that we are not the authorities on the matters of land ownership, only the recorders on behalf of the traditional owners.' That may underplay the role of anthropologists, for their opinions have been

2523 Aboriginal Land Commissioner, *Annual Report 1978-1979*, 13.
2524 *Borroloola Land Claim*, AGPS, Canberra, 1978, para 47-8.
2525 Reasons for Decision, 9.
2526 id, 123.
2527 id, para 14.
2528 *Alyawarra & Kaidtja Land Claim*, AGPS, Canberra, 1979, para 57; *Limmen Bight Land Claim*, AGPS, Canberra, 1981, para 38-40. See further para 646-8.
2529 eg *Limmen Blight Land Claim* para 41.
2530 *Limmen Bight Land Claim*, para 41. For precautions relating to restricted, secret or confidential material see para 649-56.

> valuable in regard to the language of the Act itself. As the principles to be applied under the Act become settled the position of the anthropologists as recorder only will, perhaps, become more accentuated.[2531]

There has been no tendency for the role of the anthropologist to be reduced in this way, in subsequent claims. In the *Utopia Land Claim*, Justice Toohey said:

> the Land Rights Act is not an exercise in anthropology. Anthropologists are the recorders of material and their capacity to collate it, aid in its presentation to a hearing and comment upon it has proved invaluable. The views of anthropologists concerning the language of the Act, especially where the statute uses terms having a reasonably understood meaning in anthropology, are of great assistance and I have relied upon them in earlier hearings. But, in the end, what has to be done is to determine the meaning of the words used in the Act, construe the definition accordingly and then apply it to the material presented ... There was general agreement that, with the exception of the phrase 'local descent group', neither the term 'traditional Aboriginal owners' nor the components used in its definition were technical anthropological expressions or had any generally accepted meaning among anthropologists.[2532]

Anthropologists continue to play a highly significant role in the hearings, as indicated by the practice of appointing consultant anthropologists in relation to each claim, in the responsibility of the consulting anthropologist to report to the Land Commissioner on the interpretation of the anthropological evidence, and in the involvement of anthropologists in the preparation of Claim Books in each case.

- *Relationship between Aboriginal and Anthropological Evidence*. Apart from questions of the meaning of technical terms in the Act, the evidence of anthropologists has chiefly been important in relation to that of Aborigines themselves. Successive Commissioners have stressed the need for corroboration of the anthropological evidence by that of the Aboriginal claimants, although there has been some difference of approach as to how this is best done.[2533] In the early hearings, the practice was to hear the evidence of the anthropologists after that of the Aboriginal claimants. The advantages of this, in Justice Toohey's view, included:

  > an immediate familiarity with the claimants and with the country. Also it cast the anthropologists more truly in 'the role of recorders. A comprehensive and helpful claim book was available to give a broad picture before the evidence began but there were not the same tendency to see the anthropological model as one into which the evidence of all witnesses should fit.[2534]

  The same course was taken in the later *Utopia Claim*.[2535] More recently, however, Justice Maurice has insisted that the anthropological evidence, or at least the written materials on which it is based, should be available both to the Commissioner and to counsel for objectors, before the Aboriginal evidence is given, on the ground that this enables a more thorough testing of the Aboriginal evidence.[2536] Whichever procedure is adopted, the land claims experience supports the view that the evidence of traditional Aborigines is a primary source of information about the content and working of their customary laws.

## Methods of Proving Aboriginal Customary Laws

627. ***Approaches to Reform***. Existing rules relating to the admissibility of evidence can create difficulties for the proof of Aboriginal customary laws. In some cases these difficulties have been avoided by informality in presentation of evidence, and by the absence of any objection from counsel opposing, or because the tribunal concerned has operated informally, without strictly applying the rules of evidence. But in other cases evidence of Aboriginal customary laws has been able to be admitted only by ingenious efforts to bring it within exceptions to the hearsay rule. This Commission's recommendations in its Evidence Reference are

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2531 *Alyawarra & Kaititja Land Claim*, para 58.

2532 *Anmatyirra and Alyawarra Land Claim to Utopia Pastoral Lease*, para 89, 105-8. Further on the anthropologist's role as 'expert' see K Maddock, '"Owners", "Managers" and the Choice of Statutory Traditional Owners by Anthropologists and Lawyers' in N Peterson and M Langton (ed) *Aborigines. Land and Land Rights*, Canberra, AIAS, 1983, 211.

2533 eg *Borroloola Land Claim*.

2534 *Yingawunarri (Old Top Springs) Mudbura Land Claim*, AGPS, Canberra, 1980, para 20.

2535 *Anmatijirra and Alyawarra Land Claim to Utopia Pastoral Lease*, para 13.

2536 In the *Warumungu Land Claim* the Commissioner initially held inadmissible hearsay expert evidence tendered after the Aboriginal evidence (except where it tended to explain or clarify uncertainties raised by that evidence. Subsequently, however, he allowed the evidence, but decided to reconvene the hearing in the locality of the claim to allow the Aboriginal claimants to be further examined on the basis of the anthropological evidence so given: *Warumungu Land Claim*, Reasons for Decision (1 October 1985) 123-6.

relevant to this question. However that Reference deals only with federal courts. Specific reform of the law of evidence as it relates to the proof of Aboriginal customary laws in State and Territory courts may be necessary. One approach would be to follow the Papua New Guinea Customs Recognition Act, s 2(2)(a) of which dispenses with 'strict legal procedure' and the 'technical rules of evidence' in the proof of custom.[2537] Both Australian and overseas experience shows the need for flexibility and a degree of informality in this area. Excluding the rules of evidence (at least as binding rules, since they might remain relevant as guides to the reliability of evidence) would seem both a simple and a comprehensive solution. However it is necessary first to examine in more detail the present law, and any obstacles it poses to proof of Aboriginal customary laws and traditions. The law of evidence is intended to facilitate rather than to hamper the process of trial, by allowing relevant material to be placed before the court and excluding material which is likely to be unreliable or excessively prejudicial. It is also intended to make the trial process more efficient, by saving time and cost. Excluding the law of evidence would have the disadvantage of leaving arguments about admissibility unstructured, and depriving the courts of the assistance which satisfactory rules might give. Only if the existing rules, however modified to assist with proof of Aboriginal customary laws, can be shown to be wholly unsuitable for present purposes, would their wholesale exclusion be appropriate.

## Expert Evidence

628. ***The Range of Experts***. One way of proving Aboriginal customary laws is to call as witnesses persons expert in the study of those laws and of Aboriginal societies generally. Among established academic disciplines the most obviously relevant is anthropology, although experts in Aboriginal customary laws might also be lawyers, political scientists or linguists. It is necessary to discuss, first, the law relating to qualification as an expert, and secondly, the limitations on what an expert may testify to, and the application of the law on these questions to expert evidence about Aboriginal customary laws.

## Who is an Expert?

629. ***The Present Law***.[2538] When an expert testifies as to facts, his evidence is subject to the same rules of admissibility as any other witness. However, an expert is regarded by the law as competent to express opinions relating to the subject of his expertise, where such opinions are relevant to a matter in dispute. This compares with a non-expert who, except in some limited cases,[2539] is not permitted to express opinions in this way. This distinction between 'opinion' and 'fact' is not a clear or precise one. There is a continuum of cases from the certain or indisputable to the uncertain and disputable, from the concrete to the abstract, from the particular to the general. However propositions about Aboriginal customary laws, and indeed any general propositions about the culture, organisation or dynamics of an Aboriginal group or community, would normally be classified as opinions in this sense.[2540]

630. ***Qualification as an Expert***. An expert, in the legal sense, is one who by reason of special qualifications is able to express informed opinions on some subject requiring special knowledge or understanding.[2541] The courts have been reasonably flexible in accepting particular subjects as fields of expertise, and there is no doubt that the customary laws of an Aboriginal group, and the social anthropology of Aborigines (including the study of their traditions and culture) are areas of expertise in that sense. However, there is uncertainty in the Australian case-law as to the kind of qualifications required for recognition as an expert: is a course of study or formal academic training required, or is it sufficient that the expertise is obtained from experience in the field without any such training? Some Australian cases suggest the need for 'an organized branch of knowledge in which the witness is an expert',[2542] for 'study and instruction in some relevant scientific or specialised field [enabling the witness] to express an opinion, founded on scientific or specialised knowledge

2537 See para 620. The PNGLRC's proposals for proof of custom (para 621) do not differ in substance, since they allow the court to refer to 'evidence and information' given by a person with 'knowledge of the customary law', and, generally, to obtain 'evidence and information and ... the opinions of persons' as the court thinks fit.

2538 For a detailed account see ALRC 26, *Evidence* (Interim), AGPS, Canberra, 1985, vol 1, para 155-61, 346-63. On anthropologists as expert witnesses see also L Rosen, 'The Anthropologist as Expert Witness' (1977) 79 *American Anthropologist* 555.

2539 See para 640.

2540 Even here, distinctions may have to be drawn between knowledge of particular matters based on personal experience and observations and more general or abstract propositions, which will be matters of 'opinion'. See eg *Yildiz v R* (1983) 11 A Crim R 115 (Vic FCt). For the difficulties and dangers that expert anthropological evidence of Aboriginal customary laws can pose see K Maddock, 'Aboriginal Customary Law' in P Hanks and B Keon-Cohen (ed) *Aborigines and the Law*, George Allen & Unwin, Sydney, 1984, 212, 217-8.

2541 *Clark v Ryan* (1960) 103 CLR 486, 491 (Dixon CJ).

2542 id, 501-2 (Menzies J).

thus acquired'.[2543] On the other hand, other judges have referred simply to the fact that the witness was sufficiently skilled in the subject, irrespective of how that skill was obtained. Thus in *Wise Bros Pry Ltd v Commissioner for Railways (NSW)*, Justice McTiernan simply required proof of 'sufficient skill and experience to enable [the witness] to express an opinion which would assist the jury to form a correct judgment' on the issue,[2544] and in *Clark v Ryan* Chief Justice Dixon seems to have adopted a similar view.[2545] English courts have always adopted the more liberal approach, and it may be that this view will prevail in Australia.

631. ***Qualification as an Expert in Foreign Law***. The view that a witness may be qualified as an expert in Aboriginal customary laws by reason of 'habit and experience as distinct from a course of study' gains support from the analogous question of expertise in foreign law. Aboriginal customary laws are not, of course, foreign to Australia. In one sense, however, they are and will remain 'foreign': Australian courts lack 'organs to know and to deal with'.[2546] Aboriginal customary laws just as much as (in many cases, much more than) questions of foreign law. So far as foreign law is concerned, it is established that:

> Expert evidence as to foreign law may be given by witnesses who have acquired a special experience therein. It is not necessary that they should be professional lawyers, but it is sufficient if they occupy a post which gives them experience in the law of the foreign country.[2547]

The law has adopted a less rigorous approach to the qualification of experts in foreign law than in other contexts. The approach is a flexible one, looking to the substance of the expert's knowledge rather than to the way in which it was acquired.[2548] One reason for this (as for other modifications of the opinion evidence rule) is probably simple necessity. It is unlikely that fully qualified lawyers from foreign jurisdictions will be available in many cases. In the case of Aboriginal customary laws, different considerations apply. 'Practitioners' and 'experts' in Aboriginal customary laws, if they exist, exist in Australia. But the difficulty of identifying them, combined with the persuasive analogy with proof of foreign law, is likely to lead to similar flexibility by the courts in accepting experts on Aboriginal customary laws.

632. ***Qualification as an Expert on Aboriginal Customary Laws***. Undoubtedly anthropologists, and other persons with formal qualifications in other disciplines related to Aboriginal customary laws and traditions, may qualify as experts. Several issues do however arise.

- *The Need for Local Experience*. As the courts realise, Aboriginal customary laws vary widely throughout Australia. One question is the extent to which someone claiming expertise in the customary laws of a particular group is required to have experience of that group (as distinct from experience of field work among Aborigines elsewhere.) The question arose in *Milirrpum v Nabalco Pty Ltd*.[2549] One of the two anthropological experts is that case, Professor Berndt, had extensive experience of working in the relevant area. The other, Professor Stanner, had considerably less (two visits, totalling 11 days). His evidence was objected to by the Solicitor General on this ground, but was admitted. Justice Blackburn said:

  > The Solicitor-General did not dispute Professor Stanner's general qualifications as an anthropologist, but contended that because of his limited experience with the Aboriginals of the subject land he was not qualified to give expert evidence in this case. In such a matter, it seems to me, there can be no precise rules. The court is expected to rule on the qualifications of an expert witness, relying partly on what the expert himself explains, and partly on what is assumed, though seldom expressed, namely that there exists a general framework of discourse in which it is possible for the court, the expert and all men according to their degrees of education, to understand each other. Ex hypothesis this does not extend to the interior scope of the subject which the expert professes. But it is assumed that the judge can sufficiently grasp the nature of the expert's field of knowledge, relate it to his own general knowledge, and thus decide whether the expert has sufficient experience of a particular matter to make his evidence admissible. The process involves an exercise of personal judgment on the part of the judge, for which authority provides little help ... In this case I do not hesitate to rule that Professor Stanner's general anthropological experience, combined with his special study

2543 *Weal v Bottom* (1966) 40 ALJR 436, 438 (Barwick CJ).
2544 (1947) 75 CLR 59, 72.
2545 (1960) 103 CLR 486, 492, stating that the words 'profession or course of study' in this context 'have a wide meaning and application'.
2546 *Sussex Peerage Case* (1844) 11 C & F 85, 115 (Lord Brougham LC), cited by Lord Wright in *Lazard Bros & Co v Midland Bank Ltd* [1933] AC 289, 298.
2547 *Luder v Luder* (1963) 4 FLR 292, 295 (Joske J).
2548 On proof of foreign law see JA Gobbo, D Byrne, JD Heydon (ed) *Cross on Evidence*, 2nd Aust edn, Butterworths, Sydney, 1979, 648-51; *Dicey & Morris on the Conflict of Laws*, 10th edn, Stevens, London, 1980, vol 2, 1206, 1209-11; ALRC 26, vol 1 para 156, 352-60.
2549 (1971) 17 FLR 141.

> of Aboriginals of other parts of Australia and his short periods of study in the subject land, qualify him to give admissible evidence on the matters in issue in this case. The shortness of his experience in the subject land may be relevant to the weight of his evidence.[2550]

This view is consistent with the general tendency to treat degrees of expertise as going to weight rather than admissibility. No doubt the decision in Professor Stanner's case was not difficult. A court which refused to hear his views on matters of Aboriginal social and religious life and land-holding would render itself ridiculous. Marginal general expertise combined with lack of local experience might well disqualify a witness, but such a witness would not often be produced anyway. In this area the law seems to be flexible enough to cope with the wide variety of cases.

- *Persons Not Formally Qualified*. A further question is whether it is possible to qualify as an expert by reason of experience of a traditional community, even though formal educational qualifications are lacking. In practice, the courts have heard evidence from persons such as local community advisers, ministers of religion, and government officials. To some extent this is done out of necessity. There might be no-one available with formal expertise in relation to a particular community. Or the evidence may simply be admitted without objection, as an aspect of the laxity and non-observance of the rules which, as Justice Muirhead observed in *R v William Davey*, characterises much of the case law.[2551] But the better view is that a witness may qualify as an expert in the legal sense, by 'habit and experience', although in such cases a more searching scrutiny of the nature and depth of the experience is likely to be required before attaching weight to the evidence.[2552] This is the desirable position, as the Commission concluded in its *Evidence* Report, where it recommended that:

  > Where a person has special knowledge, skill, experience or training, evidence of the opinion of that person based wholly or partly on that knowledge, skill, experience or training is admissible.[2553]

  In practice the courts do now hear evidence on customary law matters from persons qualified by 'habit and experience' in traditional Aboriginal customs and laws. Care needs to be taken in such cases that the scope and expertise is defined and not exaggerated. But the law on this point appears to be, if not entirely clear, at least moving in the right direction.[2554]

## The Scope of Expert Evidence

633. ***The 'Ultimate Issue' Rule***. Even though a witness qualifies as an expert in a particular field, the law imposes limits on the admissibility of the evidence the expert may give. For present purposes, three such limiting rules need to be mentioned: the ultimate issue rule, the basis rule, and the common knowledge rule.[2555] The first of these is the so-called 'ultimate issue' rule, so called because it relates to the ultimate issue or issues of fact to be decided in the case. In *Samuels v Flavel* Chief Justice Bray discussed 'the propriety of a witness, particularly an expert witness, giving evidence in terms of the ultimate issue to be decided by the court'. In his view:

> Such evidence is probably still strictly inadmissible ... though it is, in fact, often admitted without objection and there may be cases when it must be admitted ... because it is impossible for the opinion of the expert to be conveyed in any other form. But in my view it should be allowed only where absolutely necessary ...[2556]

It seems clear that this represents the law in Australia,[2557] although the rule is quite often evaded, if not ignored, in practice. This makes it difficult to predict when it will be applied to exclude what might seem to be highly relevant evidence. For these and other reasons the rule has often been criticised.[2558] It would be artificial and unhelpful to prohibit a witness from expressing a considered opinion as to Aboriginal customary laws or traditions, even though the opinion related directly to an 'ultimate issue'. In *R v Isobel Phillips*, for example, the admission of opinion evidence as to the operation and content of relevant

2550 id, 160.
2551 *R v William Davey*, unreported, Federal Court of Australia (13 November 1980), reasons for judgment, 30-1.
2552 *Napaluma v Baker* (1982) 29 SASR 192, 194 (telling J).
2553 ALRC 26, vol 1 para 141-9; Draft Evidence Bill, cl 68.
2554 See further para 637.
2555 For the 'basis' rule see para 634-5. For the common knowledge rule see para 636.
2556 [1970] SASR 256, 261-2, cited with approval by Young CJ, *R v Wright* [1980] VR 593, 597-8. See ALRC 26, vol 1 para 359.
2557 cf *R v Sender* (1982) 44 ALR 139, 143 (Everett J); *R v Handley & Afford* [1984] VR 229.
2558 See ALRC 26, vol 1 para 359, 743, for examples of such criticisms.

customary laws so as to give rise to a defence of duress, was not objected to by counsel, and was accepted by the court.[2559] The Commission is not aware of any customary law cases where such a restriction has been imposed. Whether this is because a direct expression of opinion on such matters is, in Chief Justice Bray's terms, 'necessary'[2560] or simply because the rule is not applied in practice, is unclear.[2561] Comments by Justice Blackburn in *Milirrpum v Nabalco Pry Ltd* support the view that the rules of evidence do not preclude expressions of expert opinion on Aboriginal customary laws even where these relate directly to an ultimate issue in the case. He said:

> A further objection to the evidence of the expert witnesses was that they tended to apply unwarranted concepts of their own to the actual facts of Aboriginal behaviour and to talk in terms of such concepts, even to the extent of expressing themselves in terms which anticipated the findings of the Court on the issues before it. It was maintained, for example, that questions and answers expressing the idea of the 'rights' of clans of Aboriginals to particular land were objectionable ... In my opinion it is ... far preferable to allow the expert to answer questions in terms of 'rights', 'claims', etc, provided that the Court at all times remembers that there are two questions which are solely for it to decide. The first is ... whether the conclusion of the expert, be it expressed in terms of 'rights', etc, or not, is one to which the Court should come. This is a question of fact. In deciding it, the Court must be alert to the danger of allowing its conclusions to be unjustifiably affected by the use of words which are only tentatively appropriate ... The second is whether what is tentatively called the 'right' can be subsumed under some category which enables it to be recognized at common law, for example whether it can be properly characterized as a right of property. This is a matter of law.[2562]

The objection to admissibility, though not based on the 'ultimate issue' rule, was closely related to it, and was rejected in terms that clearly imply rejection of the ultimate issue rule itself in such circumstances. This result is certainly desirable, and if Justice Blackburn's views represent the Australian law there appears to be no special need for reform in the present context. But the significance of *Milirrpum's* case is reduced because it was a civil matter. The tendency has been for the ultimate issue rule to be relied on by the courts to exclude evidence that might assume undue weight in the mind of a jury. The absence of a jury in civil cases removes this concern. This Commission, in its *Evidence* Report, recommended abolition of the 'ultimate is sue' rule in federal courts.[2563] This recommendation would not apply to State or Northern Territory courts, and it is possible that the ultimate issue rule might be an obstacle to testimony about Aboriginal customary laws, at least in criminal cases.

634. ***Opinions Based in Part on Hearsay: The 'Basis' Rule***. One important limitation on expert evidence relates to expert opinion evidence based upon hearsay (that is, upon statements of another person the truth of which is relied on, and which do not fall within one of the exceptions to the hearsay rule).[2564] Experts, like all other witnesses, are bound by the hearsay rule. Expert evidence which is merely the repetition of hearsay would be excluded by that rule. But much opinion evidence, especially in the social sciences, is based upon an accumulation of data including hearsay. To exclude opinion evidence based in part on hearsay would be to exclude expert evidence in many fields of human behaviour.[2565] This applies particularly to expert anthropological evidence of Aboriginal customary laws. In the last analysis all anthropological opinion of an unwritten culture such as traditional Aboriginal culture is based upon a combination of observing Aboriginal life and events and talking to Aborigines about them. Moreover observation without explanation is of limited value: in matters of culture, tradition and customary law it is the explanations and beliefs of the participants (their 'internal attitude')[2566] which give form and meaning to their actions. It appears that the existing Australian law does not exclude altogether expert evidence based in part on hearsay. The High Court summarised the position in these terms:

> Statements made to an expert witness are admissible if they are the foundation, or part of the foundation, of the expert opinion to which he testifies but ... if such statements, being hearsay, are not confirmed in evidence, the expert testimony based on them is of little or no value.[2567]

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2559 *R v Isobel Phillips*, unreported, NT Court of Summary Jurisdiction (19 September 1983) Murphy SM. See para 430, 648.
2560 *Samuels v Ravel* [1970] SASR 256, 261-2.
2561 Whether the 'ultimate issue' rule applies to questions of foreign law is also unclear.
2562 (1971) 17 FLR 141, 164-5.
2563 ALRC 26, vol 1 para 743; Draft Evidence Bill, cl 69.
2564 The most important exception for present purposes is that relating to 'reputation' evidence, as to which see para 641. On the problem of expert evidence based on hearsay see R Pattenden, 'Expert Evidence based on Hearsay' [1982] *Crim L Rev* 85.
2565 cf *English Exporters Pty Ltd v Eldonwall* [1973] 1 Ch 415, 420 (Sir Robert Megarry VC) (property valuers).
2566 HLA Hart, *The Concept of Law*, Oxford, Clarendon Press, 1961, 55-6.
2567 *Gordon v R* (1982) 41 ALR 64, 64. cf *Ramsay v Watson* (1961) 108 CLR 642.

Whether the law excludes unsupported expert opinion evidence which is based entirely or substantially upon inadmissible evidence is unclear.[2568] In criminal cases there is a discretion to exclude unsupported opinions of this kind, if led by the prosecution, on the ground that they are of no probative value or that their probative value is outweighed by their likely prejudicial effect. In civil cases, however, the lack of admissible evidence to support opinion evidence based on hearsay will usually go to weight rather than admissibility.[2569]

635. ***Opinions of Aboriginal Customary Laws Based in Part on Hearsay***. It seems then that Australian law draws a distinction between the mere repetition of hearsay (which is inadmissible) and the expression of an opinion by a qualified expert based in part on hearsay (which is not inadmissible). The same distinction has been drawn, in the context of proof of customary laws, in overseas jurisdictions such as India,[2570] and by the Aboriginal Land Commissioner.[2571] It was also drawn in the leading case, *Milirrpum v Nabalco Pty Ltd*. There, a major objection to the expert evidence was its hearsay basis. Like the other objections, it was rejected. Justice Blackburn said:

> I do not think it is correct to apply the hearsay rule so as to exclude evidence from an anthropologist in the form of a proposition of anthropology — a conclusion which has significance in that field of discourse. It could not be contended — and was not — that the anthropologists could be allowed to give evidence in the form: 'Munggurrawuy told me that this was Gumatj land.' But in my opinion it is permissible for an anthropologist to give evidence in the form: 'I have studied the social organization of these Aboriginals. This study includes observing their behaviour; talking to them; reading the published work of other experts; applying principles of analysis and verification which are accepted as valid in the general field of anthropology. I express the opinion as an expert that proposition X is true of their social organization.' In my opinion such evidence is not rendered inadmissible by the fact that it is based partly on statements made to the expert by the Aboriginals.[2572]

This decision was based partly upon acceptance of the ordinary methods of anthropology as a 'valid field of study and knowledge', and partly upon the unacceptable distinction that would otherwise exist between the natural and social sciences:

> The anthropologist should be able to give his opinion, based on his investigation by processes normal to his field of study, just as any other expert does. To rule out any conclusion based to any extent upon hearsay — the statements of other persons — would be to make a distinction, for the purposes of the law of evidence, between a field of knowledge not involving the behaviour of human beings (say chemistry) and a field of knowledge directly concerned with the behaviour of human beings, such as anthropology ... I do not believe that the law of evidence requires me to put chemistry into one category and anthropology into another.[2573]

Justice Blackburn preferred to view the matter as 'one of weight, rather than of admissibility of the evidence'.[2574] This view is cited with apparent approval in the leading Australian text on the law of evidence,[2575] and it is consistent with the views expressed by the High Court.[2576] However the matter cannot be regarded as settled. In England a more restrictive rule may exist, at least in criminal cases,[2577] and in the *Warumungu Land Claim*, Justice Maurice expressed at least tentative disagreement with Justice Blackburn's reasoning.[2578] It may also be that the courts would take a more cautious position on opinion evidence based on hearsay when the evidence was before a jury. *Milirrpum* was a civil matter.

636. ***The Common Knowledge Rule***. Expert testimony on matters of 'common knowledge' is generally inadmissible.[2579] The courts have been reluctant to permit experts to testify on matters which juries are capable of assessing for themselves. However they are likely to accept that juries are not acquainted with

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2568 It is probable that it does, at least in criminal cases: see *R v Handley & Alford* [1984] VR 229.

2569 If there is a basis rule, certain exceptions to it probably exist. The most important for present purposes relates to material commonly relied upon in the particular profession or trade. *Borowski v Quayle* (1966] VR 382. It is probable that this exception is a narrow one, and doubtful whether it would render admissible, anthropological or other evidence of Aboriginal customary laws which was otherwise inadmissible because based on hearsay. But cf *H v Schering Chemicals* [1983] 1 All ER 849, 883 (Bingham J), recognizing as admissible material (including writings in reputable journals) which is `part of the general corpus of knowledge falling within the expertise of an expert in this field', even though that material contained otherwise inadmissible hearsay.

2570 *AIR Manual*, 32. See para 618.

2571 See para 626.

2572 (1971) 17 FLR 141, 151.

2573 ibid.

2574 ibid.

2575 Cross, 428.

2576 See n 122.

2577 *R v Turner* [1975] QB 834; *R v Abadom*; [1983] Crim L Rev 254; Pattenden, 130.

2578 Reasons for Decision (1 October 1985) 10-13.

2579 *Toohey v Metropolitan Police Commissioner* [1965] AC 595; *R v Turner* [1975] QB 834.

Aboriginal customary laws, traditions and ways of life generally. and in fact this has been the case: the rule has not been applied to exclude anthropological evidence of Aboriginal customs, practices and traditions.[2580]

637. ***Conclusion: Expert Evidence***. To summarise, the common law rules with respect to the qualification of persons as expert witnesses about Aboriginal customary laws, traditions and culture appear to be satisfactory. A possible exception is the case of expertise acquired by experience without formal study or qualifications, although it appears that the Australian common law is moving towards allowing sufficient experience of this kind to qualify a person as an expert witness.[2581] However potential difficulties in the proof of Aboriginal customary laws arise from the ultimate issue and basis rules.[2582] There is considerable uncertainty about whether these rules may exclude opinion evidence about Aboriginal customary laws which relate to an ultimate issue in the case, or which is based upon statements not proved in evidence, especially in criminal cases. Evidence of Aboriginal customary laws should not be excluded by the ultimate issue rule. The basis rule should be treated, in criminal as well as civil cases, as a matter going to weight rather than admissibility.[2583] A rule which required anthropologists to prove the basis of any opinion would create practical difficulties in many cases. In addition opinions may be based on material that cannot or will not be formally admitted, eg because of questions of secrecy. Insistence on an exclusionary rule would deprive the court of much valuable evidence. However, before considering whether and what reform is called for, the rules relating to the admissibility of Aboriginal evidence about their customary laws need to be discussed.[2584]

## Aboriginal Evidence

638. ***The Law of Evidence and Aboriginal Testimony about Customary Laws***. The importance of Aboriginal evidence of Aboriginal customary laws has been stressed already, and is shown both by cases in Australian courts and by the experience of the Aboriginal Land Commissioner.[2585] But the rules of evidence, strictly applied, could preclude much Aboriginal evidence about their customary laws. Apart from restrictions as to the content of evidence (where non-experts are in no better position than experts[2586]) there is the more basic question whether traditional Aborigines would, under a strict application of the rules of evidence, be permitted to give 'opinion' evidence about their customary laws at all. It would be odd if the courts were to accept the opinions of outside experts, while declining to accept as expert the opinions of the Aborigines whose customs and traditions were at issue. Admittedly there is value in the systematic study and evaluation which an established discipline can provide. Not all traditional Aborigines are 'learned in their law'. and there may be difficulties, for those who are, in speaking about aspects of the law which are not their particular responsibility. An outside expert may be able to provide a more comprehensive account, and an analytical framework within which the particular issue can be grasped. But to say that traditional Aborigines fully initiated into their laws are nonetheless not experts in the legal sense is difficult to justify. Yet that assumption has been made. In *Milirrpum v Nabalco Pty Ltd*[2587] it was assumed that the Aboriginal clan leaders who gave evidence were not experts. Objections to the admissibility of their evidence had to be dismissed on other, special, grounds.[2588] If this assumption reflects the common law, clearly some change is needed.

639. ***Rejection of Special Rules for Proof of Aboriginal Customary Laws***. In some jurisdictions evidence of native custom and law is admitted notwithstanding the ordinary rules of evidence. However in *Milirrpum v Nabalco Pty Ltd* Justice Blackburn, while acknowledging 'the unusual difficulties associated with the proof of matters of Aboriginal law and custom', felt obliged to fit the evidence into the framework of 'the rules of the law of evidence which the Court is bound to apply'.[2589] The difficulties were perhaps made greater by the rejection of overseas analogies. Discussing the rule in *Angu v Attah* and related material,[2590] Justice Blackburn said:

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2580 This Commission's Evidence Report (Interim) recommends that the common knowledge rule be abolished: ALRC 26, vol 1, para 750.
2581 See para 630, 631. For the analogy with proof of foreign law see para 631.
2582 But not the common knowledge rule: para 636.
2583 Apart from the exercise of general exclusionary discretions in criminal cases.
2584 See further para 642.
2585 See para 625-6. cf also B Sansom, *The Camp at Wallaby Cross*, Canberra, AIAS, 1980, 204-15.
2586 See para 633-7.
2587 (1971) 17 FLR 141.
2588 See para 641.
2589 (1971) 17 FLR 141, 154.
2590 See para 617-19.

> In my opinion this is a special field of the law of evidence, not part of the common law as it is understood in Australia: it is adapted to deal with a situation quite different from that which is before me in this case. The question before me is whether Australian law recognizes the native title which is asserted. On the other hand, the purpose of the rule in *Angu v Attah* and of the highly developed system of rules of which it forms a part, is to enable proof of the detailed matters of native law and custom to be given in courts which have the responsibility of applying such law and custom ... on the assumption that the native law and custom is applicable to the matter before the court ... In my opinion the special body of law known as the law of traditional evidence' has no application to this case.[2591]

Despite statutory changes in some jurisdictions, this 'special body of law' continues to be relevant in a number of countries, and is by no means a relic of colonialism. In the only case to consider its application to Australia it was rejected out of hand. But Australian courts, both now and under the Commission's recommendations, may well have to apply Aboriginal 'law and custom in suits between subjects, or between a subject and the Crown'.[2592]

640. ***Aboriginal Experiential Evidence***. It is usual to distinguish two ways in which Aborigines can testify about their customary laws: either in relation to a fact or situation within their immediate experience, or by expressing an opinion about customary law in more general terms. In some cases, at least, matters of customary law will be, or will be treated as, matters of fact. A person's beliefs and perceptions at a particular time are essentially questions of fact. Within limits this would also be so with evidence of a member of an Aboriginal community, or for that matter an observer, of the beliefs and perceptions generally held by the community.[2593] As Justice Blackburn said in *Milirrpum v Nabalco Pty Ltd*:

> No difficulty arose in the reception of the oral testimony of the Aboriginals as to their religious beliefs, their manner of life, their relationship to other Aboriginals, their clan organization and so forth. provided, first, that the witness spoke from his own recollection and experience, and secondly, that he did not touch on the question of the clan relationship to particular land or the rules relating thereto. No question of hearsay is at this stage involved: what is in question is only the personal experience and recollection of individuals.[2594]

641. ***Aboriginal Opinion Evidence***. However, even if it were possible in principle it would be extremely laborious to attempt to generate from the personal experiences of a number of witnesses what the rule or custom is in a particular matter. In practice it is inevitable that Aboriginal witnesses with authority to speak on these matters will be asked to express their view in more general terms. Beyond a certain point, general statements about customary laws, and about their application in a particular case, would be classed as matters of opinion rather than fact, and would therefore be inadmissible unless some other exception to the opinion evidence rule applied.

- *'Reputation' evidence*. One established exception to the hearsay rule may render admissible certain forms of evidence of customary law. This is the common law equivalent of s 32 of the Indian Evidence Act 1872,[2595] allowing 'reputation' evidence, that is, evidence as to statements by deceased persons relating to a 'public right or custom'. It was as reputation evidence that the Aboriginal evidence in *Milirrpum v Nabalco Pty Ltd* was held admissible. Justice Blackburn considered statements that deceased relatives regarded specific land as belonging to a named clan. This, he held, was in reality a statement as to reputation and, because it affected a substantial number of people (members of that clan and others), it was a statement as to 'public and general rights'.[2596] He rejected the argument that a pattern of particular statements of land-holding by different clans could not add up to a general reputation:

  > The group or community is the group consisting of all the people of all the clans who are plaintiffs ... Once the rights asserted are seen as a complex of different but consistent rights, applicable to a whole community, being the group of clans who are the plaintiffs in the action, the apparent difficulty disappears. There is an identity between the community of' people in which the reputation is alleged to be held, and the community of people which enjoys the right which the reputation seeks to establish ... If it were practically possible for each witness to describe the total system applicable to all the people in the group, in one speech without

2591 (1971) 17 FLR 141, 158-9.
2592 ibid. cf para 614.
2593 Thus in *Yildiz v R* (1983) 11 A Crim R 115 a Turkish interpreter with extensive experience of Turkish communities in Australia and Cyprus was allowed to give evidence as to Turkish community attitudes to male homosexuality. In the circumstances this was classified as 'experiential', not 'opinion' evidence. The Victorian Full Court upheld the trial judge's ruling that 'evidence ... led carefully and within the confines of knowledge of custom and customary attitudes is a particular community ... is admissible': see id, 123 (Murray J).
2594 (1971) 17 FLR 141, 153.
2595 See para 612. On reputation evidence in Australia see ALRC 26, vol 1, para 710; Cross, 545-6.
2596 (1971) 17 FLR 141, 156-7.

> interruption, the matter would be easier to see in its true light. Why should it make any difference that the reputation has to be established bit by bit ... [T]here is apparently no English or American case like this, where the matter of public right sought to be proved is a complex totality of rights rather than a single right. But in my opinion the proper conclusion from that is not that there is no authority for the admission of reputation evidence in such circumstances, but that the situation is a new one and that the true rationale of the reputation principle allows, indeed requires, that it be applied.[2597]

In certain limited circumstances, therefore, evidence of statements about customary laws made by deceased Aborigines will be admissible as reputation evidence, under an exception to the hearsay rule. But in other cases such evidence will be inadmissible either as hearsay or as non-expert opinion evidence or both. The difficulty Justice Blackburn had in that case, in fitting the evidence into the established rules, demonstrates the problems posed by the present law. It perhaps also helps to explain the informality of much present practice.[2598]

- *Aborigines as 'experts'*. One obvious way of avoiding the difficulty would be to regard Aborigines as experts in their own customary laws. But, as has been seen, the assumption seems to be that Aboriginal evidence is to be distinguished from expert evidence for these purposes: in *Milirrpum v Nabalco Pty Ltd* they were described as 'two kinds of witnesses'.[2599]

## Conclusion

642. ***The Need for Clarification***. It is not satisfactory that the evidence of traditionally oriented Aborigines about their customary laws and traditions should be inadmissible in law unless it can be forced into one of the limited exceptions to the hearsay and opinion evidence rules, or that it should be admitted in practice only by concession of the court or counsel, or that it should be admissible where the custom is a generation-old (reputation evidence as in *Milirrpum's* case), but inadmissible where the custom relied on is modern and possibly different. What is relevant in such cases is the customary laws of the community at the time the dispute or event occurred.[2600] Both overseas and Australian experience (in the courts and in land claims[2601]) demonstrates the importance of Aboriginal testimony about their customary laws. Such testimony has its difficulties, but so does anthropological evidence. The best evidence seems to be a combination of both, with expert evidence providing a framework within which the Aboriginal evidence can be understood and assessed. The deficiencies and uncertainties in the present law both as to expert and non-expert opinion evidence, outlined in this Chapter, should be remedied by a provision, along the lines of s 48 of the Indian Evidence Act and s 56 of the Nigerian Evidence Act.[2602] This should provide that evidence given by a person as to the existence or content of Aboriginal customary laws or traditions is not inadmissible merely because it is hearsay or opinion evidence, if the person giving the evidence:

- has special knowledge or experience of the customary laws of the community in relation to that matter; or

- would be likely to have such knowledge or experience if such laws existed.

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2597 id, 157-8.

2598 In *Nationwide Publishing Pty Ltd v Furber*, unreported, Federal Court of Australia (Toohey, McGregor, Fitzgerald JJ) 13 April 1984, an appeal from an interlocutory injunction, the Federal Court appears to have accepted statements made by a senior Aboriginal law-man from the relevant area 'as evidence bearing upon what might be described as relevant Aboriginal law. I am not prepared to accept the submission that such opinion evidence should have been given by Aboriginal women rather than men': Reasons for judgment, 11 (McGregor J), and cf id, 4 (Toohey, Fitzgerald JJ). There was no detailed discussion by the Court of the basis on which this evidence was admissible, and a number of other formal deficiencies in presentation of evidence were overlooked in view of the urgency of the proceedings.

2599 (1971) 17 FLR 141, 153.

2600 There is, and should be, no requirement that Aboriginal customary laws, to be recognised, have to be of immemorial, or of any particular, antiquity. In Milirrpum the requirement of continuity since 1788 (which was held not to have been proved) existed not as a general requirement of custom but because the plaintiffs sought to prove a continuing Aboriginal title. As Blackburn J pointed out, the technical connotations of that phrase' ('from time immemorial') have no relevance: (1971) 17 FLR 141, 152. If Aboriginal customs or traditions are to be recognised, it is necessary to show that the custom or tradition in question is now sufficiently established and accepted, and historical continuity is a relevant consideration. But there should be no requirement of a 'critical date', as the Privy Council pointed out in 1931: *Eshugbayi Eleko v Officer Administering the Government of Nigeria* [1931] AC 662, 673 (Lord Atkin).

2601 See para 625, 626 respectively.

2602 See para 618, 619. A similar provision applies as part of the 'received law' in the Christmas and Cocos (Keeling) Islands: Evidence Ordinance (Singapore) 1955, s 49.

It should also be provided that such evidence is admissible, notwithstanding that the question of Aboriginal customary laws is a fact in issue in the case.[2603] Such a provision would have advantages, apart from the basic one of rendering relevant Aboriginal evidence admissible:

- it would deal with the problem of 'experiential' evidence given about Aboriginal traditions and customary laws by persons without formal academic qualifications but with long contact and experience with Aboriginal communities;

- it would avoid any objection to evidence based on the 'ultimate issue' rule, the 'common knowledge' rule and the problem of opinions based in part on hearsay;

- it may encourage counsel and courts to pay closer attention to proof of Aboriginal customary laws, rather than relying on less satisfactory assertions or generalisations.

On the other hand, such a provision would not make undesirable inroads into the laws of evidence so far as they provide a structure for legal proceedings. in particular, other discretions to exclude evidence (eg the court's discretion to exclude prosecution evidence the prejudicial character of which outweighs its reliability) would be retained. Any more extensive provision, excluding the laws of evidence entirely in relation to the proof of Aboriginal customary laws or traditions, is accordingly unnecessary.[2604]

2603 On the meaning of 'fact in issue' see para 633. In addition the legislation should make it clear that questions as to the existence or content of Aboriginal customary laws are questions of fact and not of law: see para 614.

2604 cf para 627.

# 25. The Taking of Aboriginal Evidence

643. ***Problems in Taking Aboriginal Evidence***. Quite apart from the technical legal difficulties created by the rules of evidence for proof of Aboriginal customary laws, which were discussed in Chapter 24, the giving of evidence about their customary laws can raise particular sensitivities for Aboriginal people. These may be due to considerations of secrecy, or to customary rules prescribing who may be permitted to speak for what, and to whom, on a particular matter. These rules may apply in subtle and complex ways, depending very much on the context, the identity and status of those involved, and the surrounding circumstances.[2605] The Aboriginal Land Commissioner, Justice Maurice, has described the relevance of secrecy in the following terms:

> ... [O]nly some will have been admitted to information concerning the mythology of a particular site, and then possibly, only to part of it. The possession of such information brings with it esteem, power and influence and is therefore sought after, but it can only be achieved by degrees over a long period of time, and in seemingly undefinable ways involving some sort of group acceptance. To acknowledge having information of this kind without being recognised as entitled to it may lead to the imposition of extreme sanctions. And, whilst being entitled to have knowledge according to such systems is one thing, having the right to tell others is quite another. Those who possess and control the flow about Aboriginal mythology control the country and in particular, control the ability of people to move about it freely and to exploit its natural resources.[2606]

Not all the problems of secrecy can be overcome by legislative means. Primarily they require the careful selection of witnesses, flexibility in court procedures, and care in the way evidence is received. Nonetheless, it is necessary to examine some of the difficulties that the giving of evidence may present for Aborigines, to see if better ways can be found for dealing with these issues. Five areas of difficulty are discussed in this Chapter:

- authority to speak (para 644-645);
- group evidence (para 646-648);
- secrecy (para 649-656);
- privileged communications (para 657-661);
- self-incrimination under Aboriginal customary laws (para 662-665).

## Authority to Speak

644. ***Authority to Speak on a Particular Matter***. The notion of 'authority to speak' on a particular matter is of considerable importance in Aboriginal tradition, much more so, for example, than for Western law and culture. In Neate's words:

> When seeking information about specific areas of land it is necessary to ask those persons who are fully knowledgeable about the land and have special responsibilities towards it. It is not sufficient just to ask any person about his or her or somebody else's country. That person may not know enough to be able to give a full account of it, or may know but feel unable to do so in the absence of other people standing in certain relations to him or her: or he or she may know but wish to defer to another person who is more senior in the hierarchy of knowledge or is one of the other sex and so is a proper person to ask.[2607]

This is a comment on the land claim experience, but it is equally true for other questions of Aboriginal customary laws. It raises two matters: first, the need to identify correctly those witnesses who have both knowledge and authority to speak on a particular matter, and second, the importance of group evidence in terms both of the accuracy and the completeness of evidence adduced from an Aboriginal witness.

645. ***Identifying Witnesses With Authority, to Speak***. It is most desirable that decisions involving Aboriginal customary laws be based as far as possible on statements that are accurate and are made by those with

2605 As Dr D Bell pointed out: *Submission 491* (16 September 1985) 8.
2606 *Warumungu Land Claim*, Reasons for Decision (11 October 1985) 78.
2607 G Neate 'Legal Language Across Cultures: Finding the Traditional Aboriginal Owners of Land' (1981) 12 *Fed L Rev* 187, 205.

authority to make them. Customary rules based on matters such as kin relationships, traditional status, sex and age dictate the knowledge that may be possessed, the authority to speak and the range of people to whom that information may be conveyed. An obvious and important example are those rules distinguishing 'men's business' from 'women's business'.[2608] However the matter is more complex than this. The proof of traditional marriage provides a good example of the complexities that can arise, and the importance of selecting the appropriate witnesses. Aborigines themselves are generally in no doubt as to whether a relationship is 'a passing fancy', 'just renting', or a proper traditional marriage.[2609] Whether a traditional marriage exists will depend on whether it can be shown that by the rules and practices of the relevant group the relationship is regarded as a marriage. In *Police v Ralph Campbell*[2610] the views of the girl herself and her parents were sought in order to establish that there was a traditional marriage. Casual liaisons may sometimes develop into what are ultimately regarded as traditional marriages.[2611] Obviously there may be disagreements in such cases. In addition:

> Disputes about matters other than the recognition of marriage (ceremonial matters, money matters, etc) may be standing in the way of the recognition of the marriage, in cases where neither side actually opposes the union itself so much as the grouping associated with one half of it.[2612]

Where this is so, care needs to be taken in ascertaining whose views matter and who has authority to speak. It is not sufficient simply to rely on the opinion of any one person or persons of one sex. Adequate research and preparation is necessary to ascertain whose views count. In the words of Dr Bell:

> ... children can tell you which persons are correct marriage partners and which are avoidance relations. However, when a dispute concerning a particular marriage arises, only certain senior persons, who are familiar with the intimate details, will be prepared to offer an opinion. This may appear to cut across legal notions of impartiality but within the Warlpiri system, it is improper and extremely dangerous to pass judgment on the business of other persons. The authority of persons to interpret the law derives from their standing within the particular group affected by an action. People who are not related through ties of kin and country have no right to speak.[2613]

The common law draws no such distinctions. The evidence of any person based on direct observation or experience is admissible as evidence of what was observed or experienced. But the existence of customary rules restricting who may testify on a certain matter is relevant, not merely because the law should be sensitive, rather than insensitive, to such constraints where possible (eg where there is a choice of witnesses) but because more accurate and authoritative evidence may be obtained from persons sure of their right to speak in relation to a particular matter. These problems are not capable of a general solution through legislation, though some specific empowering provisions which may help are recommended below. But lawyers and administrators should be aware of the difficulties, and be prepared to take necessary measures to deal with them.

## Group Evidence

646. ***Land Claim Initiatives***. An Aborigine may have, according to customary laws, no authority to speak on a given matter, but may be able to give evidence in conjunction with others who collectively have such authority. The land claim experience has been that the Aboriginal evidence is likely to be both fuller and more persuasive when it is given in the presence of peers who both by their own evidence and by their demeanour confirm the truth of what is said. Such group evidence may be an important way of increasing both the accuracy and the amount of evidence from a witness. It helps to overcome a situation where one person has no right to speak alone but can do so in the presence of others. According to Neate the advantages of group evidence are:

(i) giving confidence to witnesses in an unfamiliar (court-like) environment;

(ii) allowing the accuracy of the evidence to be checked immediately through

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2608 See para 650.
2609 See para 229, 236.
2610 Unreported NT Court of Summary Jurisdiction (J Murphy SM) 8 June 1982. See para 625.
2611 P Sutton, 'Aboriginal Customary Marriage' (1985) 12 *ALB* 13, 13-14; and cf para 228-9.
2612 Sutton (1985) 15.
2613 D Bell, 'Re Charlie Jakamarra Limbiari', unpublished paper, 1984, 2. On the question of consultation and steps to be taken in ascertaining correct witnesses see Sutton (1985); J von Sturmer, *Talking with Aborigines*, Australian Institute of Aboriginal Studies, Canberra, 1981.

(a) the correction of errors by others in the group and

(b) the confirmation of correct evidence

(both being shown verbally and by the demeanour of the witnesses);

(iii) ensuring that complete evidence is given by the witnesses. For example, where matters of a ceremonial nature are in issue it may be inappropriate because of Aboriginal rules of conduct for one person to give all the evidence. Though he or she may know all the answers there may be rules against him or her giving them. In this context diffidence in answering should not be equated with ignorance. Where one person is able to defer to another member of a group (the proper witness on that point) a complete and accurate answer can be given.[2614]

However this approach is not entirely free of difficulty, as Justice Toohey, the former Aboriginal Land Commissioner, pointed out:

> the [practice of] giving of evidence in groups ... which has grown up since early hearings under the Land Rights Act ... generally has proved satisfactory. However it does have some problems, not the least of which is ensuring that the transcript of evidence accurately reflects the individual speakers. But it has wider implications than that. In her comments on the claim, Ms Susan Tod Woenne, consultant anthropologist to the Commissioner, said:
>
> > whilst there are definitely advantages in taking evidence from groups of witnesses...there are also disadvantages in that it is often difficult to assess whether the evidence spoken by one of the group is an individual view, a view of several (or all) of those present, or an attempt to assist another in communicating with counsel and or his Honour. This is particularly the case if the group is asked as a group to respond to questions when the facility in English amongst its members is varied, when the group is very large, and or when the age range with the group is considerable ...
>
> I agree with this. It becomes a matter for judgment whether a view expressed is that of the individual speaking, whether it is merely the passing on of the statement of another, whether the evidence is that of the group or perhaps of someone whose will has overborne that of others. While retaining the advantages of people being grouped to give evidence, it is better if questions can be directed to particular named individuals. It helps (and this has been done by counsel in some hearings) if counsel can, in identifying the person giving the answer, say whether the speaker appears to be giving his own answer or merely interpreting for or assisting another.[2615]

When group evidence is given there is also a need if possible for 'a transcript of evidence in English and the Aboriginal language to ensure that the subtleties of the latter language had been properly translated'.[2616]

647. ***Other Administrative Hearings***. The Broadcasting and Television Act 1942 (Cth) s 25(2) provides that the Australian Broadcasting Tribunal is not bound by rules of evidence and may inform itself in such manner as it thinks fit. The Tribunal frequently takes group evidence, for example from public broadcasters, children's television groups and union interests. The practice is to swear in several members of the organisation concerned, and to enable them to defer to each other in responding to questions from the Tribunal.[2617] Another body which has been prepared to take group evidence is the Northern Territory Liquor Commission. The Commission has power under the Liquor Act (NT) s 50(2A)(d) to inform itself as it thinks fit, and is not bound by the rules of evidence. In an application involving the Desert Oaks Motel, Erldunda, the Commission noted that it could take a number of steps to ensure a witness could give effective evidence:

> These steps can be imagined as points upon a continuum, one end of which is the most formal hearing that the Commission could conduct, that is, in a Magistrates Court and strictly in accord with the rules of evidence and court procedures. At the other extreme is the proposal put at the hearing, that is, to take into account hearsay evidence from groups of witnesses in a bush setting.[2618]

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2614 G Neate, *Submission 373* (9 April 1983) 3.

2615 *Limmen Bight Land Claim*, AGPS, Canberra, 1981, para 38-9.

2616 G Neate, *Submission 373* (9 April 1983) 3.

2617 Criticisms made by the High Court of the panel system of cross examination employed in Australian Broadcasting Tribunal hearings related principally to a system where a single witness was cross-examined by a panel. See *Australian Broadcasting Tribunal; ex parte Hardiman* (1980) 144 CLR 13; 35, distinguished by Rogers J in *Spika Trading Pty Ltd v Royal Insurance Australia Ltd*, unreported, NSW Supreme Court, 3 October 1985, 10-11.

2618 *Trevor John Mackman (Applicant) and Central Australian Aboriginal Legal Service Inc, Pitjantjatjara Council (Objectors)*, Reasons for Decision (14 August 1984) 3.

The Full Commission determined that in the case before it, it would not take evidence at the Aboriginal community concerned, but that it would accept group evidence, and would make other concessions in relation to the rules of evidence.[2619]

648. ***Application to Court Hearings***. A hearing in the court of summary jurisdiction at Tennant Creek, *Police v Isobel Phillips*,[2620] provides a good illustration of a way in which existing procedures may be adapted to allow group evidence to be taken. At the request of an Aboriginal Legal Service solicitor, Mr Murphy SM allowed four senior Aboriginal women to be sworn and give evidence as a group. Counsel applied

> to adopt a rather unusual course in a criminal court although ... it is an action which is frequently adopted in land claim hearings. There are four women in court and I would like to have them all sworn together to give evidence together, although ... for the purpose of the transcript, the witness providing the answer would have to be identified. [Some] questions I want to ask would be appropriate for one woman to answer and others for another woman to answer.[2621]

Counsel's purpose in calling the four women was to determine the Aboriginal customary laws applicable to a fight between two young Aboriginal women. Individually, the older women did not have authority to speak on all aspects of the incident (principally because of their relationship to the younger women involved), or they did not have full knowledge of the relevant customs. Their giving evidence together ensured them against later accusations of interfering in another person's business.[2622] The calling of group evidence in this case was apparently effective in that case, and greater use of such proceedings is to be encouraged.[2623] Care should be taken to ensure that witnesses are cross-examined and re-examined on their own evidence only.[2624] During questioning members of the group may not feel comfortable about their right to answer a particular question, and may wish to add the appropriate person to the group. This should be allowed, with that person being sworn and examined in turn. The courts may already have power (as an aspect of their inherent power to regulate their own procedure) to enable group evidence to be taken along these lines.[2625] There can be real advantages in such 'group evidence' being given by traditionally oriented Aborigines, especially on matters related to Aboriginal customary laws. Courts should be encouraged to exercise their existing powers, on the application of a party, to take evidence in this way. To this end, and to clarify the question whether such evidence can be permitted, legislation dealing with proof of Aboriginal customary laws should include a power in the court or tribunal to give necessary directions to enable two or more members of an Aboriginal community to give evidence pertaining to the customary laws of that community together, where this is necessary or desirable.

## Problems of Secrecy

649. ***Arguments from Secrecy***. One argument sometimes presented against the recognition of Aboriginal customary laws is the problem of maintaining secrecy. Apart from the distress that disclosure may cause, Aboriginal customary laws may enjoin severe penalties on those who breach secrecy. In Chapter 8, two responses were made to this argument.[2626] First, it is not proposed that recognition take the form of codification, with its associated loss of control, and the danger that matters that are secret and properly the province of the Aboriginal people concerned would be exposed. This is not to say that there will not be circumstances in which Aboriginal people will need to choose whether to disclose secret information as a price for seeking protection of the general law, or whether not to seek that protection. Secondly, there are ways in which the courts, through their existing powers or (if necessary) with additional procedural powers,

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2619 ibid.

2620 *Police v Isobel Phillips*, unreported, NT Court of Summary Jurisdiction (Nos 1529-1530 of 1982) 19 September 1983 (J Murphy SM). See also para 430.

2621 id, transcript, 9.

2622 D Bell, *Submission 491* (16 September 1985) 9.

2623 Group evidence in respect of complaints under the Aboriginal Land Rights (Northern Territory) Act 1976 (Cth) s 69 was advocated by RW Ellis, ALRC, *Evidence Public Hearing Transcript* Darwin (19 November 1985) 184-7.

2624 In *Spika Trading Pty Ltd v Royal Insurance Australia Ltd*, unreported, NSW Supreme Court, 3 October 1985, Rogers J with the consent of the parties ordered that the evidence of 5 hydrologists be given together. In his view 'the technical problems of hydrology were successfully explained by these techniques and ... as a result, the hearing was substantially shortened' (id, 10). For the High Court's comments in the Hardiman case (in fact directed to another issue) see n 13.

2625 HI Jacob, 'The Inherent Jurisdiction of the Court' (1970) 23 *Current Legal Problems* 22, 32-40, and for legislative recognition see Australian Courts Act 1828 (Imp) s 16.

2626 See para 115, 116.

can restrict access to material that may be presented as evidence of Aboriginal customary laws in a particular case. These existing powers, and their possible reinforcement, are dealt with here.

650. ***Secrecy and the Land Claim Experience***. The Northern Territory land claims have raised the question of secrecy in an acute form. To establish that they are 'traditional Aboriginal owners' claimants have had to demonstrate 'common spiritual affiliations to a site on the land, being affiliations that placed the group under a primary spiritual responsibility for that site and for the land'.[2627] In almost every land claim the Land Commissioner has received some material on a restricted basis, that is, available only to certain people such as counsel and those advising counsel.[2628] Such restricted evidence has included oral evidence, ceremonies performed, sites revealed and objects of ceremonial significance displayed. Neate lists the following restrictions which have been placed on material, without presenting serious difficulties to participants:

> 1. evidence which was tape recorded and transcribed but tendered only as a restricted exhibit, available only to those present when the evidence was given;
>
> 2. evidence which was not recorded verbatim but of which a summary was prepared (eg by an anthropologist) and tendered as a restricted exhibit, available to only those present when the evidence was given;
>
> 3. written notes of evidence made available to those present when the evidence was given, on condition that it not be marked as exhibit and that it be returned to the claimants before the conclusion of the hearing;
>
> 4. evidence given in secret session, not recorded in any way and only referred to (if at all) in the most general terms by counsel in the course of final addresses and by the Commissioner in his report: and
>
> 5. in exceptional circumstances, evidence given to the Commissioner alone.[2629]

Some matters of Aboriginal customary laws are either secret to particular persons or groups or restricted to men or women. Aboriginal women have had to confront difficulties in presenting evidence to an 'audience' of the opposite sex, as Meredith Rowell points out:

> When giving their evidence the women are always painfully conscious that they are talking in front of a mainly male audience. In this situation, which has no traditional counterpart, women experience a special difficulty beyond ordinary nervousness, especially in answering questions pertaining to Dreamings, to matters of spiritual importance, and to ceremonies ... When asked in a court situation, 'What places does that Dreaming go through?', women witnesses generally discuss the question at length in their own language first before providing any answers. This discussion involves not so much the identity of the sites but, rather, whether the names should be spoken in the immediate company ... What their hesitance means is that the situation prevents them from sharing their knowledge openly. In the reverse situation, if there were a group of white female officials appointed to hear evidence from Aboriginal people about their country, the men would find themselves in a similar dilemma. It is significant to note that during the Willowra claim, when there were fewer than usual white men present (Aboriginal men of course voluntarily abstained from attending), the women's evidence was clear, confident and complete ...[2630]

In a number of other ways the procedure of hearings has been adapted to enable Aboriginal men and women to present evidence on a restricted basis. Justice Toohey, the then Land Commissioner, described what could be done:

> There have been many occasions during the hearing of land claims when I have been asked to go with Aboriginal men to witness ceremonies, to look at sacred objects and to hear them speak of ceremonial and ritual matters, where no woman has been permitted to attend. Fortuitously, counsel have generally been male and ordinarily there has been no difficulty in them being present. If fortuitously counsel had been female, no doubt the sort of problem that has arisen here would have arisen in regard to that evidence. It would be unfortunate if my capacity to receive evidence thought to be relevant should depend upon the gender of the legal representatives appearing before me and those advising them. As it happens there have been occasions when, with the consent of all appearing at the hearing, I have heard from Aboriginal women and witnessed their ritual activity in the absence of male counsel and their male advisers.[2631]

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2627 Aboriginal Land Rights (Northern Territory) Act 1976 (Cth) s 3 (1).

2628 Justice Toohey, 'Land Claims' (1982) 3 *ALB* 4, 5-6.

2629 G Neate, 'Keeping Secrets Secret' (1982) 5 *ALB* 1, 17. See also M Fisher, 'Secrecy, Proof and Confidentiality of Aboriginal Customary Laws in the Legal System' (1985) 17 *ALB* 12.

2630 M Rowell, 'Women and Land Claims in the Northern Territory' in N Peterson & M Langton (ed) *Aborigines Land and Land Rights*, AIAS, Canberra, 1983, 256, 262. See also D Bell, 'Aboriginal Women and Land: Learning from the Northern Territory Experience' (1985) 3 *Anthropological Forum* 353.

2631 Report of the Aboriginal Land Commissioner, *Daly River (Malak Malak) Land Claim*, AGPS, Canberra, 1982, 88.

In the *Daly River Land Claim*, Aboriginal women had allowed a female anthropologist to witness two ceremonies strictly confined to women. The female claimants wished the anthropologist's description of the ceremonies to be restricted to Justice Toohey himself and to no other man. The following conditions were placed on the tendering of the report:

> The women of Daly River are prepared to allow the Aboriginal Land Commissioner, female counsel and female anthropologists to read this document. If male counsel or anthropologists wish to read the document they should set out their reasons for wishing to read the submission in an application to the author, who will then consult with the women involved.[2632]

The material was not denied absolutely to other parties. As it happened, counsel participating in the case were male, but female lawyers could have read the material. Justice Toohey concluded that evidence should be admitted on this restricted basis provided it did not 'unduly prejudice other parties':

> There are competing interests to be weighed. I do not think that claimants should feel obliged to speak of matters they regard as secret. On the other hand it would be unreal to deny the impact that witnesses' accounts of ritual and ceremonial life have in establishing traditional ownership and traditional attachment to land. Where, as in the present case, evidence takes the form of someone else's observations, it may well be that a general description will be adequate and present no problems for the claimants or others. These are matters calling for a decision by the claimants and their advisors.[2633]

651. ***The Warumungu Decision***. The difficulties that can arise, in the special context of land claim hearings, are made clear by the Commissioner's decision of 1 October 1985, in the *Warumungu Land Claim*. Justice Maurice rejected claims to legal professional privilege, and to confidentiality, with respect to certain field notes and other preparatory materials made or gathered by various anthropologists and linguists in the course of the preparation of the claim. Claims to public interest immunity and confidentiality in respect of material gathered for the Northern Territory Sacred Sites Protection Authority were also rejected.[2634] The Commissioner referred to 'the secret nature of Aboriginal religious beliefs and custom' as 'a pivotal feature of Aboriginal social life and politics' and as 'what a lawyer might describe as a system of intellectual property'.[2635] He thus accepted:

> that there is a real need to maintain confidentiality with respect to information revealed by Aboriginal people for limited purposes relating to secret sacred matters.[2636]

However he held that the public interest in ensuring proper investigation of land claims, and the practical difficulties facing objectors, and counsel assisting the Commissioner, in getting access to the facts independently of the Land Council and experts employed by the Council, overrode the need to restrict disclosure on the basis of confidentiality.[2637] These factors also led him to take a very extensive view of the extent to which legal professional privilege had been waived by tendering expert evidence on matters related to the claim.[2638] In effect, a broad doctrine of waiver was applied to avoid what was perceived as a failure of the adversary process in the context of land claims. However the Commissioner stressed that disclosure would be subject to stringent safeguards to ensure that the material was used exclusively for the purposes of the claim:

> the most important consideration of all is the protective measures which I propose to adopt. The production of the records sought will occur whilst I am sitting in camera. Only myself, my associate, counsel assisting, counsel for the Attorney-General, possibly my consultant anthropologist and the researcher who gathered the material will be present. They will not be permitted to use any of the information so learned for any purpose other than the land claim.[2639]

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2632 id, 86.
2633 id, 88.
2634 *Warumungu Land Claim*, Reasons for Decision (1 October 1985). The Commissioner had earlier rejected an application that, in hearing various objections to disclosure made by the claimants, the Central Land Council and expert witnesses, counsel for the intervenors, and especially the Northern Territory Government, should be excluded: Reasons for Ruling (16 July 1985). The decision of 10 October 1985 is the subject of an application for review in the Federal Court.
2635 Reasons for Decision (1 October 1985) 75.
2636 id, 75.
2637 eg id, 75-8, 107-8, 148-9. He also rejected the Sacred Sites Protection Authority's claim to public interest immunity id, 73-108. For the question of legal professional privilege, public interest immunity and confidential communications see para 657-661.
2638 id, 52-73. In one case the evidence was before the Commissioner only because a former Land Council employee chose to make an independent submission under s 54A of the 1976 Act, without objection from the applicant's counsel: id, 71.
2639 id, 106-7. See also id, 85, 129, 134-6, 142, 147, 149-50, 155, 158-9, 161, 164-5 where these protective measures are emphasized.

Despite these protective measures, the decision has caused considerable concern, and even dismay, among anthropologists and among those working on behalf of claimants and potential claimants. It has been said that Aborigines will be much more reluctant to disclose important information, both in the context of land claim preparations and also for other purposes (including pure research), that anthropologists will be reluctant to work on behalf of land councils in preparing claims, that elaborate forms of record keeping (or alternatively, minimal record keeping) will have to be adopted, and that it will be difficult to ensure that restrictions on the use of confidential material for other purposes will be observed.[2640] It is too early to tell to what extent these fears or predictions will be justified, having regard to the stringent protections proposed by the Commissioner to protect secret material.[2641] However the decision highlights the problems of secrecy that can occur when Aboriginal customary laws are relied on in courts or tribunals. Its implications, both generally and for the Aboriginal Land Rights (Northern Territory) Act 1976 (Cth), need careful consideration.[2642]

652. ***Secrecy in Court Hearings***. Problems of secrecy are by no means confined to land claims, or indeed, to cases involving indigenous customary laws. In other contests (for example, industrial secrecy or welfare reports involving children), information will be tendered to a court on a restricted basis. As Lord Donovan has stated:

> There are exceptional circumstances when a court finds itself in this dilemma: if it is known that the information it obtains will be disclosed to the parties before it and also perhaps to the world at large, then those persons who have the information may, despite their legal obligation, resort to one device or another to avoid giving it, or will give information which is not the truth or the whole truth. Justice may not therefore be done. On the other hand, the knowledge that the court will treat the in formation in strict confidence greatly increases the probability that it will be forthcoming. Yet in this case the parties will understandably feel aggrieved that they have not had the chance of ... testing the information.[2643]

In the context of proof of Aboriginal customary laws and traditions, there may be information which Aboriginal people will only be willing to give, if at all, on a restricted basis, and in order that justice can be done, steps may need to be taken so that, so far as possible, these wishes are respected. The question is whether additional powers, or legislative guidance in the exercise of existing powers, are necessary to achieve this. One submission to the Commission argued that:

> evidentiary and procedural rules should be amended so as to allow for Aboriginal laws and practices and to protect their secrecy by establishing new categories of privileged evidence, providing for particular hearings in camera on the application of the Aboriginal parties concerned and providing added safeguards for confidentiality of evidence and material submitted to the courts.[2644]

Such arguments involve the two distinct questions: first, protecting the secrecy of evidence of customary laws, and secondly, the broader issue of a privilege against disclosing certain information. The first question is dealt with here, the second in the following section.[2645]

653. ***The Scope of Existing Powers***. Judicial experience suggests that the problem of preserving secrecy or confidentiality of evidence can, to some extent at least, be resolved through the exercise of existing powers, including the powers

- to regulate judicial procedure;
- to hear evidence *in camera*;
- to allow production of evidence on a restricted basis;
- to grant protective orders including orders suppressing publication of proceedings.[2646]

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2640 The implications of the *Warumungu* decision were discussed with the Commission in Central Australia, Darwin and elsewhere in October 1985.
2641 And assuming the decision survives a Federal Court challenge which is pending.
2642 See para 657-661.
2643 *Collymore v Attorney-General of Trididad and Tobago* [1970] AC 538, 550. See also In *Re K* [1965] AC 201.
2644 G Brandis, *Transcript of Public Hearings Brisbane* (7 May 1981) 2391.
2645 See para 657-661.
2646 See generally Jacob, 32-40.

At common law, a court has a discretionary power to exclude persons where the presence of such a person might intimidate witnesses,[2647] deter a party from seeking relief,[2648] prevent a witness giving evidence,[2649] involve the divulging of a secret process,[2650] endanger legitimate business interests,[2651] or endanger national security.[2652] These common law powers are reinforced or paralleled by statutory provisions dealing with summary and committal proceedings.[2653] On the other hand the public interest in maintaining a system of public justice is an exceptionally strong one, and these powers are accordingly exercisable only where this is really necessary in the interests of justice.[2654] And it is unclear to what extent the court in exercising its inherent power can regulate the conduct of non-parties outside the courtroom. Breach of such an order may only amount to contempt if the breach itself adversely affects the administration of justice.[2655]

654. ***The Use of Existing Powers in Customary Law Cases***. The courts have shown considerable sensitivity in customary law cases. In *R v Williams*[2656] (with the prosecution's consent) inappropriate persons were excluded from the court room and women were excluded from the jury. In *R v Gudabi*,[2657] all women were excluded from the court, an all male jury was (again with the Crown's consent) empanelled and the court staff was composed only of men. An order was granted preventing publication of much of the proceedings.[2658] In a recent child abduction case in Alice Springs, Justice O'Leary ordered the suppression of all evidence. The matter proceeded, with the consent of the prosecution, by way of affidavit.[2659] A number of similar examples could be given.

655. ***Secrecy and Natural Justice***. The powers illustrated in the previous paragraphs may not be available where their use threatens to result in a denial of natural justice to an affected party. The principle of natural justice is basic, both in courts and in administrative proceedings. But, as the Australian experience shows, although that principle may limit the use of judicial or administrative power to protect secret information, it does not exclude it. In the *Daly River Land Claim* it was argued that the use of material that had not been disclosed to the parties amounted to a denial of the opportunity to contradict adverse testimony, and that production of evidence on such a restricted basis was accordingly contrary to natural justice.[2660] Justice Toohey commented that:

> As a general rule the Commissioner ought not to receive material which has not been made available to those participating in the enquiry which he is carrying out. And as a general rule those participating should be given the opportunity to dispute testimony and to make comments upon it. But there are other principles which call out for recognition. Some remarks of Lord Devlin, in a quite different context, are apt:
>
> > But a principle of judicial enquiry, whether fundamental or not, is only a means to an end. If it can be shown in any particular class of case that the observance of a principle of this sort does not serve the ends of justice, it must be dismissed; otherwise it would become the master instead of the servant of justice. Obviously, the ordinary principles of judicial enquiry are requirements for all ordinary cases and it can only be in an extraordinary class of case that any one of them can be discarded.[2661]

Justice Toohey concluded that secret matters adduced in the proof of Aboriginal customary laws might well be described as an extraordinary class of case. The revelation of men's secrets to women or to uninitiated

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2647 *R v Governor of Lewes Prison* [1918] 2 KB 254, 271.
2648 *Scott v Scott* [1913] AC 417.
2649 *Jamieson v Jamieson* (1913) 30 WN (NSW) 159.
2650 *Sander v Curnan* [1965] VLR 648.
2651 *Bagot's Executor and Trustee v King* [1948] SASR 141.
2652 *Robbie v Director of Navigation* (1944) 44 SR (NSW) 407.
2653 See, for example, Court of Petty Sessions Ordinance 1930 (ACT) s 52; Justices Act 1902 (NSW) s 32; Justices Act 1886 (Qld) s 71; Justices Act 1921 (SA) s 69, 107; Justices Act 1959 (Tas) s 56; Justices Act 1902 (WA) s 66-7; Magistrates (Summary Proceedings) Act 1975 (Vic) s 43; Justices Act (NT) s 107.
2654 *Scott v Scott* [1913] AC 417; *Attorney-General v Leveller Magazine Ltd* [1979] AC 440; *Mirror Newspapers Ltd v Waller* [1985] 1 NSWLR 1.
2655 G Nettheim, 'Open Justice and State Secrets' (Paper delivered to the Australasian Universities Law Schools Association, Adelaide, August 1985) 39. In addition, inferior courts, even if they have power to make such orders, may lack power to enforce them because of their limited contempt powers.
2656 (1976) 14 SASR 1. See para 492.
2657 *R v Gudabi*, unreported, NT Supreme Court (Forster CJ) SCC No 85 of 1982, 30 May 1983, transcript, 16; reported on another point on appeal (1982) 44 ALR 424.
2658 On the specific issue of jury composition and secrecy see para 560A.
2659 P Ditton, *Submission 465* (1 January 1985) 1-2.
2660 *Daly River (Malak Malak) Land Claim*, 86-9. See also *Transcript of Hearings, Daly River (Malak Malak) Land Claim*, 1269-91. cf Neate (1982) 17-18. For the general requirements of natural justice in this context see for example H Whitmore, *Principles of Australian Administrative Law*, 5th ed, Law Book Co. Sydney, 1980, 126-8; H Whitmore & M Aronson, *Review of Administrative Action*, Law Book Co, Sydney, 1978, 114-120.
2661 *Daly River (Malak Malak) Land Claim*, 38, citing *In re K* [1965] AC 201, 238.

men could undermine traditional authority and the social stability of an Aboriginal community, as well as leading to the infliction of severe penalties on the informant. But it is necessary to balance these problems with fairness to the other party in a case. In a deportation matter before the Administrative Appeals Tribunal, *Re Pochi and Minister for Immigration and Ethnic Affairs*,[2662] the Government sought to exclude not only the public, but also the other party from part of the proceedings. The Administrative Appeals Tribunal Act 1975 (Cth) s 35(2) empowers the court to exclude the public and an applicant from any hearing. Justice Brennan noted that the Tribunal was bound by the rules of natural justice, and stated:

> Serious though the exclusion of the public is, the exclusion of a party from a hearing which affects his interests is a much graver step. To exclude a party from such a hearing, even if his legal advisers are permitted to remain, is to deny him a full opportunity to cross-examine upon, to comment on or to controvert the case against him — a denial which, in the absence of statutory authority, would constitute an indefensible denial of fair treatment by the Tribunal.[2663]

He added that:

> To exclude a party ... it must appear that exclusion of the party is essential to preserve the proper confidentiality of the information needed to determine the application. It is necessary to show that the information is of such importance and cogency that justice is more likely to be done by receiving the information in confidence, and denying the party access to it, than by refusing an order to exclude the party. This criterion is not easy to satisfy though it is possible to do so.[2664]

Similarly in the *Arumungu Land Claim* the Commissioner declined to exclude counsel for the objectors (including the Northern Territory) from the hearing of certain objections to disclosure of secret material, and indeed ordered that the material be disclosed to the Commissioner and counsel, though under strict conditions as to its confidentiality.[2665]

656. ***Conclusion: Powers to Ensure Secrecy***. A court can only act on information that can be communicated to it and tested by the parties. It can be argued that, subject always to this basic constraint, the courts do now possess a range of powers to protect secret information divulged to them. However, it is desirable to confirm these powers in the Commission's proposed legislation, to provide for their exercise on application by a party (and not only by consent) and to ensure that they extend to the protection of secret customary laws. Giving them legislative form may also help draw attention to the need to use these powers in appropriate cases. But there are two potential difficulties with such a recommendation, which need to be referred to.

- *Constitutional questions*. The proposed power would include the power to exclude persons from the court, or even to sit in camera, where this is necessary to preserve secrecy and to allow testimony about Aboriginal customary laws to be given. However is *Russell v Russell*[2666] the High Court held that federal legislation could not require a State court to sit *in camera* (ie as a closed court), on the basis that this interfered with the structure of the court, something which, under s 77(iii) of the Constitution, the Commonwealth cannot do. Assuming that the proposed provision was enacted by the Commonwealth Parliament,[2667] it could be argued that it would be invalid for the same reason. However there is a clear difference between a provision which allows a court to sit *in camera* where, in the judge's view, this is required in the circumstances, and a requirement that a court sit *in camera* whatever the circumstances. State courts already have power to exclude persons from the court, to make restriction orders , and to protect confidentiality in other ways. The proposed provision would be essentially of the same kind, and would not therefore alter the 'structure' or 'constitution' of the State court.

- *Consistency with the Sex Discrimination Act 1984 (Cth)*. A second question, which was referred to briefly in Chapter 23,[2668] is whether the recommended provision in the Commission's Draft Bill could, consistently with the Sex Discrimination Act 1984 (Cth), permit a court or tribunal to make an order

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2662 (1979) 2 ALD 33.
2663 id, 54.
2664 id, 56.
2665 See para 651.
2666 (1976) 9 ALR 103. See also para 808.
2667 Whether the Commission's recommendations should be implemented by the Commonwealth or the States and Territories is discussed in Ch 38.
2668 See para 595, and cr also para 182.

excluding persons of one sex from hearing or having access to evidence in a proceeding. 65 As outlined in para 654-6,[2669] both courts and tribunals have found it necessary to make orders of this kind. Indeed the Act[2670] has created difficulties on a considerably wider scale with recognition of the separate intellectual domains and ceremonial activities of men and women in traditional Aboriginal life. Exclusion of women from men's ceremonies, or vice versa, might involve a breach of the Act, and would certainly constitute sex discrimination as defined in s 5.[2671] Orders (at least when made by administrative agencies, libraries or tribunals which are established by Commonwealth laws) restricting access to men's or women's secrets would probably contravene s 26 of the Act,[2672] in the absence of a specific statutory exclusion or an exemption from the Human Rights Commission under s 44. The only potentially relevant statutory exclusion, in most cases, would be s 37 ('religious bodies') and in particular s 37(d), which exempts:

> (d) any other act or practice of a body established for religious purposes, being an act or practice that conforms to the doctrines, tenets or beliefs of that religion or is necessary to avoid injury to the religious susceptibilities of adherents of that religion.

Although this may be capable of extending to some aspects of Aboriginal customary laws and traditions, it is unlikely that the notion of 'religion' in s 37(d) would be construed widely enough to cover the various situations outlined above. However the analogy with the practice of a religion is a persuasive one.[2673] It is undesirable to use the principle of sexual non-exclusiveness, embodied in s 5 of the 1984 Act, to exclude all official recognition of, or manifestations of, Aboriginal traditional culture which involve separate men's and women's domains.[2674] In the Commission's view decisions to maintain separate men's and women's ritual, ceremonial and intellectual domains, in accordance with Aboriginal traditions and customary laws, should be a matter for Aborigines themselves. There should be a specific exemption in the 1984 Act to cover

- acts or practices engaged in by or on behalf of members of Aboriginal communities which are necessary to avoid injury to the susceptibilities of members of the community, as to the performance of their traditional religious, ritual or ceremonial obligations;

- restrictions imposed by courts or other bodies (including libraries) for the purpose of preserving the secrecy or confidentiality of, or restricting access to information about, the religious, ritual or ceremonial activities of Aboriginal communities, where the restriction is necessary to avoid injury to the susceptibilities of members of the community about the secrecy or confidentiality of those activities;

- the imposition of restrictions on entry to land for particular purposes or at particular times, where the restriction conforms to the customary laws of an Aboriginal community associated with the land.

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2669 It would not exclude an order from being discriminatory under the definition in s 5(1) of the 1984 Act that it applied only to men or women of the particular group (eg to Warumungu men), since sex would be one criterion for the order: cf s 8.

2670 As explained in para 182, the Act goes well beyond the terms of the Women's Discrimination Convention of 1980, in reliance on other Commonwealth powers. For the position under the Convention see para 595.

2671 The Human Rights Commission granted an exemption to an Aboriginal women's group to exclude men from performances of traditional women's dances at an Aboriginal Arts Festival, on the assumption that, because federal financial assistance had been granted to the Festival, s 26 of the Act applied. The Commission concluded that:

(i) the spiritual and ritualistic nature of the Aboriginal women's dances is analogous to an act or practice of the kind described in section 37(d) of the Sex Discrimination Act

(ii) the spiritual and ritualistic aspects of the women's dances for Aboriginal women should not be afforded less significance than for the religious acts and practices that are exempted under section 37(d) of the Sex Discrimination Act when carried out by a body established for religious purposes.

Commonwealth *Gazette*, S63, 28 February 1985, 1.

2672 This deals with the administration of Commonwealth laws and programs. Examples of restrictions which might conflict with s 26 or other provisions of the Act include:

- restrictions on access to material held by the Australian Institute of Aboriginal Studies;
- restrictions on access to material in evidence before the Aboriginal Land Commissioner (see para 650);
- restrictions on access to or dealings with areas, objects or human remains the subject of a declaration under the Aboriginal and Torres Strait Islander Heritage (Interim Protection) Act 1984 (Cth).

2673 As the Human Rights Commission concluded: see n67.

2674 And which contravene a section of the Act: see s 14-27 for the basic prohibitions, and s 30-44 for the exemptions.

A provision to this effect is incorporated in the Miscellaneous Provisions Bill contained in Appendix A. Such a provision would, among other things, provide a basis for evidentiary protections along the lines suggested earlier in this paragraph.

Accordingly, the legislation can properly confer, and should confer, specific power on courts and tribunals to protect secret information, where, on the balance of relevant considerations, this is necessary in the interests of justice. This would include power to restrict publication or the giving of evidence to persons of a particular sex.

## Privileged Communications

657. ***Confidential Communications***. Although the powers discussed in para 653-6 will usually be sufficient to protect evidence by Aborigines themselves of secret matters contrary to Aboriginal customary laws, other situations can arise. For example, information contained in an anthropologist's report may be of a confidential nature. Unrestricted publication of the evidence may breach customary law rules, and may also breach undertakings between the anthropologist and the Aboriginal community concerned. Generally there is no problem with the use of such evidence by the persons from whom it emanated, or with their consent. But an opposing party may seek to subpoena such material. This may lead to forced disclosure of material of a confidential nature, unless it is possible to rely on legal professional privilege, public interest immunity, or some other ground of privileged communications.

658. ***Public Interest Immunity***. There is much case law on the extent and scope of the public interest immunity[2675] which operates to exclude evidence of communications, the disclosure of which may harm state interests or which may be contrary to the 'national interest' or to the 'proper functioning of the public service'.[2676] There is no precedent extending the categories of public interest to cover confidential material relating to Aboriginal customary laws. In the *Warumungu Land Claim*, the Land Commissioner rejected a claim by the Sacred Sites Protection Authority that the public interest was threatened by requiring the records in question to be disclosed. While conceding that the public may have an interest in the effective performance of the Sacred Sites Authority, the Land Commissioner rejected any parallel between the case before him and the 'categories of public interest recognised as attracting Crown privilege'.[2677] He considered it inappropriate to extend the categories of public interest to the confidential information in question, on the basis that if Aboriginal people sought the protection of the Aboriginal Land Rights (NT) Act 1976, (Cth) they must be prepared to reveal sufficient information to justify the protection offered. Even assuming the Authority could claim public interest immunity, the Land Commissioner indicated that the public interest would not be jeopardised by the production of the documents in question,[2678] having regard to the protective measures he proposed to order. In the light of the case law, it is difficult to conceive of circumstances in which public interest privilege could successfully be invoked to protect confidential information relating to Aboriginal customary laws and practices.

659. ***Legal Professional Privilege***. In certain circumstances it may be possible to bring confidential communications between Aboriginal informants and others such as anthropologists, linguists, legal advisers, Land Councils and community advisers within the protection of legal professional privilege. For example in the *Warumungu Land Claim* documents regarded as privileged included:

- the claim book and drafts of claim books which are to be regarded as drafts of pleadings;[2679]
- copies of field work (though not the originals) prepared for the Sacred Sites Protection Authority on other projects where the copies were made for purposes of preparing the land claim;[2680]
- anthropological and other notes prepared for the purposes of legal proceedings, even though the documents were in the hands of third parties.[2681]

2675 ALRC 26, *Evidence* (Interim), AGPS, Canberra, 1985 vol l para 120, 451, vol 2 para 242-5; and authorities there cited.
2676 *Sankey v Whitlam* (1978) 142 CLR 1, 39.
2677 *Warumungu Land Claim*, Reasons for Decision (1 October 1985) 100, and see para 651. The Sacred Sites Protection Authority has proceedings pending in the Federal Court challenging the decision.
2678 id, 106.
2679 id, 158.
2680 id, 51.

In each case the test to be applied is a relatively strict one: it is whether the documents in question were prepared solely for the purpose of obtaining legal advice or of preparing a party's case for legal proceedings (including administrative proceedings of a quasi-judicial kind), pending or anticipated.[2682] The possibility that a party will be held to have waived the privilege further restricts the scope of protection.[2683] Thus it will only be in special circumstances that confidential communications about Aboriginal customary laws will be protected by legal professional privilege.

660. ***Extension of Legal Professional Privilege to Other Relationships***. The law of legal professional privilege has been narrowed considerably in recent years, and it is very much a special and extraordinary privilege.[2684] Like virtually all other confidential professional relationships, communications between anthropologists and their clients or informants are not protected by a privilege from disclosure, in the way that communications between solicitors and their clients for the purpose of obtaining legal advice or conducting legal proceedings are protected.[2685] In its *Evidence Report* (Interim) this Commission rejected any extension of an absolute privilege to cover such situations.[2686] Rather than creating new categories of privilege it proposed to give the court a discretion in deciding whether to compel production of 'confidential communications' and 'confidential records'. This would enable the court to balance the desirability of gaining access to such evidence, against the disadvantages, such as harm to an interested person or to a confidential relationship, which may result from disclosure.[2687] 'Confidential records' would include file notes, assessments and other data collected by anthropologists. In exercising its discretion the court would take into account:

> (a) the importance of the evidence in the proceedings;
>
> (b) if the proceeding is a criminal proceeding — whether the evidence is adduced by the defendant or by the prosecutor;
>
> (c) the nature of the relevant offence, cause of action or defence and the nature of the subject-matter of the proceedings; and
>
> (d) any means available to limit publication, of the evidence.[2688]

However the Professional Association for Applied Anthropology and Sociology argued in a submission to the Commission that a special anthropologist-client privilege should be created:

> We believe that a special case can be argued for the extension of privilege to anthropological communications and records, if not in a general sense, then at the very least in those circumstances (eg the hearing of land claims, heritage protection and customary law matters) where anthropological evidence is likely to be of direct relevance to the issues ... Anthropologists are often called upon to distinguish themselves from other members of their own societies in the ways in which they receive and treat cultural information. The unauthorised disclosure of confidential material not only has the potential to undermine the basis upon which anthropological inquiry is conducted but may do irreparable damage to a host group or community. The fact that such material may only be revealed to the court should not necessarily be a consideration in decisions about its revelation. The very process of unauthorised disclosure may be as much the issue as the content of the communications ... [T]here should be a statutory provision extending privilege to confidential anthropological communications and records in federal and Territory jurisdictions, including legislation enacted to recognise Aboriginal customary law, and ... such communications and records should only be admitted with the consent of the anthropologist and the party to whom the communications and records relate ... IT]he only exception to this provision should be communications made for a criminal purpose.[2689]

661.***Conclusions***. The argument for a specific privilege is strongest in the context of particular legal or administrative processes (eg land claim hearings) in which anthropologists play a role. But, as the Commissioner held in the *Warumungu Land Claim*, there is no doubt that reports or other material prepared

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2681 id, 22-30. For issues of waiver see para 615A.
2682 See *Grant v Downs* (1976) 11 ALR 577; *Baker v Campbell* (1983) 49 ALR 385.
2683 *Warumungu Land Claim*, Reasons for Decision (1 October 1985) 52-73.
2684 See ALRC 26, vol 2 para 230-8.
2685 As the Commissioner pointed out in the *Warumungu Land Claim*, 'there does not arise out of the relationship between Aboriginal informant and anthropologist a special privilege attaching to their communications': Reasons for Decision (1 October 1985) 89.
2686 ALRC 26, vol 1 para 955, 956.
2687 id, Draft Evidence Bill cl 103(1).
2688 id, cl 103(2).
2689 Professional Association for Applied Anthropology (WA), *Submission 503* (20 January 1986) 3, 6, 10-11.

by anthropologists or other social scientists[2690] for the purpose of preparing a claim may attract legal professional privilege. The difficulty at this level, if there is one, lies in the very extensive operation given in the *Warumungu* decision to the doctrine of waiver of privilege. But the situation in that case was a very special one, so that even if the decision is accepted it by no means follows that confidential communications made to anthropologists or others engaged in courts or tribunals in para-legal or legal roles will not be privileged. So far as the wider range of tasks unrelated to the preparation of material for the purposes of legal or quasi-legal proceedings engaged in by anthropologists and other social scientists are concerned, the Commission believes, for the reasons outlined here and spelt out in more detail in the *Evidence Report* (Interim), that to extend the law of privilege to grant an absolute privilege to anthropologist-informant relationships is inappropriate. There would be no reason to allow such a privilege to anthropologists but not to linguists, community advisers and others who may be entrusted with Aboriginal secrets. It is undesirable to extend the categories of absolute privilege this manner. The creation of a discretion for all categories of confidential communications is a better solution. In the special context of confidential communications concerning Aboriginal customary laws,[2691] there should be a special provision which allows the court, in appropriate cases, to protect confidential communications or records relating to the customary laws of an Aboriginal community. Since these are the product of an oral tradition, both the general problem of secrecy and the specific one of confidential communications or records would be addressed by such a provision. These records should be defined so as to include field notes, photographs, tape recordings and other electronic recordings. In some circumstances it may be necessary for the court to exclude certain evidence altogether. Before doing so the court should weigh the likelihood of harm to interested persons, to the Aboriginal community concerned,[2692] to any confidential relationship involved or to any class of such relationships, against the importance of the evidence, by whom it is called and the nature of the proceeding.[2693] The court's powers to protect confidentiality in other ways will also be relevant. A general provision such as that recommended here will go a considerable way to resolving the difficulties described in this Chapter.[2694] This provision should apply both to courts and to other tribunals established by law and having the power to take evidence. It would therefore apply to the Aboriginal Land Commissioner under the Aboriginal Land Rights (Northern Territory) Act 1976 (Cth). In view of concerns raised by the Commissioner's decision in the *Warumungu Land Claim*,[2695] there may be a question whether some more extensive exclusion or privilege is necessary to protect confidential material under that Act. In the absence of clear evidence of difficulties arising from that decision the Commission is not satisfied that such a provision is necessary. However the matter should be kept under review.

## Privilege against Self-Incrimination

662. ***Self-Incrimination under Aboriginal Customary Laws: The Issue***. A separate, though related, question is whether the law should compel a respondent to answer questions in court where the answer would disclose a past violation of Aboriginal customary laws which might bring 'shame' to the witness, or render the witness liable to some retaliation. Should there be a privilege against self-incrimination under Aboriginal customary laws in relation to such information?[2696] At common law the privilege against self incrimination applies where:

> the answer ... would in the opinion of the judge have a tendency to expose the deponent to any criminal charge, penalty or forfeiture which the judge regards as reasonably likely to be preferred or sued for.[2697]

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2690 One person whose evidence was sought in the *Warumungu Land Claim* was by training a linguist rather than an anthropologist, and the distinction between the different social and human science disciplines is by no means firm or clear.

2691 The recommendation in ALRC 26 (para 660) applies only to proceedings in federal courts, whereas the question of secrets concerning Aboriginal customary laws and traditions is more likely to arise in State and Northern Territory courts and tribunals.

2692 See para 643.

2693 *Warumungu Land Claim*, Reasons for Decision (1 October 1985) 133-5.

2694 It will not resolve all difficulties. There will understandably be instances where respect for their customary laws will prevent Aborigines from divulging certain information under any circumstances. Speaking of the land claim experience, Neate commented that:

> There have been occasions where witnesses have declined to divulge details of particular sites or ceremonies preferring to maintain the usual secrecy even as a consequence the case may not be as strong.

Neate (1982) 3. However, no legislation can help in such cases. All that courts can do is to protect as far as is possible and proper the secrecy of information conveyed to them.

2695 See para 651, 660.

2696 Where the giving of the answer itself would amount to a breach of customary law, the Aboriginal witness would be able to rely on the Commission's proposal on confidential communications, outlined in para 663.

2697 *Blunt v Park Lane Hotel Ltd* [1942] KB 253, 257. cf *Police Service Board v Morris* (1985) 58 ALR 1. See ALRC 26, vol 1 para 104-7, 464-5, 852-62; 1 Freckelton, 'Witnesses and the Privilege Against Self-Incrimination' (1985) 59 *ALJ* 204.

The privilege has been held to apply to admissions of adultery, or of matters which might expose the witness to ecclesiastical censure (though this may not represent Australian law now).[2698] There is controversy about whether there is a privilege against self-incrimination under foreign law. According to Cross:

> There must clearly be a reasonable probability the criminal proceedings would be taken abroad, which means that there must be some likelihood that the witness would go, or be extradited to the country whose law was in question. Furthermore, there may be a difference between cases in which the foreign law is admitted or easily proved and those in which the criminating tendency of the question could only be ascertained by an elaborate consideration of expert evidence on the subject ...[2699]

Whether the incrimination relates to foreign or local law, in each case the court must determine from the circumstances, and from the nature of evidence that the witness is called to give, that there is reasonable ground to suspect that the witness will be endangered by his answer. Cross states that the danger must be real and appreciable, not imaginary and unsubstantiated.[2700] Often the witness may have to disclose incriminating information to the court in order to demonstrate that the privilege applies.[2701] Proceedings to satisfy the court on the existence of the privilege may be held in camera. Wigmore states that the better view is that the privilege will not apply where disclosure does not place the accused in appreciable danger of conviction, nor where the motive of non-disclosure is not related to the fear of self-incrimination in any substantial way.[2702] The common law rules continue to apply in South Australia. Elsewhere in Australia the matter is governed by legislation, which reflects the common law in the Northern Territory, New South Wales and Queensland,[2703] and also (though limited to disclosure of indictable criminal offences) in Victoria.[2704] In Western Australia, Tasmania and the Australian Capital Territory, a 'certification' system applies , under which a witness can be compelled to answer a question despite its incriminating tendency, but in each of those jurisdictions either the answer may not be used in future proceedings against the witness,[2705] or proceedings in relation to the disclosed offence cannot be brought at all.[2706] Compliance with a certificate which protected the witness in one of these ways could only be assured within a jurisdiction where the legislation applied, or where its effect was recognised.

663. ***Justifications for the Privilege***. The privilege has been justified on the grounds that it protects a basic right of persons not to be forced to incriminate themselves, and that it encourages the giving of evidence and militates against perjury. Critics argue that the privilege makes the prosecution of offences more difficult.[2707] In its Interim Report on *Evidence*, this Commission has recommended that the privilege be retained and that it take the form of the Australian Capital Territory legislation with some modification. Under the Commission's proposals, if the judge considered that there were reasonable grounds for the claim of privilege, the judge would advise the witness that the question need not be answered, but that, if it were answered, a certificate would be issued preventing the answer being used against the witness in future proceedings. The privilege would not apply to incrimination under ecclesiastical law, nor to the refusal to answer on grounds that the answer would 'disgrace' the witness.[2708] The privilege would also not apply to evidence given by a party of a fact in issue.[2709]

664. ***Application to Incrimination under Aboriginal Customary Laws***. There have been instances of Aboriginal people seeking to avoid disclosing evidence on the grounds that it might 'incriminate' them under their customary laws.[2710] To refuse to extend the privilege to cover incrimination under customary laws would appear to deny the significance of customary laws in the lives of many Aborigines. To allow the privilege to be raised in matters of foreign law but not in matters of Aboriginal customary laws also seems

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2698 *Blunt v Park Lane Hotel Ltd* [1942] KB 253, 257. A privilege in such cases was rejected (obiter) by Murphy J in *Pyneboard v Trade Practices Commission* (1983) 45 ALR 609, 621, but the majority in that case (Mason ACJ, Wilson, Dawson JJ) regarded the point as 'well settled': id, 613.

2699 JA Gobbo, D Byrne & JD Heydon (ed) *Cross on Evidence*, 2nd Australian edn, Butterworths, Sydney, 1979, 267.

2700 Cross, 268; JH Wigmore, *On Evidence*, McNaughton revision, Little Brown and Company, 1961, vol 8, para 2260.

2701 Cross, 269.

2702 Wigmore (1961) para 2260, and for waiver see id, para 2276-8.

2703 Evidence Act (NT) s 10; Evidence Act 1898 (NSW) s 9; Evidence Act 1977 (Qld) s 10.

2704 Evidence Act 1958 (Vic) s 29.

2705 Evidence Ordinance 1971 (ACT) s 57(1).

2706 Evidence Act 1906 (WA) s 11-13, 24; Evidence Act 1910 (Tas) s 87-89, 101.

2707 See ALRC 26, vol 1 para 852-862 for discussion of the arguments.

2708 ibid; Draft Evidence Bill cl 104.

2709 id, cl 104(5). In this respect the recommendation probably does not reflect the common law position: *Boyle v Wiseman* (1885) 10 Ex 647; Wigmore (1961) para 2268.

2710 See *R v Gus Forbes* unreported, NT Supreme Court (Gallop J) 29 August 1980; see also Minutes of Regional Consultants Meeting, Melbourne, 24 November 1983, 6; cf n 90.

unjustified. The certification procedure which now exists in several jurisdictions[2711] could not be applied to subsequent 'proceedings' under Aboriginal customary laws taken in response to the incriminating facts: a court could not certify that such 'proceedings' would not be taken, nor that information disclosed would not be used as a basis for such responses.[2712]

665. ***A Specific Privilege***. A court should not compel a witness to answer questions tending to incriminate the witness under Aboriginal customary laws unless there are good reasons for doing so. An absolute privilege, applicable in all cases, is not desirable. There are other ways of protecting confidential or secret information (including the proposal made in para 661) and it is undesirable to create new heads of absolute privilege preventing relevant evidence being presented to a court. But it is possible to provide a measure of protection against incrimination in some cases. Accordingly the court should be given power to excuse a witness from answering a question which tends to incriminate the witness under his or her customary laws. This power should be exercised unless the court finds that the desirability of admitting the evidence outweighs the likelihood of harm to the witness, to some other person concerned, or to the Aboriginal community itself. Relevant factors in making that finding should include:

- the importance of the evidence to the proceeding;
- other ways of obtaining the information in question;
- the nature of the proceeding;
- whether the witness is a party to the proceeding;[2713]
- the power of the court to prevent disclosure of the evidence in other ways.

2711 See para 662.

2712 Responses to disclosure may or may not be lawful, but in any event the court lacks the degree of control over them required by the certification procedure. cf para 512-3.

2713 There should be no automatic exclusion of the privilege just because the witness is a party and the evidence relates to a fact in issue, although both should be relevant to the exercise of the discretion.

# 26. Other Methods of Proof: Assessors, Court Experts, Pre-Sentence Reports

666. ***Non-Adversarial Methods of Proving Customary Laws***. The proof of Aboriginal customary laws can be a difficult and sensitive problem, not necessarily suited to the adversary system which is at the basis of the present law of evidence and procedure. To overcome this difficulty, alternative methods of proof, notably the use of court experts and assessors, have sometimes been suggested. In overseas jurisdictions extensive use has been made of assessors, and to a lesser extent court experts, as an aid to the proof of customary law. Assessors have also been tried on an experimental basis in Australia. This Chapter examines the role of court experts and assessors and considers their appropriateness in the proof of Aboriginal customary laws. The related question of pre-sentence and similar reports in Aboriginal customary law cases is also raised.

## Assessors

667. ***Experiments in Australian Courts***. In some respects assessors perform a similar role to expert witnesses, but there are important differences between the two. Expert witnesses are selected and called by a party, and are subject to cross-examination. Assessors are appointed by the court, and are not subject to cross-examination. They are not decision makers but act in an advisory capacity to the judge or other tribunal of fact, and the parties are usually precluded from calling expert evidence on a matter where assessors have been appointed to advise on that matter. Assessors are used rarely in common law jurisdictions although they may play a role in a number of specialist areas, perhaps the best known being admiralty.[2714] Assessors were also extensively used in the British colonies in Africa and elsewhere, and they still operate in a number of these countries. They are required in all cases punishable by death or more than five years imprisonment in Western Samoa.[2715] Papua New Guinea has recently made provision for assessors in both civil and criminal cases in the National Court.[2716] It has often been suggested that assessors should sit with and advise judges in cases which involve aspects of customary law. In fact courts in Australia have at times used Aboriginal assessors. Thus in Western Australia between 1939 to 1954 there was provision for Courts of Native Affairs to be convened on an ad hoc basis to try natives for offences committed against another native. The court was empowered to call to its assistance the head man of the tribe to which the accused belonged, and could take into account in mitigation of punishment any tribal custom which was an element of the offence.[2717] In more recent times, some magistrates in the Northern Territory, South Australia and Western Australia have adopted the practice of hearing criminal cases in the presence of a group of local elders who have in effect acted as assessors, especially on sentencing issues. These practices go beyond the use of assessors for evidentiary purposes, and are an attempt to incorporate Aboriginal decision-making structures within the lower court system, or even to delegate limited law and order powers to local groups. They are accordingly dealt with in Part VI of this Report, in the context of local justice mechanisms.[2718] An alternative proposal, which is closer to the use of assessors in the more limited evidentiary way, was made by the South Australian Aboriginal Customary Law Committee. The Committee proposed an Office of Customary Law Adviser to report to a court hearing criminal charges with Aboriginal customary law elements. The report would include information such as the following:

- A general description of the communities involved.
- The kinship relations of the defendant, and those otherwise concerned with the case.
- The role of custom in determining the defendant's action.

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2714 A Dickey, 'The Province and Function of Assessors in English Courts' (1970) 33 *Mod L Rev* 494; I Freckelton, 'Court Experts, Assessors and the Public Interest' (1985) 8 *Int JL & Psych* 29. Even in admiralty, assessors are rarely used in Australia, and their appointment has been a source of difficulty: see eg *Peters Slip Pty Ltd v Commonwealth* [1979] Qd R 123.

2715 Criminal Procedure Act 1972 (W Samoa) s 86-103. However assessors in such cases are judges of fact, not advisers on custom. See BC Spring, 'The Judicial System of Western Samoa' in *Record of the Fourth Asian Judicial Conference*. Canberra April 1970, AGPS, Canberra, 1971, 204, 210-12, 217.

2716 National Court Assessors Act. See further D Weisbrot, 'Interpretation of Laws in Papua New Guinea: Custom and the Criminal Law in Conflict' in D Weisbrot, A Paliwala & A Sawyerr (ed) *Law and Social Change in Papua New Guinea*, Butterworths, Sydney, 1982, 59, 91-3.

2717 See para 53, 721.

2718 See para 722, 747-58, 764, 766, 767, 833-4, 836-7. For the use of local opinion on sentencing see para 510, 524-5, 528.

- An account of obligations binding the defendant in relation to the alleged offence, and the probable conduct of the defendant in a purely traditional context.

- An account of non-traditional elements and aspects relevant to the allegations and/or indictment.

- Details of the defendant's previous offences, and, if appropriate, his school, work and personal history.[2719]

Before considering the use of assessors in such situations, it is instructive to outline the provisions for Aboriginal assessors in the NSW Land and Environment Court, the role of consulting anthropologists in Australian land claims, and the use of assessors in proving customary law in other jurisdictions.

668. ***Assessors in the NSW Land and Environment Court***. The NSW Land and Environment Court, established in 1979, is unique among Australian courts in having extensive provision for assessors, who conduct preliminary inquiries and may make decisions themselves in certain matters, and in some other matters sit with and advise the judge.[2720] The court is given important powers under the Aboriginal Land Rights Act 1983 (NSW). These include:

- appeals from a Minister's refusal to grant a land claim (s 36(6)-(7));

- granting or refusing approval in certain cases to mining operations or Aboriginal land (s 45(8));

- granting access permits for traditional hunting, fishing or gathering rights (s 48);[2721]

- hearing disputes between or within Aboriginal Land Councils, where these are referred to the Court by the Registrar (s 59).

In the case of the first 3 of these, the Court is required to sit with 2 assessors, appointed under s 12(2)(g) of the Land and Environment Court Act 1979 (NSW) as persons (not necessarily Aborigines) with:

> suitable knowledge of matters concerning land rights for Aborigines and qualifications and experience suitable for the determination of disputes involving Aborigines.[2722]

In the case of the fourth, the jurisdiction over 'Aboriginal disputes' under s 59 of the Aboriginal Land Rights Act 1983 (NSW), with certain exceptions this can only be exercised by an 'Aboriginal' assessor. sitting alone without a judge.[2723] It is too early to assess how successful the use of assessors under these provisions will be.

669. ***The Land Claim Experience***. The practice of the Aboriginal Land Commissioner in appointing a consultant anthropologist in respect of each claim commenced in the first claim[2724] and has been followed since. The consultant anthropologist has a responsibility to advise the Land Commissioner on the interpretation of the anthropological evidence, and has in some cases cross-examined anthropological witnesses.[2725] This extensive use of anthropologists seems to have been most successful, and is a good example of the use that can be made of experts as assessors. However what is appropriate for a wide-ranging hearing such as a land claim will not necessarily be appropriate in adversarial judicial proceedings.

670. ***The Role of Assessors in Customary Law Cases Abroad***. The use of assessors developed from the need to inform non-native magistrates and judges about local conditions and customary laws or traditions. O'Regan gives a general description of the way in which assessors work:

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2719 South Australian Aboriginal Customary Law Committee (Chairman: Judge JM Lewis) *Preliminary Report*, Adelaide, 1979, 57.

2720 Land and Environment Court Act 1979 (NSW). See J Crawford, *Australian Courts of Law*, Oxford University Press, Melbourne, 1982, 254-7.

2721 See further para 940.

2722 Only assessors appointed under s 12(2)(g) can advise or exercise jurisdiction under the Aboriginal Land Rights Act 1983 (NSW), and they can only advise or exercise jurisdiction under that Act: Land and Environment Court Act 1979 (NSW) s 30(2A), (2B).

2723 Aboriginal Land Rights Act 1983 (NSW) s 36(1)(b). See M Wilkie, *Aboriginal Land Rights in NSW*, APCOL, Chippendale, 1985, 142-3.

2724 eg *Borroloola Land Claim*, AGPS, Canberra, 1978, and see further para 626.

2725 *Nicholson River Land Claim*, Transcript of Evidence (25 November 1982) 606-29, where consultant anthropologist Dr A Chase cross-examined DS Trigger. There was no consulting solicitor present.

> The system varies from country to country because of differences in legislation, case law and judicial practice but the following summary is typical. Residents aged between, say, twenty-one and sixty who can speak and understand English are liable to serve as assessors unless disqualified or exempted ... Lists of eligible assessors are prepared by district officials and from these lists the Chief Justice or the Registrar of the Supreme Court selects assessors to serve at specified sittings of the Court. Those chosen are summoned to attend the sittings and the presiding judge then selects several of them — usually three — to sit with him for each trial. The judge's choice may be challenged for good cause — for instance that the prospective assessor is closely related to a Crown witnesses or for other reasons might be prejudiced toward the accused. The assessors finally accepted sit with the judge, hear all the evidence — asking questions of witnesses if they wish — and the judge then sums up the evidence to them, relating it to the relevant law and asks each assessor for his opinion on any matter pertaining to native custom and on the general issue of the guilt or innocence of the accused. Each assessor then gives his opinion individually in open court and states the reasons on which his opinion is based. In most jurisdictions these opinions are advisory only. The judge does not have to accept them. He alone finally decides what the verdict of the court should be.[2726]

It is often suggested that assessors are one of the best ways of informing judges of customary law matters and of local conditions generally.[2727] According to O'Regan:

> The system has certain obvious advantages. Firstly, it helps the judge. It gives him the benefit of expert advice on matters relating to local custom. It should assist him in setting the evidence in its social context when the crime alleged stems, as many do, from land disputes, fear of sorcery or the inexorable rule of the payback. It may be particularly helpful when defences such as provocation, mistake of fact and self-defence are raised. Secondly, as a famous English judge, Lord Atkin, said speaking of the assessor procedure in Africa, 'it operates ... as a safeguard to natives accused of crime, and a guarantee to the native population that their own customs and habits of life are not misunderstood'. It involves the local people significantly in the judicial process at the highest level.[2728]

On the other hand, there is the danger that this information may be partial or wrong, and unless 'the assessor's opinions are given publicly and are subject to cross-examination, the parties will have no opportunity to correct them:

> Assessors ... are not called by the parties, are not sworn, and cannot be cross-examined. Indeed their advice is both sought by and given to the court in private and is only disclosed to the parties at the court's discretion and then usually at the end of the case in the judgment[2729]

A rule was accordingly developed which prevented assessors from communicating new information to the judge, as distinct from commenting on the evidence. But the distinction is a difficult one to apply, especially where the 'new information' is of particular relevance to the case. In relation to native assessors the question whether the advice of native assessors should be given to the judge in private or in open court was considered by the Privy Council in *Mahlikilili Dhalarnari v R*.[2730] That case involved an appeal against conviction because two administrative officers and the native assessor had given their opinions to the judge in private. The Privy Council considered this a 'substantial and grave injustice'. Lord Atkin said:

> It was suggested that so far as the native assessor was concerned if his opinion had to be given in public he might feel constrained to decide in favour of a native accused, whereas, in the privacy of the judge's room and in company only the judge and the administrative officers he would be more likely to give an honest independent opinion ... Their Lordships cannot accept this contention ... It must ... be remembered that the provision for giving the judge, at his request, the assistance of a native assessor cannot be regarded solely from the point of view of aid given to the judge. It operates, and no doubt is intended to operate, as a safeguard to natives accused of crime, and a guarantee to the native population that their own customs and habits of life are not misunderstood. From this point of view the importance of publicity is manifest.[2731]

But if the advice is to be given in public, the need for the parties (and especially the defendant in a criminal case) to be able to correct or question it is clear, and could not be regarded as met by a right to question an assessor's advice on appeal. Apart from other difficulties with such a procedure, it could in important respects convert the appeal into a rehearing of material which the parties had had no previous opportunity to deal with or refute.

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2726 RS O'Regan, *Pruning the English Oak*, Public Lecture, University of PNG, 1972, 8-9.

2727 eg AN Allott, *New Essays in African Law*, Butterworths, London, 1970, 267-9; J Gray, 'Opinions of Assessors in Criminal Trials in East Africa as to Native Custom' (1958) 2 J*AfL* 5; HF Morris, *Evidence in East Africa*, Sweet & Maxwell, London, 1968, 113-5.

2728 O'Regan 9, citing *Mahlikildi Dhalamari v The Queen* [1942] AC 585, 589.

2729 Dickey, 501. Dickey's account differs from O'Regan's as to whether assessors express their opinions in open court. The difference would appear to be that Dickey is referring to the practice in English courts, whereas O'Regan is referring to the African experience. In this and in other respects, there are important differences between assessors used in a limited number of civil cases in England and native assessors used in criminal cases in Africa.

2730 [1943] 1 All ER 463.

2731 id, 466.

671. ***Difficulties with Assessors***. Other concerns and questions have been raised with respect to assessors, both generally and in the present context. These include:

- whether the assessor should deal comprehensively with the background to an offence, the proper sentence and so on, or should merely comment on the evidence presented;

- the danger that the mechanism of assessors provides too limited a role for indigenous people, given that assessors can only advise and not decide with respect both to guilt or innocence and sentence;

- whether an Aboriginal assessor would be available in cases involving only Aborigines or also in 'mixed' cases;

- whether assessors should be available in criminal as well as civil cases, and if so, what implications there would be for the trial by jury; and

- the danger that information provided by assessors may be wrong or misleading and that no other evidence has been called to refute it. While it has been held that expert evidence cannot be called on matters falling within the special skill or experience of a nautical assessor,[2732] the African practice has been to call witnesses with expertise on native custom and to ask assessors to determine the weight to give to it. However, as has already been pointed out, this is a difficult distinction to draw.

The administrative and other difficulties in setting up an assessor system must also be considered. These include the method of choosing suitable assessors, maintaining lists of assessors to ensure that an assessor will always be available when needed by the court, and the costs of an assessor system, including travelling and other costs. But the fundamental objection to assessors is that the appointment of an assessor offends against the principle of allowing cross-examination wherever possible. The assessor's views are unchallenged and, especially if given in private, unchallengeable. Accordingly the tendency in Australia is to reject assessors in general legal procedure.

672. ***Assessors and the Proof of Aboriginal Customary Laws***. While the assessor system has a long and apparently successful history in Africa and elsewhere, there are a number of objections to adopting it as a specific method of proving Aboriginal customary laws. In Chapter 28, different Aboriginal ways of resolving disputes based on kin responsibilities and obligations are discussed. In such disputes, different persons not directly involved will be called upon to play different roles. In small communities all members will have varying degrees of involvement, and all will have some interest in the outcome. This would make it difficult, if not impossible, for a court to appoint an assessor who might be regarded as objective or uninterested (assuming that this is to remain a prerequisite). Even if this is not regarded as a bar, an individual from the community may be very reluctant to express views about a matter in a public forum. In Aboriginal terms the dispute may be 'none of his business', certainly not one which he should speak about in court.[2733] In some cases several persons would need to express opinions because of their various relationships to the accused or the role they should play in resolving a dispute. A case in point was *R v Isobel Phillips*, in which 4 Aboriginal women were permitted to give evidence jointly.[2734] All took separate oaths, but gave evidence together, each answering questions relating to the offence and its customary basis in accordance with their relationship with the accused. The taking of group evidence in this manner is to be preferred to the use of assessors.

673. ***Outside Assessors as Customary Law Experts***. The alternative, that is, choosing someone as an 'expert' assessor from outside the community, also appears inappropriate, even if the person was from the same language group or had previously resided in the community. Such a person may be able to express some general views, but would not be likely to have detailed knowledge of the circumstances surrounding a particular offence. The characteristics of most Aboriginal disputes would mean that maintaining a formal list from which the court could select an assessor as needed would not be workable. This problem could perhaps be overcome if the community had some collective responsibility for selecting an assessor or assessors to

2732 *Saul v St Andrew's Steam Fishing Co Ltd, The St Chad* [1965] Lloyd's Rep 1 (CA).
2733 cf para 644-5.
2734 See para 648.

assist the court. But the modalities of selection would present problems[2735] existing bodies such as community councils would not necessarily be appropriate nominating bodies, and it would be cumbersome and ineffective to establish special bodies for such a limited purpose. If on the other hand the aim was to select an anthropologist, or a social scientist from another discipline, with relevant experience, there is no clear indication that such experience and insight can not be applied through the ordinary adversary process. The kind of information which the court requires would, in most cases at least, be accessible in the ordinary way, with the aid of the evidentiary reforms suggested in this Part. Perhaps the greatest difficulty occurs in relation to sentencing, where the range and scope of relevant information is considerably greater than in most areas of substantive law.[2736] Even here, however, community views could be presented as evidence by persons chosen by the community, and relevant information, including information about Aboriginal customs and practices relevant to sentencing, can be presented in the same way as other evidence, or through a pre-sentence report.[2737]

674. ***Conclusion***. It needs to be stressed again that the question here is the limited one of how best to provide information to a court dealing with a customary law issue. It is not the broader issue whether Aboriginal groups should exercise autonomy over matters of local law and order.[2738] In this limited context, the nature of Aboriginal customary laws (including the kinship system) appears to create major obstacles to the appointment of 'Aboriginal assessors', at least in the context of the matters discussed in this Report. There has been little or no demand for Aboriginal assessors to be appointed, and it is suggested that the information which a court is likely to need is not of a kind usually provided by assessors. The system of assessors also has the potential for un necessary intrusion into the operation of Aboriginal customary laws. It is preferable that there be greater reliance on Aboriginal evidence, including group evidence, and on expert evidence. For these reasons a formal system of assessors is not recommended.

## Court Experts

675. ***The Use of Court Experts in Australia***.[2739] The power of an Australian court to call a witness (including an expert witness) without the consent of the parties is limited to criminal cases, and may not exist even then (the decisions on the point are conflicting).[2740] The existence of a common law power to appoint an independent 'court expert' to assist by reporting on some disputed issue is similarly uncertain, and even where that power is conferred by rule of court, it is rarely used.[2741] The main objection to increased use of court experts is that either the expert becomes in effect the arbiter of the case, or his evidence or report must be subjected to cross-examination by both sides, with an opportunity to call evidence in refutation. The former is inappropriate, especially where (as is common) there is disagreement within the particular profession or discipline: the choice of expert can in effect determine the approach that will be adopted.[2742] The latter is likely to increase the cost and length of the trial, without, in most cases, any corresponding advantages in resolving the dispute. It can be argued that the difficulties in proving Aboriginal customary laws are such that no possible assistance should be rejected. On this view, courts should be given a variety of powers to help them in resolving these difficulties, including the power to call for an expert opinion or report. Given the present uncertainty of the law, this would probably require legislation. However the Commission has received no real support for this view, and experience suggests that the problems are better dealt with in other ways. Given the objections to court experts there appears no sufficient reason for a special law in the present context.

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2735 There is, understandably, a view that court sitting with assessors should accept their advice especially if it is unanimous: Gray, 5. This makes the issue of selection even more important.

2736 With the possible exception of custody cases: see para 351-2, 373. In that area the involvement of Aboriginal child care agencies is of great significance in ensuring that the court is given relevant information.

2737 On the general question of adducing community views in sentencing see para 510, 524-31. On presentence reports see para 530, 676.

2738 cf para 667, and see Part VI where the broader question (so far as it falls within the Commission's terms of reference) is discussed.

2739 See J Basten, 'The Court Expert in Civil Trials — A Comparative Appraisal' (1977) 40 *Mod L Rev* 174; IF Sheppard, 'Court Witnesses — A Desirable or Undesirable Encroachment on the Adversary System?' (1982) 56 *ALJ* 234; Freckelton (1985).

2740 eg *R v Whitehorn* (1983) 49 ALR 448; cf *R v Apostolides* (1984) 58 ALJR 371. cf *R v Damic* [1982] 2 NSWLR 750.

2741 The most significant Australian example is the Family Court. See Family Law Act 1975 (Cth) s 62(4), 63(2); Reg 111, 117; HA Finlay, *Family Law in Australia*, 3rd edn, Butterworths, 1983, 30-1. See also HCR 038 r 2-4; FCR O 34; NSW RSC O 36 r 16, O 40 r 1(1).

2742 cf *Kian v Mirro Aluminium Co* 88 FRD 351, 356 (ED Mich, 1980):

> The presence of a court-sponsored witness, who would most certainly create a strong, if not overwhelming, impression of 'impartiality' and 'objectivity', could potentially transform a trial by jury into a trial by witness.

## Pre-sentence and Similar Reports

676. ***A Valuable Aid***. The use of pre-sentence and similar reports, whether prepared by the departmental officers normally assigned to this task or by persons specially commissioned to do so because of their special expertise and knowledge of the case, or of the defendant's community, is one way in which information about local traditions and usages can be provided to the court. The usefulness of pre-sentence reports was stressed in Chapter 21, although it was concluded that other means of informing the court on the background to an offence and on local opinion should also be used.[2743] The reports may be admitted as pre-trial reports, and are not limited to decisions on sentence, although it is in this latter context that they are commonly used. For example, in *R v Charlie Limbiari Jagamara* a pre-sentence report prepared by an anthropologist, Dr Bell, detailing matters relating to traditional marriage, was referred to extensively in the court.[2744] Given the wide range of relevant matters in sentencing decisions, and the difficulties that have occurred in some cases where courts were not fully informed, the Commission supports greater use of pre-sentence reports. As with other evidentiary aids discussed in this Part, the legislation should expressly confer power on the court to seek a pre-sentence report from a person or persons with special expertise or experience, in any case where considerations of Aboriginal customary laws or traditions are relevant in sentencing.

## Summary

677. ***Recommendations in this Part***. Accordingly, the Commission makes the following recommendations on the recognition of Aboriginal customary laws in the area of evidence and procedure.

*Police Investigation and Interrogation*

- To the extent that the general law of police interrogation does not provide equivalent safeguards, there need to be special rules protecting Aboriginal suspects under police interrogation, to help ensure the reliability and voluntariness of confessions or admissions made (para 561-3).

- These rules should apply to all Aborigines whose difficulties of comprehension of their rights under interrogation, and of the meaning of what is said, warrant such protection (para 565). This is to be achieved by focussing on whether the suspect genuinely understood the caution and the questions, and was not merely deferring to authority in the answers given. No separate test based on 'disadvantage' is necessary (para 565).[2745]

- Admissions or confessions obtained in consequence of a contravention of the interrogation rules should not be admissible unless the court is satisfied that, in the circumstances, the suspect:

    - understood the caution (ie, understood that there was no requirement to answer questions and that any answers might be used in evidence)

    - understood the nature of the questions put

    - did not answer merely out of deference to authority or suggestibility (para 565, 570).

- The interrogation rules should require the presence of a prisoner's friend when a suspect is in custody or is being interrogated in respect of a serious offence. There should be a preference for a prisoner's friend who has been nominated by the local Aboriginal legal aid organisation or who is a barrister or solicitor. If no such person is reasonably available, then a prisoner's friend may be another person chosen by the suspect. The prisoner's friend should not be a police officer, an accomplice in the suspected offence, or a person the police reasonably believe should be prevented from communicating with the suspect (eg with a view to destroying evidence or intimidating a witness) (para 568).

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2743 See para 529, 531.

2744 See para 625.

2745 On this point Professors Chesterman and Crawford dissent. They would add an additional requirement as a precondition to the operation of the interrogation rules, viz that the suspect was not specially disadvantaged in relation to the interrogation, having regard to the suspect's level of education, fluency in English, and other relevant characteristics.

- The interrogation rules should require notification of an Aboriginal legal service in cases where the suspect is in police custody or where the offence in question is a serious one, unless interrogation is necessary without delay to avoid danger to persons or serious damage to property or unless the prisoner's friend present is a lawyer or Aboriginal legal service nominee (para 569).

- The interrogation rules should also apply to admissions given in the course of other investigatory steps (such as re-enactments or identity parades) which require the presence and co-operation of the suspect, but they should not prevent the admission of material evidence (para 571).

- Waiver ought not to be a separate aspect of the rules (para 572).

- The basic interrogation rules should be stated in legislation together with the associated admissibility rule (para 573).

*Committal Proceedings*

- No specific change is recommended (para 577), apart from the use of existing procedural powers in particular cases to avoid specific difficulties which may arise (para 578).

*Fitness to Plead*

- Legislation should provide that, in a criminal proceeding against an Aboriginal defendant who appears not to be fluent in English, the court should not accept a plea of guilt unless it is satisfied that the defendant sufficiently understands the effect of the plea, and the nature of the proceedings. If necessary, the court should adjourn the proceedings to allow legal' advice or an interpreter to be provided, to assist in explaining the plea and its effect (para 585).

*Aborigines and Juries*

- No special provision excluding jury trial for Aborigines is justified (para 589).

- Attention should be given to jury selection procedures (including the preparation of jury-rolls) to help ensure that a multi-racial society is better reflected in the composition of juries. But there should be no specific requirement of Aboriginal representation on juries where Aboriginal defendants are on trial (para 594).

- The court should have power, on application by a party before the jury is empanelled, to make appropriate orders to ensure that a jury of a particular sex is empanelled, where under Aboriginal customary laws evidence to be given in the case can only be given to persons of that sex, the order is necessary to allow the evidence to be given, and having regard to other relevant matters (including other evidence to be given) the court considers the order should be made (para 595).

*Interpreters*

- Existing programs for the training and accreditation of Aboriginal interpreters should be supported and extended. The aim should be to ensure that interpreters are available where needed at all stages of the criminal justice process (ie during police interrogation, as well as in the courts) (para 600).

*Unsworn Statements*

- Legislation should provide that an Aboriginal defendant may give unsworn evidence unless the court finds that the defendant is not disadvantaged in relation to the giving of evidence in the proceeding, having regard to any relevant condition, characteristic or disability of the defendant, and whether for this reason the defendant is likely to be unfairly prejudiced by cross-examination (para 604).

- This provision should not apply if the defendant is otherwise entitled to make an unsworn statement in the proceeding in question (para 604).

- The statement should be made by the defendant personally, or be given by counsel on his or her behalf. Counsel should be able to remind the defendant of any other matter which should be referred to in the statement (para 604).

- The prosecutor should not be permitted to comment on the defendant's choice to give unsworn evidence,[2746] and any comment made by the judge should not suggest that that choice was made because the defendant believed he or she was guilty, or that unsworn evidence is necessarily less persuasive than sworn evidence (para 605).[2747]

*Dying Declarations*

- In order to resolve any doubts about the law it should be declared that dying declarations made by Aborigines shall not, by reason of their adherence to traditional beliefs, be held inadmissible on grounds of any lack of belief in a religious sanction or supernatural judgment (para 576).

*Proof of Aboriginal Customary Laws*

- Legislation should provide that evidence given by a person as to a matter of Aboriginal customary laws or traditions is not inadmissible on the grounds that it is hearsay or opinion evidence if the person giving the evidence —

    - has special knowledge or experience of the customary laws of the community in relation to that matter; or

    - would be likely to have such knowledge or experience if such laws existed.

    It should also be stated that such evidence is admissible, notwithstanding that the question of Aboriginal customary law is the issue or a substantial issue in the case (pare 642).

*Aboriginal Witnesses: Group Evidence and Authority to Speak*

- Lawyers, judges and administrators should be aware of problems for some Aboriginal people arising because under Aboriginal tradition they lack authority to speak, or to speak alone, on a particular matter (para 645).

- Courts and tribunals should be given express power to allow two or more members of an Aboriginal community to give evidence pertaining to the customary laws of that community together, where this is necessary or desirable (para 648).

*Secrecy, Confidentiality and Aboriginal Customary Laws*

- Legislation should confer specific power to hear evidence in camera, to exclude certain persons (eg members of the opposite sex to the witness) from the court or to take other steps to protect secret information, where this is necessary, on the balance of relevant considerations, in the interests of justice (para 656).

- There should be an express exemption in the Sex Discrimination Act 1984 (Cth) for acts done, and judicial, administrative or other restrictions imposed on the giving of information which relates to the religious, ritual or ceremonial life of Aboriginal communities in accordance with their traditions, as well as for customary law restrictions on entry to land for particular purposes (para 470, 656).

- The courts should have express power, where necessary, to protect confidential communications or records relating to the customary laws of an Aboriginal community. In some circumstances it may be

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2746 Justice MR Wilcox dissents on this point: in his view the prosecution should be allowed to comment.

2747 Justice MR Wilcox dissents on this point. In his view unsworn evidence by a particular person is necessarily less persuasive than sworn evidence by that person. But he also considered that a judge should not suggest that it is necessarily less persuasive than evidence given in the proceeding by other witnesses.

necessary for the court to exclude certain evidence altogether. Before doing so the court should be required to weigh the likelihood of harm to interested persons, to the Aboriginal community concerned, and to any confidential relationship or class of such relationships, against the importance of the evidence, by whom it is called and the nature of the proceeding (para 661).

- There should be no special class of anthropologist-informant privilege (para 661).

*Privilege against Self-Incrimination*

- The courts should be given power to excuse a witness from answering a question which tends to incriminate the witness under his or her customary laws. This power should be exercised unless the court finds that the desirability of admitting the evidence outweighs the likelihood of harm to the witness, to some other member of the Aboriginal community concerned, or to the Aboriginal community itself (pare 665).

*Assessors' Court Experts and the Proof of Aboriginal Customary, Laws*

- No special provision should be made for assessors, or court experts, to assist in the proof of Aboriginal customary laws (para 672-5).

*Pre-sentence Reports*

- Legislation should expressly confer power on the court to adjourn to enable a pre-sentence report to be obtained from a person or persons with special expertise or experience, in any case where considerations of Aboriginal customary laws or traditions are relevant in sentencing (para 676).

# PART VI:

# LOCAL JUSTICE MECHANISMS FOR ABORIGINAL COMMUNITIES

# 27. General Principles

## Introduction

678. ***Background to the Terms of Reference***. As well as requiring the Commission to consider whether and in what manner Aboriginal customary laws and practices should be applied to Aborigines in civil or criminal cases before the ordinary courts, the Commission's Terms of Reference require it to consider:

> to what extent Aboriginal communities should have the power to apply their customary law and practices in the punishment and rehabilitation of Aborigines.

This question was to a large extent impelled by representations made by the Yirrkala Community Council to the Council for Aboriginal Affairs in 1975.[2748] Aboriginal leaders from Ngukurr, Groote Eylandt and Yirrkala appealed to the Council for assistance on how to reduce the problems resulting from the easy availability of alcohol in their communities. The Council agreed with the proposals made by the Aboriginal leaders, which were aimed to improve conditions which were largely beyond their control. Their Report stated:

> The Leadership Council makes some very practical suggestions for (a) more responsible conduct by and supervision of supplies of liquor, and (b) a system of restraint, control and, if necessary, punishment of drunken offenders by

2748 See para 4. The Council was constituted by Dr HC Coombs, Chairman, Emeritus Professor WEH Stanner and Mr BG Dexter, then Secretary, Department of Aboriginal Affairs.

> Aboriginal authorities backed by European law. The Council for Aboriginal Affairs was impressed by the suggestions and, in general, commends them. In brief, the leaders advocate four measures.
>
> 1. the appointment of uniformed Aboriginal orderlies with power to arrest and confine drunken Aborigines until sober or charged with an offence;
>
> 2. a working agreement with the Northern Territory Police that, when practicable the arrest, and in all circumstances the custody of arrested Aborigines, will be matters for the Aboriginal orderlies;
>
> 3. an agreement with the appropriate Northern Territory authorities that charges against Aborigines will be heard by a court sitting at Yirrkala, with Aborigines assisting the judge or magistrate as assessors or as Justices of the Peace, and always with legal representation of the persons charged;
>
> 4. the recognition by Australian law of the legal authority of the Council of Leadership and the orderlies.[2749]

Requests from Yirrkala, and from other communities looking for ways to solve local order problems were thus an initial catalyst for the Reference:

> This reference was given to the Commission in response to requests by many Aboriginal communities in the north for help in handling law and order problems in their communities and for recognition of the problems they face in adapting their traditional forms of social control to their contemporary situation. I believe that this kind of initiative by Aboriginal people typifies the quite revolutionary changes that have occurred in Aboriginal life in the past decade.[2750]

679. ***'Law and Order' in Aboriginal Communities***. In addressing the second aspect of the Terms of Reference, broader questions of law and order in Aboriginal communities arise, including the ways in which different communities deal with, or would like to deal with law and order problems. An Aborigine may commit an offence against the general criminal law which may be categorised as 'non-customary' but which may be very disruptive of community life, with the result that members of his community would like some say in the way in which the offender is dealt with. Some offences may breach both the general criminal law and Aboriginal customary laws. Or an 'offence' may be entirely customary, in which case communities may consider it is within their jurisdiction to deal with it — a view that may not be shared by the general legal authorities. Some Aboriginal communities have sought Commonwealth or State legislation to give them power to make rules for the community and to deal with persons who break such rules, while others have sought the enactment of customary laws enforceable in the general legal system.[2751]

680. ***Outline of this Part***. While the Commission's Terms of Reference refer only to the possibility of 'Aboriginal communities being given the power to apply their customary laws and practices', what underlies this aspect of the Terms of Reference is the broader question of autonomy for Aboriginal communities in law and order matters. Accordingly, this Part of the Report will consider a broad spectrum of issues and proposals. This Chapter will consider the general principles underlying justice mechanisms for Aboriginal communities. For convenience, the term 'justice mechanism' has been adopted in this Report to cover generally the various forms or structures of dispute resolution which operate or could operate within Aboriginal groups.[2752] Chapters 28 and 29 describe existing dispute-resolving mechanisms, in Aboriginal communities. Chapter 30 considers the relevant overseas experience. Chapter 31 considers what mechanisms may be applied in Australia, and ways of implementing them in accordance with the wishes of particular Aboriginal communities concerned. Finally, Chapter 32 discusses the role of the police, and the policing of Aboriginal communities by means other than the regular police force.

## Justice Mechanisms: Theory and Practice

681. ***Some General Developments***. Any examination of this aspect of the Commission's Terms of Reference needs to take into account the background of continuing experiments with forms of 'justice mechanisms' other than the ordinary courts, and with procedural and other changes to the ordinary courts. The reasons for this have included the need to reduce the complexity and formality of present legal procedures, to encourage (e.g. through mediation) negotiated rather than adjudicated settlements, and thereby to reduce to some extent

2749 Council for Aboriginal Affairs (HC Coombs, WEH Stanner, BG Dexter) *Report on Arnhem Land*, AGPS, Canberra, 1975, 17-18.
2750 Statement by the Hon RI Viner, MHR, Minister for Aboriginal Affairs, 112 *Parl Debs (H of R)* (24 November 1978) 3449.
2751 See para 455-9, 685-6.
2752 See para 803.

the increasing costs and delays of ordinary litigation. It is important to be aware of these developments for a number of reasons:

- they may be a source of ideas or models which could be adapted by Aborigines for their use;
- they may assist as precedents in justifying changes or modifications to the legal system sought by Aboriginal groups;[2753]
- conversely, their record of success or failure may provide useful or cautionary lessons in the present context.

It is not possible in this chapter to give anything like a full account of the various justice models which have been suggested or tried, in Australia or elsewhere.[2754] Australian developments have included:

- the use of counselling and other procedural reforms in the Family Courts;[2755]
- the introduction, as a pilot scheme, of community-based family centres;[2756]
- diversion of young offenders from juvenile or children's courts to children's aid panels, etc;[2757]
- the growth of tribunals such as small claims or consumer claims tribunals;[2758]
- the use of 'community-based' dispositional orders in sentencing offenders, as an alternative to imprisonment;[2759]
- the use in New South Wales of senior solicitors to arbitrate minor civil claims (less than $10000) on referral from a Magistrate or District Court;[2760]
- community justice centres in New South Wales.

682. ***Community Justice Centres (NSW)***. Perhaps the most interesting example for present purposes is the experiment with Community Justice Centres under the Community Justice Centres (Pilot Project) Act 1980 (NSW). Three such centres were established as part of a pilot project in 1980. Their functions were to mediate in 'neighbourhood' disputes brought to them by private parties, and to assist such parties in reaching an agreed settlement of their dispute. The Centres had no power to compel attendance, and it was specified that agreements reached through mediation sessions, though recorded in writing, were not legally enforceable.[2761] Mediators were chosen from members of the general public and given a limited degree of training.[2762] A careful review of the Pilot Project was conducted under the auspices of the Law Foundation of

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2753 These would not, in this perspective, be seen as isolated or 'discriminatory' programs but as part of a more widespread movement to improve, by diversifying, the machinery of justice in Australia.

2754 The literature on the topic is immense. See eg M Cappelletti and B Garth, 'Access to Justice: The Worldwide Movement to Make Rights Effective' in M Cappelletti & B Garth (ed) *Access to Justice: Vol I A World Survey*, Giuffre, Milan, 1978, Book 1, 3-124, and the national reports included in that suriey. See also M Cappelletti & J Weisner (ed) *Access to Justice: Vol. II Promising Institutions*, Giuffre, Milan, 1978, 2 volumes. On the application of these ideas to indigenous societies see eg M Galanter, 'Justice in Many Rooms: Courts, Private Ordering and Indigenous Law' (1981) 19 *J Legal Pluralism* 1 and the works there cited; FG Snyder, 'Anthropology, Dispute Processes and Law' (1981) 8 Brit J Law & Soc 141; K Hazlehurst (ed) *Justice Programs for Aboriginal and other Indigenous Communities*, Australian Institute of Criminology, Canberra, 1985.

2755 See A Asche & J Marshall, 'The Interaction of Judges, Lawyers and Counsellors in the Family Court of Australia' (1980) 1 *Aust J Sex, Marriage & Family* 27; J Crawford, *Australian Courts of Law*, Oxford University Press, Melbourne 1982, 193-4 and references. cf more generally S Roberts, 'Mediation in Family Disputes' (1983) 46 *Mod L Rev* 537.

2756 Family Law Council, *Report to the Attorney-General in respect of Family Law Centres*, November 1983; Hon Sen Gareth Evans QC, Commonwealth Attorney-General, (1984) 9 *Commonwealth Record* 1546 announcing the establishment of two family law centres as a pilot project.

2757 Crawford, 205-8, and cf ALRC 18, *Child Welfare*, AGPS, Canberra, 1981, 76-90.

2758 Crawford, 238-46 and references.

2759 ALRC 15, *Sentencing of Federal Offenders*, AGPS, Canberra, 1980, para 393, 394. See also para 489, 539-41.

2760 See (1983) 21 *Law Soc J* (NSW) 234.

2761 Community Justice Centres (Pilot Project) Act 1980 (NSW) s 23.

2762 See generally J Schwartzkoff & J Morgan, *Community Justice Centres, A Report on the New South Wales Pilot Project, 1979-81*, Law Foundation of New South Wales, Sydney, 1982, 7-48 for a description of the Project and its operation. See also University of Sydney, Institute of Criminology, Proceedings No 51, *Community Justice Centres*, Sydney, 1982; D Neal (1983) 8 LSB 86-7; W Faulkes, 'Community Justice Centres in New South Wales' in Hazlehurst (1985) 143. More generally see RL Abel, *The Politics of informal Justice*,

New South Wales, which reached broadly favourable conclusions. The resulting recommendation, that the Project be continued and extended, has been accepted. But the Law Foundation Report's conclusions emphasise the rather limited character of the Project's aims:

> The CJCs adopted a 'service' model of informal dispute resolution which was appropriate for cases of this kind — informal, accessible, confidential, non-coercive, and chiefly concerned to meet the needs of individual parties. For such reasons the researchers concluded that the New South Wales centres were not in practice vulnerable to certain criticisms from time to time made of informal dispute resolution programmes in the USA; it could not reasonably be said, for example, that they represented a dangerous aggrandisement of State power or that they sought to provide a form of 'second-class justice' for disadvantaged people ... The researchers saw much of the strength of the pilot scheme as lying in its being quite separate from and operating quite differently from legal institutions.[2763]

The Law Foundation Report points out the strong emphasis the Project placed upon the needs of ethnic minorities (i.e. migrants),[2764] but makes no mention of Aborigines as participants in disputes mediated by a Community Justice Centre. The Commission was informed by the Director of the Surry Hills Community Justice Centre (which, because of its location, is the one which is the most likely to have had contact with Aboriginal parties) that the Centre had had relatively little impact on Aboriginal disputes in the neighbourhood, although it had dealt with the occasional dispute between an Aboriginal and a non-Aboriginal person.[2765] The Director commented that, apart from the obvious need for Aboriginal mediators, some review of the Centres' administrative arrangements would be desirable in dealing with inter-Aboriginal disputes. For example mediation sessions might be better conducted elsewhere than at a Centre (e.g. at the office of the Aboriginal Legal Service). With such modifications it is possible that the Centres could be of greater value to Aborigines in the settlement of disputes.[2766]

## Justice Mechanisms in Aboriginal Communities: Needs, Problems and Responses

683. ***Previous Discussions of these Questions***. Apart from official discussions, the prospects for Aboriginal community justice mechanisms in some form have been discussed by a number of authors, especially over the past ten years. Of earlier discussions the most important were by AP Elkin,[2767] who strongly supported the establishment of properly constituted native courts, at least on an experimental basis[2768] and Justice Kriewaldt,[2769] who did not favour the establishment of special courts in minor or major, cases, but did make recommendations for:

- exclusion of special (lay) magistrates and justices of the peace in cases involving Aborigines;
- assessors to sit with the Supreme Court judge in appropriate cases (there was then trial by jury in only a limited class of cases in the Northern Territory);

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Academic Press, New York, 1982; R Tomasic & M Feeling *Neighbourhood Justice: Assessment of an Emerging Idea*, Longman, New York, 1982.

2763 Schwartzkoff & Morgan, vi-vii.

2764 id, 162. Little more is known about dispute settlement among migrant groups in Australia than among Aboriginal groups. One study of Lebanese Muslim groups in Sydney emphasized the continuation of informal mediation and conciliation in family and similar disputes, but also the considerable interaction between Australian and Shari'a law: MNT Humphrey, 'Disputes and Law. A Study of Lebanese Muslim Immigrant Communities in Sydney', Macquarie University Ph D thesis, 1982, 184-6, 192-3, 209-13, 226, 242-4, 273-4, 284-7. Humphrey concluded that 'while in theory [self-help, mediation and adjudication] constitute separate modes of dispute processing, in practice they cannot be analysed as discrete systems, only interdependent ones': id, 226.

2765 Faulkes (1985) 143 reports that 'Aboriginals are represented in our case-load in roughly the same proportions as they are in the catchment areas'. But this is based on relatively small absolute numbers of cases: id, 151. Despite considerable effort, the Centre has been so far unable to attract and train Aboriginal mediators, and in the absence of such mediators was very reluctant to advertise the service as suitable for Aboriginal clients, or to make active efforts to promote it.

2766 Information provided by Ms Wendy Faulkes, Director, Surry Hills Community Justice Centre (6 May 1985). In Victoria, a Report of the Dispute Resolution Project Committee has recommended setting up a service similar to that operating in New South Wales. No program for implementation has yet been announced. See Report of the Dispute Resolution Project Committee, *Neighbourhood Mediation Service*, Melbourne, February 1985. In South Australia a community panel-based mediation service is offered by the Norwood Community Mediation Service. See R McCarron, *Report on the Norwood Community Mediation Service*, Adelaide, 1984.

2767 AP Elkin, 'Aboriginal Evidence and Justice in North Australia' (1947) 17 *Oceania* 173, 194-210.

2768 id, 206-10.

2769 MC Kriewaldt, 'The Application of the Criminal Law to the Aborigines of the Northern Territory of Australia' (1960) 5 *UWAL Rev* 1, 43-50.

- the Supreme Court to sit if possible close to the 'scene of the crime'.[2770]

The more important recent discussions, include the following:

- *Misner (1974)*.[2771] Following the work done for three Reports, (discussed in para 659) prepared for the Commonwealth minister for the Northern Territory[2772] Misner studied the possibilities for local Aboriginal justice machinery. His private study was both more detailed and markedly more pessimistic. In view of the limits of political acceptability within the 'white community', the 'great discrepancies among Aboriginal communities as to what they want and could handle', as well as the logistical and practical problems[2773] his view was that:

  > there is grave doubt whether, except in cases where only a minimal jurisdiction is given over to an Aboriginal Court or where only police functions but no judicial function are performed by Aboriginals, any new approach to the problem of justice on Aboriginal settlements is possible.[2774]

  And, after noting difficulties posed by the requirements of minimum standards of justice in the International Covenant on Civil and Political Rights of 1966 [2775] he concluded:

  > The problem is clear: due to logistical and cross-culture problems in the Northern Territory, the criminal justice system is an ineffective and sometimes oppressive, tool in dealing with Aboriginals. One possible solution to these problems is the establishment of tribal courts and tribal police. It would appear, however, that for many separate reasons the best that one could hope for is the adoption of basically 'white courts' onto the settlements which would be staffed by Aboriginals. It should not be assumed that all or any Aboriginal settlements would want to accept or be able to accept this responsibility.[2776]

- *Eggleston (1976)*.[2777] As part of a wider study, Elizabeth Eggleston considered the possibility of special Aboriginal courts as a form of recognition of Aboriginal traditional law and culture. Her conclusion, though not detailed, was strongly supportive of the idea:

  > I strongly believe that attempts should be made to pass over more responsibility to Aborigines in relation to the whole legal process, whether tribal law is involved or not. For this reason I favour the creation of special courts staffed by Aborigines. [A] United Nations study of Equality in the Administration of Justice ... recognises that separate systems of courts for specific ethnic groups may be 'concessions to traditional tribal patterns or types of temporary legitimate protection of minorities' and thus need not necessarily be regarded as discriminatory (though others may be discriminatory in effect). This non-discriminatory ideal should be regarded as the policy underlying any creation of special courts for Aborigines and specific provisions should be tested by reference to it. Aboriginal communities should be consulted before detailed legislation is framed. Intensive study of overseas experience with plural systems of law is also needed, so that the best model may be adopted and the most serious problems be avoided ... Even if authority over law and order is transferred to Aboriginal communities it is probable that their powers would be limited. Their jurisdiction might only extend to minor crimes leaving homicides to be dealt with by the ordinary courts. The ordinary courts should then be encouraged to give more recognition to tribal law and better means of finding out the actual beliefs of the Aboriginal people than at present exist should be devised. The official recognition of tribal law, as proposed, would not only solve some practical difficulties but would be tangible recognition by white society of the value of Aboriginal culture.[2778]

  Earlier she had suggested, as one possibility, that legislation provide for Aboriginal courts to be established as required, and

  > that such courts should only be staffed by persons with certain qualifications and that procedure should be different from that of ordinary courts. There would be no practical difficulty about such requirements.

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2770 Elkin would have agreed with all three suggestions, which indeed he had already made: Elkin, 194 (exclusion of JPs), 197-8, 203 (use of assessors), 198-9 (local trials). The latter suggestion has also been supported by Justice Gallop when sitting in the Northern Territory Supreme Court: *R v Mark Djanjdjomeer*, unreported, NT Supreme Court, 14 February 1980, 29.

2771 RL Misner, 'Administration of Criminal Justice on Aboriginal Settlements' (1974) 7 *Sydney L Rev* 257.

2772 See para 685.

2773 Misner, 271.

2774 id, 274.

2775 See para 180.

2776 Misner, 283.

2777 E Eggleston, *Fear, Favour or Affection. Aborigines and the Criminal Law in Victoria, South Australia and Western Australia*, ANU Press, Canberra, 1976, 287, 303-5, 319-20 (based substantially on the position as at 1965-7).

2778 id, 304-5.

> Practical difficulties would arise only if the requirements were unreasonable, including matters like separate court buildings and special staff who had no other employment.[2779]

- *Daunton-Fear and Freiberg (1977).*[2780] As part of a larger review of Aborigines and Australian law, Daunton-Fear and Freiberg discussed the possibility of 'tribal courts' as one approach to the problems. Such a system, in their view, had many difficulties:

  > It would be unrealistic to paint a sanguine view of the possibility of indigenous courts, for the difficulties seem overwhelming. Foremost among these is the question of whether in fact such a system would make use of the existing practices and traditions of the people or whether this scheme is merely another imposition created by an idealised perception of Aborigines on the part of the Europeans.[2781]

  On the other hand the example of the PNG Village Courts (then just introduced) was seen helpful as: 'it would seem that such a system of limited jurisdiction maybe both acceptable and suitable in Australia and should be given careful consideration'.[2782] They concluded:

  > This litany of problems of tribal courts is indeed depressing but should not be overwhelming. It is submitted that despite these difficulties the idea of indigenous courts has much merit and that rather than being dispirited by experience elsewhere, Australia should learn from the errors and develop a system of courts based on Australian needs in the latter half of the twentieth century.[2783]

- *Keon-Cohen (1981).*[2784] In a wide-ranging comparison of 'native justice' in the three jurisdictions, Keon-Cohen reached only 'very tentative conclusions'.[2785] He stressed the special character of the Australian situation, as well as variability within Australia:

  > differing needs of different indigenous communities may require a range of jurisdictions to meet the requirements of native justice. Thus, isolated traditional Aboriginal communities may require a customary law jurisdiction, while fringe-dwelling acculturated communities may require a local government by-law scheme. This question of variability, both as to indigenous legal needs and realistic federal government response, is a central question facing Australian reformers.[2786]

  There were, in his view, many other difficulties in the way of any 'separate Aboriginal customary law jurisdiction' in Australia: these included 'complexity, uncertainty, confusion, and resulting cost'[2787] and the political reality that Australian governments are no more likely than American ones 'to vest [substantial] penalty powers in indigenous communities'.[2788] While accepting that 'no universal justice mechanism panacea ... can be offered',[2789] he suggested that increasing governmental control, whether over existing or new justice systems, not accompanied by a more basic system of separate self-government, would be mistaken.[2790] In his view:

  > amongst Australia's traditional Aboriginals ... native justice is more likely to be achieved though maximising the use of existing customary law ways, and encouraging their development.[2791]

  The inference is that such encouragement should be indirect, rather than through outside involvement in the establishment of formal machinery, although no specific measures were suggested.

684. ***No Solutions Proposed***. Discussion of these issues in the literature so far gives a much better guide to the difficulties in the way of the establishment or support of Aboriginal community justice mechanisms than it does to the possibilities and potential solutions. The question is whether various responses, legal and administrative, to the problem suggest possibilities for further action.

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2779 id, 287.
2780 MW Daunton-Fear & A Freiberg, '"Gum-tree" justice: Aborigines and the courts' in D Chappell & PR Wilson (ed) *The Australian Criminal Justice System*, 2nd edn, Law Book Co, Sydney, 1977, 45, 89-99.
2781 id, 90.
2782 id, 95. For further discussion of PNG Village Courts see para 769-79.
2783 id, 98.
2784 BA Keon-Cohen, 'Native Justice in Australia, Canada and the USA: A Comparative Analysis' (1981) 7 *Monash UL Rev* 250. The author was for some years a Senior Law Reform Officer with the Commission working on the Aboriginal Customary Law Reference.
2785 id, 274, 321.
2786 id, 312.
2787 ibid.
2788 id, 313. He adds: 'Unfortunately these 'politically realistic' responses rarely accord with social realities in indigenous communities': ibid.
2789 id, 324.
2790 id, 283.
2791 id, 322; cf id, 325.

685. ***Legal and Administrative Responses***. Partly as a result of Aboriginal views and demands, and partly out of growing dissatisfaction with the existing summary criminal process as it involves Aborigines, a number of legal and administrative responses have been made or attempted, although in many cases these have taken the form of calls for further study or examination of the issues. Important examples in more recent times include the following:[2792]

- *Hawkins and Misner (1973-4).* In three reports commissioned by the Commonwealth Minister for the Northern Territory, GJ Hawkins and RL Misner made a series of recommendations for changes in the criminal justice system in the Northern Territory.[2793] Two of these reports discussed problems of the administration of justice in Aboriginal communities. The First Report stated only that:

  > Punishment, to be effective, must be prompt, fair and in response to acts which the community deems to be offensive. Considering the vast distances between outlying districts and the courts and also considering the different cultural patterns between a settlement and an urban centre, the distribution of justice in the Northern Territory must be decentralised so that local groups will be better able to deal with their own affairs. Elected councils on the settlements and missions should be able to deal with the 'street offences' now contained in the social welfare regulations. All persons on the settlement or mission, European or Aboriginal, would be subject to the council's jurisdiction, An appeal should be allowed from the council to the magistrate and for this purpose an additional magistrate will be necessary in order to visit the settlements on a regular basis. A further study would be necessary in order to outline appropriate procedures for conducting and recording the council's proceedings. Also it must be determined at a later time whether each settlement should have a lock-up and a person to serve as a gaoler. It is envisioned that punishment may take other forms than traditional imprisonment, e.g. community work projects.[2794]

  These issues were discussed in greater detail in the Third Report.[2795] This did not attempt to make any specific or detailed proposals, other than that the matter be subject to an 'immediate review by an inter-disciplinary body which would conduct an extensive full-time inquiry into this extremely complex issue'.[2796] After discussing jurisdictional and other problems and some of the training and other support that would be required for any effective scheme, the Report concluded:

  > It would be naive to assume that the tribal justice programs can be put into effect overnight. In fact any hastily constructed program may be harmful. But this should not be used as an excuse to delay the search for answers. A highly qualified inter-disciplinary team should be immediately formed to seek solutions to the problem of justice on Aboriginal settlements ... It should not be assumed that a system of tribal courts is necessarily practical, beneficial or desirable. The real challenge is to begin seriously considering the possibility.[2797]

- *Commission of Inquiry into Poverty, Second Main Report, Law and Poverty in Australia (1975).*[2798] Among many issues, the Second Main Report of the Poverty Commission examined the law as it affects disadvantaged people, including Aborigines. Referring to existing (mostly discretionary) approaches to modifying the law as it applies to 'tribal Aboriginals', Commissioner Sackville concluded:

  > While these developments are commendable, they are piecemeal in character, concentrating on specific difficulties rather than the overall effect of the imposition of European law on tribal Aboriginals. In our view the basic problems can be attacked only if an attempt is made to restore and maintain the traditional authority of tribal Aboriginals so that, to the maximum extent possible, European law is applied in tribal areas only at the request of the tribal community.[2799]

  After giving as examples the Papua New Guinea Village Courts and the former Western Australian Courts of Native Affairs[2800] the Report pointed out that:

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2792 Earlier examples include the Reports by Moseley and Bleakely: see para 49-50, 53.

2793 GJ Hawkins & RL Misner, *Restructuring the Criminal Justice System in the Northern Territory*, AGPS, Canberra, 1973; GJ Hawkins & RL Misner, *Framework for Change: Second Report on the Criminal Justice System in the Northern Territory* (tabled in the Parliament in August 1974, not printed); GJ Hawkins & RL Misner *Some Specific Proposals: Third Report on the Criminal Justice System in the Northern Territory* (tabled in the Parliament in August 1974, not printed).

2794 Hawkins & Misner, First Report, 2.

2795 Hawkins & Misner, Third Report, 19-42.

2796 id, 19.

2797 id, 42.

2798 Cth Parl Paper No 294 (1975) (Commissioner, R Sackville).

2799 id, 281.

2800 See further para 769-79.

> One major difficulty in implementing our proposal in Australia lies in ascertaining the source of legitimate tribal authority. It is not fully clear who has authority over whom ... nor whether such authority as exists is legitimate in all circumstances. It has been suggested, for example, that those in authority do not have legitimate power unless they are on their own tribal lands. Moreover, it is not certain when the traditional sources of authority would regard themselves as obliged to refer offenders to the ordinary courts. These issues will require intensive discussion with tribal groups in order to formulate proposals for restoration of tribal authority. Other difficulties arise, including the precise definition of the jurisdiction to be conferred on Aboriginal communities and the formulation of principles to govern problems of 'conflicts of laws'. We think that these questions should be investigated as soon as possible.[2801]

- *Aboriginal Communities Act 1979 (WA).* Action was not confined to the federal level. In 1979, following a report by Magistrate T Syddall, the Western Australian Government introduced a scheme for Aboriginal justices of the peace to sit with the magistrate in specific remote communities. The scheme is described in detail in Chapter 29.[2802]

- *South Australian Committee on Aboriginal Customary Law (1979).* A South Australian Committee on Aboriginal Customary Law was appointed by the South Australian Attorney-General in 1978 to inquire into and report on the recognition of Aboriginal Tribal Law and the administration of justice in Aboriginal communities in the North-West and at Yalata. The Committee's most recent Report, on Children and Authority in the North West (1984), addressed particularly the problems of petrol sniffing by children, but it also contained recommendations relating to alcohol, general law enforcement, police aides and the role of the judicial system. The Report did not specifically deal with the question of community courts.[2803] But it did recommend more frequent and longer Magisterial visits to the NorthWest. It recommended against the extension of police services or the introduction of a system of Aboriginal police aides.[2804]

- *House of Representatives Standing Committee on Aboriginal Affairs, Report on Aboriginal Legal Aid (1980).*[2805] As part of its Report the Standing Committee discussed a number of issues relevant to the Aboriginal Customary Law Reference, including Aboriginal police aides,[2806] the problem of representation of community views to sentencing courts[2807] and the recognition of Aboriginal customary laws.[2808] The Committee canvassed the various possibilities for, and difficulties with, recognition without attempting to reach any definite conclusion. Noting that the issues were being examined by this Commission, the Standing Committee commented that:

  > If Aboriginal customary law is applied in cases involving offences against Aboriginal communities which are also offences against Australian law, the division of jurisdiction between the two systems will be significant. At the present time there is no recognition of traditional punishment as a valid punishment to be applied by existing courts dealing with criminal charges against Aboriginals. Australian courts cannot impose penalties which are repugnant to natural justice or morality or which are in conflict with any other laws ... By allowing Aboriginal communities to apply customary law, there is a danger of subjecting an Aboriginal offender to the tyranny of the group. There is the problem that, in many respects, the adoption of a policy of non-interference by legal authorities in communities regulated by customary law and practices carries with it an abrogation of responsibility for the protection of the rights of the individual.[2809]

  In their view these factors:

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2801 id, 282.
2802 See para 747-58.
2803 For some comments on this issue see Aboriginal Customary Law Committee (Chairman: Judge JM Lewis) *Preliminary Report*, Adelaide, September 1979, 60-3.
2804 Report of the South Australian Aboriginal Customary Law Committee (Chairman: Judge JM Lewis) *Children and Authority in the North-West*, Adelaide, August 1984, v. By contrast a report prepared for the South Australian Committee in May 1983 by JD Tregenza made the following comments:
> The principal areas of concern are those of juvenile offences largely related to petrol sniffing and adult offences related to the use of alcohol. To cope with the issues they want a police presence in the area, a formalizing and strengthening of the power and role of the Aboriginal wardens and the instituting of a Community Court system supported by the police and European judicial system. (id, Appendix 4, 130).

2805 Commonwealth Parl Paper No 149, 1980.
2806 id, 77-9.
2807 id, 102-4.
2808 id, 105-6.
2809 id, 106.

> would appear to preclude Australian courts from applying tribal sanctions in the punishment of serious offenders and probably confine Aboriginal communities to dealing with minor offences in the summary jurisdiction.[2810]

- *House of Representatives Standing Committee on Aboriginal Affairs, Report on Strategies to Help to Overcome the Problems of Aboriginal Town Camps (1982).*[2811] That these difficulties did not, in the Standing Committee's view, preclude the adoption of some form of justice machinery even in less-traditional contexts, was made clear in its *Report on Aboriginal Town Camps*. The Report noted this Commission's inquiry, and commented:

> One aspect of the inquiry is an investigation into the possible operation of community justice systems in Aboriginal communities. The Committee is aware of the difficulties of such systems operating in town camping communities where there is close contact with the non-Aboriginal community and where the operation of customary law is not as strong as in traditional communities. The concepts being developed by the Commission of a conciliation panel to resolve internal disputes and the operation of internal policing in discrete town camping communities should be fully investigated. Such concepts, if introduced, would recognise and reinforce existing structures in town camps for resolving disputes and could have a significant impact in reducing the level of crime in the communities.[2812]

  The Standing Committee accordingly recommended that the Commission 'fully investigate the operation of community justice systems in town camping communities'.[2813]

- *Northern Territory: Justice (Courts) Project in Aboriginal Communities (1983).* Growing out of earlier informal experiments and statements[2814] the Northern Territory Department of Law introduced a 'Justice (Courts) Project in Aboriginal Communities', on a trial basis. The scheme involves a magistrate and an anthropologist working together. It is planned to be introduced in perhaps 3 or 4 communities but is operating in only one community, Galiwin'ku, at present. The proposal is discussed in Chapter 31.[2815]

- *The Groote Eylandt Aboriginal Task Force Report (1985).* The Task Force with an all-Aboriginal membership reported to the Commonwealth and Northern Territory Governments on 'the possibility of establishing an accepted mechanism to reduce high criminal activity within the Groote Eylandt Community'. The Report stated:

> The Task Force takes the view that the Aboriginal communities on Groote Eylandt are not seeking separate and independent justice mechanisms ... [W]hat they are seeking is a better working relationship with all agencies of the criminal justice system with some modifications of the rules and procedures.[2816]

  To this end the Report recommended greater community involvement in the court process, the appointment of an Aboriginal justice of the peace, the appointment of police aides, the introduction of, a community service order program and that the Aboriginal Community Justice Program operating at Galiwin'ku be applied to Groote Eylandt. It also recommended that:

> The Australian Law Reform Commission be requested to undertake an investigation into the incorporation of Groote Eylandt Customary Laws within the judicial system presently operating in Groote Eylandt in close consultation with the leaders of the Aboriginal Communities.[2817]

## Aboriginal Needs and Demands

686. ***Aboriginal Views.*** An essential pre-requisite to any consideration of justice mechanisms for Aboriginal communities is to ensure that the wider community is not simply foisting its own perception of 'the problems', and its own solutions, upon Aborigines affected. It is necessary to be clear about the needs and purposes that machinery is intended to meet, and to be reasonably confident that the machinery is sought by

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2810 ibid.
2811 Commonwealth Parl Paper 366/1982.
2812 id, para 415.
2813 id, para 416.
2814 cf Northern Territory, *Legislative Assembly Debates* (17 May 1979) 1287-1292 (Attorney-General Everingham and other speakers).
2815 See para 764.
2816 Groote Eylandt Aboriginal Task Force, *Report* (1985).
2817 id, para 3, 4. See para 459, 464.

those to whom it will apply. In fact the Commission has met with a wide range of responses and views on these central issues.

- Many Aboriginal communities would draw a distinction between those matters which are for the general legal system to deal with and those which they consider fall within their jurisdiction or responsibility:

> The Pitjantjatjara are determined to keep their customary methods for dealing with disputes in the traditional mode, and concede that 'serious' offences should be dealt with by the conventional South Australian legal system.[2818]

There is however an area of uncertainty between the two, and it is here that many conflicts between two competing legal systems arise. Some groups will deal with matters even though they know the police are also involved. Others may be reluctant to become involved in such cases. Many seek further powers to deal with their own problems but accept that this needs to be sanctioned by the general legal system. This was clearly expressed in a submission to the Commission by the Council President on behalf of the Peppimenarti Community (NT):

> As a general principle, we want Aboriginal law to rule on Aboriginal land, and to some extent to rule Aboriginals outside Aboriginal land. For example, we would like to have the power to take our own people away from towns and hotels (if they are getting drunk or into trouble) back to our own community. Or if a young fellow steals a car, or makes trouble, we want to be able to take them back to our own system of law. We want to keep traditional punishments ... We feel that gaol sentences in white man's system do not solve many problems .... If a marriage is illegal by our law (e.g. too close relatives) we want the power to stop or annul that marriage ... Illegal marriages of our people in white man's churches and towns, has caused deep trouble in our system of families and relatives. We MUST STOP this before more damage is done. Motor registration, insurance, drivers licences, worker's compensation etc. we think should all stay the same as they are.[2819]

Implicit in these statements is a request for the two systems to work together, with the Aboriginal voice being heard, and responded to, by the general legal system on issues of particular concern.

- While Aboriginal communities in general accept the authority and functions of the police and the courts, many do not consider they should intrude into all matters even if an offence may have been committed against Australian law. It is the nature of and background to an offence that may be of paramount importance. The fact that there has been a fight and some persons are injured may be regarded as a just result and resolve the dispute. The police may take a different view. Some communities may seek the exclusive right to deal with certain minor law and order problems. Others would like some input into the decision-making process so that they could call in the police when they wanted assistance and also have some say during the court process:

> We feel it is fair that while people living on or visiting Aboriginal lands or settlements should be subject to Aboriginal laws and punishments if they make trouble. However, in all cases, we want the option to send an offender through the white man's law system. There are no white police on our settlement. We do not need them here all the time. We only want the option to call them in when we think it necessary.[2820]

Many communities already exercise such powers on a de facto basis. Whether they can or should be formalised to any greater extent is another question.

- Most Aboriginal communities have modified the punishments given to offenders because of the possibility of the punisher being charged for committing an offence under the general legal system. Some regret that such change has taken place and seek specific sanction for certain physical punishments:

> I think it [spearing] is the only way to stop young men or any other person of any age ... In the olden days that used to check the trouble ... but in this day and age they think 'well white fellow laws say you can't spear me,

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2818 D Hope, 'Contemporary Issues in the Management of Law and Order in South Australian Pitjantjatjara Communities', in B Swanton (ed) *Aborigines and Criminal Justice*, AIC, Canberra, 1984, 350.

2819 H Wilson (Council President on behalf of the Community at Peppimenarti) *Submission 250* (6 April 1981). See also para 455-60.

2820 H Wilson, *Submission 250* (6 April 1981).

> you can't hurt me, so if I want to sue you I can sue you'. That is the reason why we want it to be recognised as such and the elders to hand out punishment if they think it is needful.[2821]

This view was presented to the Commission on several occasions during its Public Hearings.[2822]

- Some Aboriginal communities rely on the 'old people' or 'tribal elders' to resolve disputes. There are many different ways in which these operate.

> We are quite satisfied with our 'court' system — which is a meeting of elders. No punishment is meted out without discussion and the offender is given the opportunity to defend himself.[2823]

## The Commission's Role

687. ***Diffuse and Wide-Ranging Problems***. These responses are clearly not limited to the question of the application of Aboriginal customary laws but address wider issues of law and order and the interaction of Aborigines with the general legal system. It is evident that the questions posed for the Commission by the second limb of its Terms of Reference must be considered against a background of:

- debate over, and selective experiments with, existing legal institutions in an attempt to achieve such goals as
    - greater use of mediation, conciliation and informal settlement;
    - reduction in cost and formality;
    - more responsive decision-making in specialised contexts;
    - better control of law and order problems, in the light of the defects of existing structures for social control;
    - reduction in the number of Aborigines coming into contact with the criminal justice system;
    - reduction in the number of Aborigines in Australian gaols; and
- suggestions (from Aborigines and others) that encouragement of local justice mechanisms is a key to the recognition of, or respect for, the local customary law and traditions of Aboriginal groups.

At the same time it is necessary to keep very clear what role the Commission can play in this area, in the light of constitutional and administrative constraints, and of its Terms of Reference. The constitutional limitations imposed by Chapter III of the Commonwealth Constitution, and the administrative problems of direct Commonwealth involvement in local justice mechanisms are not arguments against appropriate reforms. They are in the nature of external constraints on direct Commonwealth action and are referred to in more detail elsewhere.[2824]

688. ***The Terms of Reference: Conflicting Interpretations***. The second question asked of the Commission is:

> to what extent Aboriginal communities should have the power to apply their customary law and practices in the punishment and rehabilitation of Aborigines.

It is not clear whether the second question posed by the Reference is to be restricted to the punishment and rehabilitation of Aborigines in respect of offences against the general law, or whether it also encompasses punishment and rehabilitation of Aborigines only for offences against Aboriginal customary laws (whether or not such offences are also offences against the general law). There are difficulties on either assumption.

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2821 J Roberts, *Transcript* Darwin (3 April 1981) 902.
2822 For example: D Turner, *Transcript* Fitzroy Crossing (30 March 1981) 671; *Transcript* Peppimenarti (6 April 1981) 998; D Manjeriju, *Transcript* Maningrida (8 April 1981) 1056-7; D Vachon, J Tregenza, *Transcript* Amata (14, 15 April 1981) 1428, 1443-4.
2823 H Wilson, *Submission 250* (6 April 1981). See also para 694-718 for descriptions of the situations at Yirrkala, Strelley and Edward River.
2824 See para 808.

On the first interpretation, there is the problem that the offence may not be recognised as a wrong under Aboriginal customary laws, or may be regarded in a very different light. This raises questions of the relationship between the general criminal law and its administration, and Aboriginal customary laws and practices, which are discussed in Part IV. In part these questions involve the 'delegation' of the power to punish for offences defined other than in Aboriginal terms. In part they involve the mitigation of general law offences to take customary laws into account (e.g. through criminal defences of various kinds or in sentencing). As Chapters 18 and 21 conclude, there may be value in at least some of these forms of recognition, but they are limited in character and indirect in any effect they may have in supporting or restoring Aboriginal authority. On the second interpretation, that is, that the power of Aboriginal communities extends not only to punish or rehabilitate the offender but, through the application of local customary laws, to define the offence, a considerably greater degree of local control seems to be envisaged. But the assumption seems to be that this control is to be limited to those rules and sanctions properly regarded as 'customary' (as it is certainly to be limited to Aboriginal defendants). This is a very modified form of control, no matter how flexible the definition of 'customary law and practices'. As soon as one talks about the establishment of justice mechanisms in some official way (e.g. Aboriginal courts) in Aboriginal communities, this inevitably raises the idea of formal mechanisms of a 'non-customary' kind.[2825] It is almost a contradiction in terms to talk of setting up an official mechanism in an Aboriginal community to apply customary laws. It would be equally inconsistent to confer 'autonomy' on such communities on condition that it was only exercised in a certain, recognisably 'customary', way. Considering the range of new problems these communities face, this would be no autonomy at all.

689. ***Local Self-Determination***. It is by no means clear that Aborigines would wish to take responsibility for all law and order problems occurring within their communities. It cannot be assumed that many offences with which Aborigines are commonly charged would somehow diminish or disappear if 'customary processes' were applied. To apply Aboriginal customary laws in this way may be simply misconceived. But there is an even more fundamental question. If Aboriginal communities are to be given power to apply their customary laws and practices (whether defined broadly or narrowly), is this being done in order to return to Aborigines greater control over their daily affairs, or is it rather an attempt to divest the general legal system of a problem it has been unable to resolve? Care is required to ensure that under the guise of saying 'these are matters for Aborigines to resolve', the shortcomings of the general legal system as it applies to Aborigines are not foisted onto Aboriginal communities. They may have neither the inclination nor the resources to take on this task. The primary answer is, no doubt, that nothing can be done without the general agreement of those Aborigines affected by a proposal. This is likely to mean that there will be no uniform response. Some Aboriginal communities may seek to apply their customary laws, or may seek even broader powers, to control law and order within their communities. Other communities may merely seek greater understanding between the two legal systems and control over the manner and level of policing. How, then, is it possible to accommodate this broad range of likely responses? These issues were discussed for example, by Dr von Sturmer, who referred to the 'common notion':

> that Aboriginal 'mechanisms' (customary law, traditional decision-making procedures, etc.) should be extended to treat the whole new body of substantive matters with which they now have to deal. It is certainly demonstrable that the Aboriginal mechanisms alluded to continue to exist. Indeed, unless those people who are willing, for whatever reason, to foist new ways of doing things on Aboriginal societies, are also prepared to come to grips with the ways in which things are already done, their 'interventions' are doomed to failure. But it is a far cry from arguing this to accepting that the 'mechanisms' can be 'extended' in new conditions to meet what, in departmental jargon, are often described as 'the new challenges'. Not only do the exact nature of the 'mechanisms' and the precise range of the matters over which they 'play' remain to be identified, it is also palpably the case that the 'mechanisms' do not 'engage' the whole new array of matters which flow from the contact situation.[2826]

690. ***Underlying Difficulties***. The history of 'recognition of indigenous law', of recognising some indigenous capacity over law and order matters, in Australia and in other comparable jurisdictions, has largely been one of trying to establish formal 'courts' or other similar mechanisms, usually run by the indigenous people, to which authority could be transferred or which could be recognised. But if the aim is only to recognise local customary laws, then (in societies lacking courts or similar agencies and relying on less formal, less centralised procedures based on kinship and locally-recognised power) attempts to 'find' or 'erect' official machinery are misconceived. Such attempts might have some value if the aim were to

2825 This could be achieved by providing for concurrent jurisdiction with the existing courts or for some exclusive Aboriginal jurisdiction.
2826 J von Sturmer, *Submission 383* (25 July 1983).

'indigenise' the existing criminal justice system, that is, to recruit Aborigines to perform some or all of the tasks of law-applying and law-enforcement as part of the general legal system. Equally, it would have some value if the aim were to confer a degree of autonomy on Aboriginal groups with respect to law and order matters. These last two aims are not necessarily consistent with each other. If 'indigenisation' were the aim then the existing legislative structure would be taken for granted, with emphasis being placed instead on finding suitable roles (new, existing or modified) which Aborigines may fill within it. If autonomy were the aim, then the focus would be on the scope of autonomy and on identifying the relevant unit of government. Such an exercise, even if thought desirable by outsiders could not occur without the active support and initiative of the Aboriginal group concerned, and need not lead to the 'recognition' or 'application' of customary laws (though it may do so). Aboriginal groups may be more concerned with the kind of rules applied within their group, or with their administration and policing, than with their application by 'courts'. They would be at least as likely to propose new or hybrid solutions to their problems at the legislative or executive levels as to propose customary ones, in particular since many of these problems are perceived as new or introduced, and not necessarily to be .resolved through the application of customary laws even in some modified form.

691. ***Approaches for the Commission***. Clearly there are a number of different approaches in the field of 'law and order' in Aboriginal communities which might be taken. These include:

- the recognition of local customary laws and of the authority of the group to apply customary law procedures and sanctions;

- the conferral of autonomy in law and order matters (whether or not alongside other matters) on particular Aboriginal groups. This is likely to include both customary and non-customary matters, and would certainly involve a degree of control over outsiders;

- the creation of Aboriginal courts to hear defined offences, whether customary or not, committed within an Aboriginal community;

- the use of Aboriginal personnel (e.g. Aboriginal police, police aides, justices of the peace) in applying the general legal system to Aborigines.

The difficulty is that the Terms of Reference appear only to envisage the first of these approaches, while in Australia and some other countries all or most of the emphasis has been on the third and fourth. Aboriginal groups would probably emphasise the second. These questions will be returned to in Chapter 31. But whatever restrictions the Terms of Reference may impose on the recommendations or proposals the Commission can make, it is undesirable to consider the first approach in isolation from the others. The following Chapters of this Part examine what practical models are available for adoption by Aboriginal groups and what changes in practices or procedures might be made to accommodate Aboriginal views and needs.

# 28. Dispute Settlement in Aboriginal Communities

## Customary Methods of Dispute Resolution

692. ***A Range of Mechanisms***. In many, if not all, Aboriginal communities there exist methods for social control and the resolution of disputes. Their effectiveness and the ways in which they operate vary. In some localities reliance is placed on the accepted authority of older men and women, and there are long-established procedures. for resolving disputes. These seem to have been affected by the fact of living in or around cities or country towns or otherwise in contact with the Western economy and society. A particular factor has been the intrusion of the general legal system. Although Aboriginal customary laws do not operate in isolation, they have proved remarkably resilient, and able to adapt to changing circumstances.[2827] But it should not be assumed that what may seem obvious problems of 'law and order' in Aboriginal communities (e.g. control of alcohol, or petrol sniffing and associated juvenile offending) are regulated by Aboriginal customary laws, or that the attempt to extend the latter's scope to deal with introduced problems is, regarded as desirable by Aborigines themselves.

693. ***Research on Dispute Resolution***. Little research has been done on Aboriginal dispute resolving mechanisms. Intensive study over an extended period of time would be necessary to gain a clear understanding of ways of resolving disputes, and even then it would be dangerous to generalise or to apply the results of such research to other communities. Nonetheless, it is possible to make some general comments on existing Aboriginal dispute-resolving mechanisms, based on the Commission's discussions and field work and on other available information.[2828] Three examples of existing justice mechanisms are set out below as illustrations of the ways in which three different communities, at Edward River (Qld), Yirrkala (NT) and Strelley (WA), function. General implications may not be able to be drawn from these different, widely separated communities. The situation recorded at a particular time will change, and profound changes of various kinds have occurred. But this material is the best available.

## Edward River[2829]

694. ***Background***. Edward River is a remote Aboriginal community, with a population of approximately 350-380, situated on the western side of the Cape York Peninsula. It is 130 kilometres south of the mining town of Weipa and 550 kilometres north-west of Cairns. It was established as a mission of the Anglican Church in 1939 and was run as a mission until relatively recent times. It is an Aboriginal reserve under the Aborigines Act 1971 (Qld) and has an Aboriginal court established under that Act.

695. ***Dispute Resolution***. Disputes at Edward River, which do not necessarily involve offences against the general legal system, are dealt with in three different ways. More serious offences committed by Aborigines and all offences committed by non-Aborigines are dealt with by the ordinary Queensland court system. These constitute a very small percentage of offences committed by Aborigines. Much more commonly, inter-Aboriginal disputes are dealt with either by the local Aboriginal Court or in accordance with 'old custom' or 'Murri law'[2830] methods of resolving disputes. There is much overlap between matters dealt with in the Aboriginal Court and. those matters which would formerly have been resolved in accordance with 'old custom'. For example, the 'old custom' way of resolving disputes could often involve a fight between one Aborigine and another. Each person might then come before the Aboriginal Court charged with assaulting the other, an offence under the Reserve by-laws. The features of these two separate systems of resolving disputes and the interaction between them will be briefly outlined here.

696. ***'Old Custom' or 'Murri Law'.*** In essence, 'old custom' is the Aboriginal way of resolving disputes at Edward River which arise as a result of transgressions of local rules of behaviour. The Aboriginal court system on the other hand is seen as the 'white man's' way of assessing transgressions and applying

2827 See para 38.

2828 For a short description on dispute resolution where there has been violation of a marriage contract see D Bell, 'Re Charlie Jackamarra Limbiari. Report to the Court', unpublished report tendered in *R v Charlie Limbiari Jagamara*, unreported, NT Supreme Court, 28 May 1984.

**2829** This section is based on material made available to the Commission by Mr John Taylor who has conducted extensive field work at Edward River.

2830 The terminology used by Taylor.

punishments to them.[2831] 'Old custom' law as it operates at Edward River has an unwritten but well understood code of behaviour or 'right conduct', and there are clear procedures to be followed by these seeking redress for breaches of the code. Common breaches of conduct that would require some form of action include:

> 1. Omission of kinship duties — principally revolving around the distribution of food and gifts.
>
> 2. Mistreatment — this usually arose in domestic context and involved unfair physical violence.
>
> 3. Infidelity.
>
> 4. Breaches of bestowal expectations and arrangements.
>
> 5. Insult — this could involve using the personal name of a recently deceased person or swearing with the intention of provoking someone else.
>
> 6. Threatening or causing injury.
>
> 7. Trespass — for example encroaching into another's country or the resources of that country.
>
> 8. Failure to consult or to acknowledge rightful decision-making authority.
>
> 9. Homicide.
>
> 10. Breaches of ceremonial ritual codes.[2832]

697. ***Responses to 'Wrongs'***. Certain breaches (e.g. breaches of taboo) brought automatic retribution by way of supernatural agencies. However breaches which imposed a responsibility on a person or group of persons to act were likely to have one of three outcomes. First, the aggrieved person may decide to do nothing about it.[2833] Secondly a person might seek private redress, which involved a conscious decision not to resolve the matter in public but focussed on retaliation and punishment?[2834] Seeking private redress often resulted in long-running disputes, with the effect of exacerbating relations between the disputants. The third way in which a person could seek redress of a breach of the code of behaviour was to have the matter resolved publicly. A dispute that became public was usually resolved to the parties' satisfaction so that the problem with private redress, of long-running feuds and paybacks, did not arise.

> Public disputes most commonly eventuated in the omission of kinship duties, in breaches of bestowal expectations and arrangements, in instances of insult or real or threatened injury and occasionally in cases of infidelity, trespass and homicide.[2835]

698. ***Public Dispute Resolution***. As observed by Taylor, this form of resolution has a number of clearly identified stages. Not all disputes necessarily go through each of these, as some may be resolved along the way. But generally a dispute resolution would contain each of six stages:

- Declaration — a public announcement by the aggrieved person setting out the details of the transgression.
- Rejoinder — denial or counter-charge by the accused.
- Argument — public disputation between the parties during which they would both usually be armed with their fighting weapons: 'both disputants would stride up and down gesticulating, arguing loudly and waving their weapons in a threatening manner'.[2836] During this stage other persons standing in special relationships to the disputants would arrange themselves in such a way that they could assist either party in the dispute if required.

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2831 J Taylor, *Submission 388* (11 October 1983) 21.
2832 J Taylor, *Submission 387* (21 May 1983) 14-33.
2833 id, 45-6.
2834 id, 40.
2835 id, 33.
2836 id, 34.

- Insult and physical combat — this generally involved fighting with weapons between the parties, often escalating as other persons aligned with each of the disputants became involved. During this phase certain persons were expected to play the role of 'blockers'. 'Blockers' sought to ensure that disputes and the fighting did not get completely out of hand and they attempted to contain the dispute to the parties involved. To some extent they acted as umpires in the dispute, first attempting to stop violence and then, if physical conflict followed, ensuring there was no foul play.

- Separation — this occurred as a result of a number of factors including physical exhaustion, the need for injuries to be treated, satisfaction obtained by each of the disputants and the feeling that the matter had been resolved:

> The Edward River notion of fair play stressed that those who initiated trials-at-arms should come away bearing equal injuries irrespective of the nature of the wrong action that triggered the combat in the first place.[2837]

- Reconciliation — this was indicated by the return of normal relationships between the parties.

699. ***Changes to Public Disputing***. Taylor suggests that such public methods of resolving disputes have changed little over the last 40 years, although of course there has been some impact caused by the responses of non-Aboriginal staff and the impact of their views on Aboriginal people. The lay-out of the village and the fact that there are now houses with clearly defined territorial areas attached to them and roads through the community has also had some impact. Public disputes generally occur in the public areas rather than in a person's private yard, and the use of weapons in disputes is still common. In fact the underlying threat of violence is a crucial feature in all public disputing.[2838] The role that customary methods of disputing play at Edward River has become more complicated with the more ready availability of alcohol. Alcohol can be involved in 'old custom' disputing but it also has the general effect of increasing tensions between people resulting in fights. It is also the cause of a large number of offences coming before the Aboriginal court.

700. ***The Aboriginal Court***. The system of Aboriginal courts which operates on reserves in Queensland is set out in more detail in chapter 29.[2839] At Edward River an Aboriginal Court, constituted by two or more Aboriginal Justices of the Peace or members of the Aboriginal Council,[2840] may hear charges against Aborigines resident on the reserve for breaches of the regulations and by-laws applicable to that reserve. These rules are essentially of a local government kind, but there are also general provisions concerning the conduct and behaviour of Aboriginal residents. New legislation dealing with Aboriginal courts was enacted in 1984,[2841] but the courts continue to operate in much the same way. In a sample of cases coming before the Edward River Court Taylor found that 93 people (86 men and 7 women) appeared on a total of 106 charges. The offences committed fell largely into two categories: 41 (38%) of the charges laid were directly associated with verbal or physical assault while 54 (51%) of the charges related either to the importation of alcohol onto the reserve or its consumption there,[2842] not all of the first category of cases can be said to have a customary basis certainly a number of them resulted directly from the various stages involved in a public dispute.

> In many instances the charges themselves arose out of an evolving and culturally indigenous system of dispute resolution. The true causes of these disputes lay elsewhere and the appearance of people before the court was often times just a coda to a process that perforce had to function independently of the introduced court system.[2843]

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2837 id, 38.

2838 One interesting feature that has developed during public disputes is that as the dispute moves from argument to insult to combat, English is adopted as the language of the dispute. This apparently has two effects. It broadens the range of insults available to the disputants and it enables non-Aboriginal members of the community to become aware of the dispute and to realise that it is reaching a serious level. It adds another dimension to the dispute by involving staff such as the manager or the Queensland police to some extent, letting them know that perhaps the time has come for intervention.

2839 See para 723-46.

2840 Under the old legislation the Court could be constituted by three members of the Council. The new legislation requires all members of the Council or a majority of them: Community Services (Aborigines) Act 1984 (Qld) s 42.

2841 Under the old legislation the Court could be constituted by three members of the Council. The new legislation requires all members of the Council or a majority of them: Community Services (Aborigines) Act 1984 (Qld) s 42.

2842 These statistics relate to a period between June 1967 and January 1970. The Commission obtained more recent statistics in a visit to Edward River in July 1984, which present a similar picture. See para 734-40.

2843 J Taylor, *Submission 388* (11 October 1983), 5.

701. ***Range of Cases Heard***. Taylor divides the cases coming before the Aboriginal Court into three kinds. There are those cases which involve contravention of the community's by-laws which are essentially of a local government kind e.g. relating to health, hygiene or government property. Secondly, there are those charges which result directly from 'old custom' disputing. Often no charges were brought as a result of a public dispute, either because the matter did not come to the attention of officials or because it was not considered by them as sufficiently serious to justify laying charges. The third type of case involved fights and disturbances following the consumption of alcohol. There was a significant overlap between the second and third categories.

702. ***Interaction Between 'Old Custom' Disputing and the Aboriginal Court***. The introduction of an Aboriginal court at Edward River in 1965 had an impact on the level of old custom disputing. Aboriginal residents took into account the fact that certain conduct, even if part of 'old custom' dispute resolution, might involve an appearance before the Aboriginal court with, for example, the risk of higher fines for each appearance. Taylor states that the Aboriginal court at Edward River played a totally different role depending on whether one looked at it from the viewpoint of Aborigines or from that of the staff of the Department of Aboriginal and Islander Advancement.

> In the view of the Aboriginal residents the court's most important function lay in the avenue it provided for reconciling the consequences of 'old custom' dispute settling with European notions of law and order. Since the legal codes over which the court was empowered to act did not include customary law except for a strongly worded paragraph on sorcery ... the only way Edward River people could obtain redress for breaches of their traditional codes was to engage in old custom disputing. But 'old custom' disputing, as people well knew, evoked negative reactions from the Europeans. Hence the processes of the court provided a way of 'making level with the staff'. The court did more than simply propitiate European sensibilities concerning the incidence of abusive language, threatening behaviour and physical assault. It also helped to control the degree to which individuals sought redress through 'old custom' disputing.[2844]

However, it was an important shortcoming that the court did not provide any avenue for certain breaches of Aboriginal codes of conduct to be dealt with. The non-Aboriginal staff had a completely different view of the Aboriginal court and the function it should perform:

> In the DAIA view, the Aboriginal court was both a training device intended to give Aborigines experience of the legal processes of the wider Australian community and a means of enforcing behaviour thought to be necessary and desirable in a group that officially was supposed to be assimilating to the way of life of the donor culture.[2845]

703. ***Non-Aboriginal Perceptions of 'Old-Custom' Disputing***. This difference of views has a number of wider implications for Aboriginal people:

> When DAIA staff failed to recognise 'old custom' disputing for what it was and instead interpreted it as 'lawless' or 'primitive' behaviour, then every instance of an 'old custom' dispute coming before the Aboriginal Court as a breach of the peace provided verification for a strongly held though unofficial view, namely, that the Edward River people were not yet ready for independence and responsible self-management. While this misperception existed and while no alternative forum was provided for the resolution of 'old custom' disputes, it would seem that Edward River people would never be trusted with the management of their own affairs.[2846]

704. ***Perceptions of Violence***. A further important difference in perception between the Aboriginal members of the community and the white staff related to the attitude to fighting and personal assaults. In Taylor's view most Aborigines did not consider that fighting should be of any concern to the Aboriginal court or to outsiders. It was a way of resolving personal differences, well accepted by all parties. Taylor doubts whether any charges concerning fighting would have been brought if the incident in question had not been drawn to the attention of Europeans in some way. Several fights attended by the Aboriginal police did not result in any charges being brought because no senior non-Aboriginal member of staff was present.[2847] The latter, by contrast, took the view that fighting and other disturbances including arguments and bad language threatened the peace and good order of the settlement and therefore should be dealt with by the Aboriginal court. This attitude had brought changes to traditional disputing methods:

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2844 id, 56-57.
2845 id, 57.
2846 id, 77.
2847 id, 57-8.

> In deference to European sensibilities regarding violence they attempted to tone down the level of violence manifested in disputes and created territorial canons to suit the settlements physical structure and to lessen the likelihood of the non-involved being injured. As well they accepted the fact that they would have to pay a penalty whenever disputation took a violent turn.[2848]

705. ***Non-Aboriginal Offences***. There was some resentment that what Aboriginal residents perceived as wrong doing by staff could not be dealt with by the Aboriginal court. Even if the Aboriginal court had had jurisdiction over such staff, some of these cases would not have fallen within the jurisdiction of the court, or even constituted a criminal offence. The result was that Aboriginal members of the community tended to seek their own ways of resolving such problems. For example, on the occasions when personal relationships between members of the Aboriginal community and the white staff created tensions, the community was able to exert pressure to have staff removed by notifying senior officials of DAIA or local politicians. In this area of community concern the court was seen as totally inadequate.

706. ***Summary***. As observed by Taylor, 'old custom' disputing at Edward River is still carried out in much the same way as it was before the mission was established in 1939. Some changes have occurred, under the influence of the staff and also through the operation of the Aboriginal court. Despite these influences the resolution of disputes in a public way is still common. The Aboriginal court as it currently operates hardly provides a mechanism for resolving such disputes, as it contains no provision for airing personal grievances and seeking a satisfactory solution. Public disputing causes concern not only to the staff but also to many Aboriginal members of the community who consider aspects of the disputing process to be unsatisfactory, especially the violence and injuries suffered. There is .for example often criticism by Aborigines of the Aboriginal police for not doing their job properly and preventing fights from occurring, and there is strong feeling over the effect that alcohol is having. The Council at Edward River have never attempted to draft its own by-laws.[2849] Several factors account for this, including the lack of available drafting expertise, uncertainty as to whether the Aboriginal court is an appropriate forum, lack of knowledge of the right to propose by-laws and a general over-dependence on the non-Aboriginal DAIA staff. Taylor suggests that it may be possible to prepare by-laws which take account of customary practices, although finding someone to articulate the customs to the satisfaction of both Aboriginal residents and staff might be difficult.

## Yirrkala

707. ***Background***. The Yirrkala Community, consisting of a number of clan groups, is situated in North-east Arnhem Land (NT) and is a former mission of the Methodist Church. Yirrkala and it's outstations have a population of approximately 700-800 Aborigines as well as non-Aboriginal support staff. Until the late 1960s it was an isolated community, but now the modern mining town of Nhulunbuy (pop 4000; established 1972) is within easy reach. Nhulunbuy contains the regional police station and court. Transport to other major centres by air is also readily available.

708. ***Dispute Resolution Process***. A detailed study of dispute resolution mechanisms at Yirrkala was undertaken by Dr Nancy Williams, based on fieldwork in the late 1960s and early 1970s.[2850] The study reveals that the Yirrkala people have a sophisticated and ritualised process of dispute resolution, based on the use of intra-and inter-clan moots.[2851] The grievances of the disputants may, and in many cases would, have already been publicly announced or become widely known with such publication normally occurring in one of the following ways:

- verbal declaration;
- verbal declaration accompanied by some threat of physical injury;
- assault;

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2848 id, 71.

2849 Under the new Qld legislation, the community is to draft its own by-laws. See para 727.

2850 The material for this section comes principally from an unpublished manuscript by Nancy M Williams, 'Two Laws: Managing Disputes in a Contemporary Aboriginal Community', Canberra, 1983, based on a Ph D Thesis published in 1973. The Commission is grateful to Dr Williams for granting access to both these works.

2851 This term is used by Dr Williams to describe the meetings specifically called for the purpose of airing grievances and resolving disputes: Williams, 84.

- destruction of property.[2852]

Once a grievance becomes public in this way it has the status of a dispute and the procedures that need to be adopted to resolve it become important. According to Dr Williams there are 5 basic characteristics of the dispute settlement process at Yirrkala:

> 1. Intervention and subsequent management by a clansman with political authority who is senior to both the disputants;
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> 2. Gathering and checking evidence by the intervening clansman;
>
> 3. Obtaining an admission of all culpable acts (the 'true story');
>
> 4. Confirmation of findings and of action taken by those with authority over and responsibility for the principals in the dispute.
>
> 5. The application of sanctions.[2853]

An integral feature of this process is the moot, in which the disputants and interested parties are brought together so that the matter may be discussed. All or only some of the five characteristics of dispute resolution may occur within the moot, although it is likely that some preliminary work to gather information will have been done beforehand and that follow-up work will be required afterwards. The moot itself is an organised procedure, and as witnessed by Dr Williams, had four distinct phases:

- Statements of the offence and relevant law by those with jurisdiction.
- People address themselves to the specific allegations in the case under consideration. They may mention any other allegations they consider pertinent, and they judge the consequences of alleged acts.
- Response to the allegations. The convener urges the defendant to admit the extent of his or her culpable acts. The defendant, who was the agent of the culpable act, responds.
- Statements about the outcome, and the composition for the dispute may be made by a number of people but should include the convener, the offender, and the aggrieved person.[2854]

Williams comments that:

> ... the relationship between modes of disputing and procedures of dispute settlement is clear ... Brothers-in-law (sisters' husbands) offered restraint as well as exhortation to settle the dispute, and subclan and clan leaders offered to manage the procedures of dispute settlement that would provide a satisfactory outcome.[2855]

709. ***Kin Obligations***. Disputes at Yirrkala covered a wide range of matters, including failure to fulfil obligations to kin,[2856] domestic disputes, including disputes both as to existing and prospective marriages and other matters. While breaching contractual obligations is listed by Dr Williams as a primary cause of grievances or disputes, she notes that other causes of dispute were (1) the failure to recognise a person's specific rights over certain women, land, natural resources or ritual objects, (2) breaches of religious restrictions, (3) the failure to carry out sanctions imposed during a previous dispute and (4) allegations of sorcery.[2857] In her view, physical assault is not regarded as an offence in itself. Rather it is seen as related to some other underlying issue.

710. ***Sanctions***. Sanctions imposed in the dispute resolution process have changed over time. There is now greater emphasis on non-physical sanctions although physical sanctions.[2858] have not disappeared

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2852 Williams, 127.
2853 Williams, 85.
2854 Williams, 87-113.
2855 Williams, 154.
2856 Williams describes these as of a contractual nature. id, 116-7.
2857 id, 117-121.
2858 Williams lists 3 types of physical sanctions, examples of which are common in the mythology and folklore of the Yirrkala clans: wounding or killing a person of either sex with a spear, to secure revenge; wounding or killing a woman with a spear or a knife, as a means of controlling women, usually wives; and garrata (makarrata in some dialects), ie ritualised revenge: id, 159.

completely. The likelihood that persons handing out physical punishments may be dealt with under Northern Territory law appears to be at least one — if not the main — reason for this change. The sanctions more readily applied are temporary exile from the community, usually to outstations, restitution, usually by monetary compensation, and temporary removal from employment.

711. ***Role of the General Legal System***. Aboriginal modes of dispute resolution at Yirrkala continue to be affected by the general legal system, and conflicts occur. However the local people, according to Dr Williams, had developed their own methods of attempting to resolve the jurisdictional issue. by distinguishing between those matters where they expected the general legal systems, to intervene, and those matters they considered they should deal with without such intervention. In this way the authority of the clan leaders within a defined jurisdiction is sought to be maintained. A distinction is drawn between 'little trouble', including 'grievances that arise out of a breach of kin-defined rights or duties',[2859] and 'big trouble' which refers to situations involving 'physical assault which resulted in serious injury or death and thereby made the act of assault highly visible'.[2860]

> The consistent conjunction of remarks about big trouble and Australian legal intervention [by Aborigines] indicated that the defining attributes of this category were derived from those acts which Yolngu had observed were most likely to be followed, if they were noticed, by intervention of white Australian authorities.[2861]

Intervention by white authorities in other than 'big trouble' as defined was resented because it was regarded as an encroachment on Aboriginal jurisdiction. Generally, the police did not in fact intervene in purely Aboriginal disputes, thus reinforcing the Aboriginal view. The community did however, reserve the right to call in the police when they required their assistance, and this right was perceived by them as an adjunct to their own power.

712. ***The Current Situation***. Since Dr Williams' fieldwork was done, much has happened at Yirrkala. There are now 16 outstations where up to 250 Aborigines live at different times of the year. But there is still much debate and reflection on achieving better cooperation between what are perceived as two co-existing systems of law there. One result of this ongoing discussion is the so-called Yirrkala proposal, discussed in Chapter 31.[2862] But the Commission has been told that the methods of resolution of disputes outlined by Dr Williams continue to operate along much the same lines,[2863] although they may now involve smaller family groups rather than larger meetings or 'moots'.

## Strelley

713. ***Background***. The Strelley Community,[2864] comprising 500-600 people, is situated about 40 kilometres inland from Port Hedland (WA) although in recent years there has been a great deal of movement away from Strelley Station so that people are now spread over a number of properties. It is a very self-contained and independent community with strong leadership. No police are stationed there. Strelley has a unique background. The Aboriginal people living there are part of a large group of Aborigines who walked off pastoral properties in the area in 1946. In part the strike was in protest at working conditions and the treatment to which they were subjected, but it was also a protest against the repeal of the Constitution Act 1889 (WA) s 70, which had provided a guarantee of public expenditure on behalf of the colony's Aboriginal population.[2865] This walk-out breached a number of Western Australian laws, in particular the *Native Welfare*

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2859 Williams, 214. Falling within this category are `arguing', 'family problems', girls, boys and `hitting with a stick'.

2860 Williams, 213.

2861 ibid.

2862 See para 820-32.

2863 NM Williams, 'Comments on the Yirrkala Proposal and Similar Developments' in Australian Law Reform Commission — Australian Institute for Aboriginal Studies, *Report of a Working Seminar on the Aboriginal Customary Law Reference*, Sydney, 1983, 77-9.

2864 The principal language groups at Strelley are Nyangumarta and Mamyjlyjarra, but there are a number of other groups also.

2865 Section 70, which required 5000 pounds or 1% of the colony's annual revenue (whichever was the greater) to be spent assisting the Aboriginal population, had been inserted in the Constitution at the insistence of the British Government as a condition to the grant of responsible government in 1889. A key feature of s 70 (which was the only provision in any colonial or State constitution specifically protecting Aboriginal interests) was that the money was to be spent 'under the sole control of the Governor'. Local politicians bitterly opposed s 70: it was purportedly repealed by the Aborigines Act 1897 (WA), and eventually validly repealed by the Aborigines Act 1905. See P Hasluck, *Black Australians*, Melbourne University Press, Melbourne, 1942, 200-203; P Biskup, *Not Slaves, Not Citizens. The Aboriginal Problem in Western Australia 1898-1954*, University of Queensland Press, St Lucia, 1973. 25-7, 46-52. This overtly political aspect of the 1946 walk-off is usually ignored, and was drawn to the Commission's attention at the community's request: R Butler, Nomads Group, Strelley, Submission 485 (23 July 1985). See also DW McLeod, *How the West was Lost. The Native Question in the Development of Western Australia*, Pt Hedland, 1984, ch 1, 4.

*Act 1905* (WA), and resulted in a number of persons, Aboriginal and non-Aboriginal, spending time in gaol. More recent events have included various mining ventures and the purchase of a number of pastoral properties. The Strelley Community now runs several pastoral properties which employ approximately half the people living there.[2866]

714. ***Decision-Making and Dispute Resolution***. This struggle for survival has strongly shaped the community's approach to management of its affairs. Decision-making is on a communal basis: decisions are made in regular meetings involving the whole community, with everyone being given the opportunity to participate. Even dissolution of marriages are apparently formalised or settled at community meetings.[2867] The resolution of disputes and the hearing of cases involving offences against local law and order are dealt with in this way. It is not clear if the procedures at community meetings are the same for the different matters dealt with. The Commission has been told that meetings to hear evidence against offenders and to consider punishments involve persons present sitting in a large circle in positions according to their skin group and family relationships. The accused persons will sit inside the circle strategically placed according to the position of the accusers and of their own families who may have to speak on their behalf. Certain persons are assigned the role of negotiators. The meeting is highly organised and all attending understand their role.

> It is not a free-for-all; it is not a lot of people accusing — the protocol and the structure is every bit as clearly defined as in a courtroom.[2868]

715. ***'The Ten-Man Committee'***. In order to deal with law and order problems the community selects what is called the 'ten-man committee'.[2869] The committee's function to apprehend and bring wrongdoers before a community meeting. The meeting will then consider the behaviour of the offender and determine an appropriate punishment. The 'ten-man committee' cannot, however, act unilaterally:

> ... it cannot go off and act by itself. It must have the agreement of the community. In other words, the Committee does not initiate the action; the community initiates the action.[2870]

The jurisdiction of the 'ten-man committee' is not limited to the boundaries of the community. It regularly visits Port Hedland and other localities to apprehend persons. The range of offences for which persons may be picked up and returned to the community are quite broad: some may involve breaches of kin or community obligations but many are alcohol related. Some young persons are picked up because their drinking habits are considered detrimental to their health and welfare. Alcohol is certainly perceived by the people at Strelley as a major destructive factor to Aboriginal people and their culture.[2871]

716. ***Links with the General Legal System***. While the activities of the 'ten-man committee' in Port Hedland or elsewhere have no official sanction from the general legal system, the members of the committee have on occasions been assisted by the local police. The extent of this assistance depends, it seems, on the particular personnel stationed at the Port Hedland police station from time to time.[2872] The activities of the 'ten-man committee' and the lack of any formal liaison with the local police can mean that a person will be dealt with under both systems: by the ordinary courts and by the Strelley community. The Commission had discussions at Strelley about the possibility of formalising the role of the 'ten-man committee' in some way, for example, by its members wearing a uniform or badge of some kind. It was suggested that this may improve the police understanding of who they were and what they were doing and perhaps prevent problems resulting from non-recognition. A further difficulty, of course, is the possibility that certain of the actions of the 'ten-man committee' could involve breaches of the law and leave members of the committee liable for prosecution. Some official recognition of their role may, perhaps, prevent this. There was no clearly expressed view of the

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2866 J Bucknall, *Transcript of Public Hearings* Strelley (23-24 March 1981) 407-8, 430-1 'What happens here [Strelley] is that it is only through all the families in a general meeting coming together that a decision is arrived at'. See also Strelley Community Newsletter, *Mikurrunya* (6 May 1983).

2867 J Bucknall *Transcript* Strelley (23-24 March 1981) 353. The Commission is not aware of similar proceedings elsewhere in Australia.

2868 id, 413.

2869 While the membership of this committee is fixed, occasionally additional persons may be co-opted because some of the committee members are unavailable or for other reasons. id, 332-3.

2870 id, 342.

2871 At Strelley itself an unofficial ban on alcohol has been maintained since 1949. The committee's jurisdiction is regarded as extending to all persons with continuing links to Strelley: L Roberts, Submission 418 (29 May 1985). See further L Roberts 'Current Developments in Aboriginal/Police Relations in Western Australia', in KM Hazlehurst (ed) *Justice Programs for Aboriginal and other Indigenous Communities*, Australian Institute of Criminology, Canberra, 1985, 53, 56-7.

2872 J Bucknall, *Transcript* Strelley (23-24 March 1981) 334-5.

community members on the desirability of such changes, most implying that because the system worked satisfactorily at present there was no need to change it.

717. ***Sanctions***. While the Commission has little information on the format of the public meetings held at Strelley it has been told of the following sanctions:

- admonition ('growling');
- ridicule or shaming;
- a fine;
- banishment from the community (usually to one of the neighbouring communities);
- community work.

In rare cases physical sanctions are administered ('a little bit of a hiding') but the community apparently does not approve of spearing.[2873] On occasions, the community will pay the fine of a person who has come before the Magistrate's court. If this happens the person is regarded as being in debt to the community and may have to perform some community work as a result.

718. ***Comment***. Information about the processes of decision making and the informal justice mechanisms at Strelley is limited, but it gives some idea of the way in which the attempts are made to resolve problems and to interact with the general legal system. The reality of the broader legal system is accepted and accommodated, but is not regarded by the people as the way in which they would seek to resolve all their problems. In a similar way to Yirrkala, it seems that certain matters are seen as being within the jurisdiction of the general legal system, while others are to be resolved locally.

## General Conclusions

719. ***Representativeness of this Experience***. These examples may not be representative of Aboriginal communities around Australia.[2874] In some Aboriginal communities new authority structures have been developed, for example, elected community councils. These have a predominantly administrative role and are usually run by younger, school educated Aborigines, but some have come to play an important part in maintaining order and resolving certain kinds of disputes. The role played by a council may depend on the status of the persons elected and the extent to which senior people in the community influence individual council members. It will also depend on the nature of the dispute. It would be more common for matters not related to Aboriginal laws or customs to be dealt with by the elected Council. For example, at Beswick (NT), trouble-makers are barred for set periods of time from the beer canteen by the Council, a decision based on community discussion. The Council determines the penalty and is responsible for ensuring compliance. Council members may also play a role in attempting to 'settle people down' if trouble erupts in the canteen. The Council prefers to play an active role of this kind rather than calling in the police. The Council in consultation with the elders also attempts to resolve other troubles that arise.[2875] At Angurugu (NT) the Council unofficially fines individuals for unacceptable behaviour (including interference with Council property) regardless of whether court proceedings take place. In other communities, Councils or individual Council members are regularly involved in mediating disputes.[2876] In Central Australia a number of Councils have on occasions requested the Aboriginal Legal Service not to represent individuals charged with offences which are of particular community concern (e.g. 'grog-running' into dry communities). The Legal Services have had little choice except to comply, but this raises difficult issues. On the other hand some communities, in order to distinguish the function of the elected council, have also chosen a tribal council which has primary authority in traditional matters. This has been done, for example, at Yuendumu (NT), Yirrkala (NT),

2873 It was also suggested that in some cases it may be appropriate for persons to be put through the law, though it would usually be wrong to classify this as a form of punishment. See para 507-8.

2874 For a discussion of methods of dispute resolution among the Pitjantjatjara see the Report of the South Australian Aboriginal Customary Law Committee (Chairman: Judge JM Lewis) *Children and Authority in the North West*, Adelaide, 1984, 43-6.

2875 T Lewis, *Transcript* Darwin (3 April 1981) 892-4.

2876 F Cobbo, *Transcript* Cherbourg (8 May 1981) 2450.

Roper River (NT) and Yungngora Community (Noonkanbah, WA). It appears to be a fairly recent phenomenon.

720. ***Conclusion***. Whatever form they may take, there is little doubt that in many Aboriginal communities unofficial methods of resolving disputes operate alongside the general legal system. These may work together to resolve problems: at other times, though less frequently, they are in direct conflict. Generally, the customary processes operating do have an important role to play. If disputes and conflicts within Aboriginal communities can be resolved in unofficial ways this should. be encouraged as a preferable alternative to reliance on the general legal system. However these customary processes have their limitations. No longer do they cover the whole range of disputes, conflicts and law and order problems arising within Aboriginal communities, nor do they seek to. The questions whether it is desirable that these customary processes be recognised by the general legal system and whether it is possible to do so, will be considered in Chapter 31.

# 29. Special Aboriginal Courts and Justice Schemes

## Introduction

721. ***History of 'Aboriginal Courts'***. From time to time, attempts have been made in some States to create special courts for Aborigines.[2877] These courts have not used existing Aboriginal authority structures, but have sought to adapt the model provided by the general court system to allow for what was perceived as the special situation of Aborigines. They have not necessarily been intended as concessions to Aboriginal requirements: one reason for their creation may have been the difficulty in obtaining convictions before the ordinary courts, where juries were often reluctant to convict.[2878] Aboriginal court systems have often been imposed on Aborigines with little consideration being given to the views or to the effectiveness of their customary mechanisms.

- *Western Australia*. In Western Australia between 1939 and 1954 there was provision for Courts of Native Affairs to be convened on an ad hoc basis to try a 'native' for an offence committed against another 'native'. The Court consisted of a special magistrate, nominated by the Governor, as chairman, and the Commissioner of Native Affairs or his nominee. The Court could enlist the assistance of a headman of the tribe to which the accused belonged, and could take into account in mitigation of punishment any tribal custom which was proved to be an element in the commission of the offence. If tribal custom was an element, the Court's punishment powers were limited to imprisonment not exceeding 10 years or banishment from his country to be kept during the Governor's pleasure in prison, or at a place reserved for banished native prisoners. There was no appeal from a Court of Native Affairs. It is not known how often these courts were convened although it is probable they were not held regularly.[2879]

- *Queensland*. Special courts to hear offences committed by Aborigines who were resident on reserves in Queensland were provided for in the Aboriginal Preservation and Protection Act 1939 (Qld). The Act gave extensive powers to the Chief Protector of Aborigines (later the Director of Native Affairs) to deal with offences by Aborigines. Amendments in 1945 extended these powers to include property management, deceased estates and Aboriginal courts, police and gaols. The superintendents of reserves were empowered to constitute a court to hear a wide range of offences committed by Aborigines on reserves. An Aboriginal police force was established, also under the superintendent's control. From 1965 Aboriginal justices of the peace or members of the Aboriginal Council were empowered to constitute the Aboriginal court.

- *Northern Territory*. In the Northern Territory plans were originally drawn up for a system of native courts in 1938. This was followed in 1940 by an Ordinance providing the framework for the courts.[2880] The jurisdiction and powers of the Courts for Native Matters were to be prescribed by regulation, but although regulations were drafted to cover these and other aspects of the scheme they were never brought into operation. Courts for Native Matters, while much talked about, never sat.[2881]

722. ***The Present Situation***. Both Queensland and Western Australia still have systems of Aboriginal courts. While these operate in different ways, basically they involve the enforcement by Aboriginal personnel of a set of local by-laws. However, many magistrates in different Australian jurisdiction have experimented unofficially with ways of making the court and its procedures more relevant and understandable to Aboriginal people. For example in 1979 in the Northern Territory, Chief Magistrate Galvin introduced modified court procedures when he sat at the Port Keats Aboriginal community.[2882] He would arrive at Port Keats a day or two before the court was to sit to familiarise himself with the local scene and to discuss matters generally with the elders. During the court sittings the elders sat with the Magistrate and he would

2877 See para 49-50, 52-6.
2878 MC Kriewaldt, 'The Application of the Criminal Law to the Aborigines of the Northern Territory of Australia' (1960) 5 *UWAG Rev* 1, 43.
2879 Elkin reports that in 1943 such courts were convened twice to try two cases of homicide (resulting in one conviction for manslaughter and one for murder): AP Elkin, 'Aboriginal Evidence and Justice in North Australia' (1947) 17 *Oceania* 173, 206. Eggleston gives details of six cases heard before Native Courts between 1947-52 at Broome; four Aborigines were charged with wilful murder, one with manslaughter and one with assault occasioning grevious bodily harm. All were found guilty. Eggleston, 284-5.
2880 Native Administration Ordinance 1940; Elkin, 205.
2881 The 1940 Ordinance was repealed by Ordinance No 16 of 1964.
2882 C McDonald, *Submission 130* (28 August 1979). Mr Tom Pauling SM did the same at Yirrkala.

discuss with them the appropriate punishments. This would be done in all but the more serious offences. The Court was conducted with less formality and as a result was apparently well accepted by the elders, and other people at Port Keats, as a genuine attempt to get them involved in the decision-making process and to make the court more comprehensible.[2883] Magistrates Grubb and Lewis when sitting in the former North-West of South Australia (now Pitjantjatjara land under the Pitjantjatjara Land Rights Act 1981 (SA)) made it a practice to consult with tribal elders during court proceedings. The elders performed the role of assessors, which included discussion of appropriate penalties.[2884] Magistrate Terry Syddall conducted court hearings in a similar way in the Kimberley region of Western Australia during the 1970s. More recently a scheme to get greater community involvement during the court sittings has been set up at Galiwin'ku (NT).[2885] However, these responses by magistrates to the needs of Aboriginal defendants and their communities have been very much ad hoc, depending largely on the individual magistrates involved. They have not become entrenched procedures anywhere. This Chapter describes the various special schemes for Aboriginal courts or similar bodies, and the extent to which these have proved successful alternatives to the administration of justice by the ordinary courts.

## Queensland Aboriginal Courts

723. ***Constitution of the Courts***. Aboriginal courts, presided over by Aboriginal justices of the peace, operate in fourteen Aboriginal trust areas (formerly reserves) throughout Queensland.[2886] They have existed in substantially their present form for twenty years. Their operation and scope, as well as that of the reserve system itself, have been the subject of recent review, and new legislation has been enacted. The Community Services (Aborigines) Act 1984 (Qld), which repealed the Aborigines Act 1971 (Qld), seeks to create a new regime for the regulation and control of Aboriginal 'trust areas',[2887] including new provisions for the operation of Aboriginal courts.[2888] This new legislation was necessary to support the proposal to grant title to Aboriginal reserve land to Local Aboriginal Councils in the form of a deed of grant in trust.[2889] The first deeds of grant in trust were made in November 1985 to certain of the Torres Strait Islands. No grants have yet been made to Aboriginal reserve land. Section 42 of the Community Services (Aborigines) Act 1984 (Qld) enables each trust area to have an Aboriginal court, constituted:

> (a) by two justices of the peace each of whom being an Aboriginal resident in the area for which the court is constituted and being entitled to sit as a member of the court in a particular case; or
>
> (b) where paragraph (a) cannot be complied with, by the members of the Aboriginal Council established for the area concerned or a majority of them.[2890]

724. ***Jurisdiction***. The court exercises jurisdiction conferred on it by the Act or the community by-laws.[2891] Section 43(2) gives specific power to hear and determine:

> (a) matters of complaint that are breaches of the by-laws applicable within its area;
>
> (b) disputes concerning matters within its area that are not breaches of the by-laws applicable within its area or of any law of the Commonwealth or the State; and
>
> (c) matters committed to its jurisdiction by the regulations,
>
> and [the court] shall exercise that jurisdiction referred to in provision (a) in accordance with the appropriate by-law having regard to the usages and customs of the community within its area and that jurisdiction referred to in provision (b) in accordance with the usages and customs of the community within its area.

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2883 C McDonald, *Submission 162* (1980). See also para 764.
2884 Justice WAN Wells, *Submission 17* (March 1977).
2885 See para 764.
2886 A similar system operates in Queensland Islander Communities: Community Services (Torres Strait) Act 1984 (Qld).
2887 A 'trust area' includes a reserve (s 6).
2888 For a description of the courts under the repealed legislation see P Hennessy, ACL RP 11/12, *Aboriginal Customary Law and Local Justice Mechanisms: Principles, Options and Proposals*, ALRC, February 1984, 49-65.
2889 The Land Act (Aboriginal and Islander Land Grants) Amendment Act 1982 (Qld) is the basic enabling legislation. The Community Services (Aborigines) Act 1984 (Qld) is the supporting legislation relating to administration.
2890 A person who is a party to a matter before the court may not sit as a member of the court (s 42(3)).
2891 See para 727.

The court thus has a criminal jurisdiction for specified breaches of the Act, regulations and by-laws and a mediation or conciliation role over local 'disputes' where there has-been no breach of the general law. It is required to take into account the usages and customs of the community both in exercising its criminal jurisdiction and in resolving disputes. No longer does an Aboriginal court have the power to hear civil cases involving less than $200, a power which, apparently, was rarely if ever used. All persons, Aboriginal or non-Aboriginal, who are residents of an Aboriginal community come within the jurisdiction of the Aboriginal court. But persons who hold an appointment that requires their residence are specifically excluded: this would include many, if not most, non-Aboriginal. residents.[2892] Such persons if they breach the local by-laws are to be dealt with by a Magistrate's Court (s 44).

725. ***Appeals***. For the purposes of appeal the decision of an Aboriginal court is to be treated as if it were a decision of a Magistrate's court (s 45) so that the ordinary avenues of appeal exist. Under the repealed Aborigines Act 1971 (Qld) there was, in addition, provision for an appeal to be made to a district officer and from his decision to the visiting justice or, alternatively, direct to the visiting justice. Thus the former three avenues of appeal have been replaced by one.

726. ***Procedure under the New Regulations***. Regulation 23 of the Community Services (Aborigines) Regulations 1985[2893] provides that the procedures for and the enforcement of decisions of an Aboriginal Court shall be the same as for justices of the peace or magistrates under their respective Acts, depending on whether the case would have been heard before justices or a magistrate. This would appear to require Aboriginal courts to operate with a great deal more formality than they have in the past. It is uncertain how this will operate in practice, or how strictly this requirement will be enforced.

727. ***By-laws***. Section 25 of the Act sets out the functions of Aboriginal councils, which include making by-laws for:

- the peace, order, discipline, comfort, health, moral safety, convenience, food supply, housing and welfare of the area for which it is established;
- the planning, development and embellishment of the area for which it is established;
- the business and working of the local government of the area for which it is established.

In addition a council may make specific by-laws to regulate the entry and residence of persons within a trust area (s 68), and also with respect to a beer canteen (s 76). Some councils have drafted or are in the process of drafting by-laws, but none have yet been approved. A draft set of by-laws based on a local government country shire in Queensland has been circulated by the Department of Community Welfare to councils for their consideration. A similar practice was adopted with the present by-laws: the result was the general adoption of a standard set of by-laws with very little local variation. These bylaws have been the subject of much criticism, based on their intrusiveness, paternalism and (in many cases) triviality.[2894]

728. ***Penalties***. A by-law may specify a penalty not exceeding $500 or $50 a day (s 25(6)). No longer do Aboriginal courts have the power to order imprisonment for breach of the by-laws. This was put beyond doubt in *Adcock v Puttaburra, ex parte Puttaburra*,[2895] where Justice Kneipp held that the new Act did not authorise an Aboriginal court to impose a term of imprisonment, and that any by-laws kept in force by the new legislation had to be construed accordingly. An Aboriginal court however has the new power to make a fine option order (reg 24). Thus it can order community work to be done in substitution for a fine.[2896] The

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2892 eg, State Government employees, teachers, nurses, etc (though not, apparently, members of their families who do not themselves hold such an 'appointment'). The Commission has no information about non-Aborigines appearing before an Aboriginal Court.

2893 In force 9 Feb 1985.

2894 G Nettheim, *Victims of the Law. Black Queenslanders Today*, George Allen & Unwin, Sydney, 1981, 113-16; Senator Keeffe, *Parl Debs (Sen)* (8 March 1979) 688-93; H Wearne, *A Clash of Cultures*, Uniting Church of Australia, Brisbane, 1980, 48-60; Human Rights Commission, *Aboriginal Reserves, By-laws and Human Rights*, Occasional Paper No 5, AGPS, Canberra, 1983, 16-43; Commissioner for Community Relations, *Second Annual Report, 1976-77*, AGPS, Canberra, 1977, 101. The more controversial by-laws prohibit gossiping and games of chance (ch 4.1), leaving a gate open (ch 9.3) and practices of sorcery (ch 24.1). A person swimming or bathing must be dressed in a manner approved by the Manager (ch 10.1). For criticism of the continued operation of the by-laws under the 1984 Act see Human Rights Commission, Report No 9, *Community Services (Aborigines) Act 1984*, AGPS, Canberra, 1985, para 14-17.

2895 Unreported, Qld Supreme Court, Townsville, QSC No 6 of 1984 (21 November 1984).

2896 See JA MacDonald, 'Community Service Projects on Aboriginal Communities in Queensland' in KM Hazlehurst (ed) *Justice Programs for Aboriginal and other Indigenous Communities*, Australian Institute of Criminology, Canberra, 1985, 153.

question whether imprisonment may be ordered for fine default is unresolved. An offence against the Act itself is liable to a penalty of $500 or imprisonment for six months. Such offences would not be dealt with by an Aboriginal court unless the Act specifically provides for this (s 79). The regulations may provide a penalty for breaches of the regulations not exceeding $200 (s 82, reg 27). Until councils draft and have approved new by-laws the existing ones remain in force (so far as these are consistent with the Act and regulations).[2897] It is clear that the intention behind the new legislation was that Aboriginal courts would continue to operate, but with more limited powers.

729. ***Effect of the Aboriginal and Torres Strait Islanders (Queensland Discriminatory Laws) Act 1975 (Cth)***. The operation of the Aboriginal courts has been affected by a number of Commonwealth Acts, the most important being the Aboriginal and Torres Strait Islanders (Queensland Discriminatory Laws) Act 1975 (Cth). This Act, the preamble to which states that it was passed for the 'purposes of preventing Discrimination in certain respects against those Peoples [Aborigines and Torres Strait Islanders] under laws of Queensland', overrode the then Queensland legislation in a number of important ways. Its effect was to impose certain limitations on the scope of the Queensland Act, regulations and by-laws with respect to:

- the management of an Aborigine or Islander's property (s 5);
- the permit system for entering, residing or visiting an Aboriginal reserve (s 6);
- penalties imposed on an Aborigine under a law relating to a reserve, including the power of ejectment (s 7);
- entry to premises on a reserve (s 8);
- legal representation before Aboriginal courts and rights of appeal (s9);
- the power to direct a person to perform certain work on a reserve (s 10);
- the terms and conditions of employment of Aborigines and Islanders on reserves (s 11).

It appears that in practice the Commonwealth legislation was largely ignored. In any event its provisions were gradually overtaken by changes brought about by Queensland legislation. One important provision of the Commonwealth legislation which is still applicable, however, is the right to legal representation (s 9). The new Queensland legislation does not spell out such a right, and some Aboriginal courts have been reluctant to allow legal representatives to appear.[2898]

## Support Structures for the Aboriginal Courts

730. ***Aboriginal Police***. Section 39 of the Community Services (Aborigines) Act 1984 enables an Aboriginal council, with the Minister's approval, to appoint Aboriginal police and to equip them with a uniform. Under the old Act the Manager, in consultation with the council had the power to appoint Aboriginal police, although there was no requirement to supply uniforms.[2899] Aboriginal police have the function of maintaining peace and good order; specified duties may also be conferred on them by by-law (e.g., ambulance services, fire-fighting and emergency services (s 40, 41)). The Aboriginal police also play an important role in the operation of the Aboriginal court. They are responsible for bringing offenders before the court, presenting evidence and generally assisting in the running of the court. Some courts rarely call any other evidence, and so nearly all convictions are entirely dependent on the Aboriginal police evidence.[2900] Craig, in his study of the Yarrabah reserve near Cairns, comments that at times the Aboriginal police became the de facto court at Yarrabah because when a backlog developed 'they made fewer arrests, set lower bails and allowed people extra time to pay their fines'.[2901]

2897 Acts Interpretation Act 1954-77 (Qld) s 21.
2898 See para 739. See also Racial Discrimination Act 1975 (Cth) s 10(3).
2899 Some communities, eg Yarrabah, did provide uniforms and badges.
2900 D Craig, 'The Social Impact of the State on an Aboriginal Reserve in Queensland, Australia', Ph D Thesis, University of California, Berkeley 1979, 134; ACL *Field Report 5*, 29, 51.
2901 Craig, 136.

731 ***Problems of Recruitment and Turnover***. One feature of the Aboriginal police forces on some reserves is the high turnover.[2902] Craig stated that at Yarrabah between 1968 and 1976, DAIA hired 108 different persons (predominantly young, unmarried men) a total of 195 times to keep the Aboriginal police positions filled. Fifty-four of these people signed on more than once, including 3 who were policemen on 6 different occasions. There were on average 11 Aboriginal policemen at any one time, but they lasted less than 6 months on the job. Eighty per cent of those who left the Aboriginal police did so by voluntary resignation.[2903] Several reasons are suggested for the high turnover. The principal one is the difficulty of fulfilling personal and family obligations which may run counter to the responsibilities of a police officer. As Craig comments:

> Being a reserve policeman puts them in the untenable position of having to use authority emanating from the White subsystem to arrest someone like their own uncle. The most common solution to this structural predicament is to call in the White police, but this is not always possible. A policeman is then faced with the choice of upsetting the community order by proceeding with the arrest, or losing face by having to leave the scene with a badge but no prisoner in hand ... Most people decide to honor their primary social allegiances and live without the derision that accompanies their job by quitting the force.[2904]

The Commission has been told of an Aboriginal policeman working successfully in a community in which he had no relations, but when he returned to his community, he found it impossible to maintain the same impartiality and resigned.[2905] But a policy of stationing such police in other communities than these to which they belong is not likely to be successful, given a perceived reluctance by many Aborigines to carry out a policing function, or to live, in other than their home community for long periods of time.

732. ***Aboriginal Gaols***. Gaols or lock-ups exist on all trust areas but the new legislation contains no provisions covering them.[2906] The effect of this is that the local gaols are now the responsibility of the Queensland Police.

733. ***Visiting Justice***. There is still provision for a 'visiting justice' (s 11), usually a local magistrate, who must travel to a trust area at least every three months to:

- investigate complaints;
- inspect the record of punishment of the Aboriginal court;
- if he is a Magistrate, and an Aboriginal court does not exist, hear offences;
- report to the Under Secretary on the administration of the area.

The Human Rights Commission has commented that:

> the whole concept of a visiting justice has overtones of the gaol or other institution in which people are incarcerated against their will, which is to be subject to regular inspections by that functionary. The concept fits uneasily with that of a community of Aboriginal Queenslanders living freely together under their own institutions.[2907]

## The Operation of the Aboriginal Courts

734. ***The Commission's Field Work***. No extensive study has been done on the operation of the Aboriginal courts in Queensland, and there is very little published information on how they work in practice. While there are 12 Aboriginal trust areas in Queensland entitled to conduct Aboriginal courts,[2908] the number that actually do, and the regularity of court sittings, are unknown. Nor is there any regular statistical information available on offences heard or penalties imposed by the Aboriginal courts. As a result some caution must be exercised in assessing the statistics that are available. It cannot be assumed that these give a clear picture of

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2902 ACL *Field Report 5*, 45; Craig, 126; K-P Koepping, 'Cultural Patterns on an Aboriginal Settlement in Queensland' in RM Berndt (ed) *Aborigines and Change*, AIAS, Canberra, 1977, 159; J Taylor, *Submission 388* (11 October 1983).
2903 Craig, 126-7.
2904 Craig, 126-7.
2905 ACL *Field Report 5*, 45.
2906 No doubt because the courts can no longer gaol offenders: see para 728.
2907 Human Rights Commission Report No 9 (1985) para 20.
2908 viz, Cherbourg, Woorabinda, Yarrabah, Palm Island, Hope Vale, Wujal Wujal, Lockhart River, Northern Peninsula Area, Weipa South, Edward River, Kowanyama, Doomadgee: Hon RC Katter, *Submission 425* (4 June 1984).

the situation throughout Queensland. Commission staff visited Aboriginal communities in North Queensland in 1979, 1981 and 1984.[2909] During the 1979 and 1984 visits, the Aboriginal courts were seen in operation and court records were examined. The new legislation was in force during the 1984 visit but the old by-laws and regulations still operated. Thus the courts worked very much as they had done in 1979. The following observations are made on the basis of these visits and other information available to the Commission.

735. ***Range of Offences***. Four offences, all set out in Chapter 4 of the By-laws ('Conduct and Behaviour') are almost exclusively the source for charges in recent years:

- being under the influence of alcohol;
- behaving in a disorderly manner;
- assault; and
- gambling.

The vast majority of offenders were charged with the first two of these offences. For example at Kowanyama Aboriginal Court in June 1984, 173 offenders (some repeat offenders) came before the court. Nearly all the offenders faced charges of being under the influence of alcohol (usually fined $5) and behaving in a disorderly manner (usually fined $10) although in addition there were 17 charges of assault and 11 of gambling. There were 30 pleas of not guilty to one or other of the offences charged. At Edward River Aboriginal Court in June 1984 65 offenders appeared. Of these 17 faced the charge of being under the influence of alcohol, and 44 of disorderly conduct. In contrast to Kowanyama only two faced both charges. Most, probably all, of the disorderly behaviour charges related to alcohol, but two charges were specifically identified as involving damage to property. In these cases restitution of $10 and $80 was ordered to be paid. In addition, 5 persons were charged with breaching the regulations by possessing alcohol in the trust area. All were banned from the beer canteen for three weeks.

736. ***Appeals***. Appeals are rare.[2910] There is general ignorance both of the right of appeal and the procedure required. As well, access to the appellate courts is in most cases difficult. Those communities which are part of a magistrate's court circuit have more ready access but, depending on the timing of the circuit, travel may be necessary. Given the limited penalties the Courts may impose, many regard an appeal as not worth the trouble.

737. ***Charges Heard, Court Sittings***. There is great variation in the number and regularity of court sittings between the different communities, and also in the number of charges heard. For example at Kowanyama, Yarrabah and Palm Island during 1984 the court sat approximately three days a week and heard approximately 10-30 cases at each sitting.[2911] At Edward River the court sits as required, usually twice a week. During the first six months of 1984 the court heard 486 cases.[2912] At other communities the courts sit less regularly: at Lockhart River only on Friday afternoons if required, and at Weipa South not even on a weekly basis.[2913] Many factors account for these variations, including the significant population differences between the communities, the fact that in some communities the existence and operation of the court has become more institutionalised, differing local attitudes to the effectiveness of the court in resolving disputes and punishing offenders, the presence in particular communities of individuals with. sufficient strength or community acceptance to comprise the court, and the attitude of the executive officer or resident police officers to the operation of the court.[2914]

738. ***Penalties***. While the powers of Aboriginal courts with respect to penalty is strictly circumscribed,[2915] there are variations in practice between them. The most common penalty is a fine, but in the larger

2909 See para 9, 11, 17. Communities visited were: Weipa South (1979, 1981, 1984), Aurukun (1979, 1981, 1984), Lockhart River (1979, 1984), Bamaga (1977), Kowanyama (1979, 1981, 1984), Edward River (1979, 1984), Yarrabah (1980, 1984), Palm Island (1984).
2910 See *Adcock v Puttaburra, ex parte Puttaburra*, unreported, Queensland Supreme Court, Townsville QSC No 6 of 1984 (21 November 1984).
2911 ACL *Field Report 9*, 2. For details of sittings in 1979, see ACL Field Report 5, Appendix 6.
2912 ibid.
2913 The regularity of sittings of the Aboriginal court at Weipa South may be due to its proximity to the mining town of Weipa, which has a fully staffed police station and local justices of the peace sitting regularly in the local court.
2914 ACL *Field Report 5*, 28.
2915 See para 728.

communities until the end of 1984 the local gaol was still used regularly. In some communities being sentenced to a number of days in the lock-up meant community work in the day-time and spending only nights in the lock-up. To some extent this depended on an offender's willingness to participate. Other communities had no system of community work and offenders spent all their time in the lock-up.[2916]

USUAL PENALTIES (AUGUST 1984)[2917]

| *Community* | *Drunk* | *Disorderly* | *Gambling* | *Assault* | *Possessing alcohol in breach of regs* |
|---|---|---|---|---|---|
| Kowanyama | $5 | $10 | $5 or $10 | $10 | |
| Edward River | $40 | $40 | - | | $40 or 3 week ban from beer canteen. |
| Yarrabah | $2 | $10 or $20 | - | | $10 |
| Palm Island | $20-$40 | $20-$40 If repeat offenders a number of days in lock-up | - | $20-$40 If repeat offenders a number of days in lock-up | $20-$40 |

Notes

- There is an overlap between 'disorderly' and 'assault'. Persons fighting might be charged with either one. For some communities both were used, in others only one.

- While gambling occurs in most communities it rarely is the basis of a charge before the Aboriginal court.

- Cumulative charges or repetitive offenders are also likely to be barred from the beer canteen for a period of time or to get a number of days in the lock-up.

739. ***Procedure***. Aboriginal courts have tended to develop their own procedures and there is considerable variation. Some courts (e.g. Yarrabah) have relatively formal procedures (including formal presentation of evidence, the administration of an oath to witnesses, etc.); others have little if any organised procedure. But one consistent feature is the absence of legal representation. Although Commonwealth law confers a fight to legal representation,[2918] in practice this is discouraged.[2919] These informalities can lead to difficulties. For example at Palm Island in a number of cases witnesses who admitted their involvement in a fight leading to a charge against another person of behaving in a disorderly manner were themselves convicted and sentenced, after a brief opportunity to explain their side of the story.[2920] The reasons for variations in procedure are not clear, though the role played by the executive officer (formerly manager) and the Queensland police stationed in communities is an important factor. Some Aboriginal courts are largely left to run themselves; others have only in recent years had resident Queensland police.[2921] This may change if the new regulations are fully enforced.[2922]

740. ***The Special Situation of Aurukun and Mornington Island***. In 1978 the status of Aurukun and Mornington Island communities was altered from Aboriginal reserve to local government shire. This came about following a dispute involving the Uniting Church (which had been responsible for administration of the communities), the DAIA, and the Queensland and Commonwealth Governments. The Commonwealth Government's reaction was to enact the Aboriginals and Torres Strait Islanders (Queensland Reserves and

2916 Although under the 1984 Act gaol is not an available penalty (see para 728) the local courts were not, at the time of the visit at least, aware of this.
2917 ACL *Field Report 9*. For details of penalties in earlier years, see ACL *Field Report 5*, Appendix 6; Craig 133.
2918 See para 729.
2919 Queensland Reg 53(2) allows legal representation only with leave of the court. The Yarrabah Community Council proposed that this be remedied by holding both the Aboriginal Court and Magistrates Court at Yarrabah, and commented that 'traditionally, a defendant has not been allowed to be legally represented in the Aboriginal Court': BC Barlow. Yarrabah Community Council, *Submission 480* (7 May 1985).
2920 ACL *Field Report 9*, 25.
2921 For example Edward River and Lockhart River (since 1983).
2922 See para 726.

Communities Self-management) Act 1978 (Cth) for the purpose of enabling specified Queensland reserves and communities to control their own affairs independently from Queensland law and administration. The Queensland Parliament retaliated with the Local Government (Aboriginal Lands) Act 1978 (Qld). Later the same year an amending Act was passed abolishing the status of Aurukun and Mornington Island as reserves and making them local government areas subject to the Local Government Act 1936 (Qld). No longer were they subject to the Aborigines Act 1971 (Qld), its regulations or by-laws. Hence the Aboriginal courts ceased to operate, and both communities became subject to the Magistrates Court Act 1921 (Qld) and the Justices Act 1886 (Qld). In consequence the 1978 Commonwealth Act, which by its terms applied only to reserves, did not apply to the two communities. One result of this change of status was that from 1979 Aboriginal justices of the peace have comprised a court and exercised all the powers available to justices, a situation which has created the potential for heavier penalties and greater involvement by the Queensland police than in the Aboriginal courts on reserve or trust land. Aboriginal justices still sit as a court at Aurukun, but justices no longer sit at Mornington Island where all cases are heard by a visiting magistrate. Aurukun thus has a dual system: a local court of justices and the magistrate's court sitting on circuit. The justices court at Aurukun is a court of record so that convictions before the court may be relied on in other courts in Queensland, whereas the records of Aboriginal courts do not have this status. This also means that the sentencing powers of the justices are much greater than in an Aboriginal court. Prosecutions are conducted by the Queensland police and the paperwork involved is the same as other lower courts in Queensland, although the procedures are more flexible and less formal.[2923] The courts are restricted to dealing with charges of offences against the general law of Queensland, neither shire having yet managed to get into place local government by-laws.[2924] In general an accused person can choose whether to appear before the local Aboriginal justices or the magistrate when on circuit.[2925] One interesting innovation at Aurukun is the use of banishment. Offenders are ordered to spend a period of time at one of the outstations and not to come into the community during this time. The Queensland police assist to enforce these orders.

## Assessment

741. ***More Basic Criticisms***. Criticisms at a number of different levels have been directed at the Queensland Aboriginal court system. At one level there has been criticism of the philosophy underlying the courts and of the effect they are said to have had, and continue to have, on Aborigines collectively and individually.[2926] These relate principally to Aboriginal rights to self-determination, and to the effect that the reserve system in Queensland has had on Aboriginal people. At a second level, criticism is directed at the rules and regulations which guide them and the way they operate in practice. The Community Services (Aborigines) Act 1984 (Qld) has attempted to meet some at least of the criticisms at this second level. It remains to be seen to what extent improvements will be made in the actual working of the courts. In any event, more basic criticisms are likely to continue. These include:

- the courts are inferior or 'second-class' institutions;
- the lack of real Aboriginal influence or control;
- the courts' inability, or failure, to take into account local customs and traditions;
- criticism of the courts as an aspect of the reserve system as a whole, which is seen as an imposition of alien structures and values.

742. ***'Second-class' Institutions***. A complaint commonly made about Aboriginal courts is the lack of training provided to the Aboriginal justices and the Aboriginal Police. Justices of the peace are appointed to sit in the court but are given no guidelines, instructions or formal tuition in the job they are expected to perform.[2927] One effect of this lack of training is that the Aboriginal justices are unsure of the jurisdiction, procedure or powers of the Aboriginal court. They take their job seriously but are very aware of their

2923 ACL *Field Report 9*, 13.
2924 Mornington Island has prepared draft By-laws which are not yet approved. Aurukun is awaiting this approval before drafting their own: ACL *Field Report 9*, 12.
2925 It is believed that non-Aborigines would generally choose the visiting Magistrates Court: id, 13.
2926 Nettheim (1981) 139-152.
2927 For similar criticism see Human Rights Commission Report No 9 (1985) para 405. See further para 818.

shortcomings and are keen to improve their skill, but do not know how to go about it.[2928] If it is thought they may have acted in an inappropriate way the executive officer or local Queensland police officer (or, though this is less likely, the Aboriginal council) may intervene to advise them. However, this very much depends on the attitude of the executive officer and the police to the court. The limited powers available to an Aboriginal court also affect its status. A similar problem exists with the Aboriginal police. They have no formal training, although they generally work under the direction of the Queensland police, who may provide some guidance and instruction. Several factors make the present Aboriginal police system unsatisfactory. First, the Aboriginal police are actually employed by the council, which is responsible for hiring and firing. Councils now have specific responsibility for providing uniforms but this is being implemented very unevenly. The lack of a uniform is said to affect the status of the Aboriginal police from both the community and the individual viewpoint. Secondly, family or kin relationship can make it difficult for an Aboriginal policeman to do his job. Thirdly, the relatively small size of most of the Aboriginal communities and the mix of groups from different areas also leads to tensions which make policing difficult. Being an Aboriginal policeman may set a person apart from his friends. A combination of these factors results in a high turnover which makes policing even more difficult.[2929] Finally, the limited powers of the Aboriginal police restricts the role they can play and affects their status. But the factors listed above are usually given as justification for imposing such limitations, creating a self-perpetuating image of inferiority.

743. ***The Lack of Aboriginal Influence or Control***. Another basic criticism directed at the Queensland system is that it was set up, and is in effect run, by the relevant Queensland government department (the Department of Community Services, formerly the Department of Aboriginal and Islander Advancement). To some degree the new legislation overcomes this:

- The role of the Department is to be phased out (although the extent to which communities are being prepared for this appears to be uneven).

- Community councils are required to prepare by-laws for their communities (which have effect when approved by the Governor in Council).

- Community councils would seem to have control over whether or not an Aboriginal court is established for their area.

- Community councils are said to have greater control over the content of by-laws. The existing by-laws have been the subject of trenchant criticism over their disregard for basic human rights.[2930]

- The jurisdiction of the Aboriginal court has been extended to cover offences by non-Aboriginal residents (provided the non-Aborigine is not resident as a requirement of his employment).[2931]

But these changes may be formal rather than real, especially given the history of the courts on reserves. Moreover the question of local control over the courts cannot be divorced from the basic issue of the control exercised by the Department of Community Services under the Community Service (Aborigines) Act 1984. Formally, at least, that Act took some steps towards establishing Aboriginal reserves as local government areas under Queensland law. But the relationship between the powers of Aboriginal councils in trust areas, and the powers of ordinary local government councils in those areas, is confused.[2932] Insufficient attention was given to this relationship, and to the appropriate range of local government powers for Aboriginal councils. Until these problems are resolved, the trust areas cannot be regarded as having a proper system of local government.

744. ***Local Customs and Traditions***. The Aboriginal courts do not at present administer any laws which could be regarded as being based on local customs or traditions, though there is a provision prohibiting sorcery (By-law Ch 24.1).[2933] However the new legislation provides that:

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2928 ACL *Field Report 9*, 7-8.
2929 See para 731.
2930 See the works cited in n 18.
2931 In the view of the Human Rights Commission this extension has not gone far enough: see Report No 9 (1985) para 46-7.
2932 As the Human Rights Commission pointed out: id, para 8, 35-36.
2933 The Commission has no information of charges being laid before an Aboriginal Court under this by-law in recent times.

- An Aboriginal court is responsible for the good rule and government of a trust area 'in accordance with the customs and practices of the Aborigines concerned' (s 25);

- An Aboriginal court shall exercise its jurisdiction 'having regard to the usages and customs of the community within its area ...' (s 43); and

- An Aboriginal court has jurisdiction to hear and determine disputes where no breach of the by-laws, or of the general law, has occurred (s 43(2)(b)).

Again, what these provisions will mean in practice is uncertain, but potentially they allow Aboriginal councils and courts to take Aboriginal 'customs and practices' into account, and indeed to incorporate aspects of them into local by-laws. There was no specific provision for this to occur under the previous regime, although some courts took local customs and practices into account at least as an aspect of the 'local knowledge' which is a prominent feature of the courts in practice.[2934] In this context the power to deal with disputes of a general character occurring within the community is an interesting innovation. Some Aboriginal courts were already performing this function,[2935] but it is better that it is specifically provided for.[2936] Whether such disputes will be brought before the court remains to be seen: this is likely to depend on the degree of acceptance of the court within the community, and the standing and approach of the local justices.

745. ***Imposition of Alien Structures and Values***. Despite these specific changes, it has been argued that the Aboriginal court system can never operate successfully or effectively:

> The Aboriginal court was ineffective primarily because it did not reflect the mores of the local community. The Queensland Government dictated the structure and content of the laws, which stigmatized behaviour that was acceptable to the reserve population under certain conditions e.g., ... swearing in public ... The purpose of this imposition was to teach Aborigines European values and decorum, and to deter behaviour which Whites found offensive. The administration of justice at Yarrabah provided no such deterrence; it just caused economic hardship.[2937]

Because the dominant State Government influence over the court and over the rules it applies is exercised indirectly rather than directly, the court 'machinery also gives certain Aborigines great power over other Aborigines ...',[2938] and its decisions may thus reflect and support particular local interests or groups at the expense of (unrepresented) others.

746. ***Should the Courts be Retained***? It is true that Aboriginal courts had no equivalent in traditional societies. But the Aboriginal courts have now been operating in very much their present form for .20 years, and there is some support for them among Aboriginal residents of the trust areas.[2939] It is also true that they have in some cases reinforced or established the authority of court officials within the local community in ways which may not be locally acceptable. On the other hand, as Dr von Sturmer pointed out, the courts do work, though 'with certain deficiencies. They do create something of a buffer between the white world and the black world ...'.[2940] Some of the particular criticisms made of the Aboriginal courts have diminished since the new Community Services (Aborigines) Act 1984 (Qld) came into effect. Aboriginal councils have been given, formally at least, greater autonomy in drafting their own by-laws which are enforceable in the Aboriginal court (although none are yet in place). This should resolve human rights violations in the old by-laws. The courts now have greater powers to fine and to impose fine option orders (e.g. community work), although they may no longer imprison. The role played by the Department of Community Services is, apparently, to diminish. The 1984 Act significantly opens up access to the Aboriginal trust areas. No longer are permits required to enter the land. Community Councils are given greater local government powers, though not the full powers under the Local Government Act 1936 (Qld). Queensland Police now have a

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2934 It was obvious from viewing an Aboriginal Court in operation that the Justices knew a great deal about most people coming before them, as well as, in many cases, details of the incident involved. Such factors are taken into account in sentencing or may be the basis for dismissing a charge: ACL *Field Report 9*, 26.

2935 eg Weipa South, ACL *Field Report 9*, 10.

2936 However there would be few disputes indeed which did not involve breach of the by-laws or of the general law in some way: this can hardly be described as an 'unlimited civil jurisdiction': Human Rights Commission Report No 9 (1985) para 48.

2937 Craig, 136. See also Taylor, 34-6.

2938 J von Sturmer, *Submission 462* (4 December 1984) 3 (giving examples).

2939 Record of Discussion, First Meeting of Aboriginal Advisory Council Working Party, Palm Island, 27 August 1982, 5; ACL, *Field Report 9*; BC Barlow, Chairman, Yarrabah Community Council, *Submission 480* (7 May 1985/19 June 1985). For a contrary view see S Mam, *Submission 477* (17 April 1985).

2940 J von Sturmer, *Submission 462* (4 December 1984) 3.

presence on all trust areas, and in time all will have a magistrate visiting on circuit. Some efforts are being made to establish a training scheme for Aboriginal justices.[2941] If the courts are to continue certain requirements must be met. First, the courts must maintain basic standards and be procedurally fair.[2942] Secondly, any decision on their continued operation should rest with the Aboriginal communities concerned, which should be able to choose whether they want or need an Aboriginal court, how long the court should operate in its present form, or whether a court such as that at Aurukun is preferable.[2943] This may be a difficult decision to make, as courts have been operating in communities for many years and, despite deficiencies and criticisms, they have become an established part of community life. Thirdly, more attention needs to be given to training justices and staff of the courts. And finally the confused relationship between local government powers and the powers of Aboriginal councils under the 1984 Act[2944] needs to be addressed, including the question of the appropriate range of local government powers for trust areas.

## Aboriginal Courts in Western Australia

747. ***The Syddall Inquiry***. The system of 'Aboriginal courts' in Western Australia[2945] was introduced by the Aboriginal Communities Act 1979 (WA). It stemmed largely from the efforts of Mr Terry Syddall MBE who for varying periods, commencing in 1970, worked as a stipendiary magistrate in the North West of the State. He had adopted a practice of inviting local elders to sit with him in the courtroom while Aboriginal defendants were being dealt with, and of discussing possible penalties with them. In 1977 he was asked by the Western Australian Government to conduct an inquiry into aspects of Aboriginal law and to formulate plans to improve the understanding of the law by Aboriginal communities. The inquiry was to be limited to the Kimberley area, on the basis that any decisions made following it could if appropriate be later extended to other parts of the State later. As a result a system of 'Aboriginal courts' in Western Australia was introduced in an experimental basis in 1980 at La Grange and One Arm Point.[2946]

748. ***The Aboriginal Communities Act 1979 (WA)***. The Act provides for the scheme to apply initially to the Bidyadanga Aboriginal Community La Grange Incorporated and the Bardi Aborigines Association Inc, with provision for further communities to be included by proclamation (s 4). It has in fact been extended to three other communities: Lombadina, Beagle Bay and Balgo Hills. A number of applications have been made by other communities to be included (including town-based Aboriginal communities). The Act provides for community councils to make by-laws covering a range of specified subject matters (s 7) including:

- entry to community lands;
- regulation of vehicles;
- damage to local flora;
- littering;
- disorderly conduct, language or behaviour;
- restrictions on alcohol; and
- regulation of firearms.

2941 Inspector MC Croft, Letter to Commission, 18 December 1984.
2942 See para 818.
2943 The intention of the Government in Queensland would appear to be to phase out the Aboriginal courts and Aboriginal police completely.
2944 See para 743.
2945 For the earlier WA Aboriginal courts see para 721.
2946 On the WA scheme see T Syddall, 'Aborigines and the Courts I' in B Swanton (ed) *Aborigines and Criminal Justice*, Australian Institute of Criminology, Canberra, 1984, 133; T Syddall, 'Aborigines and the Courts II', id, 144; A Hoddinott, 'Aboriginal Justices of the Peace and "Public Law"' in KM Hazlehurst (ed) *Justice Programs for Aboriginal and other Indigenous Communities*, Australian Institute of Criminology, Canberra, 1985, 173; KM Hazlehurst, 'Reflections on the Syddall/Hoddinott Western Australia Aboriginal Justice of the Peace Debate', *Submission 496* (1 October 1985).

749. ***Application of Aboriginal Traditions***. There is no specific provision for by-laws to be made dealing with local Aboriginal custom, although some of the matters specified in section 7 could in their application include custom.[2947] Sub-section 7(3) provides that:

> Nothing in this Act affects the power of a community or its Council to make other by-laws, rules or regulations under and in accordance with the Constitution of the community.

However, this provision is likely to be limited to by-law making powers associated with incorporation rather than any more general powers. The former Attorney-General clearly stated the Government's intention with respect to the recognition of customary laws:

> While the community by-laws enable customary law to be taken into account, they do not recognise or validate them in the sense of sanctioning some of the traditional forms of punishment such as spearing which are illegal under State law.[2948]

750. ***Enforcement of the By-laws***. The by-laws apply to all persons, Aboriginal or non-Aboriginal, within the community lands (s 6, 9). Penalties of a fine not exceeding $100 and imprisonment for a maximum of three months may be imposed for breaches of the by-laws. Fines are paid to the Council for the use of the community (s 12). There is provision for an offender to be ordered to pay compensation (not exceeding $250) to the community or to an injured person (s 7). Breaches of the by-laws are dealt with summarily under the Justices Act 1902 (WA). Proceedings, which may be brought by a member of the police force, are not dealt with by a special Aboriginal court but come before an ordinary court staffed by justices of the peace or a magistrate. The intention however is that the court should be staffed by Aborigines, and to this end Aboriginal justices of the peace and other Aboriginal court staff have been appointed. No provisions in the Act deal specifically with this aspect of the scheme: once Aboriginal justices of the peace are appointed they have the normal powers of justices of the peace and are not limited to hearing breaches of the by-laws. There is no exclusion of other laws of Western Australia, such as the Criminal Code and the Police Act, from Aboriginal communities so that local by-laws are additional to other State laws.[2949] Section 13 of the Act provides that:

> No by-law takes away or restricts any liability, civil or criminal, arising under any other statutory provision or at common law.

Thus there is a potential for conflict between by-laws and general State laws, in which case State laws would prevail. A number of conflicts are pointed out by Gyanraj:

- a policeman may prosecute a person for breach of the Liquor Act even though there may be a community by-law dealing with the use of liquor;
- whereas the Police Act provides a maximum penalty of six months imprisonment for disorderly conduct, the maximum under the Aboriginal Communities Act is three months.[2950]

Such conflicts, while not major, have the potential to undermine the effect of community by-laws, although in practice, given the restricted scope of the by-laws and the way they are enforced, this does not seem to have occurred.[2951]

751. ***Model By-laws***. In order to implement the scheme a model set of by-laws was drafted and some training of Aboriginal justices undertaken. The first by-laws to become effective, for the La Grange community, were gazetted on 15 February 1980. Identical bylaws, for One Arm Point (Bardi), Lombadina, Beagle Bay and Balgo Hills, have since been gazetted.[2952] The by-laws closely follow s 7 of the Act. There are thus

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2947 See also Ch 19.

2948 *News Release*, Hon I Medcalf QC (17 May 1980).

2949 Certain 'public places' offences are in effect excluded because the community land is 'private' rather than 'public': thus certain public order offences are not applicable.

2950 S Gyanraj, 'Autonomy for Aboriginal Communities' (1979) 4 *LSB* 234, 235.

2951 Hon K Wilson MLA, Minister with Special Responsibility for Aboriginal Affairs (WA), *Submission 484* (5 June 1985) 2.

2952 For Bardi see *WA Government Gazette* (7 November 1981). The other three communities included in the scheme by notice in the WA Government Gazette (27 March 1981); however, by-laws for these three communities did not appear until 4 June 1982 (Lombadina and Beagle Bay) and 15 October 1982 (Balgo Hills). They are the same as the earlier by-laws.

provisions regulating the entry of persons on to community land (Balgo Hills by-laws 3-5) and vehicle traffic on community land (by-laws 6-7), and creating a number of offences. For example, by-law 10 states:

> No person shall cause a disturbance or annoyance to other/persons by using abusive language or fighting or otherwise behaving in an offensive or disorderly manner.

By-law 12 relates to alcohol on community land. The Council is empowered to permit 'any person' to bring alcohol onto community land or possess, use or supply alcohol on community land, but the Council may impose such 'terms, conditions and restrictions as [it] thinks fit'. Proceedings for breaches of the by-laws may be brought by police officers, who are also empowered to remove a person from community land for a maximum of 24 hours or until a court is convened, where that person has committed an offence or is likely to cause injury to persons or to damage property. By-law 17 provides that:

> It is a defence to a complaint of an offence against a by-law to show that the defendant was acting under, and excused by, any custom of the community.

Although this 'customary law defence' is not specifically provided for in the Act, if there is power to create offences in the by-laws then there must also be power to establish special defences.[2953] The defence has been relied on by defendants before courts sitting in Aboriginal communities, though on rare occasions and with very limited success.[2954]

752. ***The Extent of Aboriginal Autonomy***. The by-laws which operate in the five Aboriginal communities in Western Australia are, so far as their content is concerned, non controversial. Their scope is limited. They cover a range of less serious offences, which however constitute a large proportion of the day-to-day problems within Aboriginal communities. While it is intended that there be Aboriginal involvement in the court administration, there is no requirement for this. Nor is it clear how much scope there is in practice for Aboriginal communities to draft their own by-laws to include aspects of the local customary laws, as the drafting of one set of model by-laws applicable in all five communities may indicate.[2955]

753. ***Geographical and other Limitations of the Scheme***. The number of communities included in the scheme is still small. Considerable caution has been exercised in extending the scheme, which is so far limited to the north-west of the State. Aboriginal communities outside this region, such as Mt Margaret in the Eastern Goldfields, have requested inclusion in the scheme, but this has not yet occurred. The criteria for selection, as stated by the former Attorney-General, required that the community in question 'be a coherent community with established community leaders, such as tribal elders, having recognised authority within that community', that 'the people and their leaders must demonstrate a desire to Preserve the peace and harmony of their community' and that 'they must show a willingness to abide by the laws of the land and be prepared to accept voluntary restrictions on alcohol consumption'.[2956] In addition, persons within the community with a reasonable degree of understanding of the legal system are required. Selecting persons to play leading roles and training them for their positions can be difficult and time-consuming. These, relatively strict, criteria may be one reason for the limited scope of the scheme so far: another is the State Government's desire to review the scheme before extending it to other areas.[2957]

754. ***Contrast with Queensland By-laws***. Comparing the Western Australian by-laws with the Queensland by-laws, the Human Rights Commission commented that:

> The Western Australian by-laws confine themselves to a limited range of topics involving minimum interference with the day-to-day lives of residents in various Aboriginal communities. On the other hand the Queensland by-laws, containing as they do a very wide range of topics coupled with open-ended discretions entrusted to the Managers and Councils, permit the most minute regulation of the day-to-day lives of Aboriginal persons on reserves in Queensland.[2958]

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2953 For comment on By-law 17 cf HRC, Occasional Paper No 5, 58. See also para 445-6.

2954 Information supplied by Dr John Howard (4 November 1983).

2955 On the other hand it was argued that the circumstances of the various communities were very similar, and that 'to draft by-laws in different terms would lead to confusion, and this would be compounded when Aboriginal people frequently transfer their residence from one community to another, and visit kin in communities other than their own'. Hon K Wilson MLA, Minister with Special Responsibility for Aboriginal Affairs, *Submission 484* (5 June 1985) 1.

2956 *News Release* (above n 72).

2957 See para 758.

2958 HRC, Occasional Paper No 5 (1983) 59.

The Human Rights Commission concluded that, again in contrast to Queensland, the Western Australian by-laws 'do not involve racial discrimination or any serious infringements of human rights'.[2959]

755. ***The Western Australian Scheme in Practice***. Very different views have been expressed on the success or otherwise of the scheme. The former Government of Western Australia considered the scheme very successful,[2960] but the present Government takes a more cautious and reserved view. According to the Minister with special responsibility for Aboriginal Affairs:

> It is difficult for me to comment in any definite way on the effectiveness of the Act as this tends to vary considerably between community situations and depends upon a variety of factors. I feel that I can submit a general view that the WA Act has assisted some communities in their wish to have a closer involvement in the administration of justice at the community level and has also assisted in their improved communication with authorities in law enforcement and general judicial matters.[2961]

Questions have been raised about the autonomy of the justices of the peace in operating courts within their community. When the scheme was set up it was envisaged that the magistrate would train the Aboriginal justices of the peace, and that as they became proficient his role would diminish or even disappear, leaving them to run the court themselves. This has only occurred to a limited degree in most of the communities.[2962] The result is that Aboriginal communities still have little responsibility for their own local law and order problems. Obviously, training of Aboriginal justices and other court personnel is required, but the aim should be substantial independence, if this is what local Aboriginal communities want.

756. ***Community Support***. The Commission held meetings in 1981 at both La Grange and One Arm Point and has discussed the scheme in detail with persons involved in its operation (including Mr T Syddall MBE and Dr J Howard, the two magistrates who have operated the scheme). There was clearly at the time in both communities, general support for the concept, although it was suggested that some difficulties arose in determining which matters should go to the 'white man's court' and which should be dealt with according to Aboriginal traditional law.[2963] One view expressed at La Grange was that certain matters should be dealt with by community meetings rather than before a court:

> ... like some people when they have a fight or fighting between husband and wife, they face the court ... It should have been settled by the whole community ...
>
> ... You see its not a white man's problem. May be the husband hit his wife. That's a problem on the Aboriginal side.[2964]

Fr Kevin McKelson, who has been superintendent at La Grange for over 20 years, thought the new scheme had been and would be successful:

> ... in itself it has been a blessing, and the fact that sometimes it does not work is not due to the JP's, it is due to the fact that the police possibly do not visit as regularly as they can or the local magistrate has other commitments in other areas of the Kimberleys.[2965]

757. ***The Hoddinott Study***. But this view is not universally shared. A study of the scheme by Ms A Hoddinott, based on a six month project, was published in 1985.[2966] The study was highly critical of the way the scheme has operated in practice, partly based on the lack of real independence of the Aboriginal justices, but more fundamentally on the scheme's failure to incorporate local customary laws. According to Hoddinott:

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2959 id, 58.

2960 In a letter to the Commission (30 May 1980) the then Attorney-General, Hon I Medcalf QC, referred to the 'obvious success so far of the scheme' and said that he had been advised 'that there has been a significant decline in lawlessness in [the two areas] due largely to the introduction of the scheme and the acceptance by the people in the communities involved of the authority of the persons appointed as Justices of the Peace'.

2961 Hon K Wilson MLA, *Submission 483* (5 June 1985).

2962 Aboriginal justices sit by themselves, or with the magistrate if he is present, in four of the communities. The exception is Balgo where they sit only with the magistrate. Hon K Wilson MLA, *Submission 484* (5 June 1985).

2963 J Mulardy & P Roe, *Transcript of Public Hearings* La Grange (26 March 1981) 532-5, 543-4, 552-3.

2964 P Francis, *Transcript* La Grange (26 March 1981) 552.

2965 K McKelson, *Transcript* La Grange (26 March 1981) 561.

2966 A Hoddinott, *That's "Gardia" Business. An Evaluation of the Aboriginal Justice of the Peace Scheme in Western Australia*, Perth, 1985. For a summary of this report see Hoddinott, in Hazlehurst (1985) 173. KM Hazlehurst, *Submission 496* (1 October 1985) 4-10 summarized the Report, and gave guarded approval to its conclusions: id, 13.

> The scheme, whilst promising in its inception, has developed serious difficulties in application There are general feelings of discontent among community members participating in the scheme except at Beagle Bay ... The whole social organisation of traditional Aboriginals rests on the kinship structure which is closely linked to expectations and obligations between kin. The justice of the peace scheme is creating havoc among tribal Aboriginals in terms of the expectations alone. Tribal laws are either being ignored or undermined by an alien value system. Further, Aboriginal justices feel they are becoming powerless both within their own law, and within the framework of the ... Act ... There is a lot of resentment and an increasing sense of impotency because they feel they are still advisors to the court.[2967]

However the statistical material presented by Hoddinott does not indicate any clear differences between communities in the region subject to the scheme and those that are not.[2968] Differences that do exist are almost certainly due to other factors.[2969] Moreover the scheme has never purported to be a recognition of 'tribal law' or of 'tribal arbitration'.[2970] Structurally it was from the beginning an extension into local communities of the general court system, with certain adjustments and with the addition of local personnel. The range of offences covered is limited, both in theory and practice, and most are directly or indirectly related to alcohol. It is most unlikely that any scheme centering on the application of 'tribal law' or 'tribal arbitration' would concern itself with many of these matters. On the other hand, the disruption caused by alcohol can be great, whether or not 'tribal law' is involved. As the Western Australian Minister pointed out, it is perhaps for this reason that:

> an increasing number of Aboriginal communities have requested that they be given the opportunity of having by-laws applied under the provisions of the Aboriginal Communities Act. Some of these communities are town based and it could be expected that a different range of factors would affect the operation of the Act should it be extended to these communities. It seems that most communities are seeking assistance in the area of liquor control and it may be more appropriate in some situations to introduce a modified form of the by-laws or new legislation aimed specifically at providing dry areas.[2971]

758. ***Future of the Scheme***. Clearly there are very different perceptions of the scheme, influenced in part at least by different expectations of what it should be seeking to achieve. One possibility would be to restructure the scheme, to avoid the conflict with kinship responsibilities outlined by Hoddinott. However the scheme was specially formulated with Aboriginal kinship as a central feature. Aboriginal justices are chosen as representative of particular 'sections' or 'sub-sections' in order to overcome kinship difficulties. If Hoddinott is right about kinship difficulties, then clearly the fundamental assumptions of the scheme are open to doubt. There may be a large number of cases which the Aboriginal justices do not wish to hear, and which they are quite happy for the Magistrate to hear when he visits on circuit. In these cases the Aboriginal members of the community may seek only the opportunity to give background information or advice on sentencing, rather than being seen or decision-making. This would be similar to a scheme operating at Galiwin'ku in the Northern Territory, described in para 764. One danger in introducing local Aboriginal courts is that, rather than reducing the number of persons appearing in court, they may increase the number of prosecutions, and even the range of offences, well beyond what would otherwise be the case. The penalties imposed may be no different from those the ordinary courts would impose, or may be more severe. There is no real indication that the latter problem has occurred under the 1979 Act (as it has with Queensland courts), but that may only indicate its very limited scope and effect so far.[2972] The 1979 Act is being reviewed by the Western Australian Government:[2973] in that review careful consideration should be given to provisions which would assist local communities to achieve a more substantial degree of autonomy, whether through changes to the Act or in other ways which respond to local needs and demands.[2974] Furthermore,

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2967 Hoddinott, in Hazlehurst (1985) 173, 175-7. The 'exception', Beagle Bay, is explained by Hoddinott as a mission-influenced community 'not subject to the pressures of tribal life as other communities participating in the scheme are ... Because of their level of acculturation to the wider society the community at Beagle Bay have had few problems applying the ... Act': id, 178.

2968 Nor does it indicate any difference between a community (Beagle Bay) said to be happy with the scheme and another (La Grange) said not to be. See Hoddinott Report (1985) 24, where charges per 100 persons per year for the 7 year period (1977-84) are listed: the figures are Beagle Bay (15), La Grange (14), Looma (I6) (a community to which the Act does not apply).

2969 The major difference between local communities was the extraordinarily high offending rates at Mowanjum and Pandanus Park (respectively 196 and 51 charges per 100 persons per year): ibid. Alcohol is more readily available to these 2 communities, which also consist of people living off their own land.

2970 Terms used by Hoddinott: id, 39.

2971 Hon K Wilson MLA, *Submission 483* (5 June 1985).

2972 An indication of its limited effect is perhaps the limited and rather stereotyped range of penalties imposed. After an initial flurry, community service orders are rarely used, due in part to problems of supervision: see Hoddinott Report (1985) 19. Nor, for similar reasons, is probation: Hoddinott (1985) 179. But Hoddinott reports that 'chiding' or public 'shaming' is used, and 'appeared to have more effect on the offender than the sanction imposed': ibid.

2973 BW Easton, 'Future Planning Needs' in Hazlehurst (1985) 221, 224. The need for a proper review was also stressed by L Roberts, *Submission 492* (21 August 1985). The review is being conducted by Mr John Hedges, a former Aboriginal Legal Service, Solicitor.

2974 See also para 816-9.

great care must be taken to articulate clearly the rationale for such courts, and to be realistic about what can be achieved.

## Northern Territory

759. ***Different Schemes***. There are no separate mechanisms in the Northern Territory such as those discussed in this Chapter. However, two recent developments should be mentioned. The first involves the granting of certain local government powers to Aboriginal communities, including the power to pass special by-laws to operate within the specified community area. Although the powers to make by-laws are circumscribed, the Community Government Scheme, as it is known, may provide a model for law and order powers to be given to certain communities in addition to their local government powers. The second development involves an attempt to get greater Aboriginal involvement in the administration of the criminal justice system at the local level. Finally there is an interesting dispute resolution model contained in the Aboriginal Land Rights (Northern Territory) Act 1976 (Cth). Section 25 imposes on Land Councils an obligation to conciliate in Aboriginal disputes over land within their area of responsibility. These provisions will be described in turn.

760. ***Community Government Scheme***. The Community Government Scheme was introduced by an amendment to the Local Government Act in 1978.[2975] Although not specifically limited to Aboriginal communities, it has so far been introduced in Aboriginal communities only: Lajamanu, Angurugu and Milikapiti, with Belyuen, Nguiu, Maningrida and Palurumpi intended to be included in due course. Communities must apply to the Local Government Minister for inclusion in the scheme. The Minister has to approve a model set of provisions for community government schemes which may be adopted by the community, or the community may draw up its own provisions which must be exhibited for public comment. The Minister has to arrange consultations with community residents before approving a scheme, and must be satisfied that the majority of the residents are in favour of the scheme. The scheme provides for the election of a community government council whose powers under s 454 may include commercial development; communications; community amenities; education or training; health; housing; relief work for unemployed persons; roads and associated works; water supply, and welfare. These are broad powers, considerably broader than would normally be given to a local government council. They provide the potential for a degree of autonomy, although, of course, within the constraints of the Local Government Act. It is a matter for each community to decide, when the schemes are set up, which powers they will exercise.

761. ***Local By-laws***. The community government council has the power to make by-laws which, in addition to local government matters, may cover:

- the sale, purchase, possession, presence and consumption of liquor (s 476(d)); and
- the sale, display, possession, hire, purchase, presence and use of firearms (s 476(e) or offensive weapons (s 476(f)).

A fine of up to $200 may be imposed by the court for any breach of the by-laws. By-laws come into effect on notification in the Gazette, unless another date is specified. There is provision for disallowance by the Legislative Assembly. The Minister has no direct powers to disallow by-laws although he may recommend amendments. There are no special provisions for the by-laws to be policed by either the Council or by any local Aboriginal police vested with special power to deal with such breaches. On the other hand the contents of a community government scheme have effect as a law of the Territory (s 439) so that any breaches of the by-laws would be dealt with as a breach of Northern Territory laws.

762. ***The Scheme in Practice***. The community government scheme is still in its early stages. Lajamanu has been operating for a number of years, but Angurugu only since September 1982 and Milikapiti since October 1983. No by-laws have yet come into effect. Discussions have been held at Lajamanu about by-laws: one idea was for a by-law to make it an offence to be drunk in a public place within the community boundary, but the action required to put this into effect has not been taken.[2976] The Angurugu Community on Groote Eylandt has requested by-laws to cover offensive weapons, control of dogs, petrol sniffing and swimming in

2975 Local Government Act (No 4) 1978.
2976 Notes of Discussions with Lajamanu community by MV Robinson, Consulting Anthropologist NT Government (7 September 1981).

the catchment area,[2977] but the community had received no information as to when the by-laws would be drafted and put into effect.

763. ***Delegation of Child Welfare Functions***. A further development of the community government scheme is contained in the Community Welfare Act 1983 (NT). Sections 70 and 71 of the Act envisage delegation to a community government council of certain child welfare functions. Section 70 provides for a preference principle so that Aboriginal children in need of care are placed with Aboriginal persons.[2978] Section 71 gives a specific role to a community government council:

> A community government council constituted under the Local Government Act or an association incorporated under the Associations Incorporation Act may, subject to agreement with the Minister, undertake functions under this Act in relation to the welfare of children and the provision of facilities and trained staff to provide counselling and assistance to, or in relation to the welfare of, children.

No agreement has yet been made with a community government council under s 71. The section has been criticised because the Community Government Council is given a role involving child welfare decisions which it would not have under customary laws. The 1983 Act, and its operation in practice, are discussed in Chapter 16 of this Report.[2979]

764. ***Justice (Courts) Project in Aboriginal Communities***. This pilot project, which had been under consideration in the Northern Territory for some years, was initiated in November 1982. Only one community, Galiwin'ku (Elcho Island), has so far been involved.[2980] Basically the court is run under ordinary rules but with flexibility to allow local views to be taken into account in sentencing. A group of clan elders sit with the magistrate in order to give their views on the seriousness of the offence and an appropriate sentence. The family of the accused and other community members may also attend court to give their views on the accused's behaviour and appropriate sentence. An anthropologist employed within the scheme is responsible for assessing family and community views both on individual cases and on broader issues. He assesses family structure and proposes strategies for the offender's future. His role is supplemented, and will eventually be taken over, by two locally employed Aborigines who gather information required by the court. A detailed report is prepared on each offender detailing their information for the magistrate before the offender appears in court. According to the Northern Territory Department of Law the scheme has a number of aims:

> 1. More community involvement in the system of courts.
>
> 2. The community to be able to give more advice in particular court cases, especially facts and background advice and advice as to forms of sentencing.
>
> 3. Matters brought before the courts to be dealt with in traditional ways, if that is what the community wants, as long as those ways do not offend existing law.
>
> 4. Advice from the communities about the traditional ways of maintaining control in the community.
>
> 5. Resolution of some disputes before they get to court.
>
> 6. Information concerning the effect upon the community of someone in-the community being jailed.[2981]

Although local Aborigines sit with the magistrate, in effect as 'assessors', this is neither a new arrangement nor the most significant aspect of the scheme.[2982] What is significant is the work done, by the anthropologist and by two local Aborigines employed under the scheme, to prepare a background report on the offender, and to seek to link relevant kinship responsibilities with the eventual sentencing decision. The anthropologist concerned has:

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2977 Information supplied to ALRC during a visit to Groote Eylandt in October 1985.
2978 See para 360.
2979 See para 360.
2980 It is possible that the scheme may be extended to Groote Eylandt: see Groote Eylandt Aboriginal Task Force, *Report*, 1985, para 3.10.2-3.103.
2981 NT Department of Law, copy of letter sent to Mala Leaders, Galiwin'ku Community (9 May 1983) (copy sent to ALRC by Department of Law (12 May 1983)).
2982 See para 722. For the use of assessors to assist in proof of local custom see para 667-74.

> developed a genealogical index with the permission of the participating Aboriginal clans as a major tool for precisely identifying a defendant and then tracing, through genealogical links, specified kin whose traditional responsibilities toward the defendant included the exercise of specified Aboriginal social controls. This data is then selectively made available on a restricted basis to effect consultation with the defendant's family prior to court and to provide detailed social background reports to the magistrate.[2983]

This information has allowed the magistrate, with the advice of senior Aboriginal men, to make better informed sentencing decisions:

> Prior to the sentencing of a defendant in the community court there is afforded to the magistrate a reasonable assessment as to whether or not the clan group of the offender has the ability to rehabilitate him in the manner in which they wish, such as isolating him at an outstation, putting him through a ceremony subservient to the authority of older men etc. Although many clans may aspire to do this, the magistrate must have a realistic assessment as to whether or not the clan has the ability to carry out such actions and whether the wider community will allow it to happen.[2984]

Thus the scheme concentrates at the sentencing level, with only minor changes to the court itself.[2985] A review of the scheme after one year reported an apparent drop in imprisonment rates at Elcho Island, though the figures are far too small, and the scheme has been operating for too short a time, for this to be significant.[2986] Of more interest is the observation that:

> the majority of offenders coming before the courts are from clans not living on their own estate but resident in major communities such as Galiwin'ku and Milingimbi, thus subject to considerable internal politics and an often dessicated authority structure.[2987]

Although the project is of considerable interest, it is too early to assess its real impact. That should be the subject of an independent review in due course.

765. ***Conciliation Role of Land Councils***. Section 25 of the Aboriginal Land Rights (Northern Territory) Act 1976 (Cth) imposes a duty on Land Councils to attempt conciliation of disputes over land between Aborigines and/or Aboriginal organisations. Subsection (3) provides that:

> Where proceedings are commenced before a court with respect to [a land dispute of this description] the judge or magistrate constituting the court may, if he thinks it appropriate, adjourn the proceedings at any time for the purpose of affording a Land Council the opportunity of undertaking conciliation with a view to the settlement of that dispute.

Land Councils have been involved in conciliating such disputes, although the Commission is not aware of proceedings being adjourned in any court for the purpose of enabling conciliation to occur. The Commission has been informed that in those disputes where Land Councils have been involved they have been quite successful, although some disputes between groups of long standing have been difficult, sometimes impossible to resolve.[2988]

## South Australia

766. ***Tribal Assessor***. While there are no special Aboriginal courts in South Australia provision is made in the Pitjantjatjara Land Rights Act 1981 (SA) and the Maralinga Tjarutja Land Rights Act 1984 (SA) with respect to dispute resolution. Part IV of each Act provides for the appointment by the Minister of Aboriginal Affairs (SA), with the approval of Anangu Pitjantjatjara or Maralinga Tjarutja, of a tribal assessor to hear

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2983 S Davis, 'Aboriginal Communities Justice Project: Northern Territory' in Hazlehurst (1985) 187, 189. This paper is a summary of S Davis, Aboriginal Communities Justice Project, *Final Report*, Darwin, 1985.

2984 Davis (1985) 187, 192.

2985 The court still sits at two-monthly intervals, and no legislation has been necessary to allovir the scheme to operate although this is under consideration. One administrative change of considerable interest is the practice of hearing all cases involving Elcho Islanders at Galiwin'ku, even where the offence occurred elsewhere (eg Darwin): id, 189-90.

2986 Davis (1985) 187, 193 reports a drop in imprisonment rates on the Island from 278/100 000 (1983) to 162/100 000 (1984). But the actual members were only 12 (1983) and 7 (1984). There could be various reasons for the reduction, including a change in the sentencing policy of the magistrate associated with the introduction of the scheme.

2987 id, 194. See also S Davis, *Final Report* (1985) 14-19 for a more detailed analysis of the figures, which reveals the difference to be not as stark as this summary might suggest. Davis describes the relevant clans as 'disfunctional': id, 15.

2988 Information supplied by N Andrews, Solicitor, Central Land Council (27 January 1983). See eg *Alderson v Northern Land Council* (1983) 20 NTR 1; Justice J Toohey, *Seven Years On. Report on the Aboriginal Land Rights (Northern Territory) Act 1976 and Related Matters*, AGPS, Canberra, 1984, 48-9, 51-2, 56-7. The extension of the power of Land Councils to conciliate in disputes other than over land was opposed by the Chief Minister's Department in a submission to the Commission: Department of the Chief Minister (P Carroll), *Submission 432* (3 July 1984).

appeals by any traditional owner aggrieved by a decision of the body corporate (Anangu or Maralinga Tjarutja) which holds the title to the land. Given the terms of the Acts and the functions and powers of the two bodies corporate, the role of the tribal assessor would usually be limited to disputes relating to the use of Aboriginal land. However, this need not always be the case. For example, s 36(1) of the Pitjantjatjara Land Rights Act 1981 (SA) provides:

> Any Pitjantjatjara who is aggrieved by a decision or action of Anangu Pitjantjatjara, or any of its members, may appeal to the tribal assessor against that decision or action.

The tribal assessor is required to hear the appeal at some suitable place upon the lands and to conduct 'the hearing as expeditiously as possible and without undue formality'. The assessor is not bound by the rules of evidence, but is required by s 36(4) 'to observe, and where appropriate give effect to, the customs and traditions of the Pitjantjatjara people'. Despite these provisions no one has yet been appointed to the position and, apparently, no need for an assessor has yet arisen.[2989]

## Conclusion

767. ***The Australian Experience***. The Australian experience with Aboriginal courts or equivalent bodies is limited. Aboriginal courts have been of uneven quality and have had mixed success. Overall the experience is inconclusive, even discouraging. Recent developments in the area of dispute resolution and community justice (not related to Aborigines) have been more towards mediation and conciliation, or increased involvement in sentencing and rehabilitation, rather than setting up new and separate court systems. The Queensland Aboriginal courts, while tolerated and even generally accepted within some communities, do not accord with this trend. But there is no strong tendency to enlarge their area of operations beyond the communities where they already exist. There are also more basic questions, which continue to recur in a variety of schemes, about the conflicts between introduced and local authority structures that Aboriginal courts or other official structures can create or intensify. These underlying questions will be discussed in Chapter 31.

2989 This is despite the fact that the legislation implies that the tribal assessor would be appointed for a set period of time rather than on an ad hoc basis to hear disputes as they arise. Apparently negotiations have been held between the Pitjantjatjara Council and the SA Government concerning the appointment of the tribal assessor, but no decision has yet been made.

# 30. Indigenous Justice Mechanisms in some Overseas Countries: Models and Comparisons

768. ***Relevance of Overseas Comparisons***. There is a great deal of overseas experience with indigenous justice mechanisms: in Africa, North America, Papua New Guinea and the Pacific, and elsewhere. Lessons can be learnt from this experience, even though, in the end, the Australian situation may require its own particular approach. This experience is extensive. The more significant examples from jurisdictions which may be relevant to Australia are outlined in this Chapter.

## Papua New Guinea Village Courts

769. ***Background***. Village courts began operating in Papua New Guinea in 1975.[2990] Since that time the number of courts has greatly increased and they now serve two thirds of the population of Papua New Guinea.[2991] In August 1985 there were 856 village courts staffed by 7674 village court officials.[2992] Courts are established only on request from the local community, and many requests for courts are still to be processed. The national government is committed to the expansion of the courts and is aiming at 57 new village courts in 7 provinces and the National Capital District between 1984 and 1987.[2993] The scheme has reached the stage where some commentators have claimed that the village courts are perhaps 'the most important legal institutions in the country'.[2994] The creation of village courts was linked to the end of the colonial era and the movement towards independence during the late 1960s and early 1970s. This involved to some degree a rejection of the British common law traditions previously adopted, and an attempt to make the legal system of the newly emerging nation more relevant to the Melanesian people.[2995] An important feature of this movement was the attempt to 'customise' the existing legal system so that the underlying law, made up of both custom and common law, became the dominant law rather than introduced statutes.[2996]

770. ***Structure of Village Courts***. The Village Courts Act 1973 accordingly provided for the establishment of village courts to operate alongside the existing local and district courts. Important features of the village courts include the following:

- *Functions*. The court's function is to 'ensure peace and harmony in the area for which it is established by mediating in, and endeavouring to obtain just and amicable settlement of disputes (s 16). If mediation fails the court has a compulsory jurisdiction (s 17).

- *Jurisdiction*. The court has jurisdiction over all residents normally resident within its area (s 12) with inter-village disputes dealt with by joint sittings (s 14). The courts exercise both civil[2997] and criminal

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2990 For a discussion on the background to the Village Courts see DRC Chalmers, 'A History of the Role of Traditional Dispute Settlement Procedures in the Courts of Papua New Guinea' in D Weisbrot, A Paliwala and A Sawyerr (ed), *Law and Social Change in Papua New Guinea*, Butterworths, Sydney 1982, 169; ND Oram, 'Grass Roots Justice: Village Courts in Papua New Guinea' in W Clifford (ed), *Innovations in Criminal Justice in Asia and the Pacific*, Australian Institute of Criminology, Canberra, 1979, 49; P Bayne, 'Village Courts in Papua New Guinea' in KM Hazlehurst (ed), *Justice Programs for Aboriginal and other Indigenous Communities*, Australian Institute of Criminology, Canberra, 1985, 75.

2991 *PNG Post-Courier*, 15 April 1983; W Clifford, L Morauta & B Stuart, Law and Order in Papua New Guinea, vol 1, *Report and Recommendations*, Waigani, 1984, 177.

2992 PB Keris, Village Courts Secretariat, *Submission 486* (14 August 1985) 1. More than half of these are situated in the five Highlands provinces. About 75% of the PNG population lives in an area covered by a village court: id, 2.

2993 Clifford, Maruata & Stuart (1984) vol 1, 177.

2994 N O'Neill, 'The Papua New Guinea Legal System', Paper presented to 8th IALL Course on Law Librarianship (13 May 1981) 3; D Weisbrot, 'The Recognition of Custom in Papua New Guinea and the Pacific' in Australian Law Reform Commission-Australian Institute of Aboriginal Studies, *Report on a Working Seminar on the Aboriginal Customary Law Reference*, Sydney, 1983, 51-5.

2995 M Somare 'Law and the Needs of Papua New Guinea's People', in J Zorn & P Bayne (ed) *Lo Bilong Ol Manmeri*, University of PNG, Pt Moresby, 1975, 14.

2996 The underlying law is the phrase used in the PNG Constitution (1975) s 20, 21; Schedule 2. Custom and common law are both sources of the underlying law. See para 404-405, and D Weisbrot, 'Integration of Laws in Papua New Guinea: Custom and the Criminal Law in Conflict' in Weisbrot, Paliwala & A Sawyerr, 59.

2997 eg, local disputes over compensation for death, custody of children and bride prices. Land and motor vehicle disputes are excluded (s 20, 21).

jurisdiction, although the distinction is somewhat blurred in the day to day work of the court. Specific offences within the court's jurisdiction are prescribed in the regulations. These include:

- striking a person
- using insulting words
- damage to property
- drunkenness in the village area
- failure to perform customary duties or obligations
- sorcery.

The Court may also hear contraventions of Local Government Council rules.

- *Compensation and Penalties*. A village court may order compensation in most cases of up to K300.00, but without any limit in cases regarding custody of children, bride price or compensation for death (s 21(3)). Work orders for an injured or aggrieved party, not exceeding four weeks, may also be issued. The limit on fines is K50.00 in cash or goods. A maximum of four weeks community work may also be ordered, but imprisonment, which in any event must be endorsed by a local or district court magistrate, may only be ordered if a previous fine or compensation order of the village court has been ignored.

- *Appeal and Review*. The courts exist largely outside the formal court hierarchy, but there are limited rights of appeal to a local or district court magistrate who sits with two village court magistrates. This decision is subject to review by a Provincial Supervising Magistrate (who also has other powers of review and supervision). There is no further appeal.[2998]

- *Personnel*. A number of local residents are appointed as magistrates for each court:[2999] they hold office for three years. No specific qualifications are required but short training courses are run by the Village Courts Secretariat for new magistrates. Between 3 and 10 local magistrates constitute the court, but in many areas a distinction has developed between an 'Area Court' and a 'Full Court'. With an 'Area Court' one or two village court magistrates try to mediate and reach a settlement which is reduced to writing and may be enforced. If mediation is unsuccessful a 'Full Court' of 3 or more magistrates will hear the case.[3000] A village court clerk who is the record keeper, and a village peace officer who assists the court and enforces its decisions, are the only other officials. They are not full-time officials and receive only a limited amount of remuneration. A district court magistrate is given responsibility for regularly inspecting village courts within his area.

- *Law and Procedure*. Village courts apply any law or custom (s 26). The general law does not apply, unless by express application. The courts decide matters in accordance with substantial justice (s 27) and are Tree to determine their own procedures.

771. ***Village Courts in Practice***. The number of village courts has expanded rapidly since their introduction in 1975. They seem generally to be popular and have become an important feature of the Papua New Guinea legal system. They appear to fit relatively well into the life of local communities, and their acceptance at village level, evidenced by the use made of them, is an important yardstick of their success. However during

2998 Dr Jessep suggests that the National Court may have an inherent jurisdiction to review Village Court decisions under s 155 of the Constitution. O Jessep, *Submission 402* (8 March 1984). See also Constitution s 37 (21) and (22).

2999 The Minister is responsible for appointment but generally approves magistrates chosen by local elections.

3000 O Jessep, *Submission 402* (8 March 1984). An odd number of magistrates (3, 5, 7, 9) must sit, to allow for majority decisions. It is proposed to allow a single magistrate to hear cases in those areas (eg the Trobriand Islands) where individual decision-making is consistent with local custom: L Lucas, Department of Justice (PNG), *Submission 488* (29 August 1985) 28.

the nine years of their existence, the village courts have not been without their difficulties.[3001] A number of concerns have been raised about their operation.

772. ***Formality of Procedures***. Many village courts have not developed in accordance with the intended model: informal procedures, no technical rules of evidence, ability to sit at any time and in any place,[3002] and mediation of disputes rather than arbitration. Rather the village courts have tended to take the common law courts as their model and have to an extent neglected mediation and compromise.[3003] It may be that magistrates have protected their own position by adopting a relatively formal approach. Village courts were a new legal institution within Papua New Guinea, and many magistrates were uncertain of the role they were to perform. However more recent evidence gathered by the Papua New Guinea Law Reform Commission suggests that mediation plays a greater role than suggested by some commentators. Their data showed mediation was twice as common as formal hearings.[3004] *The Official Report on Law and Order in Papua New Guinea* (September 1984) presented a different perspective:

> The emphasis on formality in village courts appears to correspond to certain needs in the community and seems to us to illustrate the way flexible legislation permits communities to make what they need out of the broad provisions of the Act.[3005]

773. ***Application of Custom***. Although village courts are meant to apply custom to settle disputes, there has been a tendency for magistrates to search for formal rules of law in order to exert their authority and the authority of the court within the village, rather than relying on local custom.[3006] On the other hand the application of custom is not always an easy matter. It is rarely in written form (although it seems that there is a growing record of customs as applied in the courts) and the ability of the court to apply custom is restricted to some extent by the limited knowledge of magistrates, who are not always the older, more knowledgeable persons in the community. Younger, tertiary educated persons are also chosen as magistrates.

774. ***Unofficial Dispute Resolution***. The reality of this criticism diminishes when one takes into account the extent of unofficial dispute resolution operating within villages, sometimes involving village court officials:

> This forum is typically less legalistic than the Village Court; it takes place directly outside the court house or in the village; many more people are included in the discussion, both as participants and audience, than the few who meet inside the Village Court; the ideas and events introduced are much more loosely associated with the dispute under consideration.[3007]

These unofficial mechanisms significantly reduce the number of matters which might otherwise come before a village court without diminishing the important role village courts can play:

> [The village courts] are used mainly for cases that have not been solved by other methods available to the community: they are' most of the time the remedy of last rather than first resort. By and large villagers use customary procedures including mediation before they go to a village court. They seek from the court authority and enforceable decisions rather than the mutual agreement which has already eluded them.[3008]

775. ***Relation to the General Legal System***. It has been suggested that many magistrates working in village courts perceive their authority as being external to the local community and regard themselves as administering government law,[3009] because this is the source of their authority.

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3001 In addition to the problems referred to here, the Secretary of the Village Courts Secretariat pointed out that appointment to a Village Court was regarded, particularly in the Highlands, as an important source of status and income, with consequent pressures on existing officials to being about such appointment: PB Keris, *Submission 486* (14 August 1985) 2.

3002 Many have formal procedures and sit in buildings especially built for the purpose: G Westermark, 'The Village Courts in Question: The Nature of Court Procedure' (1978) 6 *Mel LJ* 79, 81; O'Neil, 4; Paliwala in Weisbrot, Paliwala and Sawyerr, 203-5. Official Village Court handbooks have also been produced.

3003 Westermark, 81.

3004 Cited in Clifford, Morauta and Stuart (1984), vol 1, 180; vol 2, 222.

3005 Clifford, Morauta and Stuart (1984), vol 1, 184.

3006 Paliwala, 198.

3007 Westermark, 87. See also N Warren, 'The Introduction of a Village Court', IASER Discussion Paper 2, Institute of Applied Social and Economic Research, July 1976.

3008 Clifford, Morauta and Stuart (1984) vol 1, 180-1.

3009 Paliwala, 198-200.

> The symbolic might of the Court style is itself an aid to enforcement, for it evinces the Court's association with the government and therefore the support the officials can call upon from the government ... The power they hold mainly comes from their association with government, and by emulating other government courts they demonstrate that relationship.[3010]

However officials also complain about the lack of support given to them by the government. While their complaints have focussed principally on monetary allowances they also extend to facilities such as transport and police support. The relationship between the village courts and the police at times been difficult. There is no formal link between the two. This creates the potential for conflict when the police and village court officials become involved in the same dispute.[3011]

776. ***Supervision***. A major practical problem associated with village courts is supervision. The supervising and inspecting magistrates play a crucial role in the proper development of the village courts. Supervision of local magistrates helps to ensure that fewer mistakes are made and that the courts do not lose direction. The rapid increase in the number of courts created increased responsibilities for supervising magistrates. In response, full time Village Courts Inspectors have been recruited, and they have taken over most of the supervisory work of the magistrates. The level of supervision has greatly improved as a result.[3012]

777. ***Usefulness in Urban Areas***. At present the only village courts in an urban area are in Port Moresby. Doubts have been raised about their viability in urban areas, where there may be little or no community cohesion, where people are drawn together from many different areas, and where custom no longer plays as significant a role in day-today life. In these areas persons may be more likely to rely on the general court system.[3013] What may be required is greater flexibility in the court's procedures to accommodate urban lifestyles. Some village courts, for example at Kila Kila, a few miles from Port Moresby, sit at night to allow for the work patterns of the villagers.[3014] Such flexibility may help ensure the workability of a village court. The *Report on Law and Order in Papua New Guinea* strongly supported the extension of village courts into urban areas:

> We see a pressing need for village courts in the towns of Papua New Guinea, preferably in association with the re-establishment of some form of local government.[3015]

778. ***Village Courts and Women***. Village courts are male-dominated institutions. Virtually all the magistrates are men,[3016] and some women have accordingly been reluctant to bring disputes before the court. Doubts about the likelihood of a fair hearing and the inexperience of women as public speakers have been given as reasons for this reluctance.[3017] Paliwala suggests that in cases involving women some village courts have adopted a very traditionalist approach — a traditionalism not evident in other cases before the same courts.[3018] On the other hand the *Report on Law and Order in Papua New Guinea* cited figures, collected by the Law Reform Commission, showing that women were plaintiffs in 32 per cent of village court cases studied, and that often the complaints were against men.[3019]

779. ***Overview and Conclusions***. Despite early resistance to the concept of village courts, once they came into operation the demand for their establishment has been strong. For the most part, they have been successful in achieving their purpose. Village courts, while not without their difficulties, have clearly filled a gap in achieving order at the village level. The large number of cases dealt with by village courts also suggests they are meeting local needs and reducing the number of cases coming before the higher courts.[3020] According to Paliwala:

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3010 Westermark, 92. See also Clifford, Morauta and Stuart ((984) vol 1, 181.
3011 Clifford, Morauta and Stuart (1984), vol 1, 184; vol 2, 83-4.
3012 PK Keris, Village Courts Secretariat, *Submission 486* (14 August 1985) 2.
3013 Chalmers, 184.
3014 R Scott, 'The Village Courts of Papua New Guinea', Report on a visit to PNG, ALRC, 1977, 15.
3015 Clifford, Morauta and Stuart (1984) vol 2, 79. See also id, 85-7.
3016 'The typical magistrate is male, between 35 and 50 years old, and is an important person in the clan': Paliwala, 202. According to Paliwala, there have only been three female magistrates: id, 202.
3017 B Mitchell, 'Family Law in Village Courts: The Woman's Position', unpublished paper presented to Waigani Seminar, 1982.
3018 Paliwala, 208.
3019 Clifford, Morauta and Stuart (1984) vol 1, 182. But cf Mitchell (1982).
3020 Clifford, Morauta and Stuart (1984) vol 1, 184.

> from the perspective of court officials and our observation of the courts in operation, the model effective village court is one which attempts to achieve stability by punishing fighting, bad language, drunkenness and gambling and being tough with young offenders. It protects property by punishing theft and trespass. It facilitates traditional and modem transactions by enforcing contracts and debt. It keeps women under the control of their husbands by ensuring that they do not obtain divorce too easily, and by punishing unorthodox behaviour. Finally it acts as a judicial arm of the council.[3021]

The *Report on Law and Order in Papua New Guinea* comments that:

> While there are no objective measures, it seems likely that village courts are contributing to the maintenance of order by assisting in the peaceful settlement of disputes and providing quicker and surer punishment for minor offenders ... [T]hey have provided a spur to the sense of community and involvement in community, and to a sense of the worth of things run by and for common people. Insofar as they are successfully linked to other government agencies, village courts contribute to the legitimacy of the state and hence to other sources of order in the country at large.[3022]

The Village Courts Act is to be revised and consolidated to deal with some of the specific problems that have been identified. Changes to be made include:

- provisions to incorporate village courts established at provincial level into the village courts system;
- restrictions on the village court's powers to imprison (including imprisonment in default) to a total of six months;
- some increase in other penalty powers (which will, however, remain modest);
- additional criminal jurisdiction over dangerous driving in a village;
- clarification of the courts' powers to make custody orders over children of customary marriages and ex-nuptial children;
- provisions for enforcement of compensation orders or damages awards by execution against goods;
- reinforcement of powers of supervision and review;
- provision for cooperation between village court officers and the police.[3023]

But these reforms are of a machinery character only: the village courts have clearly become a permanent feature of the legal system.[3024]

## United States: Indian Tribal Courts

780. ***Different Kinds of Courts***. The relatively recent development of village courts in Papua New Guinea may be contrasted with the long-established systems of tribal courts in the United States. Three general categories of Indian tribal courts[3025] exist: (1) tribal courts,[3026] (2) courts of Indian offences (often called CFR courts because they are governed by the Code of Federal Regulations)[3027] and (3) 'traditional' or 'customary' courts.[3028] These courts, which vary considerably in their operation, serve over a hundred different Indian tribes throughout the United States, although they are principally located in the States of Arizona, New

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3021 Paliwala, 206.

3022 Clifford, Morauta and Stuart (1984) vol 1, 184.

3023 Details provided by L Lucas, Department of Justice (PNG) *Submission 488* (29 August 1985).

3024 Bayne (1985) 84.

3025 The term 'tribal court' is used in the literature both as a general description of all Indian courts and to distinguish a particular type of Indian Court. Hence it can be misleading. The term 'tribal courts' is used here primarily in the former sense.

3026 Established by the Indian Reorganisation Act 1934.

3027 These courts came into existence during the 1870s and resulted from new policies of the Federal Bureau of Indian Affairs. One feature was the appointment of tribal members as 'Indian Police' to assist with law enforcement on reservations. Charges against tribal members were initially heard by BIA agents.

3028 In particular, the traditional courts of the Pueblos.

Mexico, Montana and the Dakotas.[3029] In fact 24 States contain reservations and approximately 85% of American Indians live in these States. Approximately 59% (about 452,000 Indians) live on or near reservations in these States.[3030]

781. ***Customary or Pueblo Courts***. The three categories of Indian tribal courts have changed little over the last 50 years. The smallest category remains the 'customary' or 'traditional' courts of the Pueblos, of which there are approximately 18.[3031] They in no way resemble the other categories of Indian courts which are modelled on the general legal system. The tribal Governor of the Pueblo performs judicial functions and the laws he enforces are based on long-standing oral custom. The Pueblos have no written constitutions or codes of offences. Considerable power is, however, exercised by the Pueblo Council, composed of ex-Governors, which is responsible for appointing a new Governor annually and also occasionally conducts preliminary hearings of cases. The Council rarely hears appeals.

782. ***Tribal and CFR Courts***. There are important differences between these two forms of Indian courts, despite similarities in their actual operation.[3032] The fundamental difference is that tribal courts operate directly under the authority of the tribe, whereas CFR courts operate under federal law and are subject to the Bureau of Indian Affairs. In tribal courts judges are either elected by tribal members or appointed by the tribal council.[3033] All adult members of the tribe are eligible to be appointed judges provided they have no serious convictions. No formal legal qualifications or knowledge of customary law is required. Appellate systems exist on most reservations: the review power generally resides in either the tribal council or an appellate court of tribal judges.[3034] The tribal council is the dominant authority on most reservations: it is often vested with the power to appoint judges and its decisions are usually not subject to review by the tribal court.[3035] On the other hand the approximately 17 CFR courts which can be classified as courts of Indian offences[3036] are under the formal control of the Secretary of the Interior. The Bureau of Indian Affairs, after consultation with the tribal council, appoints judges for a four year term.

783. ***Reservations without Courts***. Not all Indian reservations have tribal courts. Some never adopted court systems, others have abandoned them.[3037] In addition tribal governments are able to delegate their judicial function to the State, although this requires a specific enabling Act of Congress.[3038]

784. ***Constitutional Basis***. So far as tribal courts are concerned the authority which forms the basis of the Indian court system flows not from statute but from the inherent self-governing power of American Indian tribes based on original sovereignty.

> The present right of tribes to govern their members and territories flows from a pre-existing sovereignty limited, but not abolished, by their inclusion within the territorial bounds of the United States. Tribal powers of self-government today are recognized by the Constitution, legislation, treaties, judicial decisions, and administrative practice. They necessarily are observed and protected by the federal government in accordance with a relationship designed to insure continued viability of Indian self-government insofar as governing powers have not been limited or extinguished.[3039]

The Federal Government however has an overriding responsibility in Indian matters under the Constitution. The principal provision is the Indian Commerce Clause, by which Congress is empowered 'to regulate

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3029 Brakel suggests that tribal courts exist on 60 to 120 Indian reservations depending on the definitions of 'courts' and 'reservations': SJ Brakel, *American Indian Tribal Courts: The Costs of Separate Justice*, American Bar Foundation, Chicago, 1978, 5.

3030 BW Morse, 'Indian Tribal Courts in the United States: A Model for Canada?', Saskatoon Native Law Centre, University of Saskatchewan, 1980. There are 58 reservations in the States of Arizona, New Mexico, Montana and the Dakotas: RL Barsh, *Submission 410*, 18 April 1984.

3031 Morse (1980) 26.

3032 American Indian Lawyer Training Program, *Indian Self-Determination and the Role of Tribal Courts*, Oakland, 1977, 38-49.

3033 Judges are appointed in 64 tribal systems and elected in only 19: id, 41.

3034 The survey of tribal courts cited above found that of the 67 tribes who described their appellate system, 27 had appeals to the tribal council. Fifteen tribes reported having no appeal process at all: id, 41.

3035 id, 37.

3036 Morse (1980) 27.

3037 Public Law 280 (1953) seriously affected the authority of tribal courts in some States and in some cases led to their demise.

3038 *Kennerly v District Court* 400 US 423 (1971).

3039 *Felix S Cohen's Handbook of Federal Indian Law*, 2nd edn, Michie, Bobbs-Merrill, Charlottesville, 1982, 231. See also the statement of the Supreme Court in *Worcerster v Georgia* 31 US (6 Pet) 515, 559-60 (1832).

Commerce with Foreign Nations and among the several States, and with the Indian Tribes'.[3040] This Clause places Indian tribes in the same category as other sovereign nations for commerce purposes. It has been interpreted as giving exclusive federal authority in this area.

785. ***Jurisdiction***. Perhaps the most vexed issue confronting the Indian courts (tribal courts and CFR courts) is that of jurisdiction.[3041] This has been a contentious issue since the first recognition of Indian sovereignty, and it has become more complex over time. In both the civil and criminal areas there is still uncertainty in some cases over whether Federal, state, or tribal government has jurisdiction. Such factors as whether the persons involved are Indian or non-Indian, the nature of the offence or action to be brought and the location of the offence, may determine which court or courts have jurisdiction. The reality of these difficulties and uncertainties cannot be underestimated:[3042] they arise from legislative encroachments on Indian sovereignty and from conflicting decisions of the Supreme Court. It is worth outlining briefly the principal legislation which determines jurisdiction.

- *The Indian Country Crimes Act (1778-1877).*[3043] The broad effect of the Act is that Indian tribes and the federal government share concurrent jurisdiction over offences committed by Indians against non-Indians in Indian country.

- *Major Crimes Act (1885).* This Act was passed to overcome the decision of the Supreme Court in *Ex parte Crow Dog*,[3044] which had upheld the right of Indian tribes to hear offences between Indians on reservations. The Act specified 7, since extended to 14, major offences which were to be dealt with in federal courts.[3045]

- *Public Law 280 (1953).* Civil and criminal jurisdiction over Indians was transferred to the State in five States, with additional States being given the option of taking over jurisdiction.

- *Indian Civil Rights Act (1968).* This Act aimed 'to ensure the American Indian is afforded the broad Constitutional rights secured to other Americans'.[3046] The requirements that defendants in criminal cases be given the right of counsel at their own expense and that trial by jury be available for any offence punishable by imprisonment have been particularly difficult for tribal courts to meet.[3047] This Act also restricted sentencing powers to a maximum of a $500 fine or 6 months imprisonment or both.

- *Indian Child Welfare Act (1978).*[3048] The power of State courts over Indian child custody cases was limited by this Act. Tribal jurisdiction is now exclusive over any child domiciled or residing on a reservation or who is a ward of the court, unless federal jurisdiction already vests jurisdiction in a State. In addition tribes must be given notice of Indian children being dealt with by State courts and have a right of intervention in such proceedings. Proceedings must be transferred to tribal courts where they will accept it and the parents agree.

The trend of the legislation, together with the impact of a number of Supreme Court decisions such as *Oliphant v Suquamish Indian Tribe*[3049] which held that tribal courts have no criminal jurisdiction over non-

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3040 US Constitution, Act 1, s 8, cl 3. The Constitution also excludes 'Indians not taxed' from the definition of 'Free Persons' for the purposes of determining the allocation of seats in the House of Representatives and for apportioning direct federal taxes: US Constitution, Art 1, s 2, cl 3. See also the second clause of the Fourteenth Amendment excluding 'Indians not taxed' from State citizenship.

3041 For detailed discussion see Cohen, ch 6.

3042 G Forrester, 'US Indian Legal Services' (1982) 7 *LSB* 112, 114. See also P Ditton, *Submission 343* (2 September 1982).

3043 Sometimes referred to as the General Crimes Act: Cohen, 287.

3044 109 US 553 (1883).

3045 These offences are murder, manslaughter, kidnapping, rape, carnal. knowledge of any female not his wife and who has not attained the age of 16 years, assault with intent to commit rape, incest, assault with intent to commit murder, assault with a dangerous weapon, assault resulting in serious bodily injury, arson, burglary, robbery and larcency. However, it has been argued that tribal courts may have concurrent jurisdiction with respect to these offences: American Indian Lawyer Training Program, *An Introduction to Criminal Jurisdiction in Indian Country*, Oakland, 1981, 29 n 75.

3046 S Rep No 841, 90th Cong, 1st Sess 6 (1967).

3047 This is a more stringent provision than applies in most states, where jury trials are normally required only where there is the possibility of six months jail or longer.

3048 For further discussion see para 353-6.

3049 435 US 191 (1978). See also *United States v Wheeler* 435 US 313 (1978); *Santa Clara Pueblo v Martinez* 436 US 49 (1978).

Indians unless Congress delegates it to them, has severely reduced the jurisdiction of the tribal courts. It has also created a perceived need by Indians to professionalise and formalise the court system previously run informally by non experts. The vast majority of Indian tribal judges are not trained lawyers nor have many had specific training for the job. The appearance of professional legal counsel before them, not surprisingly, makes many feel uneasy.[3050]

786. ***Current Jurisdictional Problems***. The combined effect of the various Acts relating to Indians and the many Supreme Court decisions on jurisdictional issues leaves a confused picture of federal, State and tribal jurisdictions. In very general terms the following categorisation can be made:

- *Criminal law*
    - Offences occurring off reservations (i.e. non-Indian land)[3051] will come within State or federal jurisdiction regardless of whether the offender is Indian or non-Indian. The principal exception to this rule is that certain tribal fishing areas off reservations are recognised by treaties, and tribal courts retain jurisdiction to prosecute their own members for breaches of any tribal fishing regulations in such areas.
    - Offences occurring on reservations (i.e. Indian land) create most jurisdictional disputes. Generally, tribal courts have jurisdiction over Indian offenders, with the following exceptions: (1) the 14 enumerated offences in the Major Crimes Act which come within federal jurisdiction,[3052] and (2) in those States where Public Law 280 applies. Tribal courts have no jurisdiction over non-Indians, even if there is an Indian victim. Offences involving only non-Indians (as offender and victim) are matters for State courts.
- *Civil Law*
    - If both plaintiff and defendant are Indian, the tribal court has jurisdiction unless a federal question is involved.
    - An Indian plaintiff suing a non-Indian may choose between the State or tribal court (or a federal court if federal jurisdiction is involved).
    - The tribal court has jurisdiction over a non-Indian plaintiff suing an Indian with respect to a transaction occurring on the reservation (except in States where Public Law 280 applies).[3053] If the transaction occurs off the reservation State jurisdiction prevails unless federal law otherwise provides (as with the Indian Child Welfare Act 1978).

The complicated jurisdictional problems that arise are far from satisfactory and rationalisation of the system is clearly necessary. Many tribal courts are in doubt as to their powers; while some appear not to be unduly concerned about such problems, others have declined to hear certain cases for fear of acting beyond their powers. This can have an undermining effect on the authority of the tribal court.

## Tribal Courts in Practice

787. ***Workload***. In addition to these legal complexities, many practical law enforcement problems exist on Indian reservations.

> Major problems of enforcement include unequal treatment of Indian and non. Indian offenders, infrequent prosecution of non-Indians for reservation offences, uncertainty over which laws apply in a given situation, poor co-

3050 *Indian Self-Determination and the Role of Tribal Courts*, 56-7. A similar concern exists among Aboriginal justices of the peace sitting in Aboriginal courts in Queensland.

3051 What constitutes Indian country is often uncertain or disputed.

3052 See n 56.

3053 The so-called infringement test, which is the basis of this rule, requires a determination as to whether state jurisdiction infringes the right of reservation Indians to enact their own laws and be governed by them: *Williams v Lee* 358 US 217 (1959); *McClanahan v Arizona* 411 US 164 (1973).

> operation between tribal and off-reservation police agencies, and isolation of many reservation communities from state and county courts and police.[3054]

There are few reliable statistics of crime rates on reservations, or of the workload of the tribal courts in civil and criminal cases. However, there is evidence of a high level of 'crime' on Indian reservations.[3055] Much of this is attributable to the large number of street offences (e.g. public drunkenness, disorderly conduct) dealt with by tribal courts. These offences, together with many other reservation offences are usually alcohol related. Reservations typically have high levels of alcoholism and unemployment.[3056] Most cases involve pleas of 'guilty', and summary justice is the norm. The tribal courts deal with many more criminal cases then civil cases.[3057]

788. ***Criticisms of Tribal Courts***. The courts are not free from criticisms, which have been made from very different perspectives. Criticisms include the following:

- the procedure of the court is often very informal, and can lead to a lack of respect towards judges and court officials;
- the absence of due process requirements;
- shortcomings in the tribal codes the courts administer. The codes do not cover all matters coming before tribal courts, and have to be supplemented by State legislation. Furthermore the codes contain little of what might be called indigenous or traditional Indian law;
- the lack of trained personnel. This includes tribal judges who are usually chosen from local reservations and have no legal training;[3058]
- the physical facilities of the courts, including the lack of clerical and technical support;
- the fact that the courts are modelled on the general court system, and apart from staffing have nothing uniquely 'Indian' about them;
- the insertion of tribal politics into the court system, including in many cases the selection of judges;
- the low status of the judges which is said to result in a general lack of confidence in, and respect for, the tribal court. This may be one of the reasons for the high turnover of tribal judges.[3059]

The courts are also criticised in more basic respects. One such criticism is directed at the concept of *separate* courts for one ethnic group:

> ... it appears anomalous in the latter part of the twentieth century that one small ethnic group should be separated from the judicial system that extends to all other citizens of the United States.[3060]

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3054 M Taylor, 'Field Report: Consequences of Oliphant for Reservation Law Enforcement', unpublished paper, University of Puget Sound (1983) 1.

3055 Brakel suggests it may be five to 30 times higher than the rate in society at large, depending on reservation, year, demography etc: Brakel, 33.

3056 For example between October 1980 and September 1981, 49.7% of the Navajo labour force was unemployed and the per capita income was $1700 compared with $9000 for the general American population: N McCabe, Chief Justice of the Navajo Nation, *A Short Guide to the Courts of the Navajo Nation*, unpublished, 1982, 4.

3057 Brakel's sample found that only 5% of the total case load of the Navajo Courts were civil cases in 1975-6: Brakel, 40. McCabe (1981) noted that 7.7% of Navajo cases were civil.

3058 Concerted efforts are now being made to provide training for judges and other tribal court personnel. In 1970 the National American Indian Court Judges Association was formed with the principal aim of providing a judicial education program for tribal court judges: RB Collins, RW Johnson & KI Perkins, 'American Indian Courts and Tribal Self-Government' (1977) 63 *ABAJ* 808, 811. The National Indian Justice Centre and the American Indian Lawyer Training Program also produce regular publications.

3059 For criticism on these points (from rather different perspectives) see Brakel, 16-28; *Indian Courts and the Future*, Report of the NAICJA Long Range Planning Project (1978) 88-101.

3060 Brakel, 100.

The validity of the notion that Indian courts are a form of traditional Indian justice which is thus more appropriate for Indians living on reservations has also been challenged. Brakel argues that 'Indian justice' as dispensed by Indian courts 'represents nothing more or less than an effort to copy white man's precepts and white man's institutions'.[3061] They are not essential to the preservation of Indian culture, nor are they necessarily what Indian people themselves really want.[3062] He suggests the system should be abolished.

789. ***Support for the Courts***. But this is by no means a universal view. Many commentators have argued that the courts work successfully, at least within the confined jurisdiction they exercise:

> Success of Indian courts today is attributed primarily to the judges. Visitors to the courts were impressed by the judges' dedication, notwithstanding negative factors — low pay, tribal politics, and inadequate personnel, facilities, and training. Most judges said they are doing as good a job as conditions permit, and thought they easily could improve their courts if conditions were improved.[3063]

The tribal courts' shortcomings, and special needs, are recognised not only by commentators but by Indian judges, tribal councils and organisations:

> Tribal courts today face a monumental task. They must comply with the mandates imposed by the federal government, yet maintain the uniqueness and cultural relevance that makes them 'tribal courts' and not merely arms of the federal government operated by Indians in Indian country. Accomplishment of these goals depends, to a great extent, on the availability of adequate funding and relevant and pervasive training programs. In addition, tribes must address the need for separation of powers in those courts which are not traditional or customary, in order to assure procedural due process, fundamental fairness, stability and credibility. Moreover, tribes must demand, and other government entities, both within and outside the tribe, must give recognition to the judgments of tribal courts.[3064]

790. ***Navajo Peacemaker Court***. There are moves on many Indian reservations to make the court system and the laws operating on Indian reservations reflect Indian custom and traditions more closely. The Navajo Peacemaker Court is a recent experiment of this kind. It was established in 1982 as an attempt to blend traditional Navajo methods of mediating disputes with the existing Indian tribal courts.[3065] Matters come before the Peacemaker Court on referral from the Navajo District Court. A peacemaker[3066] is then appointed by the Court to mediate. Disputes between family members or neighbours and business matters involving less than $US1500, are the type of matters with which the Peacemaker Court may deal. In addition a judge may refer a matter to the Peacemaker Court where he considers it appropriate. Disputes are to be resolved primarily by mediation; however where agreement cannot be reached the parties can allow the peacemaker to arbitrate the dispute. The peacemaker has power to summon any member of the Navajo tribe to assist and his decisions are binding on all Navajos. No lawyers are permitted to appear.

791. ***Assessment***. In these and other ways, much work is being done to improve the courts. They have a long history and appear to be regarded by Indians as important institutions. In the words of one Australian lawyer who worked in one of the Indian courts for a time:

> The justification that I see for the tribal courts that operate along similar lines to a European court under a written law and order code is that they are a visible aspect of the tribes sovereignty. Generally neither the procedures nor the substantive law have anything to do with traditional Indian law. The present move is largely toward tightening up the procedures through. training to ensure due process. 'Due process' is used entirely in the Anglo sense. I believe that many of the judges and others who were involved in tribal government are aware that 'due process' may not reflect the Indian way of doing things but, especially following the Indian Civil Rights Act, it is seen as another imposed value (which may or may not be good) that must be observed if the right to run one's own affairs is to be preserved.[3067]

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3061 id, 92.

3062 For a range of views on these issues see SJ Brakel, 'American Indian Tribal Courts: Separate? Yes, Equal? Probably Not' (1976) 62 *ABAJ* 1002; Collins, Johnston & Perkins, 808, and a response by Brakel, (1977) 63 *ABAJ* 813.

3063 *Indian Courts and the Future*, 86.

3064 American Indian Lawyer Training Program Inc, *Justice in Indian Country*, Oakland, 1980, 54.

3065 JW Zion, 'The Navajo Peacemaker Court: Deference to the Old and Accommodation to the New' (1983) 11 *Am Indian L Rev* 89. See also JW Zion, 'Harmony among the People: Torts and Indian Courts' (1984) 45 *Montana L Rev* 265.

3066 This position, for which there are no formal qualifications, is based on the traditional Navajo position of *Naat' aani* or 'peace leader'. Any appropriate person (Indian or not) may be appointed. See *Navajo Peacemaker Court Manual* (May 1982) 8-9.

3067 See P Ditton, *Submission 343* (2 September 1982), 19-20.

But, as these comments suggest, the problems the Indian courts have had demonstrate dangers to be avoided when considering any similar system for Australia. In addition, the vastly different history of Indian law in the United States, and especially the continuing doctrine of Indian sovereignty, must be kept in mind, as these form the basis of the Indian court system.

## Canada

792. ***Native Peoples in Canada***. Four separate groups of native peoples are commonly identified in Canada: Status Indians, Non-Status Indians, Metis and Inuit (previously called Eskimos). Together these native peoples, 'by far the most economically impoverished and socially disadvantaged group in Canada',[3068] constitute approximately 4% of the Canadian population, made up of 300 000 status Indians in 575 bands, 600 000 non-status Indians, approximately 150 000 Metis (people of mixed Indian and European ancestry)[3069] and 25 000 Inuit.[3070] The identification of the separate groups carries with it important legal implications, especially the distinction between status and non-status Indians. Status Indians are subject to the Indian Act, which recognises a special relationship between them and the Federal Government, a relationship from which other native peoples are excluded.[3071] 'Indian' is defined in s 2 of the Act as:

> a person who pursuant to this Act is registered as an Indian or is entitled to be registered as an Indian.

The Inuit are specifically excluded from the provisions of the Act (s 4).

793. ***Legal Position of Canadian Native Peoples***. In terms of their position under the law, native peoples in Canada are closer to Australian Aborigines than American Indians. The two countries have legal systems of common origin and the treatment of the indigenous minorities involving the taking of their land, the bringing together of different tribal groups on reserves and the general non-recognition of their customs and laws, has followed a similar pattern. But there are important differences. The Royal Proclamation of 1763 provided one basis for the legal recognition of native title to land in Canada. No such recognition took place in Australia. While no treaties were ever signed with Aborigines in Australia a large number of treaties were signed with Indian bands in Canada, although not with the Inuit. Responsibility for 'Indians, and lands reserved for Indians' in Canada has belonged exclusively to the Federal Government since the British North American Act (now termed the Constitution Act) 1867, whereas in Australia until 1967 the States had exclusive legislative responsibility. Indeed, since 1982 special reference has been made to the Indian, Metis and Inuit Peoples of Canada in the Constitution, which specifically preserves their existing rights.[3072]

794. ***No Tribal Courts***. There is no equivalent in Canada to the tribal courts in the United States, and only in relatively recent times has there been serious discussion of the idea.[3073] Indian bands in Canada have long had power to make local by-laws applicable on reserves,[3074] and there is provision for the appointment of native justices of the peace, although these have had little impact.[3075] Very few measures have been taken to create official mechanisms to allow Indians and Inuit to deal with their own law and order problems. The James Bay and Northern Quebec Agreement of 1975, concluded between the Governments of Canada and

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3068 RH Bartlett, 'The Indian Act of Canada' (1978) 27 *Buffalo L Rev* 581. See generally BW Morse, 'Aboriginal Peoples and the Law' in BW Morse (ed) *Aboriginal Peoples and the Law. Indian, Metis and Inuit Rights in Canada*, Carleton UP, Ottawa, 1985, 1.

3069 Very different estimates of the Metis population have been made, some as high as 1 million.

3070 BW Morse 'Lessons from Canada?' (1983) 7 *ALB* 4. For fuller statistical coverage see Department of Indian and Northern Affairs, *Indian Conditions: A Survey*, Ottawa, 1980, 10-14.

3071 The Indian Act (RSC 1970) was amended in 1985 to extend status to approx 70 000 non-status Indians, and to confer on bands the power to control liquor, residence rights and their future membership by way of membership codes. BW Morse, *Submission 487* (15 August 1985) 3.

3072 See para 143.

3073 On the Indian JP court see Ontario Native Council on Justice, *The Native Justice of the Peace: An Underemployed Natural Resource for the Criminal Justice System*, Ottawa, 1982; BW Morse, 'A Unique Court: s 107 Indian Act Justices of the Peace' (1982) 5 *Canadian Legal Aid Bull* 131. One s 107 court still functions, and the establishment of others is being discussed.

3074 Indian Act s 81, 83 and s 107 provide bases for the creation of tribal courts but few Band Councils have used these law and order powers, nor have they assumed the more general by-law powers over local-government. Less than 20% of all bands have made their own by-laws: *Indian Conditions: A Survey*, 85; BA Keon-Cohen, 'Native Justice in Australia, Canada and the USA: A Comparative Analysis' (1982) 5 *Canadian Legal Aid Bull* 187, 223. An earlier version of the same paper appeared in (1981) 7 *Monash L Rev* 250.

3075 See n 84.

Quebec, the Cree Indians and the Inuit, is the most significant development in this regard in recent years (although current negotiations through meetings of First Ministers focussing on self-government for native peoples may also have great significance for the future).[3076] The James Bay and Northern Quebec Agreement resulted from lengthy negotiations with the native people of the area who were to be affected by the building of a large hydro-electricity project. The Agreement contains specific provisions (s 18, 19, 20) dealing with the administration of justice' these impose obligations on the governments of Canada and Quebec, in consultation with native parties, to adapt the criminal justice system to their circumstances, usages, customs and way of life. The Agreement has now been in existence for nine years, but little has been done to implement these provisions.[3077] Other attempts have been made, again only in recent times, to make the legal system more receptive to the special needs and difficulties of the native people. Largely this has involved Indians being made more aware of their legal rights and the working of the legal system by such measures as the appointment of Indians as para-legals and 'native court workers', special recruitment into police forces and special entry provisions for Indians into University law schools.[3078] It has also involved the conferral of additional responsibility for child welfare matter on Indian bands.[3079] Some recognition of native law and custom has come from the courts themselves, especially in the North West Territories.[3080]

## South Africa

795. ***A Coercive Form of Legal Pluralism***. South Africa has a diverse legal history. Its present legal system has its origins in Roman Dutch law (from the Netherlands) but with a strong infusion of English common and statute law. In addition there is provision for the recognition of the customary law of the Bantu (or Blacks). There is thus, in one sense, a 'pluralist' legal structure with not only separate laws but a separate court structure for the Blacks. The rationale for this form of legal pluralism, is, of course, the political doctrine of apartheid or 'separate development', which:

> envisages the distinctive evolution of the different South African racial groups, and more particularly, as far as the African is concerned, 'progression' from an ethnic base to realise his aspirations within his 'historical homelands'.[3081]

The Government has thus been a strong proponent of tribalism and of the application of indigenous customary law. A key feature of the South African .position is its coercive character. The recognition of indigenous customary law is a vehicle for avoiding the recognition of the equality of all South Africans, and is accompanied by rules maintaining the superiority of the 'white' legal system and its rules.[3082] By contrast, many other African countries have, since independence, opted for integrated legal systems, partly in response to the demands of 'nation-building', partly as a reaction against pluralism as a form of 'separate development'. Some of the states in Nigeria have for example abolished customary courts, preferring instead that customary law be applied in the ordinary courts. Tanzania, Uganda, Zimbabwe and Kenya have also opted for integrated court systems.[3083] The Northern States of Nigeria, on the other hand, have retained

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3076 See para 143.

3077 Minister for Indian Affairs and Northern Development, *James Bay and Northern Quebec Agreement Implementation Review*, Ottawa, February 1982, 77-9; W Moss, 'The. Implementation of the James Bay and Northern Quebec Agreement' in Morse (1985) 684.

3078 Morse (1983) 4-6. See also para 844.

3079 See para 357, 371.

3080 See eg WG Morrow, 'Law and the Thin Veneer of Civilization' (1972) 10 *Alberta L Rev* 38; WG Morrow, 'A Survey of Jury Verdicts in the Northwest Territories' (1970) 8 *Alberta L Rev* 50; WG Morrow, 'Riding Circuit in the Arctic' (1974) 58 *Judicature* 236; PR Grant, 'Role of Traditional Law in Contemporary Cases' (1983) 5 *Canadian Legal Aid Bull* 107; BW Morse 'Indian & Inuit Family Law and the Canadian Legal System' (1980) 8 *Am Indian L Rev* 199. See P Havemann, K Couse, L Foster, R Matonovich, *Law and Order for Canada's Indigenous People 1984-7*, Solicitor General of Canada, Ottawa, 1984, ch 3 for an excellent summary.

3081 RS Sunner, 'Legal Pluralism in South Africa: A Reappraisal of Policy' (1970) 19 *ICLQ* 134, 134-5.

3082 Nonetheless, it has been pointed out that some of the technical aspects and approaches to recognition are of interest, and are not dissimilar to the approaches taken in other African countries, at least before and in some cases since their independence. C Tatz, 'South Africa: The Recognition of Native Law' in Australian Law Reform Commission — Australian Institute of Aboriginal Studies, *Report of a Working Seminar on the Aboriginal Customary Law Reference*, Sydney, 1983, 47-51.

3083 For the earlier cases see HF Morris & JS Read, *Indirect Rule and the Search for Justice*, Clarendon Press, Oxford, 1972, 131-66. For a recent example of post-independence application of customary law through the ordinary courts see the Customary Law and Primary Courts Act 1981 (Zimbabwe).

customary courts and worked on improving them.[3084] Other African countries have excluded customary law completely or modified its recognition to meet their new situation.[3085]

796. ***Customary Law and Separate Courts***. The recognition of customary law in South Africa is provided for in the Black Administration Act 1927. This Act establishes four courts whose jurisdiction extends only to Blacks.[3086] These courts are Chiefs Courts (s 12), Divorce Courts (s 10(1)), Commissioners Courts (s 10) and an Appeal Court for Commissioners Courts (s 13). There is, a fight of appeal to the Supreme Court (s 14) although customary law, unless specifically established in statutory form (e.g. Natal Native Code), will only be applied if there has been evidence of its existence and applicability in the lower court. All of the courts specifically created for Blacks may apply customary law. At the lowest level a chief or headman may be authorised by the Minister 'to hear and determine civil claims arising out of Black law and custom' (s 12). A chief or headman may also be granted jurisdiction, pursuant to s 20:

> to try and punish any Black who has committed, in the area under the control of the chief or headman concerned -
>
> (i) any offence at common law or under Black law and custom ...
>
> (ii) any statutory offence.

Certain offences are specifically excluded from a chief's jurisdiction and his punishment powers are also circumscribed. Above the chiefs' courts in the hierarchy of Black courts are the Commissioners' Courts. These are 'courts of law' with both an original criminal and civil jurisdiction and they also provide an avenue of appeal from the chiefs' courts. Commissioners' courts are given a wide discretion in the application of custom (s 11):

> Notwithstanding the provisions of any other law, it shall be in the discretion of the Commissioner's Court in all suits or proceedings between Blacks involving questions of customs followed by Blacks to decide such questions according to the Black law applying to such customs except in so far as it shall have been repealed or modified: Provided that such Black law shall not be opposed to the principles of public policy or natural justice: Provided further that it shall not be lawful for any court to declare that the custom of lobola or bogadi or other similar custom is repugnant to such principles.

In determining relevant customs Commissioners' Courts and the Appeal Courts may call on Black assessors to act in an advisory capacity (s 19). Commissioners are not required to have any specialist knowledge of 'Black law or custom'. Although they have the same qualifications as magistrates, they are public servants and do not have the independence of judicial officers. Their lack of training and inexperience has been the subject of much criticism:[3087]

> This inadequacy is reflected in their failure on the one hand to evolve meaningful rules for the choice of legal system and on the other hand, failure to adapt indigenous rules to modern settings.[3088]

Criticisms of the way in which s 11 has been interpreted are similarly widespread.[3089]

797. ***Conflicts over the Application of Custom***. While there is apparent flexibility in the application of custom, difficulties have arisen over which system, customary law or Roman-Dutch, should be paramount in

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3084 EI Nwogugu, 'Abolition of Customary Courts — The Nigerian Experiment' (1976) 20 *JAL* 1.

3085 Another option (principally adopted in former French, Belgian and Portuguese Territories though less common now) was to give Africans the opportunity to apply for exemptions from the operation of customary law. See TW Bennett, 'The Application of Common Law and Customary Law in Commissioners Courts' (1979) 96 *SAf LJ* 399, 405; RA Bush, 'A Pluralistic Understanding of Access to Justice: Developments in Systems of Justice in African Nations' in M Cappelletti & B Garth (ed) *Access to Justice*, vol III *Emerging Issues and Perspectives*, Sijthoff and Noordhoff, Milan, 1979, 260.

3086 s 35 defines a 'Black' as, among others: 'Any person who is a member of any aboriginal race or tribe of Africa: Provided that any person residing under the same conditions as a Black in a scheduled Black area ... shall be regarded as a Black for the purposes of this Act'.

3087 JD van der Vyver, 'Human Rights Aspects of the Dual System Applying to Blacks in South Africa' (1982) 15 *CILSA* 306, 316-7.

3088 Suttner, 144.

3089 LB Hooker, *Legal Pluralism*, Clarendon Press, Oxford, 1978, 303-12; TW Bennett, 'The Application of Common Law and Customary Law in Commissioners Courts' (1979) 96 *SAfLJ* 399.

particular cases. For example, should customary law be applied, prima facie, unless clearly inappropriate [3090] or should some other principle apply? Bennett has suggested one approach:

> As far as possible, the court should attempt to give effect to the litigant's expressed choice of legal system, but, in the absence of any such choice, it will be compelled to consider the facts as a whole and, after weighing them, objectively determine which legal system is favoured by the preponderance of the connecting factors.[3091]

There are also doubts over the meaning of the 'repugnancy clause'. But much more basic questions arise as to the suitability of recognising custom in this way in South Africa. Most Blacks no longer live in rural areas but in urban, industrialised areas. There is also now much greater mobility between rural and urban areas:

> The migrant workers return to the reserves, bringing with them new ideas acquired in the city. These have a considerable impact on rural life. Living patterns are changing, the patriarchal power is waning, the family group is smaller, and polygamy is almost non-existent ...[3092]

Such changes have had significant impact on laws, customs and traditions particularly in the area of family and marriage laws. Such changes make the application of custom more difficult: persons coming before the Black courts (either in civil or criminal matters) may well not accept that any particular customary law applied to them. In any event it is only in legal disputes arising between Blacks that 'conflict of laws' questions arise. If a white person is involved Roman-Dutch law automatically applies.

798. ***Bantustans or Homelands Areas***. Development of the homelands areas ('Bantustans') adds another coercive dimension to the way customary law is recognised in South Africa. The Transkei Constitution Act 1963, s 50, goes further than s 11 of the Black Administration Act in relation to the application of custom:

> In all suits and proceedings between parties involving or based ,on questions of Black custom the court shall apply the Black law applicable to such custom as far as is practicable in deciding such question, except where such custom is opposed to the principles of public policy or natural justice ...

There is, therefore, in the Transkei Courts (and other Bantustans) a greater obligation to apply customary law than in the Commissioners' Courts in other parts of South Africa. How significant this has in fact been is difficult to assess:

> The decisions of these courts [Commissioners' Courts and Appeal Courts for Commissioners' Courts] are so often inconsistent that it is only with difficulty that principles governing the application of one or other legal system may be extracted.[3093]

799. ***Assessment***. The South African system provides for the extensive recognition of a 'customary law of the Blacks' and for a separate system of courts to apply customary law. Quite apart from the coercive, involuntary characteristics of apartheid and the Bantustan policy, the system has many limitations. It appears that the official Black courts, especially the Commissioners courts, though primarily set up to hear civil cases between Blacks, in fact deal with very few private law disputes.[3094] In some black urban areas unofficial courts known as *makgotla* have been established as a self-help measure. They conduct summary trials and inflict on-the-spot punishments; their operation, and the rules they apply, are based largely on traditional customs and institutions.[3095] But, in any overall assessment, the subservience of the indigenous legal system to the general legal system and the lack of control exercised by the Blacks over their lives are critical. The 'indigenous' system is plainly an imposed one, dependent on the general legal system and forced to defer to it whenever conflict arises.[3096]

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3090 This was the general approach before *In re Yako v Beyi* 1948 (1) SA 388 (AD).

3091 Bennett, 413. The factors to take into account would include the nature and form of the transaction, the race of the parties, the lifestyle of the parties, the type of property involved and where it was situated and the place where the cause of action arose: id, 409-12.

3092 Suttner, 141.

3093 id, 399.

3094 van der Vyver, 317.

3095 id, 316.

3096 Hooker, 312.

## New Zealand

800. ***Special Laws for Maoris.*** No Maori courts have ever been officially constituted in New Zealand with recognised authority to deal with local law and order problems. Since European settlement, Maoris have been subject to the general legal system which, for the most part, has taken no account of Maori laws and customs. However, some concessions have been made. Maoris once had the right to be tried by an all-Maori jury, a provision repealed in 1962.[3097] Some account was, and is, taken of Maori customs and practices at the sentencing level, but not in determining substantive criminal liability. In the civil law area direct recognition has been given to various Maori customs and practices linked to the land. The Treaty of Waitangi signed in 1840 with the Maoris of the North Island was an initial recognition of Maori land title. It guaranteed undisturbed possession of the land but gave the Crown the exclusive right to purchase any land sought to be alienated. In order to regulate the way in which this was to occur the Maori Land Court was established in 1865.[3098] It had three main functions:

> (1) to ascertain the owners of Maori land according to Maori custom;
>
> (2) to transmute any title so recognised into one understood at English law;
>
> (3) to facilitate dealings in Maori land and the peaceful settlement of the colony.[3099]

The Maori Land Court (and the Maori Appellate Court) still operates with largely the same functions.[3100] There is now also a Waitangi Tribunal with power to make recommendations about changes to the law or its administration which would further the 'principles of the Treaty'.[3101]

801. ***Te Atatu Maori Committee***. A recent development is a community justice scheme operating in West Auckland run by the Te Atatu Maori Committee. The Committee sits as a form of local community court hearing cases referred to it by the ordinary courts, and seeking to deal with them in a recognizably Maori way. Similar to the *makgotla* in South Africa, the West Auckland scheme was established as a form of self-help.[3102] However its concern is exclusively with rehabilitation and reparation for an offence: it has no role in determining the defendant's guilt.[3103]

## Conclusions

802. ***The Overseas Experience***. This survey has only discussed the experience with 'indigenous justice mechanisms' in a limited number of countries and in limited detail. The discussion has to some extent focussed on the shortcomings and difficulties confronting these courts and other bodies. However, the level of acceptance by the indigenous people subject to them is a crucial consideration in assessing their validity and success. Nonetheless, from the material presented here and other material available to the Commission, a number of things are clear:

- the diversity of experience in different countries, each dependent to a very large degree on its own experience and history;
- the difficulty of classifying many of the 'justice mechanisms' as 'traditional' or indigenous, given that many operate as an extension of the criminal justice system;
- the difficulty, in particular, of limiting 'justice mechanisms' to problems which can be regarded as 'traditional';

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3097 Juries (Amendment) Act 1962, repealing s 144 of the Juries Act 1908. See para 552-560A.

3098 A Native Land Act was first enacted in 1862, but replaced in 1865.

3099 PG McHugh, 'The Fragmentation of Maori Land', Legal Research Foundation, Publication No 18, Auckland, 1980, 5.

3100 The Maori Affairs Act 1953 now provides for the constitution and jurisdiction of the Court.

3101 Treaty of Waitangi Act 1975 (NZ). See JD Sutton, 'The Treaty of Waitangi Today' (1981) 11 *Vict U Well L Rev* 17; PG McHugh, 'The Constitutional Role of the Treaty of Waitangi' [1985] *NZLJ* 224.

3102 See para 484 for a description of the scheme.

3103 Judge M Brown, 'The Te Atatu Maori Tribunal' in Hazlehurst (1985) 89.

- the frequent difficulties encountered (especially in the United States) with jurisdictional and due process requirements;

- the tendency of tribal courts to become more legalistic over time, often as a response to the way the general legal system operates;

- the relatively trivial or limited range of matters dealt with, especially in the criminal law field; and

- the continual encroachments and pressures on the laws, customs, practices and traditions of indigenous people, even in countries where they are in the majority.

Of the various overseas systems studied it could be argued that the idea of the village courts in Papua New Guinea has the greatest potential application for Aboriginal communities. The emphasis in village courts is on resolving disputes rather than as a criminal court, although they have a limited criminal jurisdiction. The courts rely on local custom rather than a written code, are locally administered and readily available to the people. They are not a substitute for the general courts but operate in conjunction with them. They do not create the jurisdictional problems that have arisen in the United States with Indian tribal courts. Furthermore, and perhaps most importantly, they are accepted by the people as 'their' court. The overseas experience confirms that it is rarely if ever possible to establish an official code or legal structure which accurately reflects the dispute resolution mechanisms operating within indigenous communities. Indeed, this has proved to be the case even of the village courts:

> [Some] observers see the [Village Courts] Act as a bridge between custom and customary law and modern justice. Others in contrast, have emphasised the way the Act has set up new institutions and officials and uses non-traditional mechanisms and adjudication for settlement of disputes ... In our view the second approach, that the Act establishes a new system of formal courts in villages, better reflects the Act as a whole, while the glowing prose on mediation ... describes one aspect of the total operations envisaged for the courts.[3104]

Local courts for indigenous people can work, as the Papua New Guinea experience has shown. That they are not traditional institutions, and that they tend to become more formal over time are not fatal objections. But there are important differences between institutions established by and for an indigenous majority, as with the Village Courts, and institutions established, modified or extended for a small indigenous minority (as is the case with the Aboriginal courts and similar bodies so far tried in Australia). Even where these come to be accepted by the indigenous groups in question, their inherent tendency — in some cases their express intention — is to expand still further the operation of the general criminal justice system, with whatever modifications, into the lives of those concerned. This is also true of all the Australian examples of Aboriginal courts discussed in Chapter 29. In addition, specific features of Aboriginal social structures, with their diffusion of authority and their strong basis in kinship, present real difficulties in setting up courts which vest power in specified persons in all cases. For these and other reasons, the establishment of local justice mechanisms for Aboriginal communities presents distinct and difficult issues, which no transplantation of overseas experience can resolve.[3105] These problems, and possible solutions to them, are discussed in the next chapter.

3104 Clifford, Morauta and Stuart (1984) vol 1, 176.

3105 As was pointed out by P Ditton, *Submission 343* (2 September 1982) 20 (based on first hand observations of the US Indian Courts).

# 31. Local Justice Mechanisms: Options for Aboriginal Communities

## Introduction

803. ***The Range of Options***. As is clear from the Australian and overseas experience described in the preceding chapters, many different structures have been adopted or proposed in response to demands for local justice mechanisms for indigenous groups. The limitations of some of these structures, and the extent to which they depend on local history and circumstances, will also have become clear. Nonetheless, proposals have been made for local justice mechanisms of different kinds for Aboriginal communities.[3106] The range of options includes:

- local autonomy over a range of law and order matters,
- Aboriginal courts or similar bodies officially constituted;
- specially designed structures aimed at overcoming the difficulties often experienced with 'Aboriginal courts' (e.g. the Yirrkala scheme);
- bodies with power of mediation and conciliation (at distinct from adjudication);
- administrative measures for recognising Aboriginal customary laws; and
- changes to the existing courts (e.g. by way of 'Aboriginalisation').

804. ***Criteria for Suitability***. Each of these options will be discussed in this Chapter. In judging the suitability of any existing or proposed structure for resolving disputes at the local level, a number of matters have to be considered. Some of these have been discussed in Part II of this Report and in the preceding chapters in this Part. They include:

- the acceptability of the proposal to the relevant local community or communities;
- the conflicts between introduced and local authority structures that Aboriginal courts or other official structures can create or intensify;
- the administrative feasibility of any scheme, in the light of differing, and often rapidly changing, circumstances;
- the need to maintain basic individual rights in the administration of justice; and
- constitutional constraints on direct federal action in establishing local justice mechanisms.

805. ***Aboriginal Self-Management or Self-Determination***. The point has already been made that new structures should only be introduced with the full agreement of those affected.[3107] As one oral submission put it:

> This community [Strelley] could achieve a great deal in this area developing their own resources from within but dealing with the question of law and order and Aboriginal people, not only for Strelley but for the Western Desert area, given appropriate opportunities, but the opportunities have to dwell within the people themselves; they have to come from within the people. Only the Aboriginal people can solve the problem.[3108]

3106 See para 683-4, 721-2, 712.
3107 See para 686, 689.
3108 J Bucknall, *Transcript of Public Hearings*, Strelley (24 March 1981) 345.

A similar view was put by Mr David Hope, who questioned the extent to which the Pitjantjatjara perceive a law and order problem in their communities, and commented that decisions about what action, if any, should be taken, must be for the Pitjantjatjara themselves:

> It would not be a question of the Pitjantjatjara working to an exotic legal base, but rather developing the particular institutional modes to suit their circumstances. This course would require from the Pitjantjatjara an initiative to seek answers through political negotiation, and that in turn would depend on their deciding really where issues in law and order come in their priorities. But that process will always be prejudiced if professionals are unyielding in the view that professional judgment has unchallengeable prerogatives in determining what is politically 'proper'.[3109]

806. ***Administrative Feasibility***. Plainly, any scheme proposed needs to be a practical one, taking into account the diversity, smallness and (especially in remoter areas) decentralization of Aboriginal communities.[3110] Care has to be taken to avoid introducing cumbersome administrative arrangements, possibly duplicating existing systems, with only marginal benefits. The Commission's work on this Reference has made it clear just how diverse and particular are the needs and requirements of the Aboriginal communities spread across Australia. Administrative practicalities are thus an important consideration in assessing particular proposals.

807. ***Due Process***. In Chapter 9, reference was made to the various internationally recognized human fights, prominent among which are due process rights.[3111] For example, Article 14 of the International Covenant on Civil and Political Rights of 1966 guarantees important due process safeguards especially in criminal cases. They include:

- the right to a fair and public heating by a competent, independent and impartial tribunal established by law (Art 14(1));
- the right to be informed promptly and in detail in a language the defendant understands of the nature and cause of the charge (Art 14(3)(a));
- the right to have adequate time and facilities for the preparation of one's defence and to communicate with counsel of one's own choosing (Art 14(3)(b));
- the right to be tried without undue delay (Art 14(3)(c));
- the right to defend oneself and (in certain cases) the right to legal aid (Art 14(3)(d));
- the defendant's fight to 'the free assistance of an interpreter if he cannot understand or speak the language used in court' (Art 14(3)(d);
- the right, in the case of a person convicted of a crime, to have conviction and sentence reviewed by a higher tribunal according to law (Art 14(5)).

It should be stressed that these guarantees are intended to operate in a very wide variety of circumstances, and in very different legal systems. It is necessary to read Art 14 as providing workable guarantees in cases of summary trial for minor matters as well as trial for the most serious offences. Obviously the requirements of the Convention will depend to a considerable extent on the context, the offence and other relevant circumstances. It cannot be argued that the establishment of local 'traditional courts' or similar mechanisms will necessarily involve breach of the Convention standards, provided appropriate procedural guarantees are established.[3112] Such local tribunals may be the only alternative to existing courts of summary jurisdiction staffed (in some cases) by untrained non-Aboriginal justices of the peace.[3113] In other words they may be an

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3109 D Hope, 'Contemporary Issues in the Management of Law and Order in South Australia Pitjantjatjara Community', in B Swanton (ed), *Aborigines and Criminal Justice*. Australian Institute of Criminology, Canberra, 1984, 359.

3110 For these features see para 33-6. See further para 871.

3111 See para 179.

3112 eg a right to appeal. The European Court of Human Rights has held that procedural or other defects at first instance can be cured on appeal (depending on the powers of the appellate court): eg *Adolf v Austria* (1982) ECHR Ser A vol 49.

3113 This accords with the view taken by the Commonwealth Parliament in enacting the Aboriginal and Torres Strait Islanders (Queensland Discriminatory Laws) Act 1975, which provided an independent right of appeal from Queensland Aboriginal courts but in other respects allowed those courts to continue to operate as local Aboriginal courts.

improvement on the only other available alternative. But basic standards of due process need to be maintained in courts and other officially established justice mechanisms.

808. ***Constitutional Constraints***. The Commonwealth Constitution imposes significant constraints upon direct federal action in establishing community justice mechanisms (whether in the form of courts or other bodies). This affects significantly what the Commonwealth could itself do in this area. In this Report constitutional and Federal-State issues have been left to be discussed in Part VIII, in the context of implementation of the Commission's proposals. But in this area the constraints are considerable, and they need to be briefly described here.

- *The Position in Federal Territories*. Fewest constitutional problems arise in the Territories, since many of the restraints imposed by the Constitution on the exercise of jurisdiction under Commonwealth law do not apply to courts and similar bodies established for Territories under s 122 of the Constitution.[3114] However the most relevant Territory, the Northern Territory, has since the grant of self-government in 1978 been treated as equivalent to a State for most purposes, although it does not have the constitutional status of a State.

- *The Position in the States*. The position in the States is much more complex. For present purposes a number of different problems arise:

    - *Establishment of Federal Courts*. If the Commonwealth wished to establish special Aboriginal courts to exercise some form of coercive jurisdiction in a State, such courts would have to be established in accordance with Chapter III of the Constitution. The judges of such courts would have to be appointed by the Governor-General in Council, would be removable only with Parliamentary approval, and would hold office until a fixed retiring age.[3115] As federal judges they could only exercise judicial powers or powers properly incidental to judicial powers.[3116] It follows that the Commonwealth Parliament could not itself set up indigenous courts along the lines of the Papua New Guinea village courts[3117] to exercise judicial power in any of the States. Proposals for such courts characteristically envisage short-term or *ad hoc* selection or election of judges at the local level. It is also not clear to what extent the Commonwealth could give such courts a combination of judicial and mediatory or conciliatory functions.

    - *Modification of existing State courts*. Alternatively the Commonwealth might seek to modify existing State courts in respect of their exercise of jurisdiction over Aborigines in appropriate cases, to take into account local traditions or processes. Modifications might be made in this way to ordinary courts such as magistrates courts or Supreme Courts exercising jurisdiction with respect to Aborigines, or to special courts such as the Aboriginal courts in Queensland.[3118] Assuming that such modifications would be within power under s 51 of the Constitution, as legislation for the Aboriginal people affected (s 51(26)) or otherwise, federal jurisdictional problems can still arise. The cardinal principle is that, while the Commonwealth can (by otherwise valid legislation) modify the procedures to be applied by State courts in their exercise of jurisdiction,[3119] it cannot alter the 'structure' or 'constitution' of those courts.[3120] A second limitation is that the Commonwealth Parliament may not vest non-judicial power in State courts, even if it would be consistent with their 'constitution' or structure to exercise such

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3114 Thus s 80 (trial by jury) does not apply: *Bernasconi v R* (1915) 19 CLR 629, nor do the requirements that judges be appointed with a fixed tenure or that only courts should exercise judicial power: *Porter v P* (1926) 37 CLR 432; *Spratt v Hermes* (1965) 114 CLR 226.

3115 Constitution, s 72.

3116 *Attorney-General for the Commmonwealth v The Queen* (1957) 95 CLR 529 affirming *R v Kirby, ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254.

3117 For details of the village courts see para 769-79.

3118 Although the Commonwealth could not establish such courts as federal courts because of the restrictions in Chapter III of the Constitution, it can, within certain limits, invest them with federal jurisdiction as existing State courts. cf *Pearce v Cocchiaro* (1977) 14 ALR 440; *Commonwealth of Australia v Hospital Contribution Fund of Australia* (1982) 40 ALR 673.

3119 It has never been decided whether the Commonwealth can modify the procedures of State courts in the exercise of State jurisdiction. A Commonwealth law providing, for example, that a traditional Aborigine appearing before a state court was entitled to an interpreter or to make an unsworn statement would not as such confer federal jurisdiction on the State court. Probably such a law would still be valid as a direct exercise of legislative power under s 51(26).

3120 *Le Mesurier v Connor* (1929) 42 CLR 481; *Russell v Russell* (1976) 9 ALR 103; Z Cowen & L Zines, *Federal Jurisdiction in Australia*, 2nd edn, Oxford University Press, Melbourne, 1978, 196-9.

power.[3121] Together these rules considerably restrict what the Commonwealth can do, and great care is needed in the formulation and drafting of any proposals (although more flexibility is possible than with special federal courts). Thus the Commonwealth could probably empower (if not require) a State court to sit with and consult Aboriginal assessors in appropriate cases, but clearly it could not give such assessors voting or decisional power. It could not require a court to sit *in camera* in all cases involving Aboriginal customary law,[3122] although it could probably empower a court to adopt special procedures in such cases (including a *power to sit in camera*) in terms that would go some way towards preserving secrecy.[3123] The Commonwealth cannot appoint judicial or other personnel to State courts[3124] although it has some limited control over the composition of courts of summary jurisdiction exercising federal jurisdiction.[3125] On the other hand other reforms in the rules of evidence and procedure, considered in Part V, present no particular problems since they do not involve the creation of special structures or the addition or substitution of personnel in State courts or agencies.

- *Establishment of Non-court Procedures*. There may be scope for the establishment of non-court procedures in this field, and for consequent diversion away from State courts. For example a mediation scheme such as the New South Wales Community Justice Centres[3126] does not involve any exercise of coercive or judicial power and could be established for an Aboriginal group or community by federal law, if this were otherwise desirable. Federal or State courts dealing with a case could be empowered or required to adjourn, pending attempts at mediation through such a scheme. The validity of any machinery of this kind would depend very much on the particular proposal: the central restriction is that no exercise of judicial power can be involved.

- *Co-operative Federalism*. Some of the constitutional constraints may be overcome through cooperative federalism. In some areas it may be more appropriate for joint Federal State action, rather than the Commonwealth being directly involved.

## Local Control over Law and Order Matters

809. ***Forms of Local Autonomy***. The point has already been made[3127] that one method, arguably the most direct and fundamental one, of dealing with local law and order matters is through the conferral on Aboriginal communities of powers of local self-government, allowing those affected to decide for themselves what (if any) changes are needed. There is an analogy with ordinary powers of local government. But given the remoteness of many Aboriginal groups, their special characteristics and the special problems facing them, and the principle of Aboriginal self-management or self-determination, there is no reason why powers should be confined to the existing range of local government matters. Exactly what those powers should be would be a matter for negotiation with the appropriate authorities. Framework legislation would be needed to allow for the exercise of a wide range of powers, pursuant to agreement with the community concerned. Proposals for Indian self-government along these lines have reached a relatively advanced stage in Canada;[3128] in Australia, the Northern Territory Community Government Scheme is a smaller-scale version of this idea.[3129]

810. ***Local Autonomy and the Commission's Terms of Reference***. There are difficulties in dealing with proposals of self-government or local autonomy in the context of a Reference on the recognition of

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3121 *Queen Victoria Memorial Hospital v Thornton* (1953) 87 CLR 144.
3122 *Russell v Russell* (1976) 9 ALR 103.
3123 See para 649-61 where a proposal to this effect is made.
3124 *Le Mesurier v Connor* (1929) 42 CLR 481.
3125 Judiciary Act 1903 (Cth) s 39(2)(d). See Cowen & Zines, 191-5.
3126 See para 682.
3127 See para 689.
3128 Debate in Canada over native rights is now focussed squarely on issues of self-government, rather on the provision of services by governments at central or provincial level. See Canada, House of Commons, Special Committee on Indian Self-Government, *Report* (Chairman: Mr K Penner) Ottawa, 1983; N Lyon, 'Constitutional Issues in Native Law' in BW Morse (ed) *Aboriginal Peoples and the Law: Indian, Metis and Inuit Rights in Canada*, Carleton UP, Ottawa, 1985, 408. For the implications in Australia of a similar shift in emphasis see ch 38.
3129 See para 760-3. Similarly the arrangements under the 1984 legislation for Aboriginal reserves or trust areas in Queensland are, in theory at least, a move in the direction of local self-government, though this is obscured by the division of authority with existing local government areas. See para 743.

Aboriginal customary laws[3130] Local autonomy or self-government involves a much broader range of issues. In one sense, if Aboriginal communities are granted local autonomy or a form of self-government the issue of recognising Aboriginal customary law does not arise. The decision as to what laws would apply within the community would be determined by the community. Aboriginal communities may well wish to devise new rules or approaches to cope with their problems: there is no reason why this should be confined to applying 'customary' or 'traditional' law. In the words of Dr Daniel Craig:

> Regarding legal reform, therefore, the real issue is not recognition of customary law. Rather, it is whether or not Aboriginal communities should be given political and economic control of their own reserves. An answer to this question of local control will solve many of the problems regarding the place of customary law in both traditional and non-traditional reserves.[3131]

In Australia, 'Aboriginal affairs' has usually been seen not as raising questions of self-government or local autonomy but as involving a series of more-or-less distinct 'problems' of Aboriginal 'welfare', of appropriate 'services' to be provided, of 'programs' for Aboriginal advancement. The way the present Reference was formulated is very much an illustration of the latter approach. To doubt the adequacy of this approach is not to deny the need for services or programs adapted to the special needs of Aborigines (as of others in need). A case for the recognition of Aboriginal customary laws can also be made on its merits, as this Report seeks to do. But even when particular programs or services can be seen as an aspect of Aboriginal self-management or as a recognition of Aboriginal traditions or customary laws, they are inherently partial and tangential to the underlying question of autonomy. For present purposes, it is necessary not to confuse particular proposals for local justice mechanisms — including proposals from Aboriginal communities themselves — with these broader questions of self-government. By-law and similar powers are considered in this Part in the context of proposals for local justice mechanisms within Aboriginal communities, rather than in the wider, and more significant, context identified here.

811. ***By-Law Powers***. Another way in which Aboriginal communities may exercise control over law and order is by having the power to make local by-laws. In a sense this power is an aspect of local autonomy. Its scope however may be broad or narrow. By laws could be enforceable in a local Aboriginal court, or other form of local justice mechanism, or they could be enforced in the magistrates courts in the usual way (as with the Northern Territory Community Government Scheme). The Aboriginal courts in Queensland and the Aboriginal Communities Act Scheme in Western Australia are examples of the former, although in both States the by-law making power is strictly circumscribed. Providing Aboriginal communities with by-law making powers gives them the opportunity to pass laws which they see as relevant and necessary. These may include aspects of their customary laws. Some communities have requested such powers (e.g. Angurugu),[3132] but do not want the additional responsibilities of running a court to enforce such bylaws. However if by-laws were passed which included aspects of Aboriginal customary laws to be enforced in magistrates courts, procedures would need to be set up to ensure the views of local Aboriginal communities were made known to the courts.[3133]

## Aboriginal Courts or Similar Bodies

812. ***Basic Features***. Several kinds of local courts have been described in this Report, including the Queensland and Western Australian schemes, the Papua New Guinea Village Courts and the Indian tribal courts in the United States. Each essentially involves the enforcement of local by-laws by courts staffed by persons appointed from (though not always by) the local community. While such by-laws could be expected to reflect local customs and practices it is only in the Papua New Guinea village courts that indigenous customs and practices are applied to any significant extent.[3134] Essentially in each of the jurisdictions mentioned the indigenous courts are modelled on the common law court system at its lowest level of the magistrate's or justices court. Is such a system appropriate in Australia?

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3130 See para 688-9.
3131 D Craig, *Submission 147* (30 April 1980).
3132 See para 459.
3133 See para 462-5.
3134 Some commentators would even question this: see para 772, 774, 779.

813. ***Support for Aboriginal Courts***. In submissions to the Commission and in its fieldwork, the Commission has received very few requests from Aborigines for Aboriginal courts to be established.[3135] There may be a number of reasons for this, but there certainly does not appear to be any groundswell of Aboriginal opinion in favour of such courts.[3136] The Commission has however received several well-argued submissions from non-Aboriginal persons in favour of such courts.[3137] Professor Kevin Ryan made the general observation:

> There is, I believe, much to be said in favour of the general idea of making aboriginal communities responsible for the administration of a set of rules which will apply to their members, and this implies that they must be invested with police powers, with judicial powers, and with powers of punishment.[3138]

Mr Henry Wallwork QC, who had originally opposed the scheme set up in Western Australia, changed his mind after the scheme had been operating for some time:

> It now seems however that these courts and law enforcement procedures allow the traditionally oriented Aborigines to retain their racial identity and traditional lifestyle even if they are not traditional forms of dispute settlement ... It may be that what is more important than the preservation of customary law is the giving of law making and law enforcing powers to Aboriginal communities in order that they may control crime and disorder within their areas by the use of the general Australia laws adapted to those communities.[3139]

Mr AR Welsh, who has had extensive experience with village courts in Papua New Guinea and who worked for several years with the Department of Aboriginal Affairs in the Northern Territory, argued strongly for such a scheme. He suggested that 'the absence of a community or village level dispute settling mechanism backed by law is presenting a serious handicap in promoting the welfare and development of the [Aboriginal] people'.[3140] In his view:

> The fact that Aboriginal Communities cannot control their members adequately in the absence of Government-backed support for participation in their own law and order is not necessarily an indication that this situation would continue to exist if such backing were introduced. Indeed I feel the lack of social control within certain Aboriginal groups is largely due to Government refusal to grant adequate powers and responsibilities to the traditional leaders of such groups.[3141]

He concluded that a village court system is appropriate and could be set up in Aboriginal communities in the Northern Territory:

> Providing that legislation takes account of the actual customs of the people it covers there is no reason to suppose that Aboriginal groups are incapable of participating in law enforcement and the administration of justice. In fact there is already evidence that Aboriginals are not only capable of such participation, but that they are also capable of properly exercising legislative functions (NT Land Councils and Queensland Aboriginal Councils) ... I believe that if the same legislation for Village Courts existed in the Northern Territory I would have no problems in setting up courts at say Yirrkala or Warrabri ...[3142]

Professor Goldring has also suggested that the Papua New Guinea village court model should be applied in Australia:

> It is therefore suggested that official sanction be given to traditional dispute-settlement bodies within traditional aboriginal communities, similar — and if possible with fewer bureaucratic requirements — to that accorded to the traditional dispute-settlement in PNG. The law should also provide that if a person has been dealt with by such a 'village court' acting within its jurisdiction, he should be immune from further proceedings in any other court in respect of the same matter or transaction.[3143]

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3135 The request from Yirrkala is the principal exception. See also the Report by Tregenza referred to in para 685, and the views in para 686.

3136 For the Groote Eylandt Aboriginal Task Force's recommendations see para 685.

3137 J Huelin, *Submission 20* (6 July 1977); Justice I Thompson, *Submission 23* (19 September 1977); J Hocknull, *Submission 244* (21 April 1981); K Ryan, *Submission 174* (l5 September 1980); RM Berndt, *Submission 171* (19 August 1980).

3138 K Ryan, *Submission 174* (15 September 1980).

3139 H Wallwork QC, *Submission 378* (2 June 1983).

3140 AR Welsh, *Submission 1* (1977) 3.

3141 ibid.

3142 id, 3-4.

3143 J Goldring, *Submission 44* (1 November 1977). At a more general level, KM Hazlehurst, *Submission 496* (1 October 1985) 15 argued that the Commission should: spell out, in general terms, the need for Euro-Australian law to legitimately accommodate Aboriginal community justice initiatives. A positive stance such as this would greatly assist the efforts of researchers, administrators, and enterprising Aboriginal communities to continue to explore and refine these possibilities.

814. ***Contrary Arguments***. On the other hand Mr Noel Wallace, who has worked with the Pitjantjatjara people in South Australia, argued against the village court model:

> There is no possibility that unbiased justice would be received under similar circumstances with the Western Desert people, due to kinship obligations.[3144]

Mr Gerry Blitner, then Chairman of the Northern Land Council, was also not in favour of Aboriginal courts. In the context of local application of customary laws he commented:

> This way [setting up Aboriginal courts] it would not function, because we have our own identity. This is what has happened in some areas [Queensland] and they have ... lost their identity.[3145]

One reason repeatedly given for rejecting Aboriginal courts, especially in traditionally oriented communities, was the need to appoint particular persons to exercise judicial authority. Mr Pauling SM commented that appointing Aboriginal justices of the peace would cut across existing family and authority structures,[3146] a view echoed by Mrs L Lippmann:

> Setting up of separate formalised courts on settlements might tend to destroy the standing of the traditional bearers of authority (as the training of Aboriginal JPs in traditional areas has tended to do), thus leaving Aborigines once more to receive the worst of two worlds.[3147]

Ms Pam Ditton, in a submission to the Commission prepared after some time working in tribal courts in the United States, commented that:

> In those areas where the Aboriginal people continue to run their own affairs by their own traditional unwritten law I do not see any system of tribal court along the lines of anything I saw in the [United] States as being other than a total disaster.[3148]

In her study of the Aboriginal Justice of the Peace scheme in Western Australia, Hoddinott pointed to what she saw as serious shortcomings in the scheme. But in her assessment the one community in which the scheme works effectively is the least traditionally oriented:

> The Beagle Bay Aboriginal Community is, in some ways an exception to the general flawed operation of the JP Scheme. Although the community does not practice tribal custom there is a strong sense of community cohesion and re-identification as Aboriginal ... Many Aborigines living at Beagle Bay have a reasonable command of the English language and a fair understanding of English law ... The JP Scheme has added to the new sense of community identity and JP's have few problems applying the Aboriginal Communities Act.[3149]

Aboriginal courts may well be effective in some Aboriginal communities, particularly those which have undergone the greatest changes with respect to their customary laws.

815. ***The Law to be Applied***. Official Aboriginal courts need not only apply local customary laws. The law applied could be the general law, or it could incorporate or take account of valued customs and traditions. As Dr Maddock pointed out:

> It may be that [Aborigines] will simply wish to be authorized to apply their own laws and practices, the range and content of these to be determined by themselves in their own way as occasion for it arises. On the other hand, it may be that some communities would wish to draw up a code of rules to be observed, the implication being that uncodified rules would not be obligatory upon members of the community in question ... Should a code of substantive rules be favoured, however, it would be necessary to ask oneself whether it is reasonable to expect a community to

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3144 N Wallace, *Submission 57* (10 February 1978). He added that this is not 'a form of nepotism the whole matter of obligations is a very important part of Customary Law and is in accordance with the teachings of the Spirit Ancestors'.

3145 G Blitner, *Submission 92* (25 August 1978).

3146 TI Pauling SM, *Submission 140* (9 November 1979) 3.

3147 Paper prepared by Mrs Loma Lippman and presented as a submission to the Commission by the Commissioner for Community Relations (Hon AJ Grassby), *Submission 13* (12 May 1977). Commenting on the Queensland Aboriginal Courts, Mr Steve Mam, Queensland State Chairman of the National Aboriginal Conference stated:

> I believe that the Aboriginal court system which operates under the Department of Community Services, is not a healthy one. I believe it is a legislative 'mish mash' which sees people purporting to administer the law without allowing for any proper system to exist I would not favour retention of the courts.

3148 P Ditton, *Submission 343* (September 1982) 20.

3149 A Hoddinott, *That's Gardia Business. An Evaluation of the Aboriginal Justice of the Peace Scheme in Western Australia*, Perth, 1985, 37.

> produce a list of rules governing the entirety of the conduct of members together with an indication of how to weigh them against each other in cases of conflict between members who were invoking different rules.[3150]

A submission from a National Police Working Party was in favour of local community by-laws with a wider content:

> Aboriginal communities should participate in determining local community by-laws. These provisions should especially relate to the problems arising from the interaction of Aboriginal tribal society with the broader Australian society and some of the 'lower order' customary offences.[3151]

While by-law schemes raise wider issues of the area, unit and content of self-government, and should not be treated as restricted to 'law and order' issues,[3152] it is clear that the law to be applied in Aboriginal courts cannot be limited to Aboriginal customary laws. The law to be applied should include both aspects of customary laws (if local Aboriginal people want this) and of the general law.

816. ***Lessons from the Western Australian Scheme***. One scheme which attempts to address at least the more obvious difficulties with Aboriginal courts has been the Western Australian scheme, described already.[3153] The scheme is similar to the usual court of summary jurisdiction, but it is, partly at least, run by Aborigines, and has the advantage of being locally based. Its supporters suggest .that the scheme as established accords with Aboriginal traditions and ways of doing things:

> In this way, Justices from the appropriate section by virtue of their status with particular offenders should normally be available to deal with them as they would be in Aboriginal law.[3154]

Mr Terry Syddall MBE, the architect of the Western Australian scheme, commented that it has been very successful:

> It seems likely that their involvement will contribute towards a harmonisation of relationships on a much wider scale by reducing resentment felt when a law alien to their culture is administered by Europeans. Moreover, by administering European law to their own people, traditional constraints such as 'shame' are automatically invoked against offenders. This gloss is absent where proceedings are administered by Europeans. Further, it is likely that non traditional offences contained in by laws such as those relating to alcoholic liquor will become 'Aboriginalized'.[3155]

A similar view has been expressed to the Commission by the present magistrate, Dr John Howard SM. The result, on this view, has been a synthesis of local customary law and the by-laws, such that the community at La Grange refer to the new law as 'Bidyadanga Law'.[3156] Mr Syddall commented that the process of synthesis would be inhibited if persons appearing before the Aboriginal justices are allowed legal representation.[3157] On the other hand, it has been argued that an Aboriginal justice of the peace, hearing an offence against community by-laws and sentencing the defendant, if found guilty, to a fine or gaol, cannot be said to be dealing with a person as he would under Aboriginal law, even if by coincidence he stands in the right relationship to the defendant and has a personal responsibility to deal with him as a wrongdoer. The conclusion of Associate Professor Getches was that:

> ... they [the Yirrkala proposal and the Queensland and Western Australian Aboriginal courts] all suffer from an attempt to appear indigenous when in fact they are transplants of Australian values and authority (very little authority at that) in native communities and hands. They do not apply or defer to Aboriginal law ways.[3158]

On this view, such courts are assimilationist in their underlying philosophy and are likely to have an undermining effect on Aboriginal customary law and its processes.[3159]

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3150 K Maddock, *Submission 22* (31 October 1977) 21.
3151 National Police Working Party, *Submission 461* (13 November 1984) 9.
3152 See paras 809-10.
3153 See para 747-56 for details.
3154 Dr John Howard, 'Aboriginal Communities Act 1979', Address to the Australian Law Librarians Conference, Perth (September 1983).
3155 T Syddall, 'Aborigines and the Courts II', in B Swanton (ed), *Aborigines and Criminal Justice*, Australian Institute of Criminology, Canberra, 1984, 162.
3156 id, 11.
3157 ibid.
3158 DH Getches, *Submission 218* (22 January 1981).
3159 For comments to similar effect see L Roberts, *Submission 492* (21 August 1985). See also para 758.

817. ***General Conclusion***. After considering the submissions received and examining the relevant Australian and overseas experience, the Commission does not recommend a general scheme of Aboriginal courts for Australia. The Village Courts in Papua New Guinea have been generally successful, and it is possible that similar bodies might be suitable in some Aboriginal communities. But the wholesale transplanting of such a scheme is unlikely to be successful. There is simply no indication that this would be welcomed by, or be workable in, the diverse range of Aboriginal communities. The Village Courts scheme requires a central secretariat and machinery for supervision which, though necessary to cope with the considerable demand for village courts there, is unlikely to be practical in Australia. Local law and order is only one of a number of areas where Aborigines may seek to exercise local authority, and not necessarily the one to which they would attach the highest priority. Establishing elaborate machinery, with framework legislation, focussing on local courts and law and order issues would tend to bias decision making. It is better that such questions be considered in the broader context of proposals for local self-government, referred to already.[3160] However, this conclusion does not mean that particular local courts or other bodies should not be established in response to genuine local demands or initiatives, or that existing courts should not be retained if the local community so wishes. But certain basic standards should be applied to local Aboriginal courts officially established. The standards should apply both to existing Aboriginal courts such as those in Queensland and Western Australia, and to any similar bodies which may be created.

818. ***Basic Standards for Aboriginal Courts***. Notwithstanding the criticisms directed at both the Queensland and Western Australian courts they appear to have some degree of local support, and are likely to continue to exist for the foreseeable future. In line with the principles discussed already,[3161] there are a number of important requirements for the acceptable working of such courts. These requirements have taken into account the basic criteria for the suitability of community justice mechanisms outlined in paragraph 804-808.

- The local Aboriginal group should have power to draw up local by-laws, including by-laws incorporating or taking into account Aboriginal customs, rules and traditions.

- Appropriate safeguards need to be established to ensure that individual rights are protected,[3162] by way of appeal or a right to elect an alternative form of trial (e.g. in the magistrate's court).

- The by-laws should, in general, apply to all persons within the boundaries of the community.

- If the court is to be run by local people, they should have power within broad limits to determine their own procedure, in accordance with what is 'seen to be procedurally fair by the community at large'.[3163]

- The community should have some voice in selecting the persons who will constitute the court, and appropriate training should be available to those selected.[3164] In minor matters there need be no automatic right to be represented by legal counsel before the Aboriginal court,[3165] though the defendant in such cases should have the right to have someone (e.g. a friend or family member) speak on his behalf.

- The court's powers should include powers of mediation and conciliation. A court which is receptive to the traditions, needs and views of the local people may be able to resolve some disputes before they escalate, perhaps avoiding more serious criminal charges. The power to order compensation of some kind in such situations is one way of achieving this.

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3160 See para 809-10.

3161 See para 805-7.

3162 F Brennan, 'Underlying Issues in the Recognition of Customary Law' in Australian Law Reform Commission-Australian Institute of Aboriginal Studies, *Report of a Working Seminar on the Aboriginal Customary Law Reference*, Sydney, 1983, 18, 20.

3163 ibid.

3164 The National Aboriginal Conference, Queensland State Branch, *Policy Directions*, Brisbane, 1985, para 9.6 stated: Suitable training for Aboriginal and TSI Justices of the Peace and police would help to prevent the injustices which now occur in communities as a result of the attempted administration of justice by unskilled people.

3165 The ICCPR, Art (3)(b), refers to the minimum guarantee of a person 'to defend himself in person or through legal assistance of his own choosing ... and to have legal assistance assigned to him, in any case where the interests of justice so require'. In the range of matters currently dealt with by Aboriginal courts it is suggested that the requirements of the Covenant are complied with. A person is not precluded from getting independent legal advice. This can be compared with Small Claims Tribunals in many States in which legal counsel cannot appear to represent parties, although a party could not be prevented from seeking advice in respect of a claim.

- Such courts need appropriate support facilities.

- There should be regular reviews of the operation of any such court, undertaken in conjunction with the local community.

819. ***Introduction of New Aboriginal Courts and Similar Bodies in Particular Communities***? With changes of this kind it may well be that existing Aboriginal courts in Queensland and Western Australia will achieve a measure of general acceptance and utility which they have not always had so far. But it is another matter to advocate the extension of Aboriginal courts to other communities, let alone to make comprehensive provision for such courts. As has been pointed out already, local powers over law and order matters are best dealt with in the broader context of local self-government.[3166] So far as a *general* system of Aboriginal courts is concerned, there is no indication that this would be welcomed by, or workable in, the diverse range of Aboriginal communities.[3167] However one possible exception to this generalisation is the so-called Yirrkala proposal, which is the only worked-out proposal submitted to the Commission for a separate formal local justice mechanism, proposed by or on behalf of an Aboriginal group.

## Yirrkala Scheme

820. ***History and Development***. Yirrkala is an Aboriginal community in North-East Arnhem Land (NT).[3168] The Yirrkala model was developed over a number of years with the assistance of Dr HC Coombs and Dr Nancy Williams. People at Yirrkala first raised the possibility of administering law and order within their community in 1974 and made representations to the Commonwealth Government to this effect.[3169] There were discussions with judges and magistrates, and senior members of the community visited Kowanyama (Qld) in 1977 to observe the Aboriginal court there.[3170] Since 1977 the Commission has received a number of submissions from Yirrkala,[3171] including notes for legislation for the scheme and for related rules and procedures. Commission staff have discussed the proposals with members of the community on a number of occasions.

821. ***Two Councils***. The intention of the scheme is to rely on traditional ways of settling disputes and restoring order but to institutionalise the procedures so that they fit within the general legal system. The scheme envisages the use of Councils, some of which are already in existence. One, an administrative body (the Dhanbul Association) elected by all adult members of the community, is responsible for the day-to-day administration of the community. Another, a Law Council (the Garma Council), comprises two senior men[3172] from each constituent clan chosen by the clans in their own way, and relying as far as possible on the established authority structure. Other councils or incorporated bodies[3173] may also be formed,' but the leaders see Garma Council as providing the focus for all matters of law and order. The Garma Council would have responsibility for such matters as:

> (a) the preservation of friendly relations between the constituent clans which make up the community;
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> (b) the maintenance of Aboriginal traditional law and custom;
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> (c) the settlement of disputes between persons, families and clans;
>
> (d) the maintenance of social order and discipline;

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3166 See para 809-10.
3167 See para 817.
3168 See para 707.
3169 See para 678, 686. The people at Yirrkala had been discussing this issue before 1974 but this was the first time that their requests were publicly acknowledged.
3170 *Transcript* Yirrkala (10 November 1981) 2852-3.
3171 Some of these have come directly to the ALRC and others have been presented on the community's behalf by HC Coombs: *Submissions 111, 114, 157, 175, 262, 306, 482*. The material in this and the following paragraph is taken from these submissions, and from other material available to the Commission. See HC Coombs, MM Brandl, WE Snowdon, *A Certain Heritage*, Centre for Resource and Environmental Studies, Canberra, 1983, 197-213: HC Coombs, 'The Yirrkala Proposals for the Control of Law and Order' in Hazlehurst (1985) 201.
3172 It is proposed that women not be represented on the Garma Council because some parts of the law are secret from them. However, where relevant, women would be consulted. In certain cases women would sit in or constitute the community court. There has been some discussion of women forming their own council.
3173 A new incorporated body has been formed with responsibility for the outstations of the Yirrkala community.

(e) the relationship with judicial, law enforcement and similar agencies of the Commonwealth and the Northern Territory.[3174]

822. ***Community Court***. Although the Garma Council would be responsible for local justice it would not itself sit as a court, but would specify the persons who should constitute 'a community court' in each case. Disputes may be resolved by agreement, but where this could not be achieved a court would be appointed, the membership being determined by the nature of the issue and the persons involved. There would be no office holders (such as justices of the peace or magistrates), so that no new authority structures would be imposed. The likely composition of a court where it was needed would be:

- a senior member of the clan or family of the complainant;
- a senior member of the clan or family of the defendant; and
- a senior person (or persons) from another clan or family, chosen for their wisdom or standing in the community.

The composition of the court would presumably vary if an Aboriginal person from outside the community was involved in the dispute or if a non-Aboriginal person was involved. The court would hear matters in public, and upon reaching a decision would report to a community meeting for final approval. Court records would be maintained setting out the cases heard, the decisions reached and the penalties imposed.

823. ***Interaction with General Legal System***. While the Garma Council and the community court would operate as an independent entity, there would be a considerable degree of interaction with the general legal system:

> ... if a magistrate or judge has before him a case involving a member or members of the Yirrkala community the magistrate or judge should authorise the Council to set up a Community Court to conduct a preliminary study of the case and see whether a consensus settlement of the case is practicable by the community's own procedures. The outcome of this preliminary study would be reported to the magistrate or judge. The Council accepts that the magistrate or judge would not necessarily be bound by that outcome but expects that weight would be given to it.[3175]

Where such a preliminary hearing was not undertaken, for whatever reason, certain persons from the community would sit with the magistrate or judge to advise him about such matters as the facts of the case, attitudes to the issues, any Aboriginal traditions involved and the form and degree of the compensation or punishment.

824. ***Scope of the Scheme***. The Garma Council considers that it should have some say in all offences or disputes involving community members. This would not necessarily mean that the Council would itself deal with all such matters. It may prefer to call in the police or refer matters to a magistrate, in which case the general law and procedure would apply. This could occur, for example, where a serious offence was involved (e.g. homicide) or an inter-clan conflict was in danger of getting out of control. However, even in these matters the Garma Council would expect there to be some continuing consultation with the outside law enforcement authorities.

825. ***Other Functions of Garma Council***. In addition to having responsibility for constituting a 'community court' it is envisaged that the Garma Council would be responsible for appointing persons with police functions within the community's boundaries, establishing rules to operate within the community to maintain social order, appointing persons to oversee and carry out any punishments imposed by the 'community court' and advising magistrates in cases involving members of the community.

- *Policing*: The Dhanbul Association has in the past employed orderlies whose main responsibility was maintaining peace and quiet during the evenings. This involved controlling the entry of alcohol and unwanted visitors. It is envisaged that this would be reintroduced, and that further powers, especially the power of arrest and overnight detention or placing a person in the care of a relative, might be conferred.

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3174 HC Coombs, *Submission 157* (28 May 1980).
3175 HC Coombs, *Submission 262* (29 April 1981).

- *Rules for the Community:* The Garma Council has formulated a broad set of rules which would apply to all persons within the community, whether visitors or permanent residents. These rules, which were set out in Chapter 19,[3176] were deliberately expressed in very general terms to allow flexibility. In addition, obligations would be imposed on the heads of every clan or family to prevent wrong things being done by members of their family or clan and to assist in deterring or preventing breaches of the rules from taking place.

826. ***Punishment and Compensation***. A range of sanctions has been proposed for the community court:

(1) compensation;

(2) committal for a period to the care of a responsible member of the offender's clan or family for 're-education';

(3) compulsory residence at a 'homeland' centre for a period;

(4) fines;

(5) compulsory community work;

(6) temporary banishment from the community;

(7) overnight imprisonment in a 'lock-up' situated at the community.

Great emphasis is placed on compensation as a way of resolving disputes. This is in line with what may be an increasing trend in many Aboriginal communities for the greater use of compensation, usually in the form of money payments. In earlier submissions from the Yirrkala community powers for the community court to impose some traditional physical punishments was sought but with a right of appeal:

> If the Court says that the accused member should be punished it can say:
>
> (f) ... that he be punished in a way traditional in Aboriginal law — but if the accused person believes the punishment would be too severe he may ask that a magistrate be asked to say whether some other punishment should be given.[3177]

In a more recent submission the request for powers to impose physical punishment was omitted.[3178] Dr Coombs argued in a separate submission that the original proposal should be accepted and that the Yirrkala community court should be allowed to impose spearing (which, he points out, is willingly accepted by the person being punished) but with provision for an appeal to a magistrate or judge.[3179]

827. ***Imprisonment***? Power to order imprisonment, apart from overnight detention, was not requested for the Yirrkala community court. Sending a person to gaol in Darwin is not regarded by many as a punishment and in some instances can lead to disputes being exacerbated or going unresolved while the person is away in gaol. Because the gaol is situated in Darwin, the prisoner is removed from his family support (and restraint) mechanisms into an environment which often has detrimental affects. Almost invariably he returns to the community with imprisonment having had no rehabilitative effect. Periods of imprisonment — provided they are not too lengthy — may indeed provide a life with more amenities than available at home. Such persons are often in further trouble within a short time after release, thus aggravating law and order problems in the community and confirming local views that gaol is of no value.[3180]

828. ***Matters to be Resolved***. The documentation prepared by and on behalf of the Yirrkala people outlining a community justice mechanism was intended to provide a framework for discussion rather than a definitive

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3176 See para 458.
3177 HC Coombs, *Submission 114* (2 January 1979).
3178 HC Coombs, *Submission 262* (29 April 1981). This followed comments, and some request for clarification, about the scheme in ALRC DP 17, 70-1.
3179 HC Coombs, *Submission 306* (14 July 1981). Dr Coombs implied that the decision not to press for this power was to an extent part of the bargaining process and that many people felt that spearing would remain an 'informal' component in the settlement of some disputes: 'I believe appeals would be few but the provision would act as a protection against extreme forms of punishment without passing ethnocentric judgments on Aboriginal processes'.
3180 See para 535.

model. The initial proposal has been modified in the light of further discussion and reconsideration. Representatives from the Commission have visited Yirrkala to discuss the proposal.[3181] These discussions, though helpful, revealed a degree of frustration on the part of some people at Yirrkala at the perceived lack of progress over the proposals originally put forward many years previously. The Aboriginal leaders with whom discussions were held were confident of their ability to make the scheme work and perceived it as their problem to worry about any detrimental effects.[3182] But it was acknowledged that a number of matters remained to be resolved. These relate to the jurisdiction of the community court, to the degree of acceptance by members of the community of the powers of the Garma Council and community court, and to the range and administration of punishments. None of these problems is beyond resolution, but those who come into contact with the scheme will need to be clear about how it is to operate. For example, would persons living on homeland centres around Yirrkala be subject to its jurisdiction at all times or only when visiting Yirrkala? Some homeland centres may be reluctant to bring themselves within the jurisdiction of the community court. Should they be given the fight to opt out or will this undermine the entire scheme?[3183] The increase in the number of persons (including members of the Garma Council) moving from Yirrkala to homeland centres raises the practical question of how often the Garma Council will meet (or 'want to meet) in order to consider law and order matters. If attending meetings involved significant travel it is likely that only more serious matters would justify bringing the Garma Council together. A further issue is the relationship between community security men and the Northern Territory police. For example, if someone from Yirrkala called the police for assistance should they attend or refer the matter to the local security men? Such issues need to be considered before any scheme is implemented, as they may be crucial to its success.

829. ***Jurisdiction***. The Garma Council has sought the power to deal with all law and order problems at Yirrkala. It would thus include both minor and major offences. However in discussions with the Commission the leaders were prepared, though reluctantly, to accept that at least initially, the jurisdiction of the community court should be limited to less serious offences, and that major offences such as murder, rape and serious assaults would be dealt with by the ordinary courts (although the Garma Council should be consulted by the Court on sentence). There was however some reluctance about accepting this limitation, with the favoured option being that all cases should be processed through the Garma Council first, even if later referred to a magistrate or judge:

> It has to be the Garma first, always Garma first, and the Balanda law comes second, advising about the Balanda law.[3184]

830. ***Community Acceptance***. A key issue is the acceptance by members of the community of the proposed system. While it may not be unreasonable to expect individuals to abide by the new rules if they seek to reside in the community, some safeguards would be necessary; for example, an opting out provision (involving choice of trial in the magistrate's court), or a right of appeal. Article 14(5) of the International Covenant on Civil and Political rights provides that a person convicted of a criminal offence should have the right to have the conviction and sentence reviewed by a higher tribunal according to law. Both opting out provisions and rights of appeal to outside authorities would tend to undermine the status of the Garma Council and the community court, especially if opting out was common, or if appeals were regularly upheld. Of the two, a fight to opt out is likely to be more damaging, since it prevents the exercise of local authority at all. Appeals could be expected to be rare, and there are established ways by which appeal courts defer to decisions taken by courts at first instance on issues of fact, discretion (including sentencing) and local community standards. Provided appeal courts exercise their powers wisely, there is no reason to expect that a right of appeal would undermine the system or frustrate the purposes it is intended to achieve.

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3181 Such visits took place in January 1979, April 1981 and November 1981 and October 1985. Further discussions were held by a Commission consultant Dr N Williams, in August 1985.

3182 'I am quite sure ... there are ways and means that we can control ourselves': *Transcript* Yirrkala (10 November 1981) 2831.

3183 Dr Coombs commented 'that the concern expressed in this paragraph ... seems exaggdrated. If the procedure outlined was followed the members of the 'community court' would be likely to be chosen from the homeland community itself — unless a member of another community was involved. Also, if the offence involved only persons from within the homeland community it could by action of its senior members of clans involved nominate its own 'community court'. In other words, the important thing would be the procedure rather than the formal structure of the Court and who had authority to constitute it.' HC Coombs, *Submission 482* (5 June 1985).

3184 R Marika, *Transcript* Yirrkala (10 November 1981) 2834. In its most recent submission on these issues, the Yolgnu clan leaders rejected limitations on the powers of the Garma Council, and sought 'substantially greater powers' than those outlined in para 821-9, including the power to deal with 'Yolngu land and all aspects of Yolngu culture as well as Yolgnu persons'. Dr N Williams on behalf of Yolgnu clan Leaders, *Submission 495* (25 September 1985) 1.

831. ***Other Issues of Concern to the Yirrkala Leaders***. In a submission to the Commission in September 1985 the clan leaders at Yirrkala repeated their wish to have the Yirrkala Scheme implemented. The specific concern raised in this submission was not the day to day law and order problems confronting the community, but rather the degree of control the clan leaders were able to exercise over their land, including permission to enter and the use of resources. There was also concern over control of their own people and their culture outside Aboriginal land:

> The Garma Council should also be recognised as having control over Yolngu persons and the use of Yolngu culture outside the Yolngu area, and if any financial benefit accrued, it should be directed to the Garma Council for disposition. The Garma Council should have brought before it all persons, including non-Aborigines, who enter Yolngu land and/or use its resources, and it should have the power to apply sanctions (generally compensation or fine) if appropriate. Compensation is the type of sanction most likely to be applied, although the Garma council should have the power to use other sanctions.[3185]

The authority to control Aboriginal people and culture, and entry to and activities on Aboriginal land, raises many of the questions of autonomy and self-government discussed in paragraphs 809-811. It also raises questions as to the operation of the Aboriginal Land Rights (Northern Territory) Act 1976 (Cth) and the Aboriginal Land Act (NT). However the issue of control of Yolngu persons and Yolngu culture outside the Yolgnu area is more complex. Attempts to protect Aboriginal culture have been made in both Federal and State legislation. The various Acts protecting Aboriginal sacred sites and the Aboriginal and Torres Strait Islander Heritage (Interim Protection) Act 1983 (Cth) are examples of this.[3186] The Commission recognises the importance of Aboriginal land and the protection of Aboriginal culture. But these matters are outside the Commission's Terms of Reference and are not dealt with in any detail in this Report.[3187]

832. ***Assessment and Recommendations***. The Yirrkala scheme is more elaborate and seeks to rely to a far greater degree on traditional mechanisms than the Western Australian or Queensland schemes. It would, it is hoped, combine aspects of a court enforcing local laws with traditional authority structures. The principal feature of the scheme is that it is an Aboriginal initiative, although there has been outside assistance in articulating and presenting it and in spelling out some of the details. Though there are difficulties on particular issues, and a number of matters to be resolved, in the Commission's view the decisive factor is the combination of:

- the continued difficulties of magistrates' courts in processing Aboriginal defendants (and the associated gross over-representation of Aborigines in the criminal justice system); and

- the existence of the Yirrkala scheme as an articulated scheme for local administration of justice, proposed by or on behalf of the local people.

It is clear from the submissions received from the Yirrkala community and from discussions the Commission has had with the clan leaders at Yirrkala that one of their major concerns is the way the general legal system operates for Yolgnu people. The clan leaders are not seeking the exclusion of the police and the courts from their land. What they are seeking is an input into the general legal system and a recognition by the general legal system of local Aboriginal customary laws and mechanisms. To some extent these needs may be met by the introduction of the scheme operating at Galiwin'ku.[3188] But even if steps are taken to set up this scheme at Yirrkala the Commission believes that serious consideration should be given to adopting the scheme developed by the Yirrkala people on a trial basis. Assuming that the appropriate authority is the Northern Territory Government,[3189] it is recommended:

(1) That the Northern Territory authorities investigate through local discussion and consultation whether the Yirrkala community still seeks implementation of the scheme;[3190]

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3185 These views were expressed most recently in a submission made by Dr N Williams on behalf of the clan leaders at Yirrkala: N Williams, *Submission 495* (25 September 1985).

3186 See para 213.

3187 See para 212.

3188 See para 764.

3189 See para 808, and see ch 38 for more detailed discussion of constitutional and administrative issues about implementation.

3190 The Commission has no reason to believe that this is not the case, and the Yolngu Clan leaders have strongly reaffirmed their desire for the scheme, with increased powers: *Submission 495* (25 September 1985). However the Commission does not speak for the Yirrkala people, who will have to be consulted directly about the acceptability of the specific legislative proposals agreed on.

(2) If so, that the scheme be implemented, with appropriate legislative backing, for a sufficient trial period (at least three years); and

(3) That the Yirrkala people be given independent advice and such other support as they may require in carrying out the scheme.

If this is to occur it is important that the proposal be implemented in a thorough-going way, and with as few derogations from the model sought by the Yirrkala people as possible.

## Non-Judicial Dispute Resolution

833. ***Local Mediation Panels***. Proposals for local justice mechanisms which do not involve the exercise of judicial power but focus on mediation and conciliation and a greater voice for Aborigines in the existing criminal justice system pose fewer problems of implementation than proposals for 'Aboriginal courts'.[3191] Either as an alternative to courts or in addition to them, local mediation panels might be established to help resolve disagreements and disputes involving Aborigines. The Community Justice Centres in New South Wales perhaps provide a model, which need not be limited to remote Aboriginal communities but may be also appropriate in cities and country towns.[3192] They would also not have to be restricted to inter-Aboriginal disputes. The Aboriginal courts in Queensland have specific powers[3193] to hear and determine disputes and to do so 'in accordance with the usages and customs of the community within its area.[3194] How much this power is used will depend on the level of community acceptance of the Aboriginal court as the appropriate forum for local disputes. It may be considered preferable to keep such disputes outside a public forum of this kind.

834. ***Demand for Such Forums***? The Commission has received very few submissions arguing for this type of forum. The discussion of dispute resolution at Edward River suggests that disputes sometimes escalate, leading to offences and injury to people because there is no appropriate forum for persons to work out disagreements.[3195] It has been suggested that some members of the community are looking for alternative ways to resolve local disputes. A submission to this effect was made to the Commission by members of the Kowanyama Community:

> ... where arrests were made because of fights either within or between families, the best way to deal with the matter would be to conduct a conference involving the families of the persons fighting so that they might settle their differences rather than bringing individual offenders before a court for the purpose of punishment.[3196]

On the other hand, it may be that in the more traditional Aboriginal communities there are already ways available to work out inter-Aboriginal disputes, and that a mediation panel is more suitable for other less homogeneous communities. In either case, support could be given to such mediation schemes both administratively, and through a legislative provision allowing courts to defer to the operation of such schemes (e.g. through adjourning proceedings in appropriate cases).[3197]

## Administrative Recognition

835. ***Major Areas of Concern***. With few exceptions, Aboriginal communities have not, so far as the Commission is aware, sought to have separate or independent justice mechanisms officially established. Though the various problems of local law and order facing many communities are well-known, and cause much concern, members of those communities have not sought to resolve them by excluding the criminal justice system or establishing alternative mechanisms. They have however, sought a better working relationship with the police and the courts.[3198] Professor Stanner expressed it in these terms:

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3191 See eg para 698-9 (Edward River), 715-6 (Strelley), 775 (Papua New Guinea); 790 (Navajo Peacemaker Court), 801 (Te Atatu Maori Committee).

3192 See para 682.

3193 Some Aboriginal courts previously exercised such powers informally: para 744.

3194 Community Services (Aborigines) Act 1984, s 43(2)(b). See para 744.

3195 See para 695, 697, 702-4.

3196 Kowanyama Community, *Submission 153* (15 April 1981).

3197 See para 488-9.

3198 In this respect the Groote Eylandt Aboriginal Task Force is representative. Though directed by its Terms of Reference to examine the possibility of 'an accepted mechanism' for local law and order matters, the Task Force's *Report* (1985) 15 clearly states that the general law must continue to apply and 'fully supports' the continuing need for police (id, 26). The Report spends much more time on background social

> In my opinion, if a remedy could be found for the shortfall or miscarriage of justice which now affects Aborigines, either because of their incomprehension of their situation when under charge, or because of the misprisal by our functionaries of Aboriginal viewpoints and motives and sense of responsibility, there would be little difficulty in the criminal law area ... It is my impression that amongst Aborigines I know well the certainty and relentlessness of the process of the criminal law are not resented. What is resented deeply is the arbitrariness, the use of violence, the impatience and the boorish neglect of Aboriginal rules of privacy, decent conduct and respect for persons and authorities so often shown by the process of our criminal law.[3199]

Those concerned in the administration of the criminal justice system need to be more sensitive to the special problems facing Aborigines and to take into account Aboriginal customary laws.[3200] For example the South Australian Police do not pursue prosecutions where tribal spearings have occurred as a form of tribal punishment 'providing the spearing relates to a strict tribal custom and no complaint is made to police by the victim'.[3201] This is one form of administrative recognition of Aboriginal customary law. Other proposals of this kind have been put forward. Many relate to questions of policing, both in terms of relations between Aboriginal people and the police, and proposals for 'Aboriginal police' of various kinds. The police are, in a special position as the first point of contact with the criminal justice system. They are considered in detail in the next Chapter. But discussion should not be limited to the police. Judges, lawyers and others involved in criminal justice all need better information and education in relation to Aboriginal customary laws. The Galiwin'ku Scheme[3202] established in the Northern Territory as a pilot project is one attempt to do this. It has at present no statutory basis but relies on flexible procedures to accommodate local needs. Much can be achieved towards the recognition of Aboriginal customary laws and satisfying Aboriginal demands in this regard by simple administrative measures of these kinds.

## Aborigines as Officials in the Ordinary Courts

836. ***Policies of 'Aboriginalisation'***. One idea often suggested in the present context is a policy of increasing the number of Aborigines holding decision-making positions within the criminal justice system. This envisages the appointment of Aboriginal justices of the peace, Aboriginal magistrates and Aboriginal support staff in the courts, as well as Aboriginal police officers. It implies also the training of more Aboriginal lawyers. It is argued that, to avoid the alienation and hostility which is a feature of relations between Aborigines and the criminal justice system, Aborigines should be involved in the system in roles other than as accused persons. More Aboriginal justices of the peace and magistrates will, it is said, make the system more understandable and less alienating. Aborigines may come to perceive the criminal justice system as something other than as a non-Aboriginal dominated structure over which they have no input or control. The assumption is that no significant changes can, or perhaps should, be made to the existing legal system, but that Aborigines should as far as possible perform judicial and other functions, at least at the lower court level. This policy received strong support from a National Police Working Party which made detailed submissions to the Commission on this Reference. The Working Party commented that:

> Aboriginalisation within the police and court structure should be a long term aim and that in the immediate term efforts should be made to place suitably qualified personnel within the judicial process in areas where there are Aboriginals, on a regular and frequent basis.[3203]

The Queensland State branch of the National Aboriginal Conference also supported 'Aboriginalisation':

> There are few Aboriginal and TSI Justices of the Peace and magistrates are often ignorant of the cultural influences which shape the behaviour of Aboriginal and TSI people ... [T]he process of 'Aboriginalisation' of the law system [should] be rapidly achieved through such actions as training and appointing Aboriginal and TSI Justices of the Peace, stipendiary magistrates, jurors etc.[3204]

The concept of 'Aboriginalisation' of the legal system also received indirect support from the Groote Eylandt Aboriginal Task Force:

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conditions and underlying causes of crime than on 'an accepted mechanism', though some support for an extension of the Galiwin'ku program (see para 764) is expressed: id, 34-7.

3199 WEH Stanner, *Submission 6* (20 February 1977).

3200 The National Police Working Party supported the greater use of administrative recognition of customary laws but pointed out that there are limitations on how far the police can go: National Police Working Party, *Submission 461* (13 November 1984) 8.

3201 See para 472.

3202 See para 764.

3203 National Police Working Party, *Submission 461* (13 November 1984) 5-7.

3204 National Aboriginal Conference, Queensland State Branch, *Policy Directions 1985*, Brisbane, 1985, 39.

> The appointment of an Aboriginal Justice of the Peace from each community would serve to increase community provision of judiciary processes. Moreover each community would have a point of access into the judicial system.[3205]

The Report also recommended the appointment of Aboriginal police aides and in the longer term more Aboriginal police officers.[3206]

837. ***'Aboriginalisation' as a Solution***. The appointment of Aborigines as justices of the peace and magistrates is unlikely to go very far towards reducing the number of Aborigines coming into contact with the criminal justice system, nor does it go any way towards the recognition of Aboriginal customary laws. Taken alone it seems an insufficient response to the present situation. Moreover, quite apart from considerations of practicality (including the 'diversion' of the relatively small number of qualified Aborigines from other positions and areas of concern) the history of 'indigenisation' as a policy in other countries with ethnic minorities is not encouraging.

> In my experience here [United States] both judges and police are placed in an impossible situation in tribal communities ... , kinship obligations and professional duties inevitably come into conflict. One of three consequences can be expected: (1) the law-enforcer becomes an outlaw in his own community and identifies increasingly with external authority; (2) the law enforcer respects kinship obligations to his own clan or family, upsetting the entire balance of power in the community and destabilizing it; or (3) law-enforcers have to be imported from other communities, in which case they are little better informed than whites. 'Indigenising' conventional law processes is almost always futile.[3207]

The Western Australian Scheme is a form of 'indigenisation' and relies on the appointment of local Aboriginal justices. The local court at Aurukun in North Queensland is run by Aboriginal justices. Aboriginal justices of the people have previously been appointed in both city and country areas.[3208] In the Northern Territory some years ago 2 senior Aboriginal men were appointed as justices to sit with the magistrate when he visited their community on circuit.[3209] The system eventually became unworkable as the justices found it increasingly difficult to avoid obligations to kin and would often be expected to speak on behalf of their family or clan if one of its members appeared in court. The judicial system should as far as possible reflect the ethnic mix of the population, but a concerted policy of 'indigenisation' or 'Aboriginalisation' will not solve the problem of Aborigines within the criminal justice system, nor is it a form of recognition of Aboriginal customary laws.

## Conclusions and Implementation: The Way Forward?

838. ***The Search for Solutions***. While it is possible to draw up various models of justice mechanisms for Aboriginal communities, and to point to potential difficulties and shortcomings, it is not possible to predict the likely success of any of them. Certainly it has become clear that there is no one solution or straightforward answer to the question:

> to what extent Aboriginal communities should have the power to apply their customary law and practices in the punishment and rehabilitation of Aborigines.

To expect Aboriginal people to have worked out a coherent approach to reform is unrealistic. The only possible response to this aspect of the Commission's Terms of Reference is to present various options and to initiate, or further, the process of discussion and consultation with a view to the eventual introduction of agreed proposals. Whatever longer term solutions are arrived at in terms of Aboriginal control or autonomy, problems of law and order for Aborigines and their communities, their relationship with the general legal system and the resolution of customary law matters remain. It does appear that changes to the general legal system can be made to reduce its impact on Aborigines, at least to some extent. Suggestions which have been canvassed in this Part include:

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3205 Groote Eylandt Aboriginal Task Force, *Report*, Angurugu, 1985, 18.

3206 See also para 459, 536.

3207 RL Barsh, *Submission 410* (18 April 1984) 4. For a discussion of the Canadian situation see P Havemann, 'The Over-Involvement of Indigenous People with the Criminal Justice System: Questions about Problem "Solving"' in Hazlehurst (1985) 121; P Havemann, 'The Indigenisation of Social Control in Canada' in Commission on Folk Law and Legal Pluralism, *Papers of the Symposium on Folk Law and Legal Pluralism. Xlth International Congress of Anthropological and Ethnological Sciences Vancouver. Canada August 19-13, 1983*, Ottawa, vol 1, 350.

3208 For example Mr Stewart Murray regularly sits at the Fitzroy local court in Melbourne.

3209 One at Maningrida, the other at Angurugu.

- Provision of machinery to enable the creation of Aboriginal courts, but not a general system of such courts similar to the PNG Village Courts.[3210] Such courts if created should not be limited to dealing with customary law matters. They should only be established following detailed discussion and with the agreement of the local Aboriginal community (para 817). There would need to be adequate procedural safeguards in the operation of these courts (para 818).

- The Yirrkala Scheme and any similar scheme that emerges in the future (paras 820-32).

- Local conciliation or mediation panels (paras 833-4).

- Greater knowledge and understanding on the part of criminal justice professionals in their dealings with Aborigines (para 835).

- Improvements in Aboriginal/police relations and in particular the way in which Aboriginal communities are policed (paras 865-7).

Among these various options there can be no single preferred approach. The decision as to what are the most appropriate alternatives for Aboriginal communities mast rest with those communities. But assistance is likely to be required to ensure that Aboriginal groups and organisations are fully informed of the various options, to enable them to make an informed choice and to assist with questions of implementation.

839. ***A New Agency***? One way in which assistance might be given is to establish an agency, similar to the Secretariat which services the Papua New Guinea village courts. This Secretariat, established before the village courts came into existence, is responsible for overall planning, to explain the courts to the people and to train the village court magistrates. The Secretariat has the following functions:

> to extend the Village Courts system throughout the Nation where desired by the people, and ensure the effective and efficient operation of the system by monitoring the operation of the courts, co-ordinating, assisting in, and rationalising supervision and inspection, liaising with different departments, authorities and agencies, training Village Court Officials and support personnel, supplying advice and assistance where necessary, and providing general administrative services.[3211]

A similar agency could perhaps be established in Australia,[3212] but it would need to have a wider range of responsibilities, not limited to dealing with Aboriginal courts. Its task might involve liaison with Aboriginal communities, groups and organisations, supplying them with information and the resources to enable them to make a considered decision about justice mechanisms and other measures to overcome problems with the law. The agency could assist in drafting proposals, and with questions of implementation, although this would depend on the constitutional basis on which it was established. It could also have a continuing function of overseeing the various schemes established, considering modifications to existing schemes or the setting up of new ones. The Report of the South Australian Customary Law Committee on *Children and Authority in the North-West* recommended the establishment of a North-West Policy Bureau 'to provide the Government with policy advice and to review matters affecting the North-West without prejudicing Pitjantjatjara autonomy'. The Report suggested that the Bureau would have a number of functions which would include:

> [to] record and evaluate development, and where appropriate, co-ordinate proposals and initiatives as they emanate from Government (State and Commonwealth), semi-government and community sources.[3213]

840. ***Potential Dangers***. There are a number of disadvantages in establishing such an agency. The most important is that it may artificially create expectations or generate interest for schemes or proposals which are not genuinely sought or needed. Aboriginal communities may feel under some pressure to become involved in considering new proposals merely because such options are available. The agency would also

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3210 Given the significant restrictions on Commonwealth legislative involvement in this area (described in para 808), this would have to be done at State or Territory level.

3211 Village Courts Secretariat, *Annual Report*, Waigani, 1980, 10.

3212 As advocated by KM Hazlehurst, *Submission 496* (1 October 1985) 14-15, who commented on:
> the need to encourage initiatives nearer to the communities concerned. State and territory based agencies were seen to be better placed for the analysis and reconciliation of local variations and state laws, than a federal agency would be. A national organisation, however, could play a major role in initially defining and packaging model options for the agencies of each participating state and territory.

3213 *Children and Authority in the North-West* (1984) 75.

have to ensure that it did not take over decision-making responsibility or become just another arm of government dealing with Aborigines. There is the related difficulty that some Aborigines may be led to believe that the answers to their problems lay beyond their own societies, in the adoption of non-Aboriginal institutions and ways of doing things. Associate Professor Barsh, drawing on wide experience of indigenous peoples in the United States and Canada, counselled against the too ready acceptance of this approach:

> I am concerned by the number of communities that told the Commission they wanted uniformed police and real judges. That was exactly what was happening in the US in the 1920s, when Indian leaders began pressing for the right to have (what they perceived as) real governments. They were overawed by the *apparent* effectiveness of white institutions. After a generation, they found that white institutions weren't working well in their communities, and began blaming themselves for the failure ('we just don't know how to run a good government'). By the 1970s, tribes discovered that white institutions hadn't worked all that well in white society, either. By that time it was too late to undo much of the damage wrought by zealous law enforcement and the rise of a juridical-administrative elite. Similar problems are developing in Greenland. Inuit leaders seem intoxicated with the apparent sophistication and power of Danish institutions, and reproduce them anxiously.[3214]

Indigenous courts are almost invariably modelled on the general legal system or rather its lower echelons They may commence with flexible procedures, but they tend to become more formalised and legalistic. Perhaps this is inevitable. It certainly appears to have the effect of undermining customary laws and practices. Aborigines need to be fully aware of those dangers.

841. ***A Non-Government Approach***? An alternative approach to establishing a federal agency was put by Dr Coombs. He suggests that a body such as ANUTECH (a subsidiary of the Australian National University set up to carry out commissioned research) could be a point of first contact to provide advice to Aboriginal organisations about what information or resources are available and how access might be obtained. Some work would be done on a commercial basis but other work might be done by academics with a research interest in an area with only expenses being paid. Dr Coombs points out that the Australian Conservation Foundation has a comprehensive panel of experts who work in this way on environmental issues. He suggests the following structure'

> ABORIGINAL RESEARCH SERVICES
> *Board of Management* (Honorary)
> Composed of Aborigines with some research experience available in city where organisation is located. If Canberra, Aboriginal research managers of AIAS and NAC, NAILS, NAIHO.
>
> *Board of Advisers* (Honorary)
> Composed of academics with experience in fields of knowledge relevant to Aboriginal needs, law, organisation, health, archaeology, anthropology, land use, environmental and socio-economic impact studies.
>
> *Panel of consultants* (volunteers)
> Euro-Australian and Aboriginal academics and professionals etc. willing to make their services available on terms to be negotiated in individual cases — from free, expenses only to full commercial terms according to circumstances.
>
> *Executive Officer*
> Aboriginal with some organisational experience and knowledge of academic disciplines.[3215]

842. ***An Aboriginal Organisation***. For a number of years the Aboriginal legal services throughout Australia[3216] have sought the establishment of a small secretariat, preferably based in Canberra, as a general support facility. If such an agency did come into existence one of its responsibilities could be to assist communities to formulate proposals for new justice mechanisms within Aboriginal communities. Such an agency would have distinct advantages. It would be run and supported by Aboriginal people, and it would rely on the experience and expertise of Aboriginal legal services which have dealt exclusively with legal problems facing Aboriginal people, and which are situated in city, country and remote parts of Australia. They are thus in a unique position, with the capacity to take fully into account Aboriginal views about their problems and difficulties. In particular such a body could have as one of its responsibilities the monitoring of Aboriginal communities needs with respect to local justice issues. Mr JP Harkins in his *Inquiry into Aboriginal Legal Aid* made the following observation about a national secretariat for Aboriginal legal services:

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3214 RL Barsh, *Submission 410* (18 April 1984) 4.
3215 HC Coombs, *Submission 437* (31 July 1984).
3216 There are currently 19 Aboriginal Legal Services situated in all States and Territories. See (1985) 16 *ALB* 1-3.

> There are a number of respects in which ALSs could benefit from communication and coordinated action. The establishment of a national legal services organisation ... is one of several ways in which this might be achieved. A national conference, suggested elsewhere in this report, and bilateral arrangements on specific issues as they arise, are other means.[3217]

He concluded that improving the delivery of legal services to Aborigines in the States and Territories should be given higher priority than a national secretariat,[3218] and he did not consider whether the role outlined here would be a suitable one for such an agency. In the Commission's view, if an agency is needed to assist Aboriginal communities to assess appropriate community justice mechanisms, it should be an Aboriginal agency. Given that a National Aboriginal and Islanders Legal Services Secretariat (NAILSS) is already in existence, even if in fledging form, it seems sensible that it be utilised rather than creating any new structures or organisations.

843. ***Related Issues***. To a considerable degree the choice between differing methods of implementation depends on the wider issues of self-government and local autonomy outlined earlier in this Chapter.[3219] These questions, and related issues of implementation, will be discussed in Part VIII of this Report. It should also be noted that some of the purposes sought to be achieved by local justice mechanisms may be achieved in other, perhaps indirect, ways. A number of these are dealt with elsewhere in this Report, including the following:

- the introduction or reinforcement of procedures to allow community opinion on customary law and attitudes to offenders to be introduced in court (para 510-515)

- the diversion of certain cases from the courts to be dealt with by local Aboriginal communities (para 481-9)

- the enforcement of Aboriginal customary laws in the courts at least in some circumstances (para 461-465)

- the creation of a complete or partial defence based on Aboriginal customary laws (para 451-453)

- taking Aboriginal customary laws into account at the sentencing level in criminal cases (para 505-511).

3217 Inquiry into Aboriginal Legal Aid (JP Harkins) *Report*, vol 1, *General Issues*, AGPS, Canberra, 1985, 45.
3218 id, 47.
3219 See paras 809-10, 817.

# 32. Aborigines and the Police

## Introduction

844. ***The Range of Issues***. The previous Chapter outlined a range of options for local justice mechanisms for Aboriginal communities. One of these options was to make the general legal system more aware of the needs of Aboriginal people, and to take account of Aboriginal customary laws by administrative means. A key issue in seeking to achieve this is the role of the police. Any detailed discussion of Aborigines and the police must involve a whole range of matters, many of them beyond the scope of this Report. In this Chapter the discussion covers the following matters:

- policing of Aboriginal communities;
- the need for better communication between Aborigines and the police;
- the desirability of more Aborigines in police forces;
- police aide systems;
- self-policing;
- the training and selection of police;
- education for Aborigines; and
- alternative strategies.[3220]

845. ***Role of the Police***. A permanent, professional police force is an integral feature of each of the criminal justice systems operating in Australia. Given the over-representation of Aborigines within these systems the role of the police and the way in which they do their work are of critical importance. Aborigines are 'disproportionately ... involved in contact with police and therefore the potential of conflict is disproportionately higher'.[3221] The police are usually the most obvious participants in the criminal process, and may be viewed with resentment by the families and friends of Aborigines arrested and charged. Special problems arise for police when dealing with Aboriginal offenders, whether in small, remote communities or in the inner suburbs of capital cities. These problems are exacerbated by the range of public order offences which police enforce,[3222] and by the fact that much Aboriginal involvement with the criminal justice system is alcohol related.[3223] The frequent conflicts between Aborigines and the police are not conducive to good relations.[3224] Other factors responsible for the variable state of relations between Aborigines and the police include the socio-economic conditions in which many Aborigines live,[3225] the lack of specialized training and the (usually) short-term placement of police officers in Aboriginal communities, the multiplicity of functions which many police officers are required to perform,[3226] and unsympathetic attitudes towards police in some cases. For the most part, the police reflect the attitudes of the general public but because of their position in the community the police must be leaders in improving attitudes.

846. ***Different Policing Methods***. The requirements for policing Aboriginal communities throughout Australia vary greatly between urban areas, country towns and remoter areas, and different approaches are adopted in each State and Territory. For example officers of the Queensland Police are now stationed or regularly visit all Aboriginal trust areas (formerly reserves), but there is also a separate Aboriginal police

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3220 In addition to the works cited below on Aborigines and the Police, see KM Hazlehurst, *Aboriginal Policing: Principles and Practices*, Australian Institute of Criminology, Canberra, 1985; M James (ed) *Community Policing*, Australian Institute of Criminology, Seminar Proceedings No 4, Canberra, 1984.

3221 ALRC 9, *Complaints Against Police* (1978) 44, n 178.

3222 NSW Anti-Discrimination Board, *Study of Street Offences by Aborigines*, Sydney, 1982. See para 395.

3223 See para 436-7.

3224 cf the various factors discussed by Lyons as reasons for very different attitudes to the police in 3 localities: G Lyons, 'Aboriginal perceptions of courts and Police: a Victorian Study' (1983) 2 *Aust Ab Studies* 45, 58-9.

3225 See para 31.

3226 In addition to normal duties they may act as prosecutor in court, process server, bailiff, gaoler and clerk of court.

force, chosen from local residents and employed by the Department of Community Services, which performs certain policing functions.[3227] In Western Australia and the Northern Territory Aboriginal police aides with limited powers are employed by the Police Force in areas of high Aboriginal population. The South Australian Police have announced they will also establish a police aide scheme.[3228] In the north-west area of South Australia (Pitjantjatjara land) no police are based in any of the Aboriginal communities, but regular mobile patrols are carried out by the South Australian Police. In emergencies the police fly in. This may be contrasted with the Northern Territory where many Aboriginal communities have permanent police stations. Other communities largely police themselves, or are not of sufficient size to justify a police station; in those cases the State or Territory Police are only called in to deal with more serious matters or matters which cannot be dealt with locally. The range of approaches presently adopted must be kept in mind when considering the policing needs of Aborigines, and the many requests that have been made by Aboriginal communities for change.

847. ***Aboriginal Views***. The Commission has not received any requests from Aboriginal communities for the removal of police stationed in their communities, nor has there been any denial of the need for police. On the contrary some communities in the Northern Territory which have no permanent police station have sought one, and many Aborigines would strongly resist any attempts to restrict their access to the police.[3229] What many Aborigines seek, especially those living in separate communities, whether in remote areas or on the fringes of country towns, is a greater degree of control over what takes place within the community. A central aspect of this is policing. Community leaders wish to be informed of police patrols entering the community, of police being called to disturbances and of persons being arrested.[3230] Some have requested that the police only enter after receiving local permission. The Report of the Groote Eylandt Aboriginal Task Force recommended that:

> Prior to entering by the Police to an Aboriginal Community, the Community Council or one of its members, must be informed of the timing and purpose of the visit.[3231]

Such requirements must be balanced against the requirement that the police be able to carry out their work efficiently and impartially. Yet there does appear scope for better communication between police and local communities. Improved consultation with community leaders may have positive results. Small, especially remote, Aboriginal communities are not structured or run in the same way as a typical suburb of a city or country town. A number of different approaches could be taken to resolve this problem. One was suggested by Professor Kevin Ryan:

> The ordinary police must not be restrained from responding to calls when breaches of the law are alleged, though it would be appropriate for them to refuse to intervene except when they are asked to do so by the Aboriginal Council or when the matter is so serious that it should not be left to the Council to handle.[3232]

It may be helpful for guidelines to be drafted, in consultation with the communities involved, instructing police of procedures to be adopted in such situations.

848. ***Need for Regular Communication***. A crucial factor is regular communications between members of Aboriginal communities, and especially their leaders, and the police. This should occur whether police are locally based or not. Such communication may improve relations and assist both police and Aborigines to be kept informed on a continuing basis. In Canada, where many similar problems arise in policing Indian reserves, some police districts supply monthly and annual reports to local Indian Band Councils.[3233] This is one form of acknowledgment of the authority of Band Councils, and it may help to develop a better relationship of respect between the police and the Council. Another option that has been suggested is to

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3227 See para 730-1.

3228 National Police Working Party, *Submission 461* (13 November 1984).

3229 Warrabri Community (Rev Whitbourn), *Submission 269* (5 May 1981). The Groote Eylandt Aboriginal Task Force Report commented: 'the Task Force fully supports the need for a "professional" Police Force on Groote Eylandt'. Groote Eylandt Aboriginal Task Force, *Report*, Angurugu, 1985, 26.

3230 CAALAS (P Ditton), *Submission 308* (21 July 1981) 7. In NSW there are doubts over the scope of access by police fire brigades etc. to Aboriginal land under the Aboriginal Land Rights Act 1983 (NSW): National Police Working Party, *Submission 504* (31 January 1986).

3231 Groote Eylandt Aboriginal Task Force, *Report*, 1985, 28.

3232 K Ryan, *Submission 174* (15 September 1980).

3233 Supt HE Gillard, *Native Policing. A New Era*, Research Paper, RCMP (October 1979) 55. In addition many Indian bands hire and control their own police force (with training provided by the RCMP or provincial police forces). There are also regional Indian police forces in Quebec and Manitoba: BW Morse, *Submission 487* (15 August 1985) 4. For a review see P Havemann, K Couse, L Foster, R Matonovich, *Law and Order for Canada's Indigenous People 1984-7*, Solicitor-General of Canada, Ottawa, 1984, ch 2.

adjust the emphasis of policing within communities to one of prevention, rather than enforcement and detection (though this is easier said than done). Changes in attitudes of police to Aboriginal policing are also needed: this may require new curricula, especially at later stages of police training.[3234]

## Aborigines in the Police Force

849. ***'Them' and 'Us'***. One way that is often suggested to improve the policing of Aboriginal communities — and to improve the overall state of Aboriginal/police relations — is to increase the number of Aborigines in State and Territory police forces. One among a number of obstacles is the attitude that has developed of 'them' and 'us'. The involvement of Aborigines may, perhaps, change the view held by many Aborigines that the police discriminate against them. The rationale behind encouraging members of minority groups to join police forces has been expressed in the following terms with reference to United States Indians:

> First, it increases the likelihood that Indians will have a sense of linkage with the police department; they will feel that their views are represented. 'We just like to know that Indians are there — I've got a cousin there — that helps', is the way that one Indian person expressed it. Second, it is believed that an Indian policeman will have better understanding of other Indians because of their common background, and that, in turn, he or she will gain more respect and cooperation. Third, Indian officers can educate White officers so that they will become more adept in their dealings with Indians.[3235]

On the other hand it has been argued that this has little substance, and that once a person from a minority group in a heterogeneous setting becomes a policeman he or she is seen essentially as an agent of the majority group.[3236] An Aborigine deciding to join the police force runs the risk of being labelled an 'Uncle Tom'. Moreover the appointment whether through special recruitment procedures or otherwise — of a few minority group members at junior levels may have little or no impact on attitudes within the force or on policy. It may be, and be seen as, a form of tokenism.[3237]

850. ***Recruitment of Aborigines***. At present the number of Aborigines in State and Territory Police Forces is very low.[3238] Until very recently no State Police Force nor the Australian Federal Police had adopted special procedures to recruit Aborigines. The South Australian Police Force has stated that it encourages Aborigines and persons of other ethnic backgrounds to join the Police Force, but has no special provision for entry.[3239] The cadet scheme in the Northern Territory does however make particular attempts to recruit Aborigines. The aim of this scheme is to .provide sufficient training for Aborigines to enable them to graduate on equal terms with other recruits. When the scheme commenced in 1980 only four suitably qualified Aborigines applied, only two remained after six months (one left because he would not live away from his country)[3240] and none proceeded to graduation. Despite the special scheme, the Northern Territory Police find that it cannot compete for educated Aborigines against other prospective employers. A factor in this is the reluctance to join because of the fear of losing friends. The New South Wales Police has an Equal Employment Management Plan which provides for a target of 8 Aborigines, including two females, in a 12 month period. There are no special standards of entry. In the latter half of 1985, four Aborigines were recruited into the force.[3241]

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3234 On police training in this area see para 873-7.

3235 Cohen, Chappell & Wilson, 138.

3236 CHS Jayewardene, 'Policing the Indian' (1979-80) 7/8 *Crime and Justice* 42, 47 and references cited esp JD Banner and GM Wilt, 'Black Policemen: A Study of Self Images' (1973) 1 J *Police Sci Admin* 21.

3237 RB Sykes, 'Self Determination: Implications for Criminal Justice Policy Makers' in Hazlehurst (1985) 21, 27 criticizing 'plans to involve Blacks in powerless positions, who will still be expected to carry the full weight of responsibility for the success or failure of liaison-type projects'. See also L Roberts, *Submission 481* (29 May 1985) 2.

3238 The Commission was told that in South Australia in 1981 there were three: Sgt FW Warner, *Transcript of Public Hearings* Adelaide (17 March 1981) 80. In Victoria in 1980 there were four: Victorian Police, *Submission 186* (18 August 1980) 3. In 1983 in Queensland there was one Torres Strait Islander in the police force and one Aborigine in training, although others might not identify as Aborigines: Information supplied by the Qld Police (30 June 1983). In the Northern Territory in 1984 there were six Aborigines in the police force and one Aboriginal cadet: Information supplied by NT Police (10 February 1984). In New South Wales it has been estimated that there may be as many as 30 persons of Aboriginal descent in the police force but not all of those identify as Aborigines. Two Aborigines work as police officers in the Aboriginal Liaison Unit: Information supplied by Aboriginal Liaison Unit, NSW Police (2 February 1984).

3239 South Australian Police, *Submission 183* (July 1980).

3240 Northern Territory Police, *Submission 188* (23 September 1980).

3241 National Police Working Party, *Submission 504* (31 January 1986). The Police Aboriginal Liaison Unit in the NSW Police is active in recruiting in High Schools and consults regularly with local Aboriginal educational consultative groups and other local Aboriginal agencies. 'Work experience' is also provided for Aboriginal students.

851. ***Recruitment Policy***. While the attitude of Police Forces to the maintenance of entry standards is understandable, unless some greater flexibility is introduced no changes are likely to occur in the numbers of Aboriginal recruits. This is the United States experience:

> Recruitment of minorities into police forces in the United States has indicated that the process requires innovations in selection and training procedures. The American experience suggests that a recruitment campaign to increase the proportion of Aborigines on police forces should utilize redefined or modified selection criteria.[3242]

One suggestion is that while filling regular officer positions should be the principal objective, an intermediate step might be the recruitment of community officers who could proceed via training to become regular police officers.[3243]

852. ***Aboriginal Police Aides***. As a step towards greater Aboriginal participation within the police forces some States have introduced a system of Aboriginal police aides. These operate in varying forms in Western Australia, and the Northern Territory and are shortly to be introduced in South Australia. Queensland has its own system of Aboriginal Police which are not part of the Queensland Police Force.[3244] Other State Police Forces are not in favour of establishing police aides.

- *Western Australia*. Section 38A of the Police Act 1892 (WA) enables the Commissioner of Police to 'appoint aboriginal persons to be aboriginal aides'. An 'aboriginal aide' may be given the same powers, privileges, duties and obligations as any other constable (although this has not yet happened). Police aides are. town-based rather than community-based, and are generally situated in remote areas. The aides operate in conjunction with and under the supervision of the regular police. As well as on the job training, they attend special annual training courses. The powers of a member of the police force (including an 'aboriginal aide' pursuant to s 38A(3)) in relation to certain Aboriginal communities are increased by s 7(2) of the Aboriginal Communities Act 1979 (WA), which enables a community council to make by-laws giving special powers to a member of the police force.[3245] There is a promotion hierarchy, but there is no scope for an aide to become, in time, a regular member of the force. Despite this, the scheme has had relatively good retention rates.[3246] Police perceptions of the success of the Western Australian aide scheme are by no means shared by others,[3247] and there has been considerable resentment at the way aides have been deployed at times of high Aboriginal-police tension. There is concern that the aides become alienated from their own communities and do not carry out the liaison role envisaged for them.

- *Northern Territory*. Section 19 of the Police Administration Act 1978 (NT), which provides for the appointment of police aides, is in similar terms to s 38A of the Police Act 1892 (WA). The section provides that the Commissioner may 'appoint persons to be aides'. An aide so appointed has all the powers, privileges, duties and obligations of a constable, subject to any terms and conditions specified in the instrument of his appointment. The first police aides were recruited for coastal surveillance. The scheme was later extended to inland centres and the powers and responsibilities of aides increased. They are given special training over an 8 week period to explain their powers and common problems likely to confront them.[3248] In practice, police aides in the Northern Territory have limited powers of arrest of both Aboriginal and non-Aboriginal persons. However, the present practice is that a police aide with arrest powers does not work on his own. The authority of aides is extended with experience,

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3242 Cohen, Chappell & Wilson, 151.

3243 id, 152.

3244 See para 730-1.

3245 These include the power to:
- apprehend any person guilty of a breach of a by-law and remove them from community lands;
- remove any vehicle, animal or other thing from community lands;
- request the name and address of any person who it is believed is in breach of a by-law; and
- take proceedings for any breach of a by-law.

At present five Aboriginal communities come within the Act: see para 753.

3246 Information provided by the WA Police, May 1983. There are approximately 35 aides.

3247 Although it is proposed to extend the aide scheme to the Perth metropolitan area (and Cabinet approval for 12 new positions have been given) there has been resistance to an extension from some Aboriginal groups, until a proper assessment of the present scheme is carried out: L Roberts, *Submission 481* (29 May 1985) 2.

3248 There are currently 24 Aboriginal aides employed at 21 communities throughout the Northern Territory. Eleven aides are based at regular police stations.

but the main limitation on their powers stems from the fact that many cannot read or write.[3249] Retention rates are not particularly high.

- *Queensland*. Aboriginal police, now appointed pursuant to the Community Services (Aborigines) Act 1984 s 39, operate on each of the 14 Aboriginal reserves (trust areas) in Queensland. They have limited policing powers, restricted to a range of minor offences.[3250] No special training course exists for the Aboriginal police but they receive some on the job. training from officers of the Queensland Police stationed on the reserve. Most wear a uniform which makes them readily identifiable. In contrast with the police aides in Western Australia and the Northern Territory the Queensland Aboriginal police are not part of the Queensland Police Force. They are appointed by the local Aboriginal Council and paid by the Department of Community Services, though they are expected to work under the direction of the Queensland Police.

853. ***Arguments for Aboriginal Police Aides***. It has been suggested that an Aboriginal police aide system may be a means of improving Aboriginal-police relations, as well as a means of improving police methods as they affect Aborigines. An Aborigine carrying out policing responsibilities within the Aboriginal community in which he lives is — it is argued — more likely to understand the pressures, problems and underlying tensions. He is on the spot if trouble occurs, knows the histories of the people involved and hence is better able to determine an appropriate action. A police officer without that knowledge could unwittingly create further problems. A further argument is that an arrest of one Aborigine by another Aborigine may cause less resentment, and perhaps less loss of dignity, than if a white police officer was involved. The Commission received a number of submissions supporting the concept of Aboriginal police or police aides.[3251] The Mossman Gorge Aboriginal community in North Queensland submitted that they needed Aboriginal police or police aides to help the police protect law abiding families from lawless and drunken members of the community. It was thought that the appointment of police aides could help to calm fears about unfair treatment by the police, and help the police to gain more insight and understanding of problems at Mossman Gorge. At the Commission's Public Hearings held during March-May 1981, there was strong support in many communities for Aboriginal police. Views to this effect were expressed at Davenport reserve (Port Augusta, SA), Yandearra (WA), La Grange (WA), Derby (WA), One Arm Point (WA), Junjawa (Fitzroy Crossing, WA), Numbulwar (NT), Amata (SA) and Moree (NSW). In Queensland, communities visited which had Aboriginal police generally favoured their retention, although shortcomings with the Queensland system were mentioned, especially relating to the limited status and powers of the aides. Almost without exception communities which supported a system of Aboriginal police considered that an Aboriginal policeman should have the same status as a white policeman (including uniforms, badges and arrest powers), and should be able to work side by side with him rather than as a subordinate. An organised training program for Aboriginal police was considered essential.[3252] A submission from the Queensland Law Society[3253] asserted that proper training and remuneration for Aboriginal police officers could improve the high turnover rate on Queensland reserves, which, it was said, had led to abuses of power. The recent Groote Eylandt Aboriginal Task Force Report commented:

> The Task Force is firmly of the view that the introduction of a community located Aboriginal Police Aide system is a positive way to improve Aboriginal-Police relations as well as improving Police activities as they affect Aboriginals. The Task Force believes that Aboriginal Police Aides performing Police duties within an Aboriginal Community are more likely to understand the pressures, problems and underlying tensions of that community.[3254]

The Task Force went on to recommend two police aides be appointed to Umbakumba and four to Angurugu, the two Aboriginal communities on Groote Eylandt. But police aide schemes, especially where there is no avenue for promotion to the regular forces, tend to produce a group of 'second class police officers', with

3249 Northern Territory Police, *Submission 188* (23 September 1980).
3250 See para 730-1.
3251 J Doolan, *Submission 94* (28 September 1978); H Middleton, *Submission 105* (8 November 1978); Mossman Gorge Community, Qld, *Submission 172* (6 May 1981).
3252 National Aboriginal Conference, Queensland State Branch, *Policy Directions 1985*, 42.
3253 W Goss & B Harrison, *Submission 273* (7 May 1981); Qld Law Society, *Submission 221* (22 June 1981). See also W Goss & B Harrison, *Transcript*, Brisbane (7 May 1981) 2398-2416.
3254 Groote Eylandt Aboriginal Task Force, *Report* (1985) 30.

limited responsibility for local policing but with no opportunity to influence the policing of Aboriginal communities in any more fundamental way.[3255]

854. ***Promotion for Aboriginal Police Aides***. A major shortcoming with existing police aide schemes is that there is no facility for progression to police constable. Experience and on-the-job training cannot overcome the educational bar which prevents most Aborigines from being eligible to join police forces.[3256] One option would be to consider expanding the entry requirements for the police forces so that, for example, working as a police aide for a period of time could provide an alternative method of entry. But sufficient standards of education and literacy are essential for police work, so that remedial education programs are likely to be necessary to assist police aides in meeting the standards required.[3257]

855. ***Aboriginal Police and Kinship***. A particular problem which arises for Aboriginal police and police aides, especially those working among more traditional Aborigines, relates to the kinship system and the avoidance relationships which form part of it. An Aboriginal policeman expected to arrest a relative can become caught between two worlds, making it difficult or impossible to fulfil both his tribal obligation and his role as a police officer.[3258] Resistance to local pressures could lower his status as member of the group and make him a target of hostility or resentment because of his powers as a police aide. The creation of Aboriginal police aides may conversely introduce a new authority within a community and unwittingly have the effect of eroding Aboriginal traditions and law.[3259] In some communities inter-clan hostilities can arise when an Aboriginal policeman from one clan has to arrest a member of another clan.[3260] On some Aboriginal reserves in Queensland this problem has been overcome to some extent by appointing an Aboriginal policeman from each of the clans or tribal groupings.[3261] During the Commission's Public Hearings problems for Aboriginal policemen resulting from kinship obligations were mentioned in several communities including Bardi (One Arm Point, WA), Bayulu (Fitzroy Crossing, WA), Yuendumu (NT), Doomadgee (Qld), Aurukun (Qld) and Palm Island (Qld). In some places it was regarded as a bar to the successful operation of an Aboriginal police force. One possibility is for Aboriginal policemen to be posted to areas other than their tribal area[3262] in order to avoid kinship obligations. But affinity to one's own home land is a major obstacle with such proposals. Lacking knowledge of the local language and in danger of being ostracised, the task of an Aboriginal police aide in such cases may be difficult or impossible. It would also run counter to an often expressed rationale for police aide schemes, that they provide local knowledge and understanding of underlying tensions within communities, and allow for policing to be carried on with a greater level of local acceptance.

856. ***Aboriginal Police Exercising Arrest Powers***. Related to the difficulties for Aboriginal police or police aides with kinship is that of arresting a person where some form of physical contact is required. This problem was specifically noted in. a recent report of the South Australian Aboriginal Customary Law Committee:

> there is locked deep in the Pitjantjatjara system of values an unthinkableness about aggressively seizing another person. Each individual is autonomous, aristocractic and inviolate. For one adult to denigrate, publicly challenge, or to lay hold of another either directly or through kinsman, therefore constitutes an offence. Serious consequences will almost inevitably follow; and if people are drunk, these can be widespread and catastrophic.[3263]

Clearly this makes it very difficult for some Aborigines to carry out an autonomous policing function.

857. ***The Need for Local Support***. Some of the problems confronting Aboriginal police may be overcome if they receive the support of the local elders or community council. If the local authority structure is ignored and the Aboriginal policeman is solely responsible to the Police Commissioner (or, as in Queensland, a Government Department) the Aboriginal aide may be regarded merely as an addition — often, a 'second

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3255 cf Sykes (1985) 21, 27: 'If the Black community continues to be offered bottom-of-the-ladder types of involvement, such as police aides or "advisors" to the courts whose advice is not necessarily taken, then the criminal justice system will not get the type of changes which it appears to seek'.

3256 In addition there may be a maximum age requirement, so that service as an aide may in one respect actually disqualify a person from becoming a member of the force.

3257 See para 850.

3258 C McDonald, *Submission 130* (28 August 1979); Craig, 57 n 149. South Australian Aboriginal Customary Law Committee (Chairman: Judge JM Lewis), *Children and Authority in the North-West,* Adelaide, 1984, 56.

3259 G Blitner, *Submission 92* (25 August 1978).

3260 J Doolan, *Submission 94* (28 September 1978).

3261 J MacDonald, 'The Police and the Reserve Aborigine in Queensland' (1978) 32 *Australian Police Journal* 21, 23.

3262 The Commission has been told of one successful example of this in a community in Cape York, Qld.

3263 *Children and Authority in the North-West* (1984) 43.

class' addition — to the ordinary police system. Community support is thus essential.[3264] Without clear and reliable local support, and without a clear perception, on the part both of the local Aboriginal community and of the police, of the role police aides should play, no system of Aboriginal police or police aides should be introduced. Another problem is that they may well cut across existing policing methods developed to suit particular needs. These include 'community wardens' and other forms of self-policing.

## Community Wardens and other Forms of Self-Policing

858. ***South Australian Wardens***. Several Aboriginal communities in the north-west of South Australia (including Amata, Ernabella, Fregon, Indulkana and Mimili) and Yalata in the west of the State have for some time used a system of Aboriginal wardens.[3265] Initially 20 persons were appointed and trained by the Police and the Department of Technical and Further Education for the Pitjantjatjara area and 10 for the Yalata community.[3266] A further 30 warders were appointed and trained in June 1985.[3267] The system is not established nor regulated by legislation. Wardens are employed and controlled by the Community Councils and carry out an internal security role. Other functions include liaison between the community and visiting police. (Emergencies apart, South Australian Police are able to visit communities only weekly.) The wardens have no official uniform but in some cases wear khaki trousers and shirt (similar to uniforms worn by South Australian police in the outback) and have made their own badges. Some communities have requested an improved status for their wardens, which they consider would come from giving them proper training, uniforms, badges and greater powers (of arrest etc.).[3268] It has been suggested that, at least if established by local initiative, such a status might free the warden from the kin relationships which, as discussed already, create real problems in many communities. Thus a warden in uniform and on duty might come to be regarded as exempt from kin obligations.[3269] The warden system, which was an Aboriginal initiative, has been operating with some success for several years. However the South Australian Police Force has decided to introduce a system of police aides to replace it.[3270] It has been proposed that the Aide Scheme operate for a trial period of three years in Port Augusta, Amata, Indulkana, Fregon and Ernabella. The aim of the scheme is to enable specially trained Aborigines, working within their own communities, to assist the police to provide a police service which is suitable to the community.[3271] The South Australian Customary Law Committee opposed this change, principally because of the practical' difficulties in making such a system work, difficulties referred to in paras 855 and 856. The Committee preferred improvements to the existing warden system and mobile policing by the South Australian Police. In its view:

> the South Australian approach, of mobile policing, does not raise the problems of an accommodation of a police culture to Aboriginal culture as might be posed by the establishment of residential arrangements.[3272]

859. ***Council-employed Peace Officers***. Other Aboriginal communities have sought to employ a local peace officer, similar to the wardens in South Australia. The Gurindji Community Council (NT) has advocated the appointment of a member of their community, chosen and dismissable by the Council, as a local policeman. He should be a member of the Council, be given proper training and a uniform, and would have the power to arrest, and if necessary lock-up overnight, local residents who commit offences on Gurindji land. The value of training and in particular a uniform was mentioned as creating an environment whereby the nominated person would be considered exempt from kin obligations. Gurindji women considered there would be benefits in having an Aboriginal policewoman as well as a policeman.[3273] At Roper River (NT) the Council at various times has employed what are called security men to help police the community. These men, who have a uniform, are representative of the four different skin groups. There are also white police stationed at

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3264 For an example of problems arising from non-consultation: D Grey, M Stracke *Transcript*, Broome (25 March 1981) 497, 508-9.

3265 The number of wardens employed at the time of the Public Hearing was: Amata (2), Ernabella (3), Idulkana (2), Mimili (1) and Fregon (2): D Vachon, *Transcript*, Amata (14 April 1981) 1422.

3266 Of the 10 appointed for Yalata only 4 still remain.

3267 National Police Working Party, *Submission 504* (31 January 1986).

3268 J Tregenza, *Transcript* Amata (14 April 1981) 1433, 1437, 1439.

3269 In a community where kinship ties are strong it is however very doubtful whether such an arrangement would work as L Roberts, *Submission 481* (29 May 1985) 3 pointed out.

3270 SA Police Department, *Police/Aboriginal Relations in South Australia*, Adelaide, 1985; See also M Pathe, 'Police/Aboriginal Relations in South Australia' in Hazlehurst (1985) 41, 44-6. See also the Police Regulation Act Amendment Act 1985 (SA) s 35 dealing with the duties and powers of special constables.

3271 SA Police Department (1985) para 5.7.1.

3272 *Children and Authority in the North-West* (1984) 49. See also D Hope, 'Aboriginal Policing in South Australia. The Problem and the Potential' (Paper delivered at ANZAAS Conference, August, 1985).

3273 H Middleton, *Submission 105* (8 November 1978).

Roper River. The Lajamanu Council (Hooker Creek, NT) has also at times employed four 'nightwatchmen' as a supplement to the police. They are mainly older men who patrol the community each night. If offenders are found they are often dealt with summarily. The council and elders later decide if the police should be notified so that they may also pursue the matter. The development of the night patrol was a community initiative to reduce the very high level of disturbances and offending. It is apparently accepted by the members of the community.[3274] There is still support in some Aboriginal communities for night watchmen, especially among Aboriginal women.[3275]

860. ***Policing by Council Members***. At Beswick Station (NT) the elected council performs a policing role. The Council relies on family leaders to help it. If trouble erupts a council member will request a member of the trouble-maker's family to assist. Specific incidents or matters of continuing concern are raised at Council meetings and families requested to keep their members in order.[3276] The council is happy with the way this system operates and does not see any need for police aides. Other views expressed at the Commission's Public Hearings supported this method of policing because it prevented people becoming resentful at a single person being given what were seen as arbitrary police powers.[3277]

861. ***The 'Ten-Man Committee'***. The involvement of the 'Ten-Man Committee' at the Strelley Community (WA) has already been described.[3278] Its role can extend to picking up offenders in Port Hedland and throughout the Pilbara, with the knowledge and support of the local police: those returned to Strelley by the committee are dealt with by the community at a public meeting. According to the local police the system works successfully.[3279] Apparently a similar committee operates at Noonkanbah (in the Kimberley area of Western Australia).

862. ***Self-Policing in Urban Areas***. A system of self-policing first began operating unofficially among Aboriginal residents of Redfern in Sydney in April 1980. Two Aboriginal men were appointed as community liaison officers by the Aboriginal Housing Company to patrol the area and assist in local law and order. As a result of lack of funds the system lapsed after six months. It was reactivated in April 1983 as an 'official' system with funding provided. Initially two community liaison officers were appointed but this was later increased to four. Their principal function was to control behaviour involving vandalism and disruptive behaviour on Housing Company property. To this end they liaised regularly with the local police and with the Police Aborigine Liaison Unit, a special unit in the New South Wales Police Force. The four liaison officers were identifiable clothing and carried ID cards. They generally worked shifts between 7 am and 2 am. From time to time the Housing Company notified its tenants in the area of particular matters which the community liaison officers would be giving special attention: for example drinking in the streets, loud music, smashing bottles, dumping rubbish and card schools.[3280] Apparently the system worked well and there was a marked improvement in local law and order.[3281] The Housing Company has temporarily discontinued the scheme although efforts are being made to resurrect it.

863. ***Advantages and Disadvantages of Self-Policing***. Self-policing has advantages both for communities and the State and Territory police forces. Communities are able to deal with trouble-makers in a more flexible manner which may be more appropriate to the circumstances, as well as more in accord with local customary laws. There may be as a result a de facto discretion to determine whether an apparent infringement of the criminal law should result in the police being called in and the matter pursued through the courts, or whether the matter can be dealt with locally. From the police viewpoint, self-policing can reduce the demands made upon them to service remote communities either with a permanent police presence or by regular visits. Police officers are understandably reluctant to live, with or without families, in remote localities. There may be no sufficient need for police in many smaller communities. Self-policing may reduce the overall demand on limited police resources, enabling a more efficient network of police services to be established. It may also, as the Redfern scheme demonstrated, be of value in urban areas. But of course

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3274 NAALAS (KM Curnow), *Submission 191* (4 February 1981). See also M Luther, *Transcript* Alice Springs (13 April 1981) 1295-6; *Northern Territory News* (25 July 1981).
3275 eg Yirrkala. Information given during a visit to Yirrkala (M Fisher and P Hennessy) 17 October 1985.
3276 T Lewis, *Transcript* Darwin (3 April 1981) 895.
3277 S Hawke, *Transcript* Fitzroy Crossing (1 April 1981) 806.
3278 See para 715.
3279 National Police Working Party, *Submission 504* (31 January 1986).
3280 Information supplied by Senior Sgt WJ Galvin, Officer-in-Charge, Aborigine-Police Liaison Unit, NSW Police and R Pacey, Aboriginal Housing Company Redfern, 14 August 1984.
3281 National Police Working Party, *Submission 461* (13 November 1984) 5.

it has its disadvantages, including the risk of unreliable provision of services, and the danger of partiality. Self-policing can also present real dilemmas, as the New South Wales Police pointed out.[3282] Some Aboriginal communities prefer to settle their own disputes and if police are called, their presence is resented. But, if the police are called and do not attend, there are likely to be complaints that the police are not doing their job or are discriminating against Aborigines.

864. ***A New South Wales Pilot Scheme***. The New South Wales Police are presently attempting to create, as a pilot scheme, the position of Aboriginal Assistant to the Police. The aim of the scheme is to create better communications between the Aboriginal community and the Police. The person appointed as Aboriginal Assistant would not be carrying out a policing function, such as police aides do, and would not wear a uniform. Persons chosen would have to be acceptable to both the Aboriginal community and the Police.[3283]

## Policing Aboriginal Communities: Conclusions

865. ***Aboriginal Police***. Increasing the number of Aborigines in the police forces of the States and Territories, and extending the systems of Aboriginal police aides, may help solve some of these problems. But it 'will not constitute a general solution and may in some cases be wholly inappropriate. There must be careful consideration and consultation on the question of appointing Aborigines to perform a policing role within Aboriginal communities, especially traditionally oriented ones. A formal system of police aides is not necessarily the solution, and in any event the major criticisms of police aide schemes, referred to already, need to be addressed.[3284] Where aide schemes are introduced they should be subject to periodic review, and should not be continued after the point where existing aides and new potential recruits can be incorporated in the regular force.

866. ***Self-Policing***. Some degree of self-policing of Aboriginal communities as an alternative to a permanent police presence may often be feasible, and may be the only solution in some cases. It can result in a more efficient allocation of police resources while allowing communities to manage their own affairs to a greater extent. It appears to have worked with some success in the north-west of South Australia[3285] and in various places in Western Australia and the Northern Territory. This does not mean that such a system can only operate in the absence of police. It could be a useful adjunct to the existing police network and result in improved policing and better Aboriginal/police relations, including in urban areas. The methods of self-policing available will vary depending on community needs and aspirations. Consultation is essential to ensure that the appropriate balance is reached. There is no single solution to the policing of Aboriginal communities. Police forces throughout Australia need to examine carefully the policing needs of Aborigines, to discuss these with Aboriginal communities and to be flexible and innovative in seeking solutions.

867. ***Alternative Policing Strategies***. To this end, improvements may be possible through the adoption of alternative policing strategies. Some of these strategies have been tried in other countries, and they may well be worth adapting to Australian conditions:

- *Decentralisation.* One possibility, at least in urban areas or the larger towns, involves decentralising the structure of policing so that 'officers develop a relatively enduring and multifaceted relationship with a manageable and definite area'.[3286] There has been some degree of success with this approach in the United States. The concept of neighbourhood policing in which 'officers live in the community and participate in community life'[3287] is one version of this approach.

- *Team Policing.* In some cities in New Zealand (principally Auckland) a system has developed of team policing. J squads, as they are called, consist of Maori officers, social workers and clergymen. They patrol areas with large Maori populations and have played an important role in defusing tensions and dealing with juveniles.

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3282 See also WT Galvin, 'Bridging the Gap: Practical Application and Obstacles to Change and Cooperation, New South Wales', in Hazlehurst (1985) 47.

3283 ibid.

3284 The new SA scheme proposes that the aides will 'not be at the bottom rung of police hierarchy. They will be experts in their own right, who will be paid accordingly': Pathe (1985) 41, 45 (emphasis in original).

3285 Although opinions on this point differ: see para 858.

3286 F Cohen, D Chappell & P Wilson, 'Aboriginal and American Indian relations with police' in D Chappell and P Wilson (ed) *The Australian Criminal Justice System,* 2nd edn, Butterworths, Sydney, 1977, 152.

3287 id, 152-3.

- *Watchdog Systems.* This system encourages residents in high conflict areas to observe police conduct to ensure that they do their job properly and comply with proper procedures. The aim would be to ensure that the police, knowing that their conduct is being observed and will be reported on will make a commitment to improving the way they deal with Aborigines. It has been suggested that such schemes 'alert police to native viewpoints and concerns, limit the range of police behaviour and possibly also decrease arrests'.[3288]

- *Decriminalisation of Certain Minor Offences,* One way of reducing the conflicts between Aborigines and the police is by reducing the opportunities for conflict to occur. Decriminalising a range of public order offences may be one way of achieving this. Public drunkenness is no longer an offence in New South Wales, South Australia and the Northern Territory and there are strong arguments for a similar approach to be adopted in other States.[3289] Other minor public offences could also be considered for repeal. This could lead to fewer arrests for minor and trivial infractions and a consequent reduction in Aboriginal involvement in the criminal justice system.

## Other Policing Problems

868. ***Aboriginal/Police Relations***. The Commission has received a number of submissions giving examples of poor relations with the police. These range from misunderstandings due to the lack of police understanding of Aboriginal society through to the abuse of police power and authority. They come from both city and country areas. The House of Representatives Committee Report into Aboriginal Legal Aid found:

> There is evidence, however, that harassment, discrimination, maltreatment and abuse of legal rights by police are still widespread and that in many areas Aboriginal/police relations are characterised by distrust and tension, if not open conflict and hostility.[3290]

While there are recurring conflicts between Aborigines and police, attempts at improving Aboriginal/police relations are being made in some States.

869. ***Regular Meetings between Aborigines and Police***. In at least four States regular liaison schemes of some kind exist:

- *South Australia*. In South Australia, an Aboriginal/Police Liaison Committee, initiated in 1972 and including representatives of Aboriginal organisations,[3291] the South Australian Police and Commonwealth and State Government Departments, meets monthly, alternating between police headquarters and the Aboriginal Community Centre in Adelaide, to discuss matters of concern between Aboriginal organisations and the police.[3292] On a regional basis the 'Central Yorke Peninsula Liaison Committee' which operates in an area with a high Aboriginal population has apparently been successful in improving police/community relations. There is Aboriginal representation on the Committee, which does not deal only with Aboriginal-related problems but with general community concerns.[3293] In addition to these Committees, certain officers in the South Australian Police Force have specific responsibility in the area of Aboriginal/police relations. The Officer-in-Charge of the Community Affairs and Crime Prevention holds the position of Police/Aboriginal Liaison Officer and represents the Commissioner in police/Aboriginal affairs throughout the State. A senior sergeant occupies the position of Police/Aboriginal Field Liaison Officer, and 13 District Liaison Officers have similar responsibility within each police district.

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3288 id, 151.

3289 See SJ Egger, A Cornish & H Heilpern, 'Public drunkenness: a Case History in Decriminalisation', in M Findlay, SJ Egger & J Sutton (ed) *Issues in Criminal Justice Administration* George Allen & Unwin, Sydney, 1983, 29; T Milne, 'Aborigines and the criminal justice system' in Findlay, Egger & Sutton (1983) 184, 193-9.

3290 House of Representatives Standing Committee on Aboriginal Affairs, *Report on Aboriginal Legal Aid*, AGPS, Canberra, 1980, 72. See also M Mansell, 'Police/Aboriginal Relations: A Tasmanian Perspective' in Swanton (1984) 112. The Groote Eylandt Task Force Report which lists a number of alleged complaints against the Police, treated them as isolated incidents rather than a general pattern: *Report* (1985) 25-8. See also Pathe (1985) 41: Galvin (1985) 47: L Roberts, 'Current Developments in Aboriginal/Police Relations in Western Australia' in Hazlehurst (1985) 153.

3291 In particular the Aboriginal Legal Rights Movement.

3292 South Australian Police, *Submission 183* (July 1980) 3.

3293 O Bevan, 'Aborigines and Police — Hostility, Harmony or Hopelessness' in Swanton (1984) 108-9. See also Pathe (1985) 41.

- *Western Australia*. In Western Australia a Special Cabinet Committee on Aboriginal/Police Relations was established in 1976, following the Skull Creek incident, the subject of the 1975/6 Laverton Royal Commission.[3294] The Committee includes representatives of the Aboriginal Legal Service of Western Australia, the Aboriginal Affairs Planning Authority (WA), the Department of Community Welfare and Education, Aboriginal organizations and the Police Department. The Committee has recently been renamed the Special Cabinet Committee on Aboriginal/Police and Community Relations and its membership and functions expanded. These changes were introduced in 1984 as a result of concern about Aboriginal/Police relations after the death of an Aboriginal man, John Pat, in police custody. There is now a full-time secretary/research officer and a Statewide liaison structure is being set up. On a pilot basis a regional liaison committee has been set up in the goldfields (Kalgoorlie) area of the State. There are 11 members of the Regional Committee, 6 of whom are Aboriginal. The Committee meets monthly and its minutes are sent to the Minister for Police. It visits outlying towns within the area either by invitation or on its own initiative and conducts some of its own research. Active work is being done to expand the scheme to other areas of Western Australia.[3295]

- *Victoria*. An interim community liaison committee was established late in 1983 in an endeavour to improve relations with the police in the Fitzroy area of Melbourne. Various community groups as well as representatives of Aboriginal organizations constitute the committee. It is proposed that this group be set up on a more permanent basis.[3296]

- *New South Wales*. An Aboriginal Liaison Unit was set up in 1981 and there are now ten officers who work full time on Aboriginal/police relations. These officers travel regularly throughout the State consulting with Aboriginal leaders and organisations about local policing needs and attempting to resolve local problems that may have developed between Aborigines and the police. The Unit does not, however, receive complaints against police. Other functions of the Unit include training and instructing other members of the force about Aboriginal culture and lifestyle, attending schools to discuss police issues in Aboriginal areas, .attending community meetings and developing a resource centre for police information.[3297] In addition local police and Aborigines participate in community committees that have been set up in some New South Wales towns with large Aboriginal populations.

- *Queensland*. In Queensland where there is no formal scheme, meetings are held from time to time by senior police officers and Aboriginal representatives. There are two Aboriginal Liaison Officers, one stationed in Cairns and the other in Brisbane.[3298] Representatives of the local Aboriginal community also assist police training by giving lectures at. the Police Academy and the Police College.

870. ***Effectiveness of Existing Liaison Schemes***. The success of current liaison systems is difficult to evaluate. Much may often be achieved merely by airing grievances or making both parties aware of particular problems. The South Australian Aboriginal/Police Liaison Committee can point to achievements such as the formulation of Police Circular No 354[3299] which sets out instructions for police when interrogating Aborigines, including a requirement to notify on request the Aboriginal Legal Rights Movement. Field Officers employed by the Service have been given special status by the police department. They are issued with identification cards which the police recognise and they are accorded the same facilities made available to solicitors and prisoner's relatives. Sergeant Frank Warner, a former field officer for Aboriginal/Police Liaison in the South Australian Police Force, considered the Committee to be a success:

> Its effectiveness ... ebbs and flows like all these things, perhaps depending at times on continuity of members ... It is however, we feel an important thing to retain; it does give Aboriginal people from any organisation an avenue to police administration.[3300]

On the other hand Mr Garry Hiskey, formerly Senior Solicitor with the Aboriginal Legal Rights Movement, stated that police representatives did not regard the Committee as an appropriate forum for the airing or

3294 Established in 1975 to investigate certain incidents between Aborigines and the police in the Laverton area of WA.
3295 See Roberts (1985) 53. See also Special Cabinet Committee on Aboriginal/Police Relations *Report to the Minister for Police*, July 1984.
3296 *Police Life*, Melbourne, September 1984, 161.
3297 Information supplied by Senior Sergeant W Galvin, Officer in Charge of Aboriginal Liaison Unit, NSW Police, July 1984.
3298 National Police Working Party, *Submission 504* (31 January 1986).
3299 para 555.
3300 F Warner, *Transcript* Adelaide (17 March 1981) 77-8.

solution of complaints, whereas Aboriginal people regarded this as its primary function. He pleaded for the police to become more flexible and less technical regarding the matters raised at the Committee Meetings.[3301]

871. ***Views Expressed at Public Hearings***. Strong support for Aboriginal/Police Liaison Committees as a way of improving relations was expressed at the Public Hearings.[3302] There was much interest in the South Australian model. At a hearing in the Kimberley region of Western Australia the view was expressed that committees would need to be established on a regional basis. Aboriginal people living in the area saw no relevance for themselves of a committee established in Perth.[3303] This proposal has since been implemented and as mentioned in paragraph 869 a regional committee has been established at Kalgoorlie. In Cairns the view was expressed that a liaison committee was worth trying provided the police representative was someone in a position of power, such as a Superintendent or the Inspector for the region.[3304] Mr Paul Coe, President of the Redfern Legal Service was in favour of establishing a liaison committee in New South Wales as a means of resolving tensions between Aborigines and the police provided the Aboriginal representatives on the Committee were able to meet with the police as equals.[3305]

872. ***Conclusions on Liaison Committees***. Regular contact between Aboriginal organisations and State and Territory police forces to enable discussion on matters of mutual concern is a simple and straight-forward way to attempt to resolve conflicts and tensions as they arise. It will not solve all problems, but the widespread support for the idea expressed to the Commission indicates its potential value. Different mechanisms may be appropriate in different areas. A more formal system may be required in the capital cities than in country towns and in remoter areas, but the important thing is communication and the potential for achieving real change. Meetings between Aboriginal groups and the police must be more than merely an opportunity to publicly state concerns already well known to both sides. Detailed, particular discussions must be possible:

> The danger of merely 'opening the lines of communication' is that it may present a facade of improvement while bona fide changes fail to occur. Thus, the communication must have a purpose; the forums should have real power to institute desired changes.[3306]

## Police Training and Selection

873. ***Lack of Understanding***. It is often suggested that one way of improving relations between Aborigines and the police is by improving the understanding by each group of the other. On the Aboriginal side there is often little comprehension of the role, function and methods of the police. Most Police, on the other hand, have little or no understanding of the culture, language, and world-view of Aborigines. During the Commission's Public Hearings many witnesses both in urban and remote areas mentioned problems that resulted from this lack of understanding and argued that better training and education for police officers could improve the situation.[3307]

874. ***Existing Police Training***. The extent of instruction in Aboriginal culture during police training varies greatly in the State and Territory police forces. In the Northern Territory, specific instruction to enable a police officer to work among Aborigines is the largest single component of the 20 week induction course.[3308] In addition, a police officer appointed to an Aboriginal town or settlement is counselled by Divisional Officers before taking up duties and, if necessary, arrangements are made for the Department of Aboriginal Affairs field officer for the area to discuss matters with him. In South Australia cadet training has recently been revised. Cadets now attend a one day workshop at the Aboriginal Studies and Teacher Education Centre at the South Australian College of Advanced Education which is aimed at

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3301 G Hiskey, *Transcript* Adelaide (17 March 1981) 109.

3302 eg S Vose, *Transcript* Port Hedland (24 March 1981) 392-3; P Roe, M Stracke, *Transcript* Broome (25 March 1981) 507; M McMahon, *Transcript* Broome (25 March 1981) 527; A Assan, D Johnson, Mrs Canendo, *Transcript* Mt Isa (23 April 1981) 1640-1: E Mabo, *Transcript* Townsville (5 May 1981) 2228; M Friday, *Transcript* Townsville (5 May 1981) 2255.

3303 F Chulung, *Transcript* Fitzroy Crossing (31 March 1981), 775.

3304 M Miller, *Transcript* Cairns (5 May 1981) 2178.

3305 P Coe, *Transcript* Sydney (15 May 1981) 2629.

3306 Cohen, Chappell and Wilson, 151.

3307 E Bruen, *Transcript* Perth (20 March 1981) 275; L Turner *Transcript* Yuendumu (16 April 1981) 1845; A Hills, *Transcript* Mornington Island (25 April 1981) 1809; G McIntyre, *Transcript* Cairns (5 May 1981) 2200a; R Willie *Transcript* Rockhampton (6 May 1981) 2357. Groote Eylandt Aboriginal Task Force, *Report 1985*, 27-28.

3308 Northern Territory Police, *Submission 188* (23 September 1980), *Submission 216* (19 February 1981).

A. Providing students with positive and critical knowledge of the cross-cultural world shared by Aborigines and other Australians;

B. Assisting students to develop positive attitudes and correct manners within this environment.[3309]

The South Australian Police Force has also encouraged officers to undertake additional studies. Officers have attended courses in Ethno-Science at the Torrens College of Advanced Education and a number have done short courses in Pitjantjatjara language studies.[3310] A suggestion for improving police training was made by Superintendent Owen Bevan, Officer in Charge of the Community Affairs and Information Service Section of the South Australian Police Force. He advocated the training of police specialists who would play a specific role in Aboriginal policing:

> In States where there are significant populations of Aborigines living in tribal or semi-tribal circumstances such police specialists could perhaps be given the opportunity to actually live among these people for a time ... Specialist officers might live and work for a nominated period in [the Pitjantjatjara] lands in an 'attachment' type role with a set of broad objectives ...[3311]

These objectives might include an understanding of Aboriginal culture and ways of life, assisting police to gain the confidence of Aborigines and to develop possible solutions to policing problems. In Queensland there is a one day seminar during initial training in which each new group of trainees is required to participate. The seminars involve the short, formal presentation of material followed by general discussion between the police and other participants. The seminars are open to any Aboriginal person who wishes to participate. The Aboriginal community provides the speakers and it is left up to individual speakers as to what they say. The view of the Queensland police is that the seminars have proved far more successful than other means that have been tried (e.g. formal lectures on Aboriginal cultures).[3312] It was said that it had also opened up communication between police and the Aboriginal community. The Queensland police training also includes a course in human relations and there is additional input on Aboriginal issues during in-service training. In New South Wales, there is a special consultant (Community Liaison Officer) in the Department of Aboriginal Affairs (Cth) who visits all levels of Police In-Service training to lecture on Aboriginal cultural issues. Officers in the Aboriginal Liaison Unit and other Aboriginal guest lecturers also attend to give lectures.[3313] In Victoria and Tasmania there is little direct instruction on Aboriginal culture and ways of life during police training. In Victoria in 1980, four lectures were devoted to ethnic groups during the 20 weeks of basic training.[3314]

875. ***Previous Recommendations for Improving Police Training***. The lack of police training in Aboriginal affairs was the subject of specific comment in the Report of the Laverton Royal Commission which investigated a number of incidents between Aborigines and the police in Western Australia in 1974 and 1975. It recommended:

- that a unit to be established within the police department capable of giving expert and intensive instruction in Aboriginal society and culture and the economic and social problems Aborigines commonly face;
- that a small committee or council be established consisting of say two police officers nominated by the Commissioner and a like number each of Aborigines and outside experts to advise the Commissioner on all aspects of the training programme;
- that suitably qualified Aborigines should play a part in any training programmes that may be introduced in the police department.[3315]

A small specialist Aboriginal Liaison Unit headed by a Chief Inspector was set up as a result of these recommendations. Officers in the Unit provide instruction at the Police Academy on Aboriginal culture and some of the social problems that Aborigines experience. Lectures by Aboriginal people are given to both

3309 National Police Working Party, *Submission 504* (31 January 1986).
3310 id, 6-7; Bevan, 108.
3311 Bevan, 110.
3312 Discussions with Qld Police, Brisbane (30 June 1983).
3313 National Police Working Party, *Submission 504* (31 January 1986).
3314 Victorian Police, *Submission 186* (18 August 1980).
3315 Laverton Royal Commission, 1975-76, *Report* Government Printer, Perth, 1976, 208-9.

recruit and in-service courses.[3316] In 1977 a Committee of Inquiry into the Enforcement of the Criminal Law in Queensland (the Lucas Report) recommended:

> A special course of instruction should be given to police to educate them concerning the problems of persons under disability [this includes Aborigines and Torres Strait Islanders].[3317]

This Commission has previously recommended improvements in the training of police officers who have dealings with Aborigines.

> The training of police officers in the Northern Territory should include some attention to culture, language and habits of thought of Aboriginals.[3318]

876. ***Police Selection***. As well as attention being given to police training it has also been suggested that there is a need for greater scrutiny in police selection procedures.[3319] One proposal has been that the occupational status of members of the police force should be raised by offering more attractive salaries, which compare favourably with public servants or other skilled tradesmen, and introducing promotional criteria which included educational standards, initiative and efficiency, rather than seniority.[3320] There should also be higher educational qualifications for entry, personality as well as intelligence tests included in selection procedures and compulsory courses in human relations for all police trainees. In the last decade there have been improvements of this kind, especially in educational requirements for police entry. But, in addition to greater attention being given to selection, it has been suggested that officers chosen to work in areas with a large Aboriginal population should demonstrate some knowledge and understanding of Aborigines. The Groote Eylandt Aboriginal Task Force recommended:

> All Police Officers who are to be appointed to Groote Eylandt must have at least two years in the field experience with the Northern Territory Police Force and have a demonstrated ability to communicate effectively with Aboriginals and possess a knowledge and understanding of Aboriginal culture.[3321]

877. ***Conclusions: Training and Selection***. Improved selection procedures and a raising of the status of police officers may indeed help Aboriginal/police relations, and police/community relations generally. But in the shorter term benefits will flow from careful selection of officers who are to be posted to areas with a large Aboriginal population, particularly in remoter areas. There should also be efforts to increase the number of women police officers serving in those areas. Police training in all State and Territory police forces should be widened. There should be included specific instruction on Aboriginal laws, culture, institutions and ways of life, to better equip police officers to understand Aboriginal viewpoints thus improving law enforcement. This does not mean giving a small number of formal lectures as part of an induction course to recruits with no actual experience of living or working in Aboriginal areas. Brief courses in 'Aboriginal culture' as part of initial training, and before recruits have gained any experience of policing in Aboriginal areas, are of little value.[3322] In-service courses and seminars are a better method, and should be a compulsory part of continuing education for police officers who work in areas with significant Aboriginal populations.

## Education

878. ***A Role for Aboriginal Legal Services***. While improvements to training may make police more aware of ways in which they should interact and communicate with Aborigines and thus improve Aboriginal/police relations, the onus can not be completely upon the police. Aborigines themselves need to be more aware of the role and functions of the police and the way in which the criminal justice system works. There may be a role to play here for Aboriginal Legal Services, which with increased resources, may be able to become

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3316 National Police Working Party, *Submission 504* (31 January 1986).
3317 Committee of inquiry into the Enforcement of the Criminal Law in Queensland (Chairman: Justice GAG Lucas), *Report* Government Printer, Brisbane, 253.
3318 ALRC 2, *Criminal Investigation* (1976) 152. The Commission's Terms of Reference in its inquiry into Criminal Investigation was limited to the Australian Federal Police which explains why its recommendation dealt only with the Northern Territory.
3319 The Northern Territory police force has stated that it already attempts to recruit persons with an adequate understanding of Aboriginal law and culture: Northern Territory Police, *Submission 116* (19 February 1981).
3320 id, 74-5. Police promotion in WA is now based on merit rather than seniority: L Roberts, *Submission 481* (28 May 1985), 3.
3321 Groote Eylandt Aboriginal Task Force, *Report*, 1985, 28.
3322 As pointed out by L Roberts, *Submission 481* (29 May 1985).

involved in basic forms of community legal education.[3323] Material could be prepared setting out in plain terms the various aspects of the legal system, especially the criminal justice system and the court process. Such material could be put on cassette tapes and video recordings made to allow easier dissemination of the information. Where necessary this material could be prepared in appropriate Aboriginal languages. It is preferable that persons with special skills or training be appointed to carry out the particular function of community legal education. Solicitors and field officers employed by Aboriginal Legal Services currently perform this function to some extent, but they are largely taken up with court-related work under intense pressure of time. Appointment of a person to carry out community legal education may in the long run lead to a reduction in the amount of this court work.[3324] JP Harkins in his *Inquiry into Aboriginal Legal Aid* has recommended against setting up separate community legal education units within Aboriginal legal services. In his view 'community legal education programs would be best achieved by the solicitors and field officers already in the field serving communities'.[3325]

## A Challenge for the Police

879. ***The Role of the Police***. The task of the police in carrying out their wide ranging responsibilities is clearly not easy, and is becoming more complex. Cross-cultural policing raises special difficulties which require perhaps unique solutions. The police must accept some of the responsibility for seeking such solutions. Superintendent Gillard of the Royal Canadian Mounted Police expressed this challenge in the Canadian context:

> with the emergence of well-organized Native associations and the acceptance in many circles of the non-Native society of the Native land claims and aboriginal rights, a new era of Police/Native relations is emerging. Not only must the Force accept those realities, but also must assist in the justice system in order to reduce the high percentage of Natives in conflict with the law. Respect and appropriate recognition should be shown by members to Native ideals, customs, art and significant ceremonial functions in order to instill pride in their past as a means of effectively dealing with present and future problems.[3326]

He concluded that:

> the RCMP ... must enter into a new era of Native/Police relations, otherwise, we will be an additional part of the problem instead of a significant part of the solution of Native Indians in conflict with the law and the current and future development of Native people.[3327]

Australian police forces must be prepared to take up a similar challenge with respect to the Aborigines.

## Conclusions

880. *Summary of Conclusions and Recommendations in this Part*. The conclusions and recommendations contained in this Part are, for the reasons given less precise and definite than the conclusions and recommendations in other parts of this Report. Those conclusions and recommendations can be summarised as follows:

- Problems of 'law and order' on Aboriginal communities, and of local involvement in the criminal justice system, involve issues of local self-government or autonomy which extend beyond the recognition of Aboriginal customary laws, or increasing Aboriginal participation in local courts or police forces (para 689-90, 809-10). Schemes such as the Northern Territory Community Government Scheme are appropriate (para 760), although if Aboriginal communities are to exercise broader responsibilities, adequate support and enforcement powers are necessary (para 762).

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3323 G Lyons, 'Aboriginal Legal Services' in P Hanks and B Keon-Cohen (ed), *Aborigines and the Law*, George Allen and Unwin, Sydney, 1984, 137, 143.

3324 eg the Aboriginal Legal Rights Movement in South Australia held a training course for its Field Officers in October 1985 and had assistance from the SA Police for part of the course.

3325 See *Aboriginal Legal Aid Report* (1980) para 373-384.

3326 Inquiry into Aboriginal Legal Aid (JP Harkins), *Report*, vol 1, *General Issues*, AGPS, Canberra, 1985, 105.

3327 Gillard, 48.

- In many Aboriginal communities, unofficial methods of dispute resolution operate alongside the general legal system. Local resolution of disputes in these kinds of ways should be encouraged and supported (para 720).

- There is only limited scope or demand for new official local justice mechanisms in Aboriginal communities (para 767, 813, 817).

- There should be no general scheme of Aboriginal courts established in Australia (para 767, 813, 817, 819, 838).

- Aboriginal courts or other official bodies may be appropriate in certain cases. If courts or similar bodies are set up it should only be at the instigation of and after careful consideration by members of the Aboriginal community concerned (para 805, 817). In considering such proposals, it is necessary to consider a wide range of alternatives, including special policing arrangements and dry area legislation. Justice mechanisms are only one avenue (para 756).

- In addition there are certain basic requirements for courts or similar official bodies (para 818):

    - The local Aboriginal group should have power to draw up local by-laws, including by-laws incorporating or taking into account Aboriginal customs, rules and traditions.

    - Appropriate safeguards need to be established to ensure that individual rights are protected, e.g. by way of appeal.

    - The by-laws should, in general, apply to all persons within the boundaries of the community.

    - If the court is to be run by local people, they should have power within broad limits to determine their own procedure, in accordance with what is 'seen to be procedurally fair by the community at large'.

    - The community should have some voice in selecting the persons who will constitute the court, and appropriate training should be available to those selected. In minor matters there need be no automatic right to legal counsel, though the defendant in such cases should have the right to have someone (e.g. a friend) speak on his behalf.

    - The court's powers should include powers of mediation and conciliation. A court which is receptive to the traditions, needs and views of the local people may be able to resolve some disputes before they escalate, perhaps avoiding more serious criminal charges. The power to order compensation of some kind in such situations is one way of achieving this.

    - Such courts will need appropriate support facilities.

    - There should be regular reviews of the operation of any such court, undertaken in conjunction with the local community.

- In establishing such courts care should be taken to minimise conflict with or the undercutting of local kinship and' authority structures. Special attention needs to be paid to the composition of the court, which may need to be variable depending on the identity of those involved in cases before the court (para 742, 758, 855-6).

- The Queensland Aboriginal courts should not be continued without broad local support (para 746). In addition:

    - the Community Services (Aborigines) Act 1984 (Qld) should be amended to clarify the arrangements for community self-government and to avoid overlap with ordinary local government arrangements (para 743, 746).

    - encouragement should be given to local Aboriginal councils to draft appropriate by-laws (rather than simply adopting a central model) (para 746).

- So far the Aboriginal Communities Act 1979 (WA) has been applied only to more remote communities. That scheme is not a recognition of Aboriginal customary laws or of traditional authority. The scheme may be more successful in less traditional communities. In reviewing the Act, consideration should be given to its extension to urban areas and town camps (para 753, 756).

- It is too early to assess the success of the Northern Territory Justice (Courts) Project. That project should be subject to an independent review in due course (para 764).

- The Yirrkala Scheme should, if it is still sought by the Yirrkala people, be adopted for a sufficient period (at least 3 years) on a trial basis. The Yirrkala people should be given independent advice and appropriate support in establishing the scheme (para 832).

- Consideration should be given, in any State or Territory where a local justice scheme is established, to a legislative provision allowing courts to defer to the operation of the scheme through, for example, adjournment or diversion (para 834).

- There is scope for administrative recognition of Aboriginal customary laws. For this and other reasons greater knowledge and understanding on the part of criminal justice professionals in their dealings with Aborigines is needed (para 835).

- Perhaps the greatest scope for administrative recognition rests with the police. In particular:

    - There needs to be better communication between police and local Aboriginal communities about policing arrangements for those communities (para 805, 807). Police liaison committees can assist, but they should have broad terms of reference and access to senior police on issues of policy (para 872).

    - There should be greater encouragement for some forms of self-policing, as an adjunct to regular police, including in urban areas (para 862-3, 866).

    - Police training on Aboriginal issues should not be confined to initial or induction courses. The emphasis should be on post-induction and further education courses (especially after officers have had some experience of policing in Aboriginal areas) (para 876-7).

- Police aide schemes should be seen as essentially temporary measures, with the longer term emphasis on self-policing, on increasing the number of Aborigines in regular forces, and on other measures (para 850, 865, 867).

- In particular, police aide schemes should not be introduced without a clear articulation of needs and aims (para 857) and clear local support (para 853). If they are introduced there should be:

    - some facility for promotion of aides (after any necessary training) into the regular force (para 851, 854, 855).

    - provision for periodic review (para 865).

- Police aides should have adequate police powers and support, and should not be seen as second class police (para 853).

- There should be careful selection of police officers to serve in areas with large Aboriginal populations, including efforts to increase the number of women police officers serving in those areas (para 877).

- Aboriginal legal services should be encouraged and assisted to provide community legal education for Aboriginal communities (para 878).

- No single approach or solution exists to the 'problems of law and order' in Aboriginal communities (para 838). Consideration should however be given to establishing a body to assist Aboriginal communities, police and government departments in the consideration of proposals, and in their implementation and review. Such a body should have an Australia-wide mandate, but could be a federal agency, a federal-State agency, a private body or preferably an Aboriginal agency linked to the Aboriginal legal services. Its terms of reference should not be limited to Aboriginal courts or justice mechanisms (para 839-41). This issue is discussed further in Chapter 38.

- In other respects, Commonwealth involvement in this area, in particular having regard to constitutional constraints, is necessarily indirect (para 808).

# PART VII:

# THE RECOGNITION OF TRADITIONAL HUNTING, FISHING AND GATHERING RIGHTS

# 33. Traditional Hunting, Fishing and Gathering Practices

> Access to the country of one's forebears provided substance for the Dreamtime experience and an identity based on the continuity of life and values which were constantly reaffirmed in ritual and in use of the land. Economic exploitation of the land to support material needs, and its spiritual maintenance were not separate aspects of people's relations to country, but rather each validated and underwrote the other. The land was a living resource from which people drew sustenance — both physical and spiritual. The nexus between the two was shattered with the alienation of land by mining and pastoralists' interests.[3328]

## Relevance of these Issues

881. ***The Aim of this Part***. In this passage Dr Bell describes Aboriginal experiences in Central Australia. These experiences are shared by other hunter-gatherer societies that have had to make, or endure, the transition to farming, mining or other commercial land uses. The shift away from a hunter-gatherer economy, and the subsequent destruction of hunting and fishing grounds to make way for towns and industrial development, have been accompanied by legal restrictions on the right of people to hunt and forage for subsistence purposes.[3329] Restrictions on foraging on land belonging to another are now usual. There has also been a realisation that steps must be taken to preserve endangered species. Rights to hunt and fish have been restricted further by governments in many countries in an attempt to regulate the commercial exploitation of the world's natural resources. In the past 200 years Aboriginal people have seen their economic interests similarly affected. In many cases their land was taken away, or its productivity drastically affected by pastoral and mining activities.[3330] In more recent times Aboriginal hunting and fishing rights have been further whittled away by legislation.[3331] A balance should be struck between acknowledging the rights and interests of Aboriginal people, and other interests, including conservation and the management of natural resources. To some extent this is happening already. On the one hand, the right to pursue a traditional lifestyle, a right recognised by the Commission's Terms of Reference, implies a right to use the land to forage and gather food for consumption. On the other hand, other factors, including the impact of new hunting techniques, and the need to regulate commercial exploitation of species, mean that no simple solution to the question of recognising traditional hunting and gathering rights is possible. It is important to determine whether a more equitable accommodation of interests than currently exists can be devised. Any such accommodation should take account of Aboriginal traditions and practices, the special relationship of Aboriginal people to the land, the fact that Aboriginal traditions may be changing, and the role of hunting and gathering in the economies of many Aboriginal communities. The role of governments vis-a-vis Aboriginal groups, who are seeking control over decisions that affect their lives, should also be reassessed.[3332] This part of the Report describes briefly Aboriginal hunting and fishing practices in Australia (Chapter 33), and whether they have a degree of recognition at common law (Chapter 34). The extent to which federal and state legislation supports or detracts from these interests is examined in Chapter 35. Finally, Chapter 36 considers the principles which should guide reforms aimed at recognising Aboriginal hunting, fishing and gathering practices.

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3328 D Bell, *Daughters of the Dreaming*, McPhee Gribble/George Allen and Unwin, Sydney, 1983, 47.

3329 A Howkins, 'Economic Crime and Class Law: Poaching and the Game Laws 1840-1880' in SR Burman and BE Harrell-Bond (ed) *The Imposition of Law*, New York, Academic Press, 1979, 273; and see RL Barsh, *Submission 440* (4 August 1984) 1.

3330 cf H Reynolds, *The Other Side of the Frontier*, Penguin, Ringwood, 1982, 128-132 for descriptions of the impact of such activities and of Aboriginal responses to them.

3331 See Chapter 35.

3332 SM Weaver, 'Progress Report: The Role of Aboriginals in the Management of Cobourg and Kakadu National Parks, Northern Territory, Australia' (North Australian Research Unit, Seminar, Darwin, July 30, 1984).

## Traditional Hunting, Fishing and Gathering in Australia

882. ***Traditional Hunting and the Law***. Traditional Aborigines have been regarded as the sole surviving representatives of hunters and gatherers in Oceania.[3333] Bush food continues to form part of the diet of many Aboriginal people outside urban areas. But traditional hunting and fishing activities are not concerned only with subsistence. The close relationship between economic activities and the law has often been described. Sackett suggests that for Aboriginal people at Wiluna:

> Hunting ties the past to the present, but is not simply a survival of some prior subsistence gambit ... Most importantly it is an aspect of the law. As such it offers a venue through which certain men can and do display concern for the belief system ... Just like ritual, hunting affords men the opportunity of making claims regarding their position and right to authority in the group ... To hunt, then, is, as with ritual participation, to follow the Law, demonstrate its great potency, and guarantee its continuance.[3334]

It was the law, in the full customary sense, that linked the use of land and sea with the spiritual maintenance of that land and sea through ritual.[3335] Rituals to maintain the land and replenish the food supply were thus an important part of traditional life.[3336] Altman says of the Gunwinggu:

> Many of the rites performed at rituals, particularly at the currently prevalent Gunabibi ritual cult, involve the enactment of totemic dances that are explicitly linked to a concern with the reproduction of certain animal species ... At ceremonies men share esoteric knowledge about animals' secret names, subsection terms and kinship categories. This male ritual concern has a secular corollary in the maintenance of the men's hunting economy: for it seems reasonable to argue that were links not conceptualised between the increase elements of ceremonies and the exploitation of game, then ceremonial focuses would have altered. When game is fat, healthy and abundant, men often state explicitly that this was proof of powerful bisnis (ceremony).[3337]

883. ***Management of Natural Resources***. As an aspect of this care and responsibility for land Aborigines were careful to regulate the use of its natural resources. For example, according to TGH Strehlow the important ceremonial places of the Aranda had:

> a sacred cave or tree storehouse for the local sacred objects and consequently its immediate environs constituted a prohibited area, whose edge was generally about a mile (or even more) from the sacred cave. Within these sacred precincts all hunting and food gathering was forbidden. Even wounded animals could not be pursued into this forbidden zone which would be entered only for ceremonial purposes.[3338]

As Maddock points out, these rules forbidding hunting near ceremonial sites in effect created game sanctuaries, and it was not only barren land and waters that were regulated in this manner:

> The main waterhole of Japalpa remained a game reserve for fish, ducks, and all kinds of water birds, and so did the banks of the Finke along the first two miles of ponds at Irbmangkara. Again many of the finest waterholes in the Macdonnell Ranges provided inviolable sanctuaries for kangaroos, emus, and native animals of every kind.[3339]

Anthropologists cite examples of traditional conservation practices, including trees germinated in coastal regions being transplanted close to inland camp sites,[3340] of yams being replanted,[3341] the rotation of fishing

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3333 KB Lee & I Devore, *Man the Hunter*, Aldine Press, Chicago, 1968, 17. For over 99 per cent of the time man is believed to have been on earth the predominant economic activity has been hunting and gathering. It is estimated that in 10,000 BC the entire population of the world were hunters and gatherers but by 1960, only 0.001 per cent were considered hunters and gatherers. id, 13-17.

3334 L Sackett, 'The Pursuit of Prominence: Hunting in an Australian Aboriginal Community' (1979) 21 *Anthropologica* 197, 244. cf Bell (1983) 91.

3335 id, 104.

3336 DF Thompson, 'The Dugong Hunters of Cape York' (1934) 64 *Royal Anthropological Institute Journal* 237, 252: cf K Maddock *The Australian Aborigines, A Portrait of Their Society*, Penguin, Ringwood, 1982, 122-5.

3337 JC Altman, *Hunter-Gatherers and the State: The Economic Anthropology of the Gunwinggu of North Australia*, PhD Thesis, ANU, 1982, 416. cf JR von Sturmer, *The Wik: Economy, Territoriality and Totemism in Western Cape York Peninsula North Queensland*, Ph D Thesis, University of Queensland, 1978, 299-301.

3338 TGH Strehlow, 'Culture, Social Structure and Environment in Aboriginal Central Australia', in RM Berndt and CH Berndt, *Aboriginal Man in Australia*, Angus and Robertson, Sydney, 1965, 121, 143, cited in Maddock, 33.

3339 ibid; DH Bennett, 'Some Aspects of Aboriginal and non-Aboriginal Notions and Responsibilities to Non-Human Animals' (1983) *Aust Aboriginal Stud* 19. For conservation implications see RE Johannes, 'Research in Traditional Tropical Fisheries: Some Implications for Torres Strait Islands and Australian Aboriginal Fisheries' in L Zann (ed) *Proceedings of the Workshop on Traditional Knowledge of the Marine Environment*, (in press); Great Barrier Reef Marine Park Authority, Townsville 1986.

3340 von Sturmer, 470.

3341 id, 63, citing VH McConnel, 'Native Arts and Industries on the Archer Kendall and Holroyd Rivers, Cape York Peninsula North Queensland' (1953) 16 *Records of the South Australian Museum* 1. See RM & CM Berndt, *The World of the First Australians*, 4th rev edn, Rigby, Adelaide, 1985, (1981) 108-9; A Chase and P Sutton 'Hunter-Gatherers in a Rich Environment: Aboriginal Coastal Exploration in Cape York Peninsula' in A Keast (ed) *Ecological Biography of Australia*, Junkby Publishers, The Hague, 1981, 1819, 1833.

areas[3342] and the controlled use of fire.[3343] Evidence given during the Jawoyn Land Claim indicated that the return of Aboriginal people to their land had enabled conservation practices to be resumed.[3344]

884. ***Customary Rules and Prescriptions***. Strict rules governed not only the taking of certain species but also the consumption and distribution of food.[3345] A person's age, status and sex had a bearing on his right to take certain species. At Mornington Island, the Commission was told that the community wished to continue to punish people for breaches of the following laws relating to food taboos:

- a person cannot eat an animal, fruit or vegetable if it is their own totem;
- pregnant women and young women must eat the right food as directed by the elders.[3346]

Athol Chase provides the following example:

> [I]n parts of Cape York dugongs could be approached, killed and eaten only by older initiated men. For women, youths and children even to be in contact with water which had dugong grease floating on it meant that they would become very ill. People. in these categories could not even touch equipment to be used in hunting dugongs for fear that illness and misfortune would result.[3347]

Defined rules for the distribution of food were important for the building of reciprocal obligations. RM Berndt comments that:

> The field of economics ... is not concerned only with obtaining food. It must be seen in reference to a network of obligations, of reciprocal relations, either indirect or direct, and involving intangible as well as tangible commodities, services as well as goods. It must be seen, too, in terms of persons of both sexes doing things for others according to the 'rules', and for social as well as personal reasons, with expectations of some kind of a return always in mind. Even within the immediate sphere of food collection, it was never simply that women obtained one kind of thing, men another; even if it were so, religious elements must also be taken into account ... In one way or another, it was men and women in co-operation who formed the basis of traditional economic systems.[3348]

885. ***Continued Importance of Traditional Hunting, Gathering and Fishing Rights***. Aborigines have had to adapt to change and outside influence, including the payment of welfare benefits in cash and the introduction of rations and store-bought food. Nonetheless, especially in more remote areas, hunting, foraging and fishing continue to be of economic and ritual importance, despite the impact of commercial interests.[3349] In many cases hunting and fishing practices have incorporated new materials. Nylon fishing nets may have replaced those made of bush fibre, fencing wire may be converted into hooks for fishing spears, guns may very often replace spears, aluminium dinghies are used instead of dugouts, crowbars as digging sticks and car springs as adzes. Yet wooden digging sticks, traditional fishnets and traps, spears, harpoons

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3342 For further examples, see B Nietschmann 'Torres Strait Islander Sea Resource Management' in K Ruddle and RE Johannes (ed) *The Traditional Knowledge and Management of Coastal Systems in Asia and the Pacific*, UNESCO, Jakarta Pusat, 1984, 129, 142. As to doubts whether Torres Strait Islanders possessed a marine conservation ethnic see RE Johannes *Submission 390* (7 January 1986) 1.

3343 id, 1832, 1838, 1846; and cf NG Butlin, *Our Original Aggression: Aboriginal Populations of South-eastern Australia* 1788-1850, George Allen & Unwin, Sydney, 1983, 158-161.

3344 Australian National Parks and Wildlife Service, Submission to the Jawoyn Land Claim (8 September 1983) *Transcript*, 2737-8. cf also RE Johannes, 'Traditional Conservation Methods and Protected Marine Areas in Oceania' (1982) 11 *Ambio* 258; RE Johannes.' Traditional Marine Conservation Areas in Oceania and Their Demise' (1979) 9 A*nn Rev Ecol Syst* 349; RL Barsh *Submission 440* (4 August 1984).

3345 J Taylor, 'Diet Health and Economy' in RM Berndt (ed) A*borigines and Change. Australia in the 1970s*, AIAS, Canberra, 1977, 153, and see Bardi Aborigines Association Inc, Lombadina Community Inc, Beagle Bay Aboriginal Council Inc, 'Aboriginal Rights to the Sea in Dampier Land Peninsula — King Sound — Buccaneer Archipelago Area of Western Australia' (A Joint Submission for Sea Closure to the Aboriginal Land Inquiry, 1984) 4, 5.

3346 Moiyunda Association, Mornington Island, *Submission 157* (23 April 1981). For further examples see Chapter 19.

3347 A Chase, 'Dugongs and Australian Indigenous Systems. Some Introductory Remarks', in H Marsh (ed) *The Dugong. Proceedings of a Seminar/Workshop held at James Cook University of North Queensland* (8-11 May 1979), James Cook University, Townsville, 1981, 115; and see Thomson, 255; Altman (1982) 414-5; Meehan (1982) 137. SL Davis 'Aboriginal Sea Rights in Northern Australia' (1985) 21 *Maritime Studies* 12, 13.

3348 Berndt (1985) 149. For studies on the relative roles of men and women, see Bell (1983) 47, 54-78; D Bell & P Ditton, *Law: the Old and The New. Aboriginal Women in Central Australia Speak Out*, 2nd edn, Aboriginal History, Canberra 1984, para 230; E Young, *Tribal Communities in Remote Areas*, Development Studies Centre ANU, Canberra, 1981, 42; B Hiatt, 'Woman the Gatherer', in F Gale (ed) *Women's Role in Aboriginal Society*, 3rd edn, AIAS, Canberra, 1978, 4; B Meehan, *Shell Bed to Shell Midden* AIAS Canberra, 1982; JC Altman, 'Hunter-Gatherer Subsistence Production in Arnhem Land: The Original Affluence Hypothesis Re-examined' (1984) *Mankind* 14(3) 179. cf Report of a Committee of Review (Chairman: Professor CA Gibb) *The Situation of Aborigines on Pastoral Properties in the Northern Territory*, AGPS Canberra, 1973, 16, 17.

3349 See AB Palmer 'Submission for the Control of Entry onto Seas adjoining Aboriginal Land, Hyland Bay' (Northern Land Council undated) 16-9, and for a review of the studies on the significance of traditional fishing, see B Lawson, *Aboriginal Fishing and Ownership of the Sea*, Department of Primary Industry, Canberra, 1984, 22-54.

and natural products such as bloodwood leaves for poisoning fish are still used.[3350] Aborigines have become accustomed to newly introduced species in their diet.[3351] More fundamentally, material aspirations and internal conflicts (e.g. between young and old) have placed pressures on traditional values such as sharing. Changes to the traditional economy, for example the introduction of shop bought foods, have resulted in fundamental shifts in the economic and social roles of men and women.[3352]

> In Aboriginal Australia before white settlement, women worked constantly and that contribution made them indispensable to their men folk. Rations relieved women of the burden of food — getting but made them primarily someone's wife and mother. Today women have no security as independent producers but are dependent on social security payments which entail relationships over which they have no control.[3353]

Despite all these changes, it is clear that hunting, gathering and fishing are of continuing importance in the lives of many Aborigines. Airman concludes his analysis of the impact of outside influence on the Gunwinggu of North Australia in the following words:

> The hunter-gatherer economy is resilient ... but its Achilles' heel is its vulnerability to the presence of large population concentrations. The eastern Gunwinggu economic system has shown remarkable resilience in adapting to changed circumstances following European colonisation. In previous countless millennia, Gunwinggu had extremely limited external contacts. But in the past twenty to thirty years, they have created an economic system, that incorporates important elements of the traditional cultural and economic systems, yet is enmeshed with a complex set of relations with the alien market economy and welfare State. This situation has been possible because, rather than just responding to changed circumstances, Gunwinggu have created their own economic and social environment, within the structural limitations placed on their lifestyle.[3354]

Not all remote communities have been able to demonstrate the resilience of the Gunwinggu, and the experience has varied enormously. Empirical studies demonstrate this divergence, but also show how traditional hunting and fishing remain important to many Aboriginal groups.[3355] Further studies have documented the nutritional composition of Aboriginal bush foods and have demonstrated that traditional Aborigines continue to use an extraordinarily wide range of plants and fish for different purposes.[3356] In doing so they indicate a considerable depth of knowledge of natural resources.[3357]

886. ***The Evidence of Land Claims Hearings***. Evidence of Aboriginal reliance on bush food is important in land claims under the Aboriginal Land Rights (Northern Territory) Act 1976 (Cth). A key feature of the definition of 'traditional Aboriginal owners' in s 3(1) of that Act, and one that must be established before the Commissioner can recommend a grant of land under the Act, is the requirement that the 'local descent

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3350 For both traditional methods and modern adaptations see von Sturmer, 43-65, 180-244; Thomson, 242-50, 255-8; Nietschmann, 28, 29; H Marsh, BR Gardner & GE Heinsohn, 'Present Day Hunting and Distribution of Dugongs in the Wellesley Islands (Queensland): Implications for Conservation' (1980-81) 19 *Biological Conservation* 258; Meehan (1982) 81-140; M Dreyfus & M Dhulumburrk, Submission to the Aboriginal Land Commissioner regarding Control of Entry onto Seas Adjoining the Aboriginal Land in the Milingimbi, Crocodile Islands and Glyde River Area, 30 May 1980, 24-6; SL Davis 'Aboriginal Land Claims to Coastal Waters in North Eastern Arnhem Land, Northern Australia' in K Ruddle & T Akichimi (ed) *Maritime Institutions in the Western Pacific*, 17 Senri Ethnological Studies, National Museum of Ethnology, Osaka, Japan, November 1983, 231; K Akerman 'The Double Raft or Kalwa of the West Kimberley' (1975) 10 *Mankind* 20.

3351 JC Altman 'Hunting Buffalo in North Central Arnhem Land: A Case of Rapid Adaptation among Aborigines' (1982) *52 Oceania* 274.

3352 Altman, *Hunter Gatherers and the State* (1982) 389-430; J Devitt, *Submission 448* (3 September 1984) 3.

3353 Bell (1983) 46. cf Taylor, 154. See para 302-12 for discussion of some of the social security issues arising from this situation.

3354 Altman, *Hunter Gatherers and the State* (1982) 430. cf id, 389-430.

3355 JC Altman, 'Maningrida Outstations', in *Small Rural Communities, the Aboriginal Component in the Australian Economy*, Development Studies Centre, ANU, 1982. See for example, JC Altman & J Nieuwenhuysen, *The Economic Status of the Australian Aborigines*, Cambridge University Press, 1979; P Brokensha, *The Pitantjatara and the Crafts*, Aboriginal Arts Board, Sydney, 1975; S Turnbull, *Economic Development of Aboriginal Communities in the Northern Territory*, AGPS, Canberra, 1980; SG Harris, 'Milingimbi Economic System', id, Appendix VIII; N Peterson, 'Aboriginal Involvement in the European Economy of the Central Reserve during the Winter of 1970s', in Berndt (1977) 136; HC Coombs and WEH Stanner, Council for Aboriginal Affairs (Report) V*isit to Yuendemu and Hooker Creek*, AGPS, Canberra, 1974; RA Gould, 'Subsistence Behaviour among the Western Desert Aborigines of Australia' (1969) 39 *Oceania* 253; LR Hiatt, Kinship and Conflict. *A Study of an Aboriginal Community in Northern Arnhem Land*, ANU Press, Canberra, 1965, ch 2; MJ Meggitt, 'Notes on Vegetable Foods of the Warlbiri of Central Australia' (1957) 28 *Oceania* 143; MJ Meggitt, *Desert People*, Angus and Robertson, Sydney, 1962, ch 5; E Young, *Outback Stores: Retail Services in North Australian Aboriginal Communities*, ANU North Australian Research Unit, Darwin, 1984; H Creamer, 'Information Relevant to the Inclusion of Hunting, Fishing and Gathering Rights in the Proposed New South Wales Aboriginal Land Rights Legislation' (Paper prepared at the request of the Permanent Head, Ministry of Aboriginal Affairs, Sydney, September 1982). See also the works cited in para 882.

3356 eg JC Altman 'The Dietary Utilisation of Flora and Fauna by Contemporary Hunter Gatheras at Momega Outstation, North Central Arnhem Land' (1984) I *Aust Aboriginal Stud* 35. JC Brand and V Cherikoff; 'The Nutritional Composition of Australian Aboriginal Plants of the Desert Regions' in GE Wickens, JR Goodin, DV Field (ed) *Plants for Arid Lands*, George Allen and Unwin, London, 1985, 53; JC Brand, C Rae, J McDonnell, A Lee, V Cherikoff, & AS Truswell, 'The Nutritional Composition of Australian Aboriginal Bush Foods' (1983) 35 *Food Technology in Australia* 293; B Gott, 'Murnong — Microseris Scapigera: A Study of a Staple Food of Victorian Aborigines' (1983) 2 *Aust Aboriginal Stud* 2; RG Kimber 'Resource Use and Management — Central Australia' (1984) 2 *Aust Aboriginal Stud* 12. D Levitt, *Plants and People: Aboriginal Uses of Plants on Groote Eylandt*. AIAS, Canberra, 1981 Berndt (1985) 108-21.

3357 And knowledge of particular value to marine biologists and scientists. See generally Johannes (1986), SL Davis, 'Aboriginal Tenure of the Sea in Northern Arnhem Land' in Zann (1986).

group' must be 'entitled by Aboriginal tradition to forage as of right over that land'. Referring to this aspect of the definition, the then Aboriginal Land Commissioner (Justice Toohey) found that at Roper Bar:

> There was certainly evidence of a wide range of activities falling within such a broad definition. As well as the hunting of kangaroo, bush turkey, goanna, porcupine and the gathering of sugarbag, yams, berries and various fruits, and fishing in the Roper River, there is regular activity on the claim area to seek out materials for artifacts. Coolamons, didgeridoos, boomerangs, woomeras, spears, pipes and stone knives are made by the claimants. Some are decorated and sold through Mimi Aboriginal Arts and Crafts Pty Ltd in Katherine. Others are used in the daily and ritual life of the claimants. One of the places visited in the course of site inspections, Burunngu, was pointed out as a particularly good source of a certain type of pandanus leaf, suitable for making baskets ... In the end it is unnecessary for me to decide whether the word 'forage' can be given so broad a meaning as to include all these activities. The Act is concerned with entitlement to forage rather than with foraging itself, though the latter may well be the best evidence of the former. There was evidence from witnesses for both estates that people other than the traditional owners of the land may and do come onto that land to fish and search for food.[3358]

Evidence of the importance of traditional fishing has also been brought in applications for sea closures in the Northern Territory.[3359] During the course of the Western Australian Aboriginal Land Inquiry, the Commissioner, P Seaman QC was presented with evidence of the importance of Aboriginal hunting and fishing in Western Australia. He concluded:

> It is clear from the hearings that kangaroo hunting is an important part of South West Aboriginal life. I accept that it is more than a recreation, being a significant source of meat for many Aboriginal families, and a significant expression of their feeling for land and culture which they have lost. They might find it much more difficult to establish traditional hunting and fishing rights than Aboriginal people in more remote areas.[3360]

887. ***Some Quantitative Data***. There is little quantitative data that reliably demonstrates the significance of bush foods today. It has been said that the 'true extent of use/or non-use of bush foods is unknown'.[3361] However three recent detailed studies quantitatively measure the modern significance of bush food.[3362] Altman's study at Momega Outstation found that bush foods constituted 81% of the protein, and 46% of the kilo calories consumed. In all some 90 faunal species and 80 plant species were taken for food.[3363] Meehan's detailed study, concentrating primarily on the role of shellfish in the diet of the Anbarra taken over an entire year, produced similar results.[3364] Speaking of these studies Young has stated that:

> ... the only communities which would show similarly low levels of dependence on purchased foods would be the outstations associated with Yirrkala, Galiwin'ku and Aurukun, and in all cases these contain well under half the total Aboriginal population. In all the other case-study communities — in the Kimberleys, the central desert and the centralised communities of northern regions — store food accounts for most of people's nutritional intake. While there are no detailed analyses of the exact contributions of purchased foods in such places, it can be assumed that it exceeds 80 percent, and in places well over 90 per cent.[3365]

Another way of assessing the significance of bush food is to quantify its value in monetary terms. After valuing the subsistence food production at Momega Outstation at market replacement value, Altman concluded that:

> Quantifying production for use in this way gives a more accurate representation of the Momega outstation economy, for about 64 percent of total cash and imputed income came from subsistence production. In other words quantification of hunting, fishing and gathering activities indicated that subsistence production was the mainstay of the economy. Only 26 percent of total income (but 72 percent of cash income) came from social security payments; and 10 percent of total income (and 28 percent of cash income) came from production of artefacts for market exchange.[3366]

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3358 Yutpundji-Djindiwirritj (Roper Bar) Land Claim AGPS, Canberra 1982, para 73-74.
3359 See para 890, and cf Lawson 27-30, 31-40.
3360 Aboriginal Land Inquiry (Commissioner P Seaman QC) *Report*, Perth, 1984 para 11.4.
3361 J Devitt *Submission 448* (3 September 1984) 1. cf JC Altman *Submission 433* (9 July 1984) 1. For earlier studies, see Meehan (1982) 157.
3362 Meehan (1982); Altman, 'Maningrida Outstations' (1982); Devitt (in press).
3363 Altman, 'Maningrida Outstations' (1982) 39.
3364 Meehan (1982).
3365 Young (1984) 101, and see Meehan (1982) 149.
3366 Altman 'Maningrida outstations' (1982) 40-1.

## Relationship to Land and Seabed Rights

888. ***Land Use and Ownership of Land***. Discussion of hunting and gathering in terms of sustenance or of tradition does not mean that these questions can be divorced from the question of land. For Aboriginal people the two are inseparable:

> The shift from a hunter-gatherer mode of subsistence to a sedentary lifestyle on government settlements, cattle stations, missions and towns has meant more than the loss of land for Aboriginal men and women. Today they no longer control the resource from which both physical and spiritual sustenance may be drawn. The use one makes of the land and the spiritual maintenance of that land in ritual are intertwined and underwritten by the law.[3367]

The relationship between rights to hunt and gather and 'ownership' of or 'title' to land is however highly complex, and has been the subject of much anthropological debate.[3368] The terms 'estate' and 'range' have been used to distinguish ownership or custodianship of land from land use, and 'clans' and 'bands' to distinguish land-owning from land-using groups.[3369] There is a danger that whatever terms are used may conceal the flexibility and diversity found in Aboriginal societies.[3370] Dr Hiatt's study of the Gidjingali illustrates the way in which land using groups may forage over land owned by others. He commented in their case:

> If every land-owning unit had had to depend solely upon the resources of its own estate, some would certainly have perished. (During the major tidal inundations salt water alone was available on the estate of one unit and on that of another there was no fresh water at any time). The diets of many others would have been monotonous and, at times, meagre. But the inhabitants did not suffer such hardships because they took open access to food and water for granted. People maintained a roughly uniform standard of living by moving over one another's estates and freely exploiting the resources. The region was rich in natural products. When a community exhausted the food supply in one place, it moved to another. On occasions the members visited neighbouring communities, and at other times acted as their hosts. Sharing deprived no one of basic requirements, and land owners from time to time had the satisfaction of fulfilling expectations of generosity.[3371]

889. ***Aboriginal Land Rights (Northern Territory) Act 1976 (Cth)***. The definition of 'traditional Aboriginal owners' in the Aboriginal Land Rights (Northern Territory) Act 1976 (Cth) talks not only in terms of the 'local descent group with common spiritual affiliations to a site and primary spiritual responsibilities for that site and for the land', but also requires an entitlement by Aboriginal tradition 'to forage as of right over that land' (s 3(1)). The Land Commissioner has taken the view that the requirement of an 'entitlement to forage as of right' must spring from Aboriginal tradition,[3372] and that it must involve a right to forage over the land of the descent group.[3373] As Justice Toohey pointed out in the *Uluru* Report:

> That may not be the same as the land claimed: in most cases it will not be because the claim area will involve several local descent groups. I do not think it is necessary, in order to find traditional ownership, that each local descent group has a right to forage over an area wider than that for which the group has primary spiritual responsibility ... It is beyond question that the members of each estate are entitled to forage as of right over that land. Evidence of this emerged at every turn ... A more difficult question is whether the evidence demonstrated a right in the members of one estate to forage over the land of another. Dr Layton expressed the view that before the people of one estate may enter on to the land of another:
>
> > they must first know the songs and then must have seen the sites or been shown the location of the sites in that estate.[3374]

Entitlement to forage is the right to hunt and gather food. However, where a grant of land is made under the Act, the grant of land is for the benefit of Aborigines entitled by Aboriginal tradition to the use or occupation

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3367 Bell (1983) 104.

3368 For example WEH Stanner, 'Aboriginal Territorial Organisation, Estate, Range, Domain and Region' (1965) 36 *Oceania* 1; Berndt (1985), 142, 143; Maddock (1982) 28-56; Hiatt (1965); von Sturmer, 245-319.

3369 Maddock (1982) 43.

3370 von Sturmer, 245 found it difficult to divorce the concept of ownership (or custodianship) from land use in his analysis of the Wik. cf Maddock, (1982) 43.

3371 Hiatt (1965) 27, and see LR Hiatt, 'Traditional attitudes to land resources', in RM Berndt (ed) *Aboriginal Sites, Rights and Resource Development*. U of WA Press, Perth, 1982, 13; Meehan (1982) 12-14.

3372 Uluru (Ayers Rock) National Park and Lake Amadeus/Lutritja Claim AGPS, Canberra, 1980 para 100.

3373 s 3(1); cf Maddock (1982) 42, 52, 53.

3374 id, para 100, 102-3. cf Alyawarra and Kaititja Land Claim AGPS, Canberra, 1979 para 90-1. In the Warlmanpa, Warlpin, Mudbura and Warumungu Land Claim AGPS, Canberra, 1982, para 102 it was stated that: although the right to forage and use water in some areas is open to negotiation, people still require permission to enter the land and need to have the requisite knowledge to avoid places of danger.

of that area of land, 'whether or not the traditional entitlement is qualified as to place time, circumstance, purpose or permission'.[3375] The two requirements serve different purposes:

> an entitlement to forage goes to a finding of traditional ownership. A right to the use or occupation of land other than that of the local descent group is relevant to the form of any recommendation made.[3376]

The Northern Territory land claim experience thus provides judicial recognition of the nexus between land use and claims to 'own' land. But it has also established that the entitlement to forage usually, if not invariably, extends beyond land claimed by one descent group into land of others. The Land Commission's hearings have acted as a catalyst for research into these questions. However they have been limited to those traditional Aborigines who are in a position to claim entitlement to land in the first place. The power to bring a land claim does not assist those Aborigines who have been dispersed and resettled, for whom proof of traditional attachment to their particular land may be no longer possible. Nor does it assist those whose land is no longer 'unalienated Crown land' claimable under the Act. But these people may also, and legitimately, wish to supplement their diet by hunting and gathering on land. Clearly the needs of each group may have to be met in differing ways.

890. ***Sea Use and Ownership of the Seabed***. In 1908, Wilkin stated:

> As foreshore rights of landed property extend not only over the adjacent reef, but to the water over it — as in the case of fish caught in the area — so the inhabitants of certain areas appear to have a pre-emptial right to certain distant fishing stations which lie off their part of the coast.[3377]

Commissioner Woodward considered that Aborigines generally regarded the estuarine, bays and waters immediately adjacent to shoreline as being part of their land.[3378] Little is known about traditional sea rights or fishing practices some distance from land, most research being conducted into estuarine and in-shore fishing practices. Recent anthropological research into traditional territory fights to the seabed has yet to reach the detail and comprehensiveness of that completed on territorial rights to land. However studies in North East Arnhem Land[3379] and the Torres Strait[3380] indicate that clear territorial sea-bed boundaries can be established, at least in some cases.[3381] These have been made the basis for applications for closure of the seas under the Aboriginal Land Act 1978 (NT). Section 12 requires the Aboriginal Land Commissioner to consider sea closure applications referred to him by the Administrator. Matters to be considered by the Commissioner include whether Aboriginal tradition restricts entry by strangers into the particular seas, and whether use of the seas by strangers would interfere with Aboriginal traditional use of the seas by those Aborigines who were traditionally entitled to use the seas (s 12(3)(a), 12(3)(b)). On the other hand the Aboriginal Land Inquiry in Western Australia preferred not to recommend a system of sea closures which could create 'more exclusivity than is necessary to protect traditional interests'.[3382] The Commissioner rejected the vesting of the sea bed in Aboriginal claimants and sought other methods of protecting Aboriginal traditional fishing interests.[3383]

## The Commission's Approach to Recognition

891. ***Claims for Recognition of Hunting, Fishing and Gathering Rights***. Although, questions of hunting, foraging and fishing rights remain of considerable importance in some areas, the Commission has had only a limited number of verbal or written comments or submissions on these questions. During the public hearing

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3375 Aboriginal Land Rights (Northern Territory) Act 1976 (Cth) s 71(1).

3376 Alyawarra and Kaititja Land Claim, para 89.

3377 A Wilkin, 'Property and Inheritance' in AC Haddon (ed) *Reports of the Cambridge Anthropological Exhibition to the Torres Straits*, Cambridge UP, Cambridge, 1908, vol 6, 167. For other early accounts see RE Johannes & JW MacFarlane, 'Traditional Sea Rights in the Torres Strait Islands with Emphasis on Murray Island' K Ruddle & T Akimichi (eds) *Maritime Institutions in the Western Pacific* 17 Senri Ethnological Studies, National Museum of Ethnology, Osaka, Japan, 1984, 253, 257-9.

3378 Aboriginal Land Rights Commission, (Commissioner Justice AE Woodward) *Second Report* AGPS, Canberra, 1974. 80.

3379 M Dreyfus & M Dhulumburrk; SL Davis, 'Research Proposal: Aboriginal Subsistence Fishing and Tenure of the Sea', unpublished, Northern Territory Industry Research and Development Trust Fund, May 1983, and see Davis (November 1983).

3380 Johannes & MacFarlane (1984).

3381 For a distinction between barrier reef fishing and extended fishing rights and the implications for recognition of fishing rights see generally RE Johannes and JE MacFarlane, 'Traditional Fishing Rights in the Torres Strait Islands' *Proceedings of the Torres Strait Fisheries Seminar, Port Moresby*, 11-14 February 1985, (in press) AGPS, Canberra, 1986. Davis (November 1983) 16-18, and see further Davis (1985) 13. For the view that such territory is not rigidly delimited but subject to tidal fluctuations see Nietschmann (1984) 134-5.

3382 Aboriginal Land Inquiry (Commissioner P Seaman QC), *Report*, Perth, 1984, para 11.54.

3383 id, para 11.29 and see para 898.

at Port Augusta there were complaints that pastoralists were trying to keep Aboriginal people off their land contrary to the reservations in their pastoral leases, though it was stated that no charges had been laid under wildlife provisions.[3384] In Cairns complaints were made about commercial fishermen taking dugong in their nets, while non-reserve Aborigines were not able to take dugong[3385] and it was argued that hunting and fishing rights are indigenous rights.[3386] The question of dugong hunting was also raised at Rockhampton.[3387] On the North Coast of NSW the Commission was told that two men had been charged with killing wallabies for food and that 95% of Aboriginal people on the north coast are unemployed, resulting in heavy reliance on bush tucker for food.[3388] At Aurukun there were allegations that commercial fishermen had placed nets over the mouths of the rivers, fished up the rivers and interfered with sacred sites.[3389] At Doomadgee there were concerns about restrictions on the hunting of goanna.[3390] Further requests for recognition and protection of hunting and fishing rights were raised in Kowanyama, Edward River, Weipa, Aurukun, Lockhart River, and Mornington Island.[3391] The Tasmanian Legal Service pointed out that mutton bird hunters were in breach of the law if they did not obtain a licence, that even where the licence was obtained bag numbers were unrealistic, and that trespass laws conflicted with customary laws.[3392] Requests for recognition have also been made in other forums. The Makarrata demands put forward by the National Aboriginal Conference claimed among other things:

> 7. The rights to hunting, fishing and gathering on all lands and waterways under the jurisdiction of the Commonwealth of Australia.
>
> 22. Timber rights to all forests and timbered areas within Aboriginal territories, including all waterways.[3393]

Increased involvement for Torres Strait Islanders in matters affecting fishing in the Torres Strait has been sought by the Queensland branch of the National Aboriginal Conference.[3394] A State Land Rights Meeting held in Sydney in September 1983 called for New South Wales fisheries and conservation legislation to be amended to accord with traditional hunting and fishing interests.[3395] Sea closure applications and submissions to the Western Australian Aboriginal Land Inquiry also raised the question of Aboriginal hunting and fishing rights:

> Claims to hunt and fish were made by Aboriginal groups living in the agricultural areas of the South West of the State. Some South West Aboriginal people claim the right to have access to farmland for kangaroo hunting and to pick wildflowers. They want access for the same purposes to fauna reserves and national parks. In the Geraldton area they wish to have access to local stations to do such things as shooting wild goats. In some areas there is complaint that there are farmers who will not give Aborigines permission to shoot kangaroos for food on farms when the same farmers will give permission to professional kangaroo shooters for profit. One South West Aboriginal described how only forty years ago his father supported the family by hunting and fishing in the Brookton area. The expansion of the farmed areas of the South West has ended those possibilities.[3396]

892. ***The Significance of these Issues***. The significance of bush and sea food to many Aboriginal communities both in terms of diet, lifestyle and customary laws and practices, which is clear from the material cited in this Chapter, is strong support for the appropriate recognition of hunting, fishing and gathering rights. Much of the material cited is based on observations and reports of experience in the more remote communities and there are dangers of generalisation. This point was emphasised by the National Farmers Federation.[3397] It is true that for other Aborigines, hunting and gathering may not take on such significance, either in terms of diet or of maintaining traditional ways of life. Hunting or fishing may be, for

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3384 R Reid, R Lieberwirth, G Richardson, *Transcript of Public Hearings* Pt Augusta (18 March 1981) 166-73. Advice from the Legal Service at Pt Augusta indicates that these problems remain.

3385 J Morgan, S Christian, *Transcript* Cairns (5 May 1981) 2189-2190(A). cf Ireland's, *Submission 251* (8 April 1981).

3386 ALRC, *ACL Field Report* 9, Northern Queensland (July 1984) 21.

3387 C Russ, P Savage, *Transcript* Rockhampton (6 May 1981) 2280-2.

3388 J Terry, S Boyd, P Torrens, *Transcript* Lismore (11 May 1981) 2506-11.

3389 F Yunkaporta, *Transcript* Aurukun (30 April 1981) 2050-53; and in relation to Arnhem Land see Davis (1986), 27-9.

3390 W Walden, *Transcript*, Doomadgee (23 April 1981) 1699.

3391 id, 5 9, 11, 16, 18, 21; and see Moiyunda Association, Mornington Island, *Submission 257* (23 April 1981).

3392 Tasmanian Aboriginal Centre, (S Clark) *Submission 237* (1 April 1981). The subsequent purchase of Trefoil Island by the Aboriginal Development Commission may have alleviated these problems. See also Tasmania Police (KH Viney) *Submission 164* (16 July 1980) 3.

3393 As contained in telexes to the Minister for Aboriginal Affairs dated 29 September 1981 and 1 October 1981, cited in Senate Standing Committee on Constitutional and Legal Affairs, *Two Hundred Years Later* ... AGPS, Canberra,1983, Appendix 3.

3394 Queensland State Branch of the National Aboriginal Conference Policy Directions 1985, rev edn, Brisbane, February 1985, 22. The National Aboriginal Conference has subsequently been disbanded.

3395 National Aboriginal Conference, *NAC News* (Canberra, February 1984) 14.

3396 Aboriginal Land Inquiry (Commisioner P Seaman QC) Report, Perth, 1984, para 11.3. See further id, paras 4.49-4.58, 11.3-6 (hunting rights); 11.19, 11.30-11.43, 11.56 (fishing rights).

3397 National Farmers Federation (W de Vos) *Submission* 476 (11 April 1985) 1.

some, a recreational activity and a chance to enjoy particular foods. Further attention will be given to. the diversity of Aboriginal lifestyles and the relative importance of traditional hunting and fishing activities in Chapter 36.

893. ***Relationship with Land Rights***. As pointed out in Chapter 11,[3398] issues of the grant of land rights (and seabed rights) have been treated as outside the scope of this report. The Commission does not seek to duplicate work being done by other Commonwealth or State bodies or commissions of inquiry. Given the extent of this activity, issues of land rights, including customary law rights to land and the seabed, have not been directly dealt with in this Report. The question is what implications this has for the treatment of traditional hunting, fishing and gathering rights. It is possible that the grant of land or sea-bed by the Commonwealth and/or State Parliaments will resolve some of the significant claims to those rights. Certainly, it is not possible to ignore land rights legislation in any examination of, or recommendations for resolving, such claims. But, as the review of Australian legislation in Chapter 35 will show, important aspects of the topic are not, and cannot be, resolved through land rights legislation, particularly for those Aborigines who can no longer demonstrate traditional attachment to a particular area of land. The relations between land rights and hunting, fishing and gathering rights may well influence the form the Commission's recommendations can take, but they do not prevent consideration of the questions in the context of the present Reference.

3398 See para 212.

# 34. Hunting, Fishing and Gathering Rights: Legislation or Common Law?

894. ***The Relevance of Common Law Arguments***. It has sometimes been argued that Aboriginal hunting and fishing rights exist at common law — that is, independently of any legislative or executive action. If so, it would follow that such rights continue to exist until abrogated by legislation (either expressly or by necessary implication). In certain cases therefore common law rights to hunt and fish may not be affected by laws of general application. This could arguably happen in two distinct ways, either through the recognition of hunting and fishing rights as incidents to customary or native title, or through their recognition as independent customary rights of a usufructuary kind.[3399]

## The Position in Canada and New Zealand

895. ***Two Canadian Cases***. Two Canadian cases in particular show how such arguments may be relevant. In *R v White and Bob*,[3400] the defendants were charged with hunting deer during the off season under a British Columbian Game Act. Justice Norris, one of the majority, held that aboriginal hunting and fishing rights had existed in favour of the Indians from time immemorial. These rights continued to exist as 'personal and usufructuary rights' under the British Crown when it acquired sovereignty over Vancouver Island. Since their rights had never been extinguished, provisions of the Game Act affecting the right to hunt and fish did not apply to the defendants. In *Hamlet of Baker Lake v Minister of Indian Affairs and Northern Development*,[3401] the plaintiffs sought a declaration that the lands comprising the Baker Lake area of the Northwest Territories were 'subject to the aboriginal right and title of the Inuit residing in or near that area to hunt and fish thereon'. Justice Mahoney, relying on the Supreme Court's apparent agreement, in *Calder v Attorney-General for British Columbia*,[3402] on the existence of native title in the absence of lawful termination or exclusion, granted the declaration.[3403]

896. ***Other Canadian Developments***. However, Canadian Indian and Inuit hunting and fishing rights are recognised in a variety of ways apart from at common law.[3404] These include:

- Band council by-laws operating within a reserve pursuant to the Indian Act 1951 s 88; such by-laws exclude provincial' legislation, though the position with federal legislation is unclear.[3405]

- The provisions of Indian treaties, which prevail over provincial law[3406] but not over subsequent clearly applicable federal legislation.[3407] Treaty hunting and fishing rights are limited to unoccupied land,[3408]

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3399 See Chapter 5 for a discussion of these arguments in the context of the recognition of Aboriginal customary laws generally.

3400 (1964) 50 DLR (2d) 613.

3401 (1979) 107 DLR (3d) 513 (Federal Court, Trial Division).

3402 (1973) 34 DLR (3d) 145. And see *Guerin v R* [1984] 6 WWR 481. For an analysis of native title and fiduciary duty see J Hurley, 'The Crowns Fiduciary Duty and Indian Title' (1983) 30 *McGill LJ* 559.

3403 In doing so Mahoney J enunciated what has been considered the basic minimum content of Aboriginal title, 'the right freely to move about and to hunt and fish over it'. N Bankes, *Submission 328* (19 July 1984) 2. For comment see DW Elliott, 'Baker Lake and the Concept of Aboriginal Title' (1980) *Osgoode Hall LJ* 653. For the effect of the Constitution Act 1982 s 35 on these cases see K Lysyk, 'The Rights and Freedoms of Aboriginal People in Canada' in WS Tarnopolosky & GA Beaudoin (ed) *Canadian Charter of Rights and Freedoms*, Carswell, Toronto, 1982, 467, 480-2. On the legal issues generally see NK Zlotkin, 'Post-Confederation Treaties' in BW Morse (ed) *Aboriginal Peoples and the Law: Indian, Metis and Inuit Rights in Canada*, Carleton UP, Ottawa, 1985, 272, 328-97.

3404 For a general account of traditional hunting and fishing practices in Alaska and Canada see DD Kelso, 'Subsistence Use of Fish and Game Resources in Alaska: Considerations in formulating Effective Management Policies' in K Sabot (ed) *Transactions of the Forty Seventh North American Wildlife and Natural Resources Conference*, Wildlife Management Institute, Washington DC, 1982, 630; PH Pearce (Commissioner, Pacific Fisheries Policy) *Turning the Tide. A New Policy for Canadian Pacific Fisheries. Final Report*, Vancouver, September 1982, 173-5.

3405 The point of s 88 is that Provincial legislation of general application will apply to Indians. Such Provincial legislation will also apply to 'non-status' Indians and Inuit in the absence of express federal legislation. See *R v Shade* (1952) 102 CCC 316 (Alta). *R v Sands*, Ontario Provincial Court, unreported, 1 September 1981; *R v Baker* (1983) 4 CNLR 73; N Bankes, *Submission 435* (19 July 1984); B Morse, *Submission 444* (27 August 1984) 3.

3406 eg *Isaac v R* (1975) 13 NSR (2d) 460.

3407 *R v Sikyea* (1965) 50 DLR (2d) 80 (Migratory Birds Convention Act and regulations held to override Treaty 11 of 1921 protecting Indian rights in the Yellowknife area). To similar effect *R v George* (1966) 55 DLR (2d) 386. cf *R v Cope* (1981) 134 DLR (3d) 36. It is not clear whether the position of treaties vis-a-vis federal legislation has been qualified by the Constitution Act 1982 s 35. cf *R v Eninew* (1984) 10 DLR (4th) 137 (where the point did not have to be decided).

3408 *Kruger and Manuel v R* (1977) 34 CCC (2d) 37; and see B Morse, *Submission 444* (27 August 1984) 3.

and the courts have sometimes been strict in requiring proof of continuance of the treaty and of the descent of claimants from the original treaty Indian group.[3409]

- Protection is also afforded by the Royal Proclamation of 1763 to those Nations and tribes of Indians who lived under British Protection.[3410]

- Certain provisions of the Natural Resources Agreements 1930, subject to which Crown land was transferred to Alberta, Saskatchewan and Manitoba, protect the Indians' 'right ... of hunting, trapping and fishing game and fish for food at all seasons of the year on all unoccupied Crown lands and on any other lands to which the said Indians may have a right to access'.[3411] Inconsistent provincial legislation is accordingly excluded[3412] but not inconsistent federal legislation.[3413] Similar provisions are contained in the Northwest Territories Act 1970 s 14 and the Yukon Act 1970 s 17(3).[3414] There is no equivalent obligation with respect to British Columbia, though attempts have been made to argue that Article 13 of the Terms of Union under which the province entered the Union may render invalid fisheries legislation which adopted a policy less liberal than that pursued by the British Government prior to union.[3415]

- The James Bay and Northern Quebec Agreement signed in 1975 provides for priority to be given to Indian hunting, fishing and trapping rights, subject to conservation principles.[3416] Paragraph 24.3.3 provides that 'the Native people shall enjoy the sole and exclusive exercise of the right to harvest in accordance with the provisions of this Section'. This right is subject to Federal and Provincial Wildlife regimes and certain other express provisions apart from the interests of conservation. For example, para 24.3.7 provides:

  > a) The right to harvest shall not be exercised in lands situated within existing or future non-Native settlements within the Territory.
  >
  > b) The annexation of land by a municipality or any other public body shall not in itself exclude such areas from the harvesting rights of Native people as long as such lands remain vacant.

  Certain species of mammals, fish and birds are reserved for the exclusive use of Native people (para 24.7.1; cf schedule 2). This exclusive use includes the right to conduct commercial fisheries in relation to the species of fish so reserved. Non native have the right to hunt and fish in certain areas (para 24.6, 24.8). The management of hunting, fishing and trapping is controlled by the Hunting, Fishing and Trapping Coordinating Committee on which the Cree Native Party, the Inuit Native Party, Quebec and Canada each have three members.[3417] The conclusion of the Northeastern Quebec Agreement has lead to the appointment of two representatives of the Naskapi Native Party and to an increase in Quebec's and Canada's representation to four.[3418] The Co-ordinating Committee has been operating since 1975.[3419] At the request of the Crees, the Quebec Government is currently undertaking a review of the implementation of the whole Agreement including Section 24.[3420] The Quebec Government has concluded a further agreement with the Inuvialuit,[3421] and is preparing negotiations with other Indian Nations which are expected to:

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3409 eg *R v Taylor and Williams* (1981) 55 CCC (2D) 172 and see *R v Simon* (1982) 134 DLR (3d) 72.
3410 *R v White and Bob* (1954) 50 DLR (2d) 613, where the Proclamation was held not to constitute a treaty.
3411 Memoranda of Agreement with Manitoba, cl 13; cf cl 12 of the Saskatchewan and Alberta Agreements, given effect by British North America Act 1930 (UK) s 1.
3412 *R v Wesley* (1932) 4 DLR 774.
3413 *Elk v R* (1980) 114 DLR (3d) 137.
3414 *R v Michel and Johnson* [1984] 1 CNLR 157 (YCA).
3415 *Jack v R* (1979) 100 DLR (3d) 193; *R v Adolph* (1984) 47 BCLR 331.
3416 *The James Bay and Northern Quebec Agreement*, Editeur Officiel du Quebec, Montreal, 1976, para 24.2.1, 24.3.2, 24.3.4, 24.4.27.
3417 These powers of management are subjected to Ministerial approval (para 24.4.25-24.4.37). It may be that the Co-ordinating Committee's role would be more accurately described as 'consultative'. V Hayson, *Submission 445* (30 August 1984) 6.
3418 The Cree Naskapi band wildlife by-laws must be submitted to the co-ordinating committee but the committee's recommendations are not binding: Cree Naskapi (of Quebec) Act 1984, s 48(2).
3419 Hon JC Munro, Minister for Indian Affairs and Northern Development, Report on the Implementation of the Provisions of the James Bay and Northern Quebec Claims Settlement Act 1977 for the period of ending March 31, 1980, Ottawa, 1980, 24.
3420 SAGMAI, Government of Quebec (G Moisan), *Submission 460* (4 October 1984) 2.
3421 See the Western Arctic Claim, *The Inuvialuit Final Agreement Entitlement* (COPE), Editeur Officiel du Quebec, Montreal, 1984, Sections 11-14.

> come up with completely different solutions in order to prevent as much as possible, conflicts with the white people (private landowners, forest concessions, sport fishing and hunting, etc.).[3422]

- There is also a limited and variable degree of protection of Indian hunting and fishing rights under provincial legislation.[3423]

In addition to long-established laws and treaties in Canada, there has been much recent negotiation by Indian and Inuit groups to establish the rights they assert on a sounder basis, to resolve land and related claims through comprehensive claims settlement agreements, and to create secure form of self government. In particular s 35 of the Constitution Act 1982 recognizes and affirms 'the existing aboriginal and treaty rights of the aboriginal peoples of Canada'. Section 37 requires a continuing series of meetings between leaders of Indian and Inuit organisations and the First Ministers of Canada and the Provinces in an attempt to define and elaborate upon the constitutional provisions affecting native people.[3424] The precise effect of s 35 in reinforcing aboriginal and treaty rights to hunt and fish remains unclear,[3425] and for the time being the question is caught up with wider issues of self government and claims settlement.

897. ***Summary of the Canadian Position***. There is no doubt the range of protections outlined in para 896 is of more significance in Canada than such common law rights as exist. The recognition, particularly at common law. of aboriginal hunting and fishing rights in Canada has in fact 'been quite limited':

> even a very general Federal enactment such as the Migratory Birds Convention Act has been held to supersede aboriginal rights and a great variety of overlapping wildlife laws makes the assertion of an aboriginal claim nearly futile.[3426]

But hunting and fishing rights continue as a prominent aspect of 'customary law' claims in Canada, to which a great deal of attention continues to be paid.[3427] Moreover, the mere existence of common law rights, whatever their scope, has been an important factor in the bargaining position of the Indian and Inuit peoples.

898. ***The New Zealand Position***. The question whether the doctrine of aboriginal title applies in New Zealand was the subject of considerable controversy earlier this century.[3428] The principle was first recognised by the New Zealand Supreme Court in 1847 in *R v Symonds*.[3429] But a subsequent decision by Pendergast J suggested that in the case of 'primitive barbarians' as opposed to civilised nations the issue of a Crown grant extinguished whatever native proprietary rights might exist.[3430] The possibility of the continued existence of aboriginal title in New Zealand was reopened by the Privy Council in *Wallis v Solicitor-General for New Zealand* in 1903.[3431] Unease at this decision led to the passing of the Native Land Act 1909, s 84 of which provided that:

> Save so far as otherwise expressly provided in any other Act the native customary title to land shall not be available or enforceable as against His Majesty the King by any proceedings in any Court or in another manner.[3432]

The combined effect of this legislation and of orders of the Maori Land Court in relation to customary land was to extinguish the possibility of native title to a major part, if not all, land in New Zealand.[3433]

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3422 SAGMAI, Government of Quebec, (G Moisan) *Submission 460* (4 October 1984) 1; and see the Agreements initialled by the Tungavik Federation of Nunavut in October 1981 but not yet ratified by the Federal Government.

3423 See D Sanders, 'Indian Hunting and Fishing Rights' (1974) 38 *Sask L Rev* 45; R H Bartlet, 'Survey of Canadian Law, Indian Law, and Native Law' (1983) 15 *Ottawa L Rev* 433.

3424 To this end the Inuit Committee on National Issues has proceeded with the identification and defining of Aboriginal fishing and trapping rights.

3425 It has been argued that Federal legislation no longer supersedes Aboriginal treaty rights because the Constitution Act 1982 s 35 recognises and affirms, among other rights, traditional hunting, fishing and gathering rights. See Lysyk (1982) 467-80. On any view if the treaty contemplates later federal regulation s 35 does not operate: *R v Eninew* (1984) 10 DLR (4th) 137. Section35 is set out in full in para 143.

3426 RL Barsh, *Submission 440* (4 August 1984) 2.

3427 In addition to the sources already cited see CJ Pibus 'The Fisheries Act and Native Fishing Rights in Canada: 1970-1980' (1981) 39 *U Toronto Fac G Rev* 43; D Brown, 'Indian Hunting Rights and Provincial Law; Some Recent Developments', id, 121. On analogous developments in the US see eg FS *Cohen's Handbook of Federal Indian Law*, Michie, Bobbs Merrill, Charlottesville, 1982, ch 8 & works there cited.

3428 PG McHugh, 'Aboriginal Title in New Zealand Courts' (1984) 2 *Canterbury G Rev* 235.

3429 [1840-1932] NZ PCC 387. See also *In re The Lundon and Whitaker Claims Act* (1872) 2 CA 41, 49.

3430 *Wiparata v The Bishop of Wellington* (1877) 3 NZ Jur (NS) SC 72, 77, 78.

3431 [1903] AC 173.

3432 cf Maori Affairs Act 1953, s 155.

## Australian Law

899. ***Absence of Treaties or Special Laws***. It will be clear from the description of Australian legislation in the next Chapter that many of the arguments on which Canadian Indians and Inuit have relied to preserve their hunting and fishing rights are not available in Australia. There is no general federal legislation comparable to the Indian Act 1951 (Can) s 88. No treaties or agreements, ancient or modern, were concluded by or on behalf of the Crown with Aboriginal or Islander people.[3434] There is no conferral of exclusive federal legislative power over Aborigines and Aboriginal land, comparable to that in s 91(24) of the Constitution Act 1867 (Can). There has been nothing comparable to the debates about Indian rights leading to, and following from, the 1982 Constitution.

900. ***Common Law Protection***? There remains at least the possibility that the common law may be held to protect Aboriginal hunting and fishing rights to some extent. Recent Canadian cases[3435] and a series of American and Privy Council decisions[3436] establish that when sovereignty over a country is acquired a radical or paramount title to that country vests in the Crown, but that the Crown's title may be burdened by pre-existing proprietary rights. Pre-existing native title has been described as arising from:

> the recognition by the Crown of a usufructuary title in the Indians to all unsurrendered lands. This title, though not perhaps susceptible to any accurate legal definition in exact legal terms, was one which nevertheless sufficed to protect the Indians in the absolute use and enjoyment of their lands, whilst at the same time they were incapacitated from making any valid alienation otherwise than to the Crown itself, in whom the ultimate title was, in accordance with the English law of real property, considered as vested.[3437]

The only Australian decision, *Milirrpum v Nabalco Pty Ltd*,[3438] denied the existence of a doctrine of Aboriginal title in Australia. Justice Blackburn doubted that the principle could apply to a settled, as opposed to a conquered, colony. Nor was he able to find that the doctrine was part of the English common law at the date of settlement of Australia. It would follow that rights to hunt and fish as an incident of such title would also be excluded.[3439] The issue has not yet been considered by the High Court, and was acknowledged by at least some members of the Court to be an arguable one in *Coe v Commonwealth*.[3440]

901. ***Mabo's Case***. A common law right to own, occupy, use and enjoy (and thus to hunt and fish upon) certain islands and areas of the sea is the basis of the plaintiffs' statement of claim in *Mabo v Queensland and the Commonwealth*, pending before the High Court.[3441] The action arises from the Queensland Government's intention to grant land currently held as Aboriginal reserves to Aboriginal Councils by way of a grant of a deed in trust. This would arguably result in the plaintiffs, traditional descendants of the owners of Mer (Murray Islands) and a member of the Island Council, being prevented from residing on Mer for more than one month without the permission of the Minister of Lands.[3442] The plaintiffs argue that since time immemorial and since settlement they have continuously occupied, used and enjoyed the land, and have had exclusive rights to hunt, fish and forage.[3443] These rights, they claim, were recognised on the acquisition of

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3433 It is questionable whether the words 'customary land' as defined by the Maori Affairs Act 1953, s 2 cover all land subject to aboriginal title. McHugh argues that the land below the tidal waters of New Zealand represents a large area of 'customary land' not subject to the Act, and thereby allows for the possibility of a legal challenge to such areas as the foreshore between the high and low water marks, harbours, bays, estuaries, non-navigable tidal riverbed and areas of the territorial seabed: McHugh (1984) 265; and see PG McHugh, 'The Legal Status of Maori Fishing Rights in Tidal Waters' (1984) 14 *Vict UWL Rev* 247, 249.

3434 See para 39.

3435 *Hamlet of Baker Lake v Minister of Indian Affairs and Northern Development* (1979) 107 DLR (3d) 513; *Calder v Attorney-General of British Columbia* (1973) 34 DLR (3d) 145; *R v White and Bob* (1954) 50 DLR (2d) 613. But cf *Guerin v R* [1984] 6 WWR 481, 499 where Dickson J, in commenting on the disagreement as to whether Indian title gives rises to a 'beneficial interest' or merely a personal usufructuary right, preferred to talk of it giving rise to fiduciary obligations.

3436 *Johnson v McIntosh* (1823) 8 Wheaton 543, 572-4; *St Catherine's Milling and Lumber Co v The Queen* (1888) LR 14 App Cas 46; *Attorney-General of Nigeria v John Holt and Co* (Liverpool Ltd) [1915] AC 599; *In re Southern Rhodesia* [1919] AC 211; *Amodu Tijani v The Secretary of Southern Nigeria* [1921] 2 AC 399; *The Attorney-General of Quebec v The Attorney-General of Canada* (1921) 1 AC 401.

3437 *Johnson v McIntosh* (1923) 8 Wheaton 543 (Marshall CJ). See also *Calder's* case (1973) 34 DLR (3d) 145, 156; *Amodu Tijani* [1921] 2 AC 399, 409-10; *In re Southern Rhodesia* [1919] AC 211, 233-4.

3438 (1971) 17 FLR 141 (Blackburn J).

3439 This does not mean that Aborigines became trespassers on Crown land, but it does mean that their position was no better than that of other subjects — and certainly that they had no special or private rights over the land or its produce. cf GS Lester, *Submission 472* (19 February 1985) 5-6.

3440 (1979) 24 ALR 118, 138. See further para 63-4, 66-7.

3441 Set down for Hearing, March 1986.

3442 Land Act 1962 (Qd) s 350 as amended by the Land Act (Aboriginal and Islander Land Grants) Amendment Act 1982 (Qld).

3443 They also argue they have established permanently settled communities with a political organisation and a system of customary laws. See E Mabo, 'Land Rights in the Torres Strait', in F Olbrei (ed) *Black Australians: The Prospects for Change*, James Cook University, Townsville, 1982, 143. See also G Nettheim, (1982) 4 *ALB* 1.

sovereignty by Great Britain in 1879, and continue to exist until lawfully impaired. They seek a declaration that they are the owners by custom, the holders of traditional native title, or the holders of a usufructuary right, that these rights are not impaired, or alternatively that the defendants are not entitled to impair such rights without paying compensation.[3444]

902. ***Implications of Common Law Claims in Australia***. In practice common law claims (such as that in *Mabo's* case) are likely to do little to satisfy the aspirations of most Aboriginal people for land rights. Should such common law claims be accepted by the High Court, Aboriginal claimants must first establish the existence of the right at settlement and their direct descent from those entitled to such rights at settlement. The Murray Islanders are exceptional, having well-identified interests in specific areas of land. As a semi-hunting, semi-agrarian community, they have avoided many of the devastating consequences of widespread displacement and resettlement. But even if it were held that the principle of native title exists in Australia, this would not have helped the plaintiffs in *Milirrpum*, who were unable to prove direct descent from holders of the land in question at settlement. In other words they were unable to prove 'on the balance of probabilities that [their] predecessors had in 1788 the same links to the same areas of land as those which the plaintiffs now claim'.[3445] Secondly, Aboriginal claimants must establish that the right has not been abrogated. In *Calder's* case in Canada, the majority held that an intention by the Crown (evidenced by Proclamation and Ordinance) to exercise absolute sovereignty on British Columbia was sufficient to extinguish native title, the exercise of sovereignty being inconsistent with 'Aboriginal title'.[3446] On the other hand, United States' decisions require a clear and specific indication of intent by Congress to extinguish Indian title; dealings with property that are merely inconsistent with Indian title are insufficient.[3447] Justice Blackburn, in the one Australian decision on the point, supported the view taken by the three majority judges in *Calder's* case.[3448] The High Court has not yet considered the question. However, it appears that the continued existence of common law rights will be difficult to establish given the extensive statutory basis for land settlement and for the administration of Aboriginal reserves.[3449]

903. ***Customary Rights***. An alternative possibility would be reliance upon hunting or fishing rights as independent proprietary interests of a customary kind recognised at common law. The common law does contain some scope for the recognition of customary rights in some circumstances. The rights relied on must have existed without interruption since 'time immemorial'. The custom asserted must be 'reasonable'. Though its manner of exercise may vary, the right must be 'certain', and in particular the asserted beneficiaries and the locality of the right must be certain.[3450] The requirement that there must be proof of a long and uninterrupted use of the right by the inhabitants, and the fact that the custom is unlikely to be considered 'reasonable' where there are others exercising inconsistent rights and asserting control over the subject land, make it difficult to envisage situations where any customary rights could have survived dealings with land in mainland Australia by the Commonwealth and the States.[3451]

904. ***Profits a Prendre***. A distinction is generally made between the right to use land, which comes within the concept of a usufructuary or customary right, and the right to reap the profits from land (e.g. the right to hunt and fish), which cannot be so described because the exercise of such a right could exhaust the subject matter. As such the right to hunt and fish falls more properly into the category of a *profit a prendre*.[3452] However a *profit* represents an artificial and unduly restrictive way of describing the right of Aboriginal people to forage. For example, the right to fish or take game may be described as a *profit* for the fish or game once killed can be owned. However the right to take water cannot be a *profit a prendre* because water cannot

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3444 The Queensland Coast Islands Declaratory Act 1985 (Qld) declares that upon their annexation to Queensland the islands in question 'were vested in the Crown in right of Queensland freed from all other rights, interests and claims of any kind whatsoever' (s 3(a)) and that 'no compensation was or is payable' in respect of 'any right, interest or claims alleged to have existed prior to the annexation ... or alleged to derive from such a right, interest or claim' (s 5(b)). If valid, the Act would appear to defeat the claims in *Mabo's* case.

3445 (1971) 17 FLR 141, 198 (Blackburn CJ).

3446 (1973) 34 DLR (3d) 145, 157-163 (Judson J, Maitland and Ritchie JJ concurring). Hall J (dissenting) held that the 'onus of proving that the sovereign intended to extinguish Indian title lies on the respondent and that intention must be "clear and plain"': id, 210.

3447 Cohen (1982) 489-492.

3448 *Milirrpum's* case, (1971) 17 FLR 141, 223.

3449 For criticism of this position see B Morse, *Submission 444* (27 August 1984) 4.

3450 See para 61-2 where these requirements are discussed in more detail.

3451 cf *Milirrpum v Nabalco Pty Ltd* (1971) 17 FLR 141.

3452 ie the right to take something off the land of another, where the thing taken is either part of the land or wild animals existing on it. cf *R v Toohey, ex parte Meneling Station Pty Ltd* (1982) 44 ALR 63, where the High Court held a grazing licence did not create a profit a prendre. Land, the subject of the licence was still therefore 'unalienated Crown land' subject to claim under the Aboriginal Land Rights (Northern Territory) Act 1976 (Cth).

be owned, and is not part of the soil. Despite these difficulties, it has been argued that the *profit a prendre* is useful both:

> ... as a tool for analyzing the aboriginal rights [and] as a technique for protecting them. I agree that there are certain common law problems to any such categorization but they are not insuperable on either theoretical or practical grounds. The *profit* has always been a technique used by the common law to deal with resource harvesting rights held in gross whether this be hunting, gathering or oil and gas rights. Traditionally a *profit* could not be vested in a fluctuating body because this would tend to the destruction of the resource. But is this a valid concern with aboriginal harvesting, if we can establish a traditional capacity to self regulate the harvest within the limits of sustainable yields? In any event, it would seem that a simple statutory declaration could surmount any technical difficulties posed by the common law. Finally, a *profit* classification may be of some merit insofar as it may give aboriginal people access to traditional common law remedies such as trespass and nuisance. Alternative classifications (such as licences) are far more problematic.[3453]

The common law rules relating to profits a prendre may be useful in their limited circumstances, but as a vehicle for recognition of traditional hunting and fishing its use is limited. A particular problem is their vulnerability to extinction by subsequent dealings in land.

## Conclusion

905. ***Common Law or Legislation***? In the absence of any authoritative decision on the point by an Australian appeal court, it is far from clear whether or what customary or Aboriginal hunting and fishing fights would be recognized at common law. Even if the Australian courts do adopt the approach, which at least some Canadian courts have adopted, of recognizing an original customary title or usufructuary right, it is likely in the overwhelming majority of cases that this will have been cancelled or overridden by State, Territory or Commonwealth law or administrative action,[3454] or that no one will now be able to demonstrate historical continuity with the original beneficiaries of such rights, so as to be able to rely on them. In the great majority of cases therefore (if not all cases) it will be necessary to rely instead on Australian land-use, conservation or fisheries legislation to extend protection to Aboriginal traditional hunting and fishing practices.

3453 N Bankes *Submission 435* (19 July 1984) 3 and see McHugh, 'Aboriginal Title' (1984) 254-7, 271-3.

3454 In *Wacando v Commonwealth of Australia* (1981) 37 ALR 317, the plaintiff asserted a right to engage in beche de mer fishing on the ground that Darnley Island was not legally part of Queensland or Australia, and he was therefore not subject to Queensland or Australian legislation. The claim failed.

# 35. Aboriginal Hunting, Fishing and Gathering Rights: Current Australian Legislation

906. ***Legislative and Administrative Overview***. This Chapter examines Australian legislation as it affects 'traditional' hunting, fishing and gathering activities of Aborigines. It is based on an examination of relevant State, Territory and Commonwealth Acts and regulations, and on discussions with Aboriginal organisations and State and Commonwealth authorities such as Land Departments, Parks and Wildlife Authorities and Fisheries Departments.[3455]

907. ***Historical Background***. As early as 1848, the question had been raised of 'such free access to land, trees and water as will enable [the Aborigines] to procure the animals, birds and fish, etc., on which they subsist', and of the possibility of securing such access by inserting conditions in Crown leases.[3456] Between 1867 and 1900, legislation recognising Aboriginal rights to forage was enacted in Western Australia, Queensland, Victoria and South Australia.[3457] One example, the Fisheries Act Amendment Act 1893 (SA) s 8, enabled the Governor to declare the whole or any part of any river, lagoon, estuary of the sea, a reserve within which only Aboriginal natives of South Australia would be allowed to fish.[3458] This was the first legislative recognition of a fishing right as an independent right, that is, one not couched merely in terms of exemption from prosecution. The intervening years have seen many amendments to the early legislation, with the rights of Aboriginal people to gather food very often being reduced considerably (if not abrogated altogether) in the process.

908. ***Three Main Areas of Concern***. As the following discussion will indicate, Federal, State and Territory legislation and regulations vary considerably. The legislation is by no means consistent or complete, and in many cases difficulties can arise from divergences between legislation and administrative policy. For convenience it is proposed to distinguish between three main areas:

- hunting and gathering rights;
- rights to fish;
- rights of access to land.

In each case it is proposed to deal first with any relevant Commonwealth legislation, then with the States and the Northern Territory. In view of the large and complicated body of legislation and administrative practice, this account is substantially descriptive. The questions of principle will be returned to in Chapter 35, against the background of the present law and practice.[3459]

## Legislation on Hunting and Gathering Rights

### The Commonwealth

909. ***Wildlife Conservation***. The National Parks and Wildlife Conservation Act 1975 (Cth) makes provision for the establishment and management of parks and reserves in the Territories and elsewhere in Australia, for purposes such as tourism or the carrying out of Australia's rights and obligations in relation to the continental shelf or in relation to agreements between Australia and other countries (s 6(1)). In general terms the Act provides that land owned and leased by the Commonwealth may be declared a Park or Reserve or designated a wilderness zone and administered by the Director in accordance with the plans of management relating to that Park or Reserve (s 7, 11-14). Under s 71(1) the Governor-General has wide powers to make

3455 Compared with anthropological accounts of Aboriginal subsistence activities cited in ch 33, there has been virtually no writing on the legal aspects of the problem in Australia. But for comment on one esoteric aspect see H Reicher, 'Access by Australian Aboriginals to the Fruits of Deep Seabed Mining' (1983) 14 *UWAL Rev* 187.

3456 Mayne to Fitzroy, *HRA* Ser 1, vol 26, 635.

3457 Gaming Act 1874 (WA) s 13, Fisheries Act 1899 (WA) s 11; Native Birds Protection Act Amendment Act 1877 (Qld) s 10; Fisheries Act 1873 (Vic) s 30, Game Act 1867 (Vic) s 12; Birds Protection Act 1900 (SA) s 4, Fisheries Act 1878 (SA) s 14.

3458 For earlier Orders in Council to similar affect see Attorney-General, Advice to Executive Council, 28 August 1848, *Historical Records of Australia* (hereafter HRA) Ser 1, vol 26, 636.

3459 See para 963-9 for a summary of present law and practice.

regulations providing for the protection and conservation of wildlife, and for the preservation of parks and reserves. However such regulations are not to be interpreted as affecting the traditional use of land by Aboriginal people[3460] unless expressly stated to do so. Section 70 provides that:

> (1) Subject to subsection (2) and to the operation of this Act in relation to parks and reserves and conservation zones, nothing in this Act prevents Aborigines from continuing in accordance with law, the traditional use of any area of land or water for hunting for food-gathering (otherwise than for purposes of sale) and for ceremonial and religious purposes.
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> (2) The operation of sub-section (1) is subject to regulations made for the purpose of conserving wildlife in any area and expressly affecting the traditional use of the area by Aborigines.

There are as yet no such regulations expressly affecting the traditional use of any area of land by Aborigines.[3461]

910. ***Aboriginal Land***. The National Parks and Wildlife Conservation Act 1975 (Cth) establishes certain basic principles in relation to the Commonwealth's involvement in conservation issues arising on Aboriginal land. Thus the Commonwealth shall not acquire land for a park or reserve designated under State law, as having special significance in relation to Aborigines, without the consent of the State (s 6(2)). In addition, section 6(3) provides that:

> Land in the Northern Territory, other than land in the Uluru (Ayers Rock-Mt Olga) National Park or in the Alligator Rivers Region as defined by the Environment Protection (Alligator Rivers Region) Act 197*8*, shall not, without the consent of the Territory, be acquired by the Commonwealth for the purposes of this Part if it is land that is dedicated or reserved under a law of the Territory for purposes related to nature conservation or the protection of areas of historical, archaeological or geological importance or of areas having special significance in relation to Aboriginals.[3462]

Section 18(1) provides that the Director of National Parks and Wildlife 'may assist and cooperate with Aborigines in managing land not being a park, reserve or conservation zone held on trust for, vested in Aboriginal people or occupied by them'. However he may do so only after consultation with any Aborigines who have traditional rights in relation to the land, and only in accordance with an agreement between the Director and the federal Minister for Aboriginal Affairs, relevant State Minister or administrative authority, or any other person or body owning the land, as the case may be (s 18(2)).[3463] In 1984 the Australian National Parks and Wildlife Service appointed an officer to initiate an Aboriginal Assistance Program to more fully implement s 18. Where Aboriginal land is held under lease by the Director of National Parks and Wildlife, it may be declared by the Governor General to be a park or reserve and administered under the terms of the relevant plan of management.[3464] In 1985, the Act was amended to clarify the relationship between the Director of National Parks and Wildlife and the Land Councils in relation to the management of Aboriginal land situated wholly or partly within a Park or reserve. The new provision provides that where the Minister and the relevant Land Council agree to establish a Board of Management and, where the park consists wholly of Aboriginal Land, the majority of members shall be Aboriginal and nominated by the traditional owners (s 14C(5)).[3465] The Board's function is, in conjunction with the Director, to prepare plans of management, to advise the Minister in relation to the future development of the Park and to maintain the management of the Park. In the event of disagreement between the Director and Board, they shall each advise the Minister accordingly, who if unable to resolve the disagreement, shall appoint an arbitrator (s 11(11A)-(11F)).[3466] The Plans of Management for Kakadu and the appointment of the Board of Management at Uluru demonstrate the ways in which the National Parks and Wildlife Service has sought to accommodate Aboriginal interests, as well as the interests of conservation and tourism. If Aboriginal land held under lease

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3460 An Aboriginal is defined as 'a member of the Aboriginal race of Australia and includes a Torres Strait Islander': s 3(1).

3461 Contrast this situation with the Plans of management operating at Kakadu (Alligator River Region) National Park and as previously proposed for Uluru (Ayers Rock-Mt Olga): see para 911-12.

3462 For the special position of Uluru and the Alligator Rivers Region see para 911-12.

3463 The House of Representatives Standing Committee on Environment and Conservation in their *Second Report on the Adequacy of Legislative and Administrative Arrangements for Environmental Protection* AGPS, Canberra, 1981 recommended by majority that s 18 'be amended to require extensive consultations with State Governments before it is invoked', on the basis that s 18 'permits the intrusion of the Commonwealth into areas that are traditionally State responsibilities': id, 7. Three members of the Committee dissented on this point: id, 37. The then Government did not respond to this recommendation.

3464 7(1)(aa), 7(2), 14(1).

3465 For example, see Uluru Board of Management para 860.

3466 See further s 14A for procedures in the event of disagreements over the implementation of Plans of Management in relation to which the Board alone is responsible for making decisions under s 14D(1)(b).

by the Commonwealth is declared a park or reserve, then certain activities (mining, the felling of trees, excavations etc.) are prohibited, notwithstanding any Commonwealth, State or Territory law, except in accordance with the plan of management (s 10).

911. ***Kakadu National Park***. Following 15 years of public interest, and after numerous Government studies and reports,[3467] the Kakadu National Park was proclaimed in 1979. The creation of the National Park, on what was Aboriginal land, required amendment to the National Parks and Wildlife Conservation Act 1975 (Cth) and the Aboriginal Land Rights (Northern Territory) Act 1976 (Cth). The plan of management[3468] contains detailed provisions for the involvement of Aboriginal people in the Park's management,[3469] including the following:

- Resource harvesting program which meet conservation criteria as agreed between the Director and a representative of the Northern Land Council to be permitted (29.5.2);

- Aborigines, not being traditional owners, but entitled by tradition to use the land may so enter and use the land (29.5.6);

- Traditional hunting and foraging to be permitted subject to limitations on the hunting of certain species where the species is officially designated as endangered, nationally rare, threatened or locally of rare or of unusual occurrence in the Park; and occurs in numbers significantly below the natural capacity for that species (34.2.4);

- No further hunting permitted unless for authorised scientific purposes or for park management (34.2.4);

- Traditional fishing permitted subject to restrictions made only after consultation with a representative on the Northern Land Council (35.5.2);

- A recreational fishing permit may be granted provided the taking does not interfere with the management of wildlife (34.2.4);

- Commercial fishing is not permitted except with the consent of the Director and subject to permit (34.2.5).

Despite these provisions, whether effective control lies in Aboriginal hands, indeed whether there is any degree of formal power sharing, has been questioned.[3470] However these criticisms pre-date the 1985 amendments to the National Parks and Wildlife Conservation Act 1975 (Cth).[3471]

912. ***Uluru National Park***. The existing plan of management for Uluru National Park was approved in 1983.[3472] The plan was to have ceased to have effect on 30 June 1987. However, the grant of Uluru National Park to the traditional owners by the Commonwealth Government, and the subsequent lease of the Park back to the Commonwealth, has led to renegotiation of the management arrangements for the area. The Pitjantjatjara Council and Central Land Council have been involved in negotiations with the Commonwealth and Northern Territory Governments over questions of effective Aboriginal control and management of the Park. Agreement has been reached on the composition of the Board,[3473] what comprises six representatives of the traditional owners, one representative each of the Australian National Parks and Wildlife Service, and of the Federal Departments of Sport, Recreation and Tourism and of Arts Heritage and Environment, and two members of the Legislative Assembly of the Northern Territory. The Board when constituted will continue to

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3467 eg Weems Report 1968, Alligator Rivers Region Environmental Fact-Finding Study 1972-3, Second Ranger Uranium Environmental Inquiry Report 1977, cited in Australian National Parks and Wildlife Service, *Kakadu National Park Plan of Management*, Canberra, 1980, 11-13.

3468 Made pursuant to National Parks and Wildlife Conservation Act 1975, (Cth) s 11 and ceasing to have effect on 3 December 1985.

3469 Kakadu National Park Plan of Management (1980) para 4, 25.5.

3470 C Tatz, *Aborigines and Uranium*, Heinemann, Sydney, 1982, 153-6, 174-8. cf Kakadu Plan of Management (1980) para 29, 57. cf also the role of the Aboriginal Land Councils in the Co-ordinating Committee established to ensure the protection of environment in the Alligator Rivers Region, in particular in relation to the mining of uranium in this area: Environment Protection (Alligator Rivers Region) Act 1978 (Cth) ss 17, 18. SM Weaver, 'Progress Report: The Role of Aboriginals and the Management of Coburg and Kakadu National Parks, Northern Territory, Australia' (North Australian Research Unit Seminar, Darwin, July 30 1984). See further para 994-9.

3471 Sections 11(11A), 14A-14D and see para 910.

3472 *Uluru (Ayers Rock-Mount Olga) National Park Plan of Management*, Australian National Parks and Wildlife Service, Canberra, 1982.

3473 Pursuant to National Parks and Wildlife Conservation Act 1975 (Cth) s 14C as amended September 1985. See para 910.

operate under the existing plan of management. These currently provide for the survey and classification of vegetation in the park incorporating Aboriginal knowledge, together with research on fire management, relying on Aboriginal knowledge of traditional fire regimes (37.2.3-37.2.5).

> Pending the outcome of research harvesting by Aboriginals of plants or parts of plants for food, fuel or as primary material for the production of artefacts or for other purposes is to be regulated (37.2.12).

Similar provisions are contained in relation to the hunting of native fauna and food gathering by Aborigines.[3474] The Plan of Management further provides for research to examine questions of sustained yield and maintenance of the park ecosystems, in order to determine the feasibility of Aboriginal resource harvesting (44.5.1). Limited harvesting programs which meet approved conservation criteria agreed upon by the Director of National Parks and Wildlife and by the Uluru Aboriginal Advisory Committee, the Conservation Commission of the Northern Territory and, as necessary, a representative of the Central Land Council are to be permitted (44.5.2).

913. ***Future Directions: Jawoyn Land Claim***. The question of effective Aboriginal control of the Board of Management of a National Park on Aboriginal land has arisen in the context of the Jawoyn Land Claim (near Katherine), currently before the Aboriginal Land Commissioner. On the assumption that the claim will succeed, a draft Jawoyn National Park Act has been prepared on behalf of the claimants, after extensive consultation with them and with others experienced in the management of Cobourg and Kakadu. A 12 man Board of Management is proposed, six members of which shall be traditional owners appointed on the nomination of the Land Council (cl 10(1)). As at Cobourg the Chairman would be appointed from among these six members and would have a casting vote (cl 13). The Board would be required to appoint a Planning Committee whose task is to prepare the management plans.[3475] It is envisaged that the Planning Committee itself will prepare the plans, thus allowing for Aboriginal input and placing emphasis on Aboriginal values and priorities in the preparation of management plans. One of the purposes of these plans is the 'maintenance of the Aboriginal traditions of the traditional Aboriginal owners of the park' (cl 26 7(a)). The Board's functions would include the protection and enforcement of the right of Aborigines to use and occupy the park. The Board would have extensive power to make by-laws, provided that 'a by-law shall not interfere with the use of the park by an Aboriginal traditional owner or an Aboriginal entitled by Aboriginal tradition to use the park' (cl 33(3)). Nor shall a by-law prohibit possession of firearms and other equipment necessary for the exercise of this right although the plan of management may contain such limitations. This proposal was presented prior to the 1985 amendments to the National Parks and Wildlife Conservation Act 1975 (Cth) (s 11(11A), 14A-14D) and would appear to be subject to these amendments.

## Northern Territory

914. ***Wildlife Conservation***. The Territory Parks and Wildlife Conservation Act 1976 (NT) provides for the establishment and management of parks and reserves and for the protection of certain wildlife. Section 122 states that 'subject to the regulations made for the purposes of conserving wildlife in any area and expressly affecting the traditional use of the area by Aboriginals', nothing in the Ordinance prevents 'Aboriginals who have traditionally used an area of land or water from continuing to use the area of land or water for hunting, for food gathering (otherwise than for the purposes of sale) and for ceremonial and religious purposes'. No regulations have been made expressly affecting Aborigines under s 122. They thus have unrestricted rights to hunt for food and for ceremonial purposes in the Northern Territory under the 1976 Act.[3476] Part IV of the Act prohibits Aborigines from selling, bartering or otherwise disposing to a non-Aborigine any protected animal or partly protected animal without a permit to do so (s 29). Such a permit may not authorise the taking of protected or partly protected animals in a sanctuary or reserve (s 29(2)). Similarly it is an offence to possess parts of a protected animal dead or alive (s 31).

915. ***Aboriginal Land***. The Aboriginal Land Rights (Northern Territory) Act 1976 (Cth) specifically allows for the application of Northern Territory laws to Aboriginal land, to the extent that they are 'capable of

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3474 Paragraph 39.2.10 states that 'pending the outcome of research recommended under s 44 and this section, hunting and food gathering by Aboriginals will be regulated'. See para 39.2.3., 39.2.4, 39.2.5.

3475 See para 999.

3476 It has been suggested that regulations under s 122 may become necessary should species, such as the bustard or plains turkey, be further reduced in numbers.

operating concurrently with' the Commonwealth Act.[3477] The right of Aborigines to utilise wildlife resources is preserved and Territory conservation laws applying to the sea within 2 kilometres of Aboriginal land must allow for the right of Aborigines to use the resources of the sea. Section 73(1) states that the powers of the Legislative Assembly for the Northern Territory extend to:

> (c) Laws providing for the protection or conservation of, or making other provision with respect to, wildlife in the Northern Territory, including wildlife on Aboriginal land, and, in particular, laws providing for schemes of management of wildlife on Aboriginal land, being schemes that are to be formulated in consultation with the Aboriginals using the land to which the scheme applies, but so that any such laws shall provide for the fight of Aboriginals to utilise wildlife resources; and
>
> (d) Laws regulating or prohibiting the entry of persons into, or controlling fishing or other activities in, waters of the sea, including waters of the territorial sea of Australia, adjoining, and within 2 kilometres of, Aboriginal land, but so that any such laws shall provide for the right of Aboriginals to enter, and use the resources of, those waters in accordance with Aboriginal tradition, but any such Ordinance has effect to the extent only that it is capable of operating concurrently with the laws of the Commonwealth, and, in particular, with this Act, the National Parks and Wildlife Conservation Act 1975 and any regulations made, schemes or programs formulated or things done, under this Act, or under that Act.

The Territory Parks and Wildlife Conservation Act 1976 (NT) provides that the Commission may enter into arrangements with a Land Council relating to schemes to protect wildlife on Aboriginal land.[3478] Where no such agreement has been entered into within two years of the grant of land under s 12 of the Aboriginal Land Rights (Northern Territory) Act 1976 (Cth), any existing sanctuary or protected area contained in the deed of grant of that land is revoked (s 73(2)). For example at Daly River and in the Tanami Desert, where no arrangements have yet been concluded, existing provisions for a sanctuary have lapsed and conservation programs must be renegotiated with the Conservation Commission.[3479]

916. ***Cobourg Peninsula***. The joint involvement of the Northern Territory Conservation Commission and Aboriginal people in the management of the Cobourg Peninsula Sanctuary is provided for by the Cobourg Peninsula Aboriginal Land and Sanctuary Act 1981 (NT). Land on the Cobourg Peninsula is vested in the Cobourg Peninsula Sanctuary Land Trust (s 5-7). The Cobourg Peninsula Sanctuary Board, the body corporate (s 8), is composed of eight members appointed by the Minister, four of whom, including the Chairman, are appointed on the recommendation of the Northern Land Council (s 19(1)). The Chairman has a casting vote, thereby ensuring voting control,[3480] though the extent to which there is formal power sharing and true joint management is a more complex question.[3481] Before taking certain action the Land Council is required to consult with the traditional owners (s 4). The functions and responsibilities of the Board include the preparation of a Plan of Management for the sanctuary (s 27),[3482] including the 'protection, conservation and management of native flora and fauna within the sanctuary and the natural environment generally '(s 27(4f)). The Land Council's consent, and thus the traditional owners' consent, is required before the plan is submitted to the Minister (s 27(5)). The Board is empowered under s 35 to make by-laws prohibiting or regulating fishing, access to the land, the use of firearms, traps, the taking of animals. However s 35(3) provides that:

> A by-law shall not regulate the use by a member of the group or prohibit him from having in his possession or using any firearm, ammunition, trap, net or fishing equipment used or intended to be used by him in connection with the exercise of his right, as a member of the group, to use and occupy the sanctuary or a part of the sanctuary.

In addition, Parts IV and VIII of the Territory Parks and Wildlife Conservation Act 1976 (NT) relating to protected animals and to administration, together with provisions permitting entry to land, and the authorised destruction of feral or trespassing animals, also expressly apply to the Cobourg Sanctuary.[3483] Similarly, regulations and by-laws made under the Territory Parks and Wildlife Act 1976 (NT) apply to Cobourg to the extent that they are not inconsistent with the plan of management (s 37(2)). In 1983, the definition of 'land' under the Territory Parks and Wildlife Conservation Act 1976 (NT) s 9 was extended to include the 'sea

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3477 s 74. cf *Northern Territory Planning Authority v Murray Meats (NT) Pty Ltd* (1983) 48 ALR 188 (Toohey J); Mr Justice Toohey, *Seven Years On. Report to the Minister for Aboriginal Affairs on the Aboriginal Land Rights (Northern Territory) Act 1976 and Related Matters*, AGPS, Canberra, 1984, para 119-28.

3478 s 73(1). 'Aboriginal land' has the same meaning as under the Aboriginal Land Rights (Northern Territory) Act 1976 (Cth) s 9(1).

3479 See WA Aboriginal Land Inquiry (Commissioner P Seaman QC), *Report*, Perth, 1984, para 4.61-6.

3480 s 23(3c). The Chairman has not yet been required to exercise his casting vote.

3481 Weaver (1984), and see below para 999-1000.

3482 In practice the Conservation Commission prepares the Management plan at the direction of the Board (s 27(1)).

3483 Cobourg Peninsula Aboriginal Land and Sanctuary Act 1981 (NT) s 37(1).

above any part of the sea bed of the Territory'. Subsequently the Cobourg Marine Park was declared adjacent to the Cobourg Sanctuary. As a consequence the Conservation Commission is able to regulate conservation in the Marine Park under the Territory Parks and Wildlife Conservation Act 1976 (NT) without proceeding by way of consultation with the Board and with the Land Councils under s 35 of the Cobourg Peninsula Aboriginal Land and Sanctuary Act (NT).

## South Australia

917. ***Wildlife Conservation***. The National Parks and Wildlife Act 1972 (SA) and regulations made thereunder are potentially contradictory and require some clarification. The following provisions of the Act and regulations are relevant:

- s 8(a)(1) of the Act states that a person shall not hunt unless a permit is held.
- s 53 requires a special permit to take protected animals.
- s 68(a) requires a permit before a person can hunt or have in his possession a firearm or 'any device for the purpose of hunting'.
- s 68(b) prohibits entry onto private land for the purpose of hunting without written authorisation of the owner.
- s 80(w) empowers the Governor to make regulations exempting Aboriginal people generally, or Aboriginal persons of a specified class, from all or any of the provisions of the Act.

Regulation 14 provides that any Aboriginal person 'living in his traditional way of life':

- may take such protected animals as are reasonably required for food without a permit as required in s 53.
- may hunt on land set aside for Aboriginal purposes without a permit, but may not take animals in native reserves or conservation parks.
- does not require a permit under s 68(a) to hunt with traditional weapons.

This regulation does not however exempt Aborigines entering private land, from the requirement of written consent of the owner.

918. ***Proposed Reforms***. In 1984, the Director of the South Australian National Parks and Wildlife Service initiated an Interdepartmental Working Group to formulate policy on Aboriginal hunting. In doing so consideration was given. to Research Paper 15.[3484] The Working Group's detailed Report recommended that Regulation 14 was inappropriate and should be replaced.[3485] In particular, it concluded that:

- the term 'traditional lifestyle' should be defined to include those Aborigines ... in an urban situation but still able to demonstrate 'an affiliation with tribal customs to hunt native wildlife for food';
- the method of hunting should not generally be limited to traditional weapons;
- Aborigines should be exempt from s 53, and s 68(a) when hunting for food for themselves and their family;
- foraging on reserves should not be permitted as a general principle with the Gammon Ranges National Park and the Yumbarra Conservation park being exceptions;

3484 ALRC ACL Research Paper 15 (M Fisher) *The Recognition of Traditional Hunting, Fishing and Gathering Rights*, May 1984.
3485 SA Department of Environment and Planning *Report of the Interdepartmental Working Party on Aboriginal Hunting* (Chairman: D Barrington) 23 April 1985, 22.

- zones should be set aside for Aboriginal hunting under s 80(2) and the National Parks and Wildlife Act 1975 and joint management agreements established.[3486]

This would enable a proclamation to declare that defined areas of, for example, the Unnamed Conservation Park or the Nullabor Conservation Park could be used for hunting by Aboriginal people.[3487] At Balcanoona where Aboriginal land adjoins a Conservation Park, plans are being made to enable the joint management of the area.[3488] The Working Group hold the following criteria important in assessing Aboriginal hunting on reserves under the control of the National Parks and Wildlife Service:

- evidence of traditional use of the reserve land;
- considerations of conservation and other interests;
- status of the resource and determination of the impact of hunting on the species;
- control methods available;
- other significant matters (especially certain government undertakings to Aboriginal people about their rights to use certain land).[3489]

The criteria have been used to formulate policy for Aboriginal hunting in the Gammon Ranges National Park. The Working Group concludes that Aboriginal hunting did not appear to have a significant impact on the species listed, and recommend joint management of the reserve.[3490]

919. ***Native Flora***. Native flora is protected under the National Parks and Wildlife Act 1972 (SA). Section 49 makes provision for the issue of permits to take protected wildflowers and plants. Regulation 5 of the Wildlife Regulations requires the production of reports on the species and number of protected plants and wildflowers taken pursuant to the s 49 permit. Native oranges, native peaches and quandongs are listed in a Schedule of the Act as protected plants. These plants are however only taken very occasionally by Aboriginal people. An earlier Departmental Discussion Paper argued that there should be no restriction on their taking by Aborigines.[3491] It recommended that Part IV of the Act (Conservation of Native Plants and Wildflowers) and the corresponding regulations be amended to exempt Aborigines.[3492] The Native Vegetation Management Act 1985 (SA) makes it an offence to clear native vegetation without the consent of the Native Vegetation Management Authority (s 19, 20) unless the vegetation is in a prescribed area, of a prescribed class, and cleared by a person of a prescribed class or in prescribed circumstances (s 20). There is no exemption for traditional land management practices though possibly traditional activities may fall within prescriptions envisaged in s 20.

920. ***Aboriginal Land***. As has been seen, reg 14 of the National Parks and Wildlife Act 1972 (SA) enables Aborigines to hunt on land set aside for Aboriginal purposes. This regulation applied to reserve land and presumably to Aboriginal land. Some 150 000 sq kilometres of South Australia are Aboriginal land under the Pitjantjatjara Land Rights Act 1981 (SA) and the Maralinga Tjarutja Land Rights Act 1984 (SA). The Pitjantjatjara Land Rights Act 1981 (SA) enables the Governor to make regulations 'regulating, restricting or prohibiting any activity on the lands that may have adverse environmental consequences' (s 43(1)(b)). Such regulations can only be made on the recommendation of the Anangu Pitjantjatjara (the relevant Aboriginal body corporate) (s 43(2)). Formally, therefore, the initiative in these matters has to come from the Anangu Pitjantjatjara, which also has a right of veto over regulations under s 43(1)(b), at least as to substance but possibly also as to their precise terms. When the Maralinga Tjarutja Land Rights Bill 1983 was first published it contained a provision (cl 39(1)(b)) in the same terms as s 43(1)(b) of the 1981 Act. The Bill was

3486 id, 20-2. Its recommendation on traditional weapons contradicts the recommendation of the Arid Lands Management Review Committee: see para 939, and see further para 977.
3487 The Service recognises that hunting already occurs in these areas and that a prohibition on hunting is almost impossible to police.
3488 See para 920.
3489 *Report of the Interdepartmental Working Party on Aboriginal Hunting* (1985) 8.
3490 id, 9-12.
3491 Department of Environment (SA), Discussion Paper, *Taking of Protected Wildlife by Aborigines* (1983) (DE 1018/72) 4.
3492 ibid.

referred to a Select Committee of the House of Assembly, which suggested that clause 39(1)(b) required amendment:

> The Maralinga land is a sensitive and arid area. Any future change in its use could have considerable environmental significance. As the regulation stands, the initiation. of any appropriate regulations for environmental controls rests with Maralinga Tjarutja. This approach is in contrast to that adopted in most other areas of the State, where land owners and managers are commonly required to consult with the Government regarding any change of land use and in fact are required to obtain Government approval for several categories of development. Your Committee is of opinion that the power to initiate the introduction of regulations should rest also with the Department of Environment and Planning or any other appropriate agency and for their development to proceed in consultation with Maralinga Tjarutja. This approach is acceptable to the Department and to the Aboriginal people.[3493]

In consequence, s 43 of the Maralinga Tjarutja Land Rights Act 1984 (SA) provides that:

> 43. (1) The Governor may make regulations —
>
> (aa) prescribing a form of agreement as a model form of agreement under which exploratory operations may be carried out on the lands and providing that such a model form of agreement shall form the basis of negotiations between Maralinga Tjarutja and any applicant for permission to carry out exploratory operations on the lands:
>
> (a) regulating, restricting or prohibiting the depasturing of stock upon any specified pan of the lands;
>
> (b) regulating, restricting or prohibiting any activity on the lands that may have adverse environmental consequences;
>
> (c) regulating, restricting or prohibiting the supply or consumption of alcoholic liquor on the lands;
>
> (d) providing for the confiscation of alcoholic liquor;
>
> (e) prescribing other matters contemplated by this Act, or necessary or expedient for the purposes of this Act;
>
> (f) prescribing penalties (not exceeding two thousand dollars) for breach of, or non-compliance with, any regulation.
>
> (1a) A regulation shall not be made under subsection (l)(aa) except with the approval of Maralinga Tjarutja.
>
> (2) A regulation shall not be made under subsection (l)(b) except after consultation with Maralinga Tjarutja.
>
> (3) A regulation shall not be made under subsection (l)(c) or (d) except upon the recommendation of Maralinga Tjarutja.

Questions have also arisen with regard to conservation measures in the Unnamed Conservation Park in the far north west of South Australia. Notice was given to the Select Committee of the House of Assembly of Aboriginal interest in adding this park to the Maralinga lands, given the strong traditional interest in these lands.[3494] The Select Committee found that both Aboriginal people and the National Parks and Wildlife Service 'have indicated their willingness to establish a joint management arrangement for control of the Park, on the understanding that final responsibility rests with the Minister for Environment and Planning'.[3495] It is understood that amendments are to be made to Division 5 of the National Park and Wildlife Act 1972 (SA) to enable the National Parks and Wildlife Service to enter into joint management agreements for the management of reserves in which Aborigines have a vested interest. This proposal would enable negotiations to take place between the Adnjamanthanha people and the Service in relation to Balcanoona.[3496] It is proposed that there be conditions embodied in the Park Joint Management Agreement in relation to reserves with which 'Aboriginals have had long-standing traditional associations'.

## Western Australia

921. ***Wildlife Conservation***. In Western Australia a distinction is made between National Parks vested in the National Parks Authority under s 27, 28, 29 of the Land Act 1933 (WA) and administered under the National

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3493 Select Committee of the House of Assembly (SA) on the Maralinga Tjarutja Land Rights Bill, *Report*, SA Parl Paper 155, 1983, para 21. Appendix C to the Report provides that any such regulation should not be made except after consultation with Maralinga Tjarutja.

3494 id, para 14.

3495 ibid.

3496 cf National Parks and Wildlife Act 1975 (Cth) s 18, and see para 909.

Parks Authority Act 1976 (WA), and areas subject to the control of the Western Australia Wildlife Authority under the Department of Fisheries and Wildlife, and subject to the Wildlife Conservation Act 1950 (WA).

922. ***National Parks Authority Act 1976 (WA)***. Under the National Parks Authority Act 1950 there is no statutory recognition of the right of Aboriginal people to forage. It is understood that the policy of the National Parks Authority is to allow Aborigines to forage in their traditional style, although this is not provided for in any specific or formal way.

923. ***Wildlife Conservation Act 1950 (WA)***. Under the Wildlife Conservation Act 1950, there are general provisions relating to the taking of certain protected flora and fauna. These apply to all land including Crown land. Aboriginal people are exempted from these provisions by s 23(1) which allows 'a person of Aboriginal descent' as defined the Aboriginal Affairs Planning Authority Act, 1972, s 4 to take fauna or flora:

> upon Crown land or upon any other land, not being a nature reserve or wildlife sanctuary, but where occupied, with the consent of the occupier of that land,
>
> sufficient only for food for himself and his family, but not for sale —
>
> and the Governor may, if he is satisfied that the provisions of this section are being abused or that any species of fauna or flora which is being taken under the authority of this section is likely to become unduly depleted, by regulation suspend or restrict the operation of this section in such manner and for such period and in such part or parts of the State as he thinks proper.[3497]

The exemption in s 23(1) refers to the taking for food. This has not been interpreted in a narrow sense.

> In Western Australian the word 'food' as used in Section 23 ... is subject to a broad interpretation as a matter of policy. It encompasses any use, apart from a commercial use, to which an Aboriginal can put his mind. It follows that few restrictions are placed on Aboriginal people with respect to interpretation of Section 23.[3498]

So far no regulations have been made under s 23(1). It should be noted that the exemption requires the consent of any occupier of the land. Nonetheless, the then Conservator of Wildlife in Western Australia described s 23 as:

> a very powerful [provision]. Aboriginal people acting under Section 23 are not subject to any other provision of the Act and Regulations. Thus there are no restrictions placed on times or methods whereby Aboriginals can take fauna except where nature reserves and game reserves are concerned.[3499]

Section 23 does not apply to nature reserves and wildlife sanctuaries where regulations may be made restricting or prohibiting the taking of certain flora and fauna, restricting access to the sanctuaries or reserves, restricting the lighting of fires, use of boats, firearms, and interfering with or disturbing the fauna or natural environment. However in relation to nature reserves, agreements have been reached, pursuant to the Wildlife Conservation Act 1950 (WA) s 12D and s 12E, with Aboriginal groups to take fauna.[3500] The fact that s 23 does not apply to nature reserves and wildlife sanctuaries has been the cause of some concern on the part of Aboriginal people. Submissions made to the Inquiry into Aboriginal Land in Western Australia claimed the right to 'cut trees for artefacts, whether in national parks, or nature reserves and to have access not only for ceremonial reasons, but to camp there, make fires, hunt with rifles and fish'.[3501]

924. ***Aboriginal Land***. At present there are just under 21 000 hectares of Aboriginal land in Western Australia.[3502] The Land Act 1933 (WA) s 29(1)(a) allows for land to be reserved for any purpose and the reservation or disposition itself can contain a specification for the 'use and benefit of Aboriginal inhabitants'. The Aboriginal Affairs Planning Authority Act 1972 (WA) s 25(1) allows for 'any Crown land to be reserved for persons of Aboriginal descent'. Crown land so reserved is held by the Aboriginal Land Trust,

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3497 A 'person of Aboriginal descent' is defined in s 4 of the Aboriginal Affairs Planning Authority Act 1972 (WA) as 'any person living in Western Australia who is wholly or partly descended from the original inhabitants of Australia and who claims to be an Aboriginal and who is accepted as such in the community in which he lives'. Under s 23(2) the Conservator of Wildlife may issue a certificate to any person authorising him to sell the skins of kangaroos taken for food under s 23.

3498 WA Conservator of Wildlife (IG Crook) *Submission 446* (30 August 1984) 2.

3499 id, 1.

3500 The agreement relating to the Prince Regent Reserve concerns for example questions of access, and the taking of wallabies and kangaroos.

3501 Aboriginal Land Inquiry (Commissioner P Seaman QC) *Discussion Paper*, Perth, January 1984, para 9.3. See para 925-6.

3502 This does not include reserves and leasehold land held on behalf of Aborigines but not under the control of the Aboriginal Land Trust.

which is required to use and manage the land for the benefit of and according to the wishes of Aborigines (s 23). The Governor may make regulations for the management and use of reserved land and for the provision of appropriate means of consultation with the representatives of Aboriginal people (s 51(2)). Customary hunting and foraging rights are recognised under s 32, which provides that the Governor may declare areas of the reserved lands to be for the exclusive use of 'Aboriginal inhabitants of that area, being persons who are or who have been normally resident in their area or their descendants' (s 32(1)). Section 32(2) allows for documentary evidence of Aborigines so entitled, including evidence of the benefit derived from the 'enjoyment of the natural resources related to customary land use'. So far there have been no instances of resort being made to this section.[3503]

925. ***Aboriginal Land Inquiry and Hunting Rights***. Complaints to the Land Commissioner were also made on the ground that national parks and nature reserves had been created in traditional country without consultation.[3504] In recommending that Aborigines should have the right to apply to the tribunal for a grant to title to a reserve or park, the Commissioner stated that:

> 4.73 ... the public authorities managing such reserves or parks should be given wide powers to negotiate with Aboriginal organisations to achieve settlements of Aboriginal claims to this sort of public land. If an accommodation cannot be reached, then I recommend that the Aboriginal organisation concerned should have the right to apply to the Tribunal for the grant of title to the reserve or park.
>
> 4.74 Various problems are likely to arise when balancing Aboriginal aspirations with the public interest in the preservation of reserves and the use of parks. I consider it necessary to give the Tribunal jurisdiction to dispose of the application upon the following basis' It shall make the grant if there are appropriate means of accommodating the public interest with Aboriginal ownership or if it is satisfied that the public interest would not be unduly disadvantaged by the granting of title to Aboriginal interests.
>
> 4.77 I do not recommend that the Tribunal should be confined to making or refusing a grant of the public land concerned. It should also have the power if it thinks fit to make orders for access in favour of members of the applicant organisation on such terms and conditions as are appropriate to protect the public interest in the reserve or park. For that purpose it should also have power to make an order declaring what portion of the general laws applicable to the use of the park or reserve should not apply to the Aboriginal people who are afforded access by the order.

The Western Australian Environment Protection Authority has a large number of proposals relating to the creation of Conservation Reserves at varying stages of implementation.[3505] The Aboriginal Land Inquiry found that while there has been considerable public input into these proposals, little allowance has been made for Aboriginal aspirations.[3506] The Commissioner recommended that the Environmental Protection Act 1971 (WA) s 4 be amended to empower the Environmental Protection Authority to give consideration to Aboriginal concerns.[3507] Failing successful negotiations with the Authority there is still the possibility that Aboriginal organisations may make a claim to the land the subject of a recommendation.[3508] On the question of the application of general laws such as conservation laws, the Commissioner commented:

> I recommend that modified title-holders should in general be bound by all those general laws which affect the use which landowners may make of their land, or the activities which may be carried out on land. However there will be occasions where their absolute application would frustrate reasonable Aboriginal aspirations in relation to the use of modified titles. I recommend that the Tribunal should have the power to make an order in relation to the use of land which is the subject of an application before the Tribunal, declaring what portion of the general laws should not apply to the land and to the members of the claimant organisation.[3509]

926. ***The Aboriginal Land Bill 1985 (WA)***. This recommendation was not endorsed in the Bill to implement aspects of the Report, which was unsuccessfully presented to the Western Australian Parliament in 1985.[3510] The Aboriginal Land Bill (1985) (WA) did however propose that the Governor on the recommendation of the Aboriginal Land Tribunal could declare any national park, nature reserve on marine park a special management area (cl 96) and appoint a management committee to oversee the management of the area (cl

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3503 Advice from Aboriginal Affairs Planning Authority — Aboriginal Lands Trust, 16 April 1984.
3504 Aboriginal Land Inquiry, *Report*, para 4.49-4.72.
3505 Aboriginal Land Inquiry, *Report*, para 10.35.
3506 id, para 10.37.
3507 id, para 10.37.
3508 id, para 10.43.
3509 id, para 6.33.
3510 Aboriginal Land Bill 1985 (WA) cl 59, 60.

97). An Aboriginal land corporation or regional Aboriginal organisation, acting on behalf of Aborigines with entitlements, by traditional association or residence to the land, would have been able to apply for the land to be declared a special management area (cl 98, 100) or for a lease of the land to be granted on the recommendation of the Aboriginal Land Tribunal (cl 99, 101). The Tribunal would have to be satisfied that the grant of the lease or the creation of a special management area does not 'significantly affect the achievement of the purpose for which the land is held by the controlling body' (cl 106(2)(b)(i)) and that the declaration may be made in such a way as to protect the use and enjoyment of any existing interests (cl 106(2)(b)(ii)).

## Queensland

927. ***Wildlife Conservation***. The Fauna Conservation Act 1974 (Qld) repealed the Fauna Conservation Act 1952 (Qld), s 78 of which had exempted Aborigines from its provisions relating to the killing of native birds and animals, so long as the killing was for food and provided the employment terms relating to the particular Aborigine did not include food. The 1974 Act makes no specific provision to allow Aboriginal people to take any native birds, mammals, reptiles or animals. In addition s 34 of the National Parks and Wildlife Act 1975 (Qld) applies specifically to National Parks and makes it an offence to interfere with the forest products, notwithstanding anything to the contrary in any other Act. Apparently the provisions of the National Parks and Wildlife Act 1975 (Qld) and the Fauna Conservation Act 1974 (Qld) are not rigorously enforced against Aboriginal people hunting for food and not for purposes of sale. However given that the economy of many Aboriginal communities relies heavily on traditional hunting and fishing,[3511] legislative protection appears to be necessary, particularly in Cape York, where Cape York Peninsula Wildlife reservations have been declared over areas still subject to traditional use by Aboriginal people.

928. ***Aboriginal Land***. Until 1984 the prohibition against hunting native animals in Queensland extended equally to residents of Aboriginal reserves. The only exemption to this general prohibition was in the Local Government (Aboriginal Lands) Act 1978 (Qld) s 29, which provides that, notwithstanding the provisions of any Act, an Aboriginal resident of the shires of Aurukun or Mornington may hunt native fauna and 'consume the same to the extent necessary for the sustenance of himself and members of his family or household'. Aboriginal residents may also gather, dig and remove forest products within the shire for domestic use. This meant that Aboriginal residents of Aurukun and Mornington Island were in a better position in this respect than residents of Aboriginal reserves in Queensland. Recent amendments to the Land Act 1962 (Qld) enable reserve land to be returned to Aboriginal people under a deed of grant in trust.[3512] The management of such 'trust areas' is to occur under the Community Services (Aborigines) Act 1984 (Qld), and the Community Services (Torres Strait) Act 1984 (Qld). Section 77 of the former Act provides that:

> (1) Notwithstanding the provisions of any other Act, a member of a community resident in an area shall not be liable to prosecution as for an offence for taking marine products or fauna by traditional means for consumption by members of the community.
>
> (2) Subsection (1) shall not be construed to authorize the sale or other disposal for gain of any marine product or fauna taken by traditional means.[3513]

## New South Wales

929. ***Wildlife Conservation***. The National Parks and Wildlife Act 1974 (NSW) makes it an offence to take or kill any protected and endangered fauna with that State without a licence. In National Parks, which form a large part of available Crown land in the State, it is an offence to take or kill any animal without a licence. The provisions of the Act dealing with nature reserves are similar, in that it is also an offence (unless the person is a licencee, lessee or occupier of the land) to take or kill any animal, to carry, discharge or possess a prohibited weapon, or to cut, destroy, pick or set fire to any tree, scrub, plant, flower or vegetation. In wildlife refuges it is an offence to kill any native animal unless licensed, though fishing is permitted, and certain species of animals may be exempt under certain conditions. There are provisions allowing for open

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3511 See para 885-7.

3512 The Land Act (Aboriginal and Islander Land Grants) Act 1982 (Qld), The Land Act (Aboriginal and Islander Land Grants) Act 1983 (Qld). Areas of the Torres Strait were transferred under a deed of grant in trust in November 1985.

3513 cf Community Services (Torres Strait) Act 1984, s 76 which is in the same terms. It is unclear whether 'disposal for gain' would include disposal for the purposes of fulfilling kin obligations. See further para 975-6.

seasons, generally or in specific areas of New South Wales, for specified fauna.[3514] The lack of any clear protection of Aboriginal interests has, in the past, created administrative difficulties. In one matter at Wellington (NSW) four men were charged by police with the use of firearms for the purpose of taking protected fauna (goanna) and with the use of a firearm in a public place. To assist in mitigation of penalty, the Minister for Aboriginal Affairs sought a statement from the National Parks and Wildlife Service, 'detailing the impetus' to recognise 'traditional hunting and gathering practices'. The Service replied that since the charges were laid under the Firearms and Dangerous Weapons Act 1973 (NSW), it was 'not a matter in which the Service should be involved'.[3515] This was despite the fact that the Service itself had generally sought to avoid prosecuting Aborigines under the National Parks and Wildlife Act 1974 (NSW). A State Land Rights meeting held in September 1983 called for the amendment of the Act so that it would not apply to traditional hunting and fishing.[3516] The Director of the New South Wales National Parks and Wildlife Service subsequently indicated that:

> individual Aboriginals would not be required to hold licences under the National Parks and Wildlife Act subject to certain conditions. Local Aboriginal Land Councils would be encouraged to have an active role in wildlife management to ensure that populations are not jeopardised ... In summary, the Service's view is that Aboriginal hunting and gathering rights do not necessarily conflict with nature conservation values so far as locally common species are concerned.[3517]

To this effect the Service announced in 1986 regulations under s 70(7), 71(4), 100(2) of the Act, exempting Aborigines and their dependants from the provisions relating to the taking or killing of protected fauna except in relation to raptors, parrots and endangered fauna (i.e. s 70(1), 70(2), and 98(2)). Further exemptions under s 71(4) and 117(5) exempt Aborigines and their dependents from provisions prohibiting or restricting the gathering and harvesting by Aborigines of native plants provided that in the case of a protected plant they must be harvested or gathered without harm to the plants or unreasonable interference with their means of propagation (i.e. s 71(10 and 117(1)). The taking by Aborigines must be for domestic purposes. The service has advised that it is:

> not prepared to permit hunting and gathering in national parks or nature reserves. The Service's view in relation to state game reserves is, in general terms, the same and therefore requires some comment. These areas are set aside primarily for their importance as breeding areas for birds, some of which happen to be traditional (and 'legal', during open seasons declared under Section 95 of the Act) game birds. The use of these areas for controlled hunting during limited times of the year is very much secondary to their nature conservation values. Notwithstanding these general comments, the Service would be prepared to consider proposals for hunting and gathering in particular state game reserves on a case by case basis.[3518]

The Regulation does not apply to hunting and gathering on lands to which Aborigines do not have a legal fight of access.[3519]

930. ***Aboriginal Land***. Although the Aboriginal Land Rights Act 1983 (NSW) provides for certain rights of access to land for the purpose of hunting, fishing and gathering,[3520] it makes no special provision for hunting, fishing and gathering on Aboriginal land.[3521] The position on such land (when it is vested under the Act) is accordingly the same as for other land in the State.

## Victoria

931. ***Wildlife Conservation***. The Wildlife Act 1975 (Vic), the National Parks Act 1975 (Vic) and regulations made thereunder provide no particular exemptions for Aboriginal people. The Commission is not aware of any difficulties experienced by Aboriginal people with the operation of these Acts. Aboriginal organisations and the relevant authorities had few complaints.

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3514 See generally s 58H, 98, 99, 101, 103, 112, 117; see further Crimes (Endangered Fauna) Amendment Act, 1983 (NSW).

3515 DA Johnstone Director NSW National Parks and Wildlife Service, *Public Statement*, 'Representations by Hon FJ Walker MP, Minister for Aboriginal Affairs' (29 August 1983).

3516 *NAC News* (February 1984) 14.

3517 Public Statement (above n 59), 1, 2, and see para 982.

3518 NSW National Parks and Wildlife Service (DA Johnstone Director) *Submission 467* (6 February 1985).

3519 Minister for Planning and Environment (NSW), 'News Release', 7 January 1986.

3520 s 47-8. See para 941.

3521 cf NSW Select Committee of the Legislative Assembly upon Aborigines (Chairman: M Keane MP) *Report: Aboriginal Land Rights and Sacred and Significant Sites*, NSW Parl Paper 2, 1980, 90. See M Wilkie, *Aboriginal Land Rights in NSW*, APCOL, Chippendale, 1985, 89-97.

932. ***Aboriginal Land***. The Aboriginal Land Claims Bill 1983 (Vic) proposed to establish machinery for granting Crown Land to Aborigines. Upon such a grant any national park under the National Parks Act 1975 (Vic) on the land would cease to exist (el 13(3)), while any lease under the Act would continue but would not be renewable without the consent of the Aboriginal claimants (cl 13(4b)). The Aboriginal claimants would be vested with:

> full care and control of the flora and fauna on the land granted other than —
>
> (a) wildlife which has been declared by the Governor in Council to be notable or endangered wildlife pursuant to the provisions of the Wildlife Act 1975; or
>
> (b) wild flowers or native plants which have been proclaimed to be protected pursuant to the provisions of the Wild Flowers and Native Plants Protection Act 1958.[3522]

The Bill was introduced into the Victorian Parliament in March 1983 but has not been proceeded with, pending further discussion and consultation with Victorian Aborigines.

### Tasmania

933. ***Wildlife Conservation***. The National Parks and Wildlife Act 1970 (Tas),[3523] the Crown Lands Act 1976 (Tas),[3524] the Forestry Act 1920 (Tas),[3525] and the regulations made under these Acts contain no special provisions to accommodate Aboriginal interests. These Acts are similar to those of other States in that they restrict some kinds of hunting and fishing without a licence, and generally the taking of vegetation, lime shell, sand, or any natural substance from Crown land. They protect flora, fauna and provide for permits for taking certain wildlife and eggs; they also prohibit hunting of indigenous animals and birds in State forests. So far as Tasmanian Aborigines are concerned, it appears that mutton birding gives rise to a particular problem.[3526] Mutton birds are a protected species for which a licence is required. Aboriginal people have been advised by the Tasmanian Aboriginal Legal Service to apply for licences to hunt mutton birds commercially. The purchase of Trefoil Island for the Trefoil Island Company by the Aboriginal Development Commission has facilitated the taking of mutton birds on the island by local Aborigines. No amendments to existing legislation to enhance Aboriginal rights in this respect are envisaged by the Tasmanian authorities.

934. ***Aboriginal Land***. No land in Tasmania is specifically set aside by Tasmanian law for the use or benefit of Aborigines. The Aboriginal Development Commission has however purchased 19.8 hectares on Cape Barren Island in addition to Trefoil Island.

## Access to Land for Hunting and Gathering: The Present Position

935. ***Access to Non-Aboriginal land***. The provisions of the Aboriginal Land Rights (Northern Territory) Act 1976 (Cth), entitling Aborigines to have access to Aboriginal land under that Act in accordance with Aboriginal tradition, have been referred to already.[3527] In addition to general legislation dealing with hunting and gathering and specific legislation dealing with Aboriginal land rights, there is provision in the Northern Territory and some States for Aboriginal access to land (other than Aboriginal land) for these purposes.[3528] There are no access provisions enabling Aboriginal people to enter land to hunt for food in Queensland,[3529] Victoria or Tasmania. It remains to examine access provisions that exist in the Northern Territory, South Australia, Western Australia and New South Wales.

936. ***Northern Territory***. Section 24(2) of the Crown Lands Act (NT) as amended in 1985 provides that in any Pastoral lease under the Act a reservation in favour of Aboriginal inhabitants of the Northern Territory shall permit certain Aborigines to:

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3522 cl 15(1). cf cl 15(3) for the application of the Forests Act 1958 (Vic) to Aboriginal land.
3523 s 32-7.
3524 s 41-6.
3525 s 46.
3526 See TM Irelandes, *Submission 251* (8 April 1981) para 64.
3527 See para 915.
3528 Access to or closure of the seas for traditional fishing purposes is dealt with in para 953, 956.
3529 This is consistent with the prohibition against taking native animals on such land by all people except residents of Aurukun and Mornington Shires. See para 927-8.

(a) to enter and be on the leased land;

(b) to take and use the water from the natural waters and springs on the leased land; and

(c) subject to any other law in force in the Territory -

(i) to take or kill for food or for ceremonial purposes animals ferae naturae; and

(ii) to take for food or for ceremonial purposes vegetable matter growing naturally, on the leased land.[3530]

This right does not apply to leased land within two kilometres of a homestead, except in certain limited circumstances (s 24(3)-(5)). Section 24(6) also provides that where the lease contains a reservation in favour of Aborigines anyone who without just cause interferes with a full and free exercise of this right by Aborigines is subject to a $2000 penalty. 'Just cause' includes any reasonable activity on behalf of the lessee or person having an interest in the lease to ensure the proper management of the lease. In 1982, s 24 was held to apply as a defence to a charge of discharging a firearm on property occupied by another, contrary to s 94(1) of the Firearms Act 1979 (NT).[3531] The defendant was in possession of two cooked kangaroos and admitted having shot them. Section 24(2)(c) of the Crown Lands Act provides that the right to take for food is 'subject to any other law in force in the Northern Territory'. Section 94(3) of the Firearms Act 1979 (NT) provides that it is a defence that the defendant was authorised by another law in force in the Territory to discharge the firearm. Chief Justice Forster held that, since s 94(3) of the Firearms Act 1979 (NT) was 'passed against the background of the permission for Aboriginal people to take wild animals on their own country', a permission of long standing recently renewed, it must be read subject to that permission.[3532] While this result was undoubtedly desirable, the reasoning is not without its difficulties. Section 24 provides that where a lease contains a reservation in favour of Aboriginal people then that reservation is to be read as permitting Aboriginal people to take food and to use the waters. It does not confer on Aboriginal people the right to hunt and fish as against the world. The principal consequence of s 24 is that anyone who interferes with the exercise of the right it confers is liable to a penalty.[3533] An alternative, and possibly preferable, basis for the decision on the facts would have been to find that the occupant had, pursuant to the terms of the lease, consented to the discharge of a rifle on his land. This constitutes a defence under s 94(2) of the Firearms Act 1979 (NT).

937. ***Nexus Requirements***. Before 1978 all Northern Territory Aborigines enjoyed the right to enter land. In 1978 the right to enter land was limited to Aboriginal inhabitants of leased land and Aborigines of the Northern Territory who in accordance with Aboriginal tradition were entitled to inhabit the leased land. On the assumption that the term 'inhabit' is to be given its ordinary meaning this limitation could have several negative consequences. Aboriginal inhabitants of South Australia, for example, could not benefit from the section should they wish to hunt across the border in the Northern Territory. The limitation of s 24 to those Aborigines who in accordance with Aboriginal tradition are entitled to inhabit the leased land was unduly restrictive, in that in the eastern part of the Territory, there were real difficulties with Aboriginal communities who had suffered great displacement from the land and who may not be able to prove that they were traditionally entitled to inhabit, as distinct from foraging on, the leased land. Given the distinction, observed in the land claims hearings, between 'primary responsibilities', and rights to forage,[3534] the right to reside was an unduly restrictive criterion for the purposes of s 24. Justice Toohey accordingly proposed the following amendment to s 24(2):

(a) deleting the words 'the Aboriginal inhabitants of the leased land and the Aboriginal inhabitants of the Northern Territory who in accordance with Aboriginal tradition are entitled to inhabit the leased land'; and

3530 For the rather complex legislative history (prior to 1982) of s 24(2), which goes back to 1927, see *Campbell v Arnold* (1982) 13 NTR 7, 8-9 (Forster CJ).

3531 *Campbell v Arnold* (1982) 13 NTR 7.

3532 id, 10. Note however that the rights to enter and be on the land, and to take and use the natural waters and springs, are not described as subject to any other law in force: s 24(2(a), (b).

3533 Apart from forfeiture of the lease, a very severe penalty which has never been invoked in these circumstances. See Aboriginal Land Rights Commission (Commissioner: AE Woodward) *Second Report*, AGPS, Canberra, 1974, para 218.

3534 See para 886.

> (b) substituting the words 'the Aboriginal residents of the leased land and Aboriginals entitled by Aboriginal tradition to the use or occupation of the leased land, whether or not the traditional entitlement is qualified as to place, time, circumstance, purpose or permission'.[3535]

Amendments passed in 1985 provide that a reservation in favour of Aboriginal inhabitants of the Northern Territory now entitles those Aborigines who ordinarily reside on the leased land, or on land which has been excised since 1979, or who are entitled by Aboriginal tradition to use or occupy the leased land to enter leased land and to hunt and forage (s 24(2)(a)-(c)). However the amendments make it clear that the rights conferred do not allow Aborigines already entitled to reside on the land to reside 'other than at the place on the leased land where they ordinarily reside', nor do they allow other Aborigines to take up residence on the leased land.[3536] Without legislative provision for residential excisions from pastoral leases, the effect of the amendment will be to restrict rather than simply clarify rights under s 24(2).

938. ***Further Limitations on Access Rights***. Section 24 was also amended in 1978 to incorporate many of the suggestions made by Justice Woodward in the Second Report of the Aboriginal Land Rights Commission.[3537] Although he did not recommend that Aboriginal claims to the reversion of pastoral properties be granted, Justice Woodward considered that the existing rights of Aboriginal people to enter, travel over, and camp upon such country should be strengthened. He was critical of the fact that the right existed merely as a reservation in pastoral leases, and that at that time, the only penalty was forfeiture:

> I have no doubt that most cattle station proprietors and managers accept their responsibilities in this connection quite willingly. However I have been told of a number of instances where Aborigines have been prevented, or at least discouraged from exercising their rights. It seems to me that these rights should now be directly protected by legislation, that they should be amended to meet the requirements of the present day, and that realistic penalties should be provided for any breach. It has also been suggested that rights should be limited to those having a traditional interest in the land in question. However no such distinction has previously been drawn and it would create problems in practice. The matter might have to be reconsidered in future if the privilege were abused by people having no traditional interests.[3538]

He also considered that Aborigines should be entitled to make use of bore waters provided that they complied with any reasonable requirements of the pastoral lessee concerning such use. This recommendation has not been adopted. Despite the adoption of some of these recommendations by amendments in 1977 and 1978 to the Crown Lands Act (NT), the right to hunt and forage is still only incorporated as a reservation in a lease rather than being directly recognised in legislation. However in his review of the Aboriginal Land Rights (Northern Territory) Act 1976 (Cth) Justice Toohey questioned whether much would be achieved by legislation on this point.[3539]

939. ***South Australia***. The Pastoral Act 1936 (SA), Schedule I provides that leases shall contain such exceptions and reservations in favour of the Aborigines of the State, as may be prescribed, or as the Minister may require. As a matter of practice pastoral leases do contain a reservation in favour of Aboriginal people. A reservation included as clause 1 in the standard form of South Australian pastoral lease provides:

> And also reserved to Aboriginal inhabitants of the said State and their descendants full and free access into, upon, over and from the said land except such pans as improvements have been erected upon and in and to the springs and surface waters thereon and to make and erect wurlies and other native dwellings and to take and use for food birds and animals ferae naturae as if this lease had not been made.

Apparently conflicts continue to arise between pastoralists and Aborigines over the operation of this clause.[3540] The Arid Lands Management Review Committee (now disbanded) stated that it has been suggested that the reservation 'conflicts with racial discrimination attitudes and provisions in the ninth decade of the twentieth century'.[3541] The Committee recommended that:

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3535 Toohey (1984) para 108.
3536 NT *Part Debs (H of A)* (28 August 1985) 125.
3537 id, para 217-27.
3538 id, para 219-20.
3539 Toohey (1984) para 107.
3540 See para 891. This situation was confirmed by the Aboriginal Legal Service, Pt Augusta, in February 1984.
3541 Arid Lands Review Steering Committee, 'A Proposal for Future Establishment, Management and Regulation of Public Rights of Access and Way Over Outback Lands, Department of Lands' Adelaide, 1984, para 9.

> Legislation should henceforth specify that the Reservation in Leases in favour of Aborigines is applicable to those pursuing their traditional lifestyle travelling on foot in bona fide pursuit of their traditional game, and utilising traditional weapons and artefacts.[3542]

Such a provision would appear to conflict with the policy of the National Parks and Wildlife Service.[3543] However the Arid Lands Review Management Committee's proposal was rejected as 'contra to the policies of the present South Australian Government',[3544] whose stated policy in relation to access rights to pastoral lease lands is to 'maintain existing Aboriginal rights without either extension or curtailment thereof'.[3545] It is to be hoped that this policy extends to the creation of new perpetual leases as envisaged by amendments in 1985 to the Crown Lands Act 1929 (SA), though the position is by no means clear. An earlier Interdepartmental Working Group on the South Australian Pastoral Lands — Tenure, Administration and Management (1981) recommended that the reservation of rights only extend to Aboriginal inhabitants of leased land who in accordance with Aboriginal tradition are entitled to inhabit the land in question.[3546] This recommendation has also been rejected.[3547] The Working Group recommended that the right to take, kill or use for food or for ceremonial purposes, native animals and vegetable matter grown on the leased land should be subject to any other law in force in South Australia, such as the National Parks and Wildlife Act 1972 (SA).[3548] That Act makes it an offence for a person to be on private land (including pastoral land) for the purpose of hunting without the written consent of the owner obtained within the preceding six months (s 68b(1)). It appears to be that Aborigines would have to obtain written permission to hunt on pastoral lands. However the Working Group set up under the National Parks and Wildlife Service (SA) was critical of these provisions,[3549] which appear designed to deprive most Aborigines of any rights to hunt or forage. The South Australian Department of Land's has advised that its response to this Working Group's report is as follows:

> (a) General acceptance of and agreement with the maintenance of hitherto existing Aboriginal access and hunting rights on pastoral lease lands; with
>
> (b) Introduction of a regulatory provision requiring Aborigines to make all reasonable efforts to advise pastoral lessees on each occasion.
>
> (1) of their intention to enter the subject lease for the purpose of taking game for food/tribal purposes; and
>
> (2) of the general area or paddocks of the Run in which they propose to pursue these rights.[3550]

940. ***Western Australia***. The Land Act 1933 (WA) s 106(2) provides that 'the. aboriginal natives may at all times enter upon any unenclosed and unimproved parts of land the subject of a pastoral lease to seek their sustenance in the accustomed manner'.[3551] This provision refers only to 'sustenance'.[3552] It is unclear whether taking for ceremonial use is included, although on a liberal interpretation use for ceremonial purposes might perhaps be described as 'sustenance'. It is understood that, with the exception of nature reserves where no shooting is allowed, the Department does not object to the use of guns. Neither s 23 of the Wildlife Conservation Act 1976 (WA) nor s 106(2) of the Land Act 1933 (WA) restricts foraging to those Aborigines who traditionally inhabit the land in question, or who are traditionally entitled to hunt and forage in the area. The view has however been expressed that Aborigines from other areas and with no special needs should not be entitled to the benefit of these provisions. The Aboriginal Land Commissioner made the following comment on s 106(2):

> That provision was described at the Pastoralists and Graziers hearing as an anachronism, presumably upon the view that Aboriginal people are no longer dependent upon that sustenance for their survival. The provision is anachronistic

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3542 id, para 2.10.
3543 Department of Environment and Planning (SA) *Report of the Interdepartmental Working Party on Aboriginal Hunting*, (Chairman: D Barrington) 24 April 1985, 13.
3544 SA Department of Lands (WH Edwards) *Submission 405* (13 February 1986).
3545 ibid.
3546 Cited in the Department of Environment (SA) Discussion Paper, *Taking of Protected Wildlife by Aborigines* (DE 1018/72) 1983, 5.
3547 SA Department of Lands (WH Edwards) *Submission 405* (13 February 1986).
3548 ibid. see para 917-8.
3549 Department of Environment (SA) *Report of the Interdepartmental Working Party on Aboriginal Hunting*, (Chairman: D Barrington), 24 April 1985, 13.
3550 SA Department of Lands (WH Edwards) *Submission 405* (13 February 1986).
3551 Before 1933 the provision took the form of a covenant in the Pastoral Lease itself. cf WA Department of Lands and Surveys (BL O'Halloran), *Submission 429* (19 June 1984) 2.
3552 The Pastoralists and Graziers Association of Western Australia (Inc) have criticised this provision on the ground that access by Aboriginal people for traditional hunting and fishing should only take place with the consent of the pastoralist concerned. See National Farmers Federation (W de Vos) *Submission 476* (11 April 1985) 7.

> because they are no longer absolutely dependent upon hunting and fishing for their sustenance, and also because there will be few unenclosed and unimproved parts of pastoral leases ... I recommend that Aboriginal groups should be able to seek access to pastoral leases by virtue of traditional association with or long association by residence on or use of the land concerned. I also recommend that they should be able to seek access to hunt, fish and forage on public lands.[3553]

But these rights of access, he recommended, should not extend to Aborigines generally, as distinct from those with historical or traditional associations with the land in question. In the absence of agreement with the landholder, it was proposed that the Tribunal be able to make access orders, in favour of identifiable persons, on conditions preserving the 'reasonable privacy of the occupiers' and not unduly interfering with the use of the land.[3554] The Land Commissioner's recommendations in relation to public land were substantially endorsed in the Aboriginal Land Bill 1985 (WA) cl 69-94. Aborigines entitled in respect of the land in accordance with local Aboriginal tradition would have been entitled to apply for an order conferring the 'right to hunt and fish and gather food for domestic purposes' (s 71, 74). The Governor could make such an order on the recommendation of the Aboriginal Land Tribunal (cl 73). The Tribunal would be required to satisfy itself that such an order did not 'significantly affect' the purposes for which the land is held, and that it protected any existing interests or rights in the land (cl 88(2)(a)(b)). However the Bill was defeated in the Upper House.

941. ***New South Wales***. The Aboriginal Land Rights Act 1983 (NSW) makes specific provision for Aboriginal people to have access to land for the purpose of hunting and fishing. Section 47 provides that:

> Subject to the provisions of any other Act, and any rule, by-law, regulations, ordinance or like instrument, a local Aboriginal Land Council may negotiate agreements with the owner or occupier of any land to permit specified Aboriginal groups to have access to land for the purpose of hunting, fishing or gathering on the land.

Under s 48(1), where a Land Council seeks a right of access to land traditionally used for hunting purposes, or to land giving access to any land so used, and has been unable to negotiate an agreement to that effect, the Council may apply to the Land and Environment Court for a permit, which may be subject to conditions, conferring these rights. Any owner of land who refuses access to permit holders is guilty of an offence. These provisions have not yet been used.

## Legislation On Aboriginal Fishing Rights

### The Commonwealth

942. ***Divided Responsibility***. Constitutional authority over fisheries within Australia and in Australian waters is shared between the Commonwealth and the States. In particular the Commonwealth has specific power under s 51(x) over 'fisheries in Australian waters beyond territorial limits'. Although Commonwealth legislation has recognised 'traditional fishing' as a special category for some purposes, the law has being going through a process of change. Special provision for 'traditional fishing' is made under the Torres Strait Treaty of 1978 and legislation to implement the Treaty has been enacted. The provision for 'traditional fishing' in the Fisheries Act 1952 (Cth) (which in this respect applied only to external territories) has been repealed. Special local provision for such fishing is made by local zoning plans under the Great Barrier Reef Marine Park Act 1975 (Cth). These three areas will be discussed in turn.

943. ***Torres Strait Treaty***.[3555] The Torres Strait Treaty determines sovereignty over various islands and establishes fisheries and a seabed boundary between Australia and Papua New Guinea in the Torres Strait, and makes other provisions for the area. In particular, Part 4 of the Treaty establishes a 'protected zone', extending from the Papua New Guinea coast south to a line north of Wednesday Island off the tip of Cape York Peninsula and including most of the Torres Strait area. Art 10 provides that:

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3553 Aboriginal Land Inquiry, *Report*, para 11.10.

3554 id, para 11.11-11.14. See further para 989-90.

3555 Treaty concerning Sovereignty and Maritime Boundaries in the Torres Strait between Australia and the Independent State of Papua New Guinea, concluded 18 December 1978: text in (1178) 18 ILM 291. See generally KW Ryan and MWD White, 'The Torres Strait Treaty' (1981) 7 *Aust YB Int'l L* 72. A second treaty not yet ratified by Australia, the Convention on Conservation of Nature in the South Pacific of 12 June 1976 (Department of Foreign Affairs, *International Treaties and Conventions 1975-76*, AGPS, Canberra, 1977, 103) has no formal structures designed to protect traditional interests. But Art VI enables a contracting Party to make 'appropriate provision for customary use of areas and species in accordance with traditional cultural practices', and the preamble refers to the 'special importance in the South Pacific of indigenous customs and traditional cultural practices and the need to give due consideration to such matters'.

> 3. The principal purpose of the Parties in establishing the Protected Zone, and in determining its northern, southern, eastern and western boundaries, is to acknowledge and protect the traditional way of life and livelihood of the traditional inhabitants including their traditional fishing and free movement.
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> 4. A further purpose of the Parties in establishing the Protected Zone is to protect and preserve the marine environment and indigenous fauna and flora in and in the vicinity of the Protected Zone.

Traditional fishing is defined to mean 'the taking, by traditional inhabitants for their own or their dependents' consumption or for use in the course of other traditional activities, of the living natural resources of the sea, seabed, estuaries and coastal tidal areas, including dugong and turtle'.[3556] Although the traditional inhabitants of the zone are Torres Strait Islanders rather than Aborigines, and recognition of their traditional fishing rights might be regarded as outside the Commission's Terms of Reference on the recognition of Aboriginal customary laws,[3557] this is one area where the interests and traditions of Aborigines and Torres Strait Islanders are closely related. Moreover, the provisions of the Treaty are of considerable interest as a carefully worked out international arrangement establishing priorities as between conservation, traditional fishing and commercial fishing. Art 11(1) of the Treaty provides that 'free movement and the performance of lawful traditional activities in and in the vicinity of the Protected Zone by the traditional inhabitants of the other Party' shall, subject to the other provisions of the Treaty, be permitted. Art 12 provides that:

> Where the traditional inhabitants of one Party enjoy traditional customary rights of access to and usage of areas of land, seabed, seas, estuaries and coastal tidal areas that are in or in the vicinity of the Protected Zone and that are under the jurisdiction of the other Party, and those rights are acknowledged by the traditional inhabitants living in or in proximity to those areas to be in accordance with local tradition, the other Party shall permit the continued exercise of those rights on conditions not less favourable than those applying to like rights of its own traditional inhabitants.

The two Parties agree to take necessary measures to protect the marine environment (Art 13) and to identify and protect 'species of indigenous fauna and flora that are or may become threatened with extinction' (Art 14(1); cf Art 14(2)). Art 14(4) provides that:

> In giving effect to the provisions of this Article each Party shall use its best endeavours to minimise any restrictive effects on the traditional activities of the traditional inhabitants.

Seabed mining and drilling are prohibited for 10 years after the Treaty enters into force (Art 15). The parties agree to consultation and liaison in the implementation of Part IV, in particular through a local representative (Arts 17, 18) who is required in the exercise of his functions to:

> consult closely with representatives of the traditional inhabitants of his country, particularly in relation to any problems which may arise in respect of free movement, traditional activities and the exercise of traditional customary rights as provided for in this Treaty, and convey their views to his Government (Art 18(3)(a)).

A Torres Strait Joint Advisory Council consisting of members from each Party (3 of them representing the traditional inhabitants) is established; its functions involve reviewing the working of the Treaty, including:

> any developments or proposals which might affect the protection of the traditional way of life and livelihood of the traditional inhabitants, their free movement, performance of traditional activities and exercise of traditional customary rights as provided for in this Treaty (Art 19(2)(b)).

In doing so the Advisory Council must consult with the traditional inhabitants and report their views to the Parties in any reports or recommendations made (Art 19(4)). The provisions of Part 5 of the Treaty deal with Protected Zone Commercial Fisheries. Art 20 describes the relative position of traditional fishing visa vis conservation interests in the following terms:

> 1. The provisions of this Part shall be administered so as not to prejudice the achievement of the purposes of Part 4 of this Treaty in regard to traditional fishing.
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> 2. A Party may adopt a conservation measure consistent with the provisions of this Part which, if necessary for the conservation of a species, may be applied to traditional fishing, provided that that Party shall use its best endeavours to minimise any restrictive effects of that measure on traditional fishing.

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3556 Art 1(1)(l), and see the restrictive definition of 'traditional inhabitants' in Art 1(1)(m).
3557 See para 96.

944. ***Commonwealth Legislation Implementing the Treaty***. These 'striking and original' provisions[3558] are implemented at the federal level by the Torres Strait Fisheries Act 1984 (Cth) and the Torres Strait Treaty (Miscellaneous Amendments) Act 1984 (Cth). The Torres Strait fisheries Act 1984 (Qld) is the counterpart legislation designed to implement the Torres Strait Treaty within Queensland waters, and outside those waters within the protected zone. The Torres Strait Fisheries Act (Cth) in effect creates four categories of fishing within the Zone, viz:

- 'traditional fishing', which is stated to have the same meaning in the Torres Strait Treaty (except that the Minister may by notice declare the use of specified methods, boats or equipment not to be traditional fishing) (s 3(1)(2));[3559]

- 'community fishing', which is commercial fishing by Australian 'traditional inhabitants' as defined (s 3(1));

- 'commercial fishing', which includes community fishing but does not include traditional fishing (s 3(1)): and

- 'private fishing' which does not include 'traditional fishing' as defined (nor, of course, commercial fishing) (s 3(1)(5)).

At the same time s 14 of the Torres Strait (Miscellaneous Amendments) Act 1984 (Cth) amended the Fisheries Act 1952 (Cth) so as to exclude from its operation fishing in the Protected Zone. There is no equivalent in the Torres Strait Fisheries Act 1984 (Cth) to s 5A(2) of the Fisheries Act 1952, which makes that Act exclusive of State law in relation to commercial fishing or fishing from foreign boats. Accordingly, Queensland fisheries legislation applies, subject to any inconsistent provisions in the Torres Strait Fisheries Act 1984 (Cth), to such fishing in the Protected Zone.[3560] The Torres Strait Fisheries Act 1984 (Cth) however does not apply at all to private fishing (i.e. private fishing, not being traditional fishing) from an Australian boat (s 7). It is intended that private fishing with the use of Australian boats will be regulated under Queensland law.[3561] Before describing the priorities which may result from these various distinctions, certain other features of the Torres Strait Fisheries Act 1984 (Cth) must be described.

945. ***Torres Strait Fisheries Act 1984 (Cth)***. That Act does not in terms create any right of traditional fishing. A traditional inhabitant has a right of traditional fishing in the zone if he is not prohibited from fishing under applicable Commonwealth or Queensland law. The Minister has extensive powers of regulation of fishing, including as to species, method or equipment used etc., in areas of Australian jurisdiction (s 16). These powers extend to traditional as well as commercial fishing, though s 16(m) enables the Minister to:

> prohibit the taking of fish or fish included in a class of fish specified in the notice, otherwise than in the course of community fishing or traditional fishing.

The scope of the protection afforded to community fishing is unclear. Presumably the section applies only to the *taking* of fish, but not to matters of storage and the use of equipment.[3562] The Minister may prohibit the taking of turtle eggs (s 16(h)), but it may be possible for an exemption to be made for their taking by traditional people (s 16(6)). There is provision for consultation with traditional inhabitants who are members of the Joint Advisory Council established under Art 19, but, apart from s 8 there is no obligation to consult.[3563] Section 8 provides that:

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3558 Ryan and White, 103.

3559 But it is not as such an offence to use such methods. Indeed, for reasons that will appear, the 1984 Act does not apply when such methods are used.

3560 s 31 of the 1984 Act allows for Commonwealth law to apply exclusively to fisheries managed by the Protected Zone Joint Authority by agreement with Queensland. It is understood that such an arrangement will be made and that the Commonwealth has the approval of the Queensland Government to an arrangement that covers areas of Australian jurisdiction.

3561 See Commonwealth of Australia, *Part Debs (Sen)* (3 April 1984) 1103.

3562 It is unclear whether s 16(m) qualifies regs 16 (a), (b), (c) for example.

3563 s 39. An Opposition amendment to cl 39 which would have required the Joint Authority to consult with traditional representatives on the Joint Advisory Council was defeated. The Minister commented that:

> Clause 39 was drafted in its present form on the understanding that the Joint Advisory Council would be consulted only on broad policy issues affecting the traditional inhabitants and on important matters which could not be easily resolved by other consultative processes. It was

> In the administration of this Act, regard shall be had to the rights and obligations conferred on Australia by the Torres Strait Treaty and in particular to the traditional way of life and livelihood of traditional inhabitants, including their rights in relation to traditional fishing.

Section 39 provides that the Protected Zone Joint Authority (the body charged in the management of particular fisheries) shall, where it considers appropriate, seek the views of those members of the Joint Advisory Council who are traditional inhabitants and Australian citizens. There is no requirement to consult these members or traditional inhabitants generally, nor is there express provision for direct representation of traditional inhabitants on the Protected Zone Authority or bodies established to advise it.

946. ***Resulting Priorities***. Although the Torres Strait Fisheries Act 1984 (Cth) seeks to ensure the traditional inhabitants' 'rights in relation to traditional fishing', it is capable, unless carefully administered, of creating a priority for non-traditional over traditional means of fishing, or a priority in favour of 'non-traditional inhabitants' over traditional inhabitants. These problems arise because the Torres Strait Fisheries Act 1984 (Cth) does not apply to 'non-traditional' fishing by traditional inhabitants of the zone, and because it refers 'non-traditional' fishing, and private fishing generally, to Queensland law. In fact the fishing notices issued relating to the taking of mackerel, rock lobsters and dugong pursuant to Torres Strait Fisheries Act 1984 (Cth) s 16 have already placed traditional fishermen at a disadvantage.[3564] Only if Queensland law makes the same provision as does Commonwealth law, applicable throughout the zone to private fishing and to 'traditional fishing' by prohibited means, will these problems be avoided. It cannot be anticipated that Queensland will make such provision. Nor is it necessarily appropriate that the Commonwealth be required to legislate on the whole subject of private as well as commercial fishing to cover this particular difficulty. But it is not desirable that traditional fishermen be placed (even unintentionally) at a disadvantage visa vis private fishermen. Indeed, this is contrary to the spirit, if not the letter, of the Torres Strait Treaty itself. Amendments should be made to the Commonwealth Act to provide that a traditional inhabitant shall not be liable for an offence in contravention of a notice under Torres Strait Fisheries Act 1984, s 44 where the act would not have constituted an offence had it been done by a person who was not a traditional inhabitant.

947. ***Community Fishing Licences***. Section 17 of the Commonwealth Act makes provision for a licence to be taken out for community fishing. Community fishing is defined by s 3(1) as fishing by:

> (a) a person who is, or 2 or more persons each of whom is, both a traditional inhabitant and an Australian citizen (not being a person who is, in the course of that fishing, under an obligation, whether formal or informal, to act in accordance with the directions, instructions or wishes of another person who is not both an Australian citizen and a traditional inhabitant); or
>
> (b) a person or persons of the kind referred to in paragraph (a) and another person or other persons employed by -
>
> (i) the first-mentioned person or persons; or
>
> (ii) the Commonwealth, Queensland, an authority of the Commonwealth or an authority of Queensland,
>
> to provide the first-mentioned person or persons with training or advice in relation to fishing techniques.

The Act provides for regulation of both commercial fishing generally and by traditional inhabitants (i.e. community fishing), but it would be possible to make special provision for the latter independently of the former: indeed the Act expressly envisages this.[3565]

948. ***Fisheries Act 1952 (Cth)***. The Fisheries Legislation Amendment Act 1984 (Cth) s 6(c), 10(l)(d) removed the special protection previously afforded to traditional fishing by inhabitants of external territories, in proclaimed waters.[3566] This is without prejudice to the protection of traditional fishing by indigenous

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never intended that the three Islander members of the Joint Advisory Council be consulted on day to day fisheries management matters handled by the Protected Zone Joint Authority. Commonwealth of Australia *Parl Debs (H of R)* (29 March 1984) 1009.

3564 Commonwealth of Australia, *Gazette* (10 February 1985) No S44, (30 July 1985) No S280.

3565 eg s 14(2) and (3), 16(1)(d) and (3), 17, 19. Apart from the amendments to the Fisheries Act 1952 (Cth) referred to in para 948, the Torres Strait Treaty (Miscellaneous Amendments) Act 1984 (Cth) also amends provisions in legislation such as the Coral Sea Islands Act 1969 (Cth), the Customs Act 1901 (Cth) and the Quarantine Act 1908 (Cth), to give effect to the Treaty. For example, Part XI of the Act amends the Wildlife Protection (Regulation of Exports and Imports) Act 1982 (Cth) to empower the Minister for Home Affairs and Environment to exempt from the provisions of the Act the importation into or exportation from Australia of certain specimens by traditional inhabitants for traditional activities. These exemptions only apply if the specimens remain within the Protected Zone (s 34).

3566 That protection had been afforded by s 8(1)(d)(i) in conjunction with the definition of 'traditional fishing' in s 4(1).

inhabitants of the 'Protected Zone' under the Torres Strait Treaty, which is subject to the Torres Strait Fisheries Act 1984 (Cth).[3567] In proposing the repeal of the earlier provisions of the Fisheries Act 1952, the Minister for Primary Industry commented that:

> Traditional fishing as defined in the Fisheries Act relates to fishing by indigenous inhabitants of Australia's external territories, with particular application to Papua New Guinea. With the granting of independence to that country several years ago, that term is no longer necessary for fisheries management under the Act.[3568]

The repeal is of little direct relevance for the purposes of this Report since the exemption for traditional fishing only extended to fishing by indigenous inhabitants of an external territory.[3569] There has never been any special provision in the Act to cover commercial fishing by Aborigines and Torres Strait Islanders within Australia.

949. ***Great Barrier Reef Marine Park Act 1975 (Cth)***. This Act provides for the control and development of a marine park within the Great Barrier Reef Region (s 5). The Governor-General may declare an area of the Great Barrier Reef a Marine Park (s 3), and the Great Barrier Reef Marine Park Authority is then required to prepare a zoning plan in respect of that area (s 32). To date Marine Parks have been declared in the Far Northern Section, the Cairns and Cormorant Pass, Central, Townsville, Southern, Inshore and Southern Capricornia Sections of the Reel making an area of 384,700 sq km. Zoning plans for the Capricornia, Cairns and Cormorant Pass Sections are now in force. The Far Northern Section zoning plans are well advanced. In the preparation of the plan, the Authority, is required to have regard to certain objects (s 32(1)), none of which specifically take account of Aboriginal and Islander interests. However the Authority seeks public participation in the preparation of the plans, both before preparation (s 32(2)) where the Authority is required to allow not less than one month for public representations, and immediately after preparation and before submission to the Minister (s 32(8)(9)) where not less than one month (in practice currently three months) for submissions is allowed. There is no requirement for consultation with traditional inhabitants, over and above the general requirement for public consultation. In preparing the zoning plans the Authority is required to have regard to the interests of conservation, the need to regulate the exploitation of resources of the Great Barrier Reef, public appreciation and enjoyment of the reef, and the needs of scientific research (s 32(7)). No reference is made to traditional hunting and fishing interests nor is it suggested that certain areas should be preserved for traditional use, though such a possibility is suggested in relation to scientific needs (s 32(7)(e)).

950. ***Cairns and Cormorant Pass Zoning Plans***. The Cairns and Cormorant Pass Zoning Plans define traditional fishing and hunting in terms of taking otherwise than for the purposes of sale and trade.[3570] The zoning plans divide the regions into a series of specific areas in which certain activities may occur. For example, within General Use 'A' and 'B' Zones and except within a Replenishment Area, Reef Appreciation Area or Reef Research area, traditional fishing is not regulated and would be permitted as ordinary fishing (not specifically as traditional fishing); traditional hunting (of dugong) could occur with the permission of the responsible agency.[3571] No hunting and fishing of any kind may take place within a preservation zone. In other zones, the permission of the responsible agency is required in certain cases and in granting such permits the agency must have regard to a number of matters relating to the orderly and proper management of the zone,[3572] and in particular to:

> (a) the need for conservation of endangered species;
>
> (b) the methods of traditional hunting or fishing;
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> (c) the numbers to be taken.[3573]

A permit will be issued 'only on conditions relating to recording catch and levels of stock of limited species'. Thus where the zoning plans and regulations enable a permit to be granted for traditional fishing,

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3567 See para 944.
3568 Commonwealth of Australia, *Parl Debs (H of R)* (17 December 1983) 3365.
3569 This is not to deny the reality of the interests of traditional fishermen in external territories such as the Cocos (Keeling) Islands. Presumably allowance for this will be made in the administration of the Fisheries Act 1952 (Cth).
3570 Zoning Plans cl 2. The position of ceremonial gifts is unclear.
3571 id, cl 5.2(i)(xv).
3572 id, cl 4(1)(a).
3573 cl 4(2)(a-d).

considerable control is left in the hands of the responsible agency.[3574] The approach taken is to identify conservation needs in each specific area and to make particular regulations for that area. While this approach best serves the interests of conservation, it could involve invidious distinctions between different Aboriginal and Islander communities:[3575]

> The current attempts by the Great Barrier Reef Marine Park Authority to limit the traditional harvest of dugongs by the Aborigines of Hope Vale community (near Cooktown) have already been adversely affected by the lack of corresponding controls in other communities. During a two-week stay at Hope Vale in January 1984, one of us was asked repeatedly: 'Why are there restrictions on our hunting but not on hunting by other communities?'[3576]

An anomaly has arisen where the need for a permit for traditional fishing has resulted in traditional fishing receiving a lower priority than ordinary fishing in the Marine National Park 'A' Zone. Within the Marine National Park 'A' Zone, and except within a Reef Appreciation Area or a Reef Research Area, traditional fishing and traditional hunting may take place with the permission of the responsible agency.[3577] By contrast in Marine National Park 'A' Zone general line fishing, gill netting, bait netting, and spear fishing did not require a permit. In this instance the need for a permit for traditional fishing might be avoided if the activity could be classified as 'ordinary fishing'. The reason for treating traditional fishing more strictly than recreational fishing is unclear.[3578]

## The Northern Territory

951. ***Fisheries Generally***. Section 26(7) of the Fish and Fisheries Act 1979 (NT) creates certain offences, e.g. for exceeding bag limits, the use of fish traps, and selling fish, without a licence. Section 93 states that:

> (1) Subject to this section, the provisions of this Act and the regulations regulating or prohibiting the entry of persons into, or controlling fishing or other activities in, waters do not, unless and to the extent to which they are expressed to do so, operate to limit the right of Aboriginals to enter, and to use the resources of, those waters in accordance with Aboriginal tradition.
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> (2) Sub-section (1) does not authorize a person to
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> (a) trespass on a lease;
>
> (b) interfere with, or remove fish from, a net, trap on the property of another person; or
>
> (c) engage in a commercial activity.

Should the Department of Fisheries wish to prohibit the taking of undersized fish or the taking of endangered species altogether, the regulations must specifically and expressly prohibit Aborigines as well as non-Aborigines from doing so. For example reg 7B expressly so prohibits the use of gill nets in certain estuaries, a prohibition which would apply to any Aboriginal community wishing to take out a Class D Licence.

952. ***Commercial and Community Fishing Licences***. Section 14 of the Act enables an Aboriginal community, or persons or groups of persons who claim to be traditional Aboriginal communities, living in the vicinity of traditional land to apply for a commercial fishing licence (i.e. a Class A1 license). Though laudable in aim, this procedure has not proved particularly useful in practice. Among other things, the licence fee can be as high as $1000. The Department of Fisheries has consequently proposed a special licence which would enable Aboriginal people to trade within their own community. This licence is intended to enable the distribution of fish through the kinship system or the wider clan or ritual group, as distinct from on the open market. To achieve this aim, reg 7B, gazetted in March 1984, enables fish to be supplied to an Aboriginal community. It may be that this provision is wider than intended, for it would appear to allow fish to be traded, for example, between a remote community and the Aboriginal community in Darwin. Regulation 7B is narrower than s 93, in that it does not allow for gill netting exceeding 200 metres in length, nor the use of gill netting in certain areas. It is not clear why the trading of fish within Aboriginal communities according to

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3574 As defined in cl 2.2.
3575 For difficulties with the permit system see para 981.
3576 H Marsh, B Barker Hudson, G Heinsohn and F Kinbag, 'Status of the Dugong in The Torres Strait Area: Results of an Aerial Survey in the Perspective of Information on Dugong Life History and Current Catch Levels', James Cook University, Townsville, April 1984, 44.
3577 id, of 7.2(g)(xii).
3578 See further para 979, 988.

customary fishing practices should not fall within s 93 of the Act, which allows for Aboriginal people to 'use the waters in accordance with Aboriginal tradition', thus rendering reg 7B unnecessary in such circumstances. However it may be that for use to be made of s 93, the method of fishing would have to accord with Aboriginal tradition (i.e. traditional fish traps and fishing spears). In another aspect, therefore, reg 7B may be wider that s 93C, in that it is not limited to traditional fishing methods.

953. ***Closures of the Seas***. The Aboriginal Land Act 1978 (NT) s 12(1) empowers the Administrator to close the seas adjoining and within 2km of Aboriginal land, to others who are not Aborigines entitled by tradition to enter and use the seas in accordance with that tradition. Before doing so he may (and in case of dispute he must) refer a proposed sea closure to the Aboriginal Land Commissioner, to inquire into and report on:

> (a) whether, in accordance with Aboriginal tradition, strangers were restricted in their right to enter those seas;
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> (b) whether the use of those seas by strangers is interfering with or may interfere with the use of those seas in accordance with Aboriginal tradition by the Aboriginals who have traditionally used those seas;
>
> (c) whether the use of those seas by strangers is interfering with or may interfere with the use of the adjoining Aboriginal lands by the traditional Aboriginal owners;
>
> (d) whether any person would be disadvantaged if the seas were closed to him;
>
> (e) the commercial, environmental and recreational interests of the public; and
>
> (f) such other matters as the Aboriginal Land Commissioner considers relevant to the closure of those seas.[3579]

Once seas are closed it is an offence for a person to enter or remain on these seas without a permit issued by the relevant Land Council (s 15) or in certain other circumstances.[3580] Holders of commercial fishing licences issued prior to a sea closure notice may enter and fish the areas of the closed seas, provided the relevant Land Council is notified (s 18(1), (2)).[3581] The Milingimbi (Glyde River) Seabed claim has been heard and the seas were closed in July 1983.[3582] Other seabed applications are in progress.[3583] During the course of the hearings much anthropological evidence is presented on the traditional fishing practices of the local people, both as to the customary practices associated with the catching, distribution and consumption of the fish and to the areas of the seabed in which different clans may fish.[3584] The Northern Territory Act is so far the only legislative provision for closure of the seas in Australia.[3585]

## South Australia

954. ***Fisheries Generally***. Under the Fisheries Act 1971 (SA), Aboriginal people are subject to the same restrictions as to the numbers of fish caught, the size of fish caught and the methods of catching fish as are all other citizens. Aboriginal people require a permit to catch fish for sale. The Aboriginal Legal Services have received few if any complaints relating to prosecutions under the Act. Discussions have taken place between the South Australian Government and the Point Pearce Aboriginal Community over requests to

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3579 s 12(4). As Toohey J pointed out in his Report on the Land Rights Act *Seven Years On. Report to the Minister for Aboriginal Affairs on the Aboriginal Land Rights (Northern Territory) Act 1976 and Related Matters*, AGPS, Canberra, 1984, para 294-5) s 12(4) does not expressly empower the Commissioner to recommend a closure of the seas: he has suggested an amendment to make this clear. See M Brady, 'Sea Rights, The Northern Territory, Sea Closure: A Weakened Law', (1985) 15 *ALB* 8.

3580 s 16 (government employees issued permits by the Minister), s 17 (Members of Parliament etc), s 18 (licences under the Fish and Fisheries Act), s 20 (vessels in transit). A defence of necessity is also provided: s 19.

3581 For difficulties with the NT sea closure provisions see SL Davis, 'Aboriginal Tenure of the Sea in Northern Arnhem Land' in L Zann (ed) *Proceedings of the Workshop on Traditional Knowledge of the Marine Environment in Northern Australia*, Great Barrier Reef Marine Park Authority, Townsville, 1986 (in press).

3582 Northern Territory Government Gazette, No G 30 (29 July 1983); and see Toohey J, *Closure of the Seas: Milingimbi, Crocodile Islands and Glyde River Area, Report by the Aboriginal Land Commissioner to the Administrator of the Northern Territory*, NT Govt Printer, Darwin, 1983; and see Davis (1986) 36.

3583 Applications are pending with respect to the seabed adjacent to Howard Island and Castlereagh Bay, Groote Eylandt, Croker Island, and Bathurst and Melville Islands and see M Brady (1985), 9.

3584 The Department of Fisheries has also been conducting research into Aboriginal subsistence fishing and tenure of the sea. This has involved extensive mapping and study of specific areas of the sea. The Australian Fishing Industry Council is also conducting research as to the current method of defining areas considered for preclusion from fishing: Toohey (1984) para 876. See SL Davis, 'Research Proposal: Aboriginal Subsistence Fishing and Tenure of the Sea', Unpublished, Northern Territory Industry Research and Development Trust Fund, May 1983.

3585 See para 898 for WA proposals for sea closures.

close the stretch of water between Point Pearce and Wardang Island to trawlers engaged in net fishing, and to exempt Aboriginal people from commercial licence fees.

## Western Australia

955. ***Fisheries Generally***. In 1979 s 56 of the Fisheries Act 1905 (WA) was repealed and a new section substituted which, subject to certain restrictions, allows 'a person of Aboriginal descent' to take 'in any waters and by any means sufficient fish for food for himself and his family, but not for sale'. The Governor may however suspend or restrict this right if he is satisfied that:

> (a) the power to take fish conferred by ... this section is being abused; or
>
> (b) the population of any species of fish which is being taken under the power to take fish conferred by ... of this section is becoming or is likely to become excessively depleted ...[3586]

Under s 56(1) traditional fishing is subject to s 9, 10, 23, 23A, 24 and 26 of the Act. These sections enable the Minister to gazette special regulations prohibiting the taking of particular species of fish, outlawing the use of illegal devices, and restricting the taking of rock lobsters. While there is in principle a recognition of the right of Aboriginal people to fish for food, this recognition may be restricted by regulations under the Act. For example, suggestions have been made that Aboriginal people in the Broome area have had considerable difficulty in getting rock lobsters for their own consumption under the regulations controlling the taking of lobsters. It has also been suggested that the Act presents difficulties for some Aborigines in Broome who wish to obtain a commercial fishing licence under s 17. To receive a licence it is necessary to obtain a coxswains licence which entails passing a test of the rules of the sea. Aboriginal people claim to have had difficulties with these tests. The Pearling Act 1912 (WA) has also been subject to some criticism. This Act regulates pearling operations, and requires licences for most of the different operations involved (pearl dealers' licences, divers' licences, divers' tenders' licences, pearl cleaners' licences, shell buyers' licences, ship licences and beach combers' licences). Apparently difficulties have arisen with Aboriginal people collecting the shell for their use from the seashore. The Pearling Act 1912 (WA) s 109 forbids the removal of pearl shell from the seashore (including any reef or island uncovered at low tide) north of the Tropic of Capricorn. Commercial resource harvesting by traditional inhabitants occurs north of Derby where the Fisheries Department have issued the Bardi Aborigines Association with a professional fishing licence to enable trochus shell to be taken for the purposes of sale. As the Department points out, such taking cannot be said to be traditional.[3587]

956. ***Closures of the Seas***. The Western Australian Aboriginal Land Inquiry, in examining ways in which Aboriginal interests in the sea adjacent to Aboriginal land could be protected, recommended that the Tribunal be able to make recommendations for exceptions from fishing or other maritime laws to allow Aboriginal claimants to benefit from land rights and associated fishing interests.[3588] The Report recommended that:

> waters should only be protected for Aboriginal people for uses which are still part of traditional life. Traditional use should be defined to include access to and traditional activities connected with significant areas in or associated with the sea, or customary modes of foraging or fishing in or near the sea. An activity should not be treated as outside tradition merely because it is pursued with the latest technology.[3589]

However claims for the vesting of sea-bed or seashore in Aboriginal applicants were rejected.[3590] Instead the Minister and the Tribunal should have power to:

> grant protection of waters upon the application of the traditional interests provided that the applicants show that the use by others of the waters interferes or may interfere with their traditional use ... It is not appropriate to use the term 'sea closure' because the Tribunal should create no more exclusivity than is necessary to protect the particular

3586 'Sale' is defined by s 56(3) to include barter and exchange.
3587 WA Fisheries Department, (P Rogers, Acting Director) *Submission 390* (9 January 1986) 1.
3588 Aboriginal Land Inquiry, *Report*, para 6.33, 11.25.
3589 id, para 11.26-11.28.
3590 id, para 11.29.

> traditional interests. For example a seasonal fishery need not be closed twelve months in the year. Sailing might be compatible with some traditional interests and not with others.[3591]

The Report also recommended that river beds and banks adjacent to Aboriginal land should be able to be protected for use of Aboriginal people. Public access along a water course would be restricted where land on both sides of the river was granted as Aboriginal land.[3592] Had the Aboriginal Land Bill 1985 (WA) been enacted it would have enabled Aboriginal organisations or land corporations acting on behalf of Aborigines with entitlements in accordance with local Aboriginal tradition to an area of the seas contiguous to Aboriginal land, to apply for access and activities in that area of the sea to be regulated. In determining the application the Tribunal would have had to be satisfied that the Aboriginal claimant had entitlements according to local Aboriginal tradition, that their use of the seas was being interfered with, that no one would suffer undue detriment and in particular that commercial and recreational interests would not be unreasonably interfered with (cl 92). The regulations were not to regulate access and conduct to a greater extent than necessary to enable the area to be used in accordance with local tradition (cl 83(3)(a)). Bona fide transit vessels, and interests or rights which a person has in the area, would have been protected (cl 83 3(b)(c)). The Bill would have made it an offence to obstruct or hinder an Aborigine traditionally using the seas, or to enter and remain in the protected area without being entitled to do so (cl 93).[3593]

## Queensland

957. ***Fisheries Generally***. Section 5 of the Fisheries 1976 Act (Qld) provides that the Act does not apply to:

> the taking, otherwise than by the use of any noxious substance or explosive, of fish or marine products in Queensland waters for private purposes by any Aboriginal or Torres Strait Islander who at the material time is resident on a reserve ...

There is now also the exemption from fisheries legislation for reserve residents, contained in the two Community Services Acts of 1984.[3594] This is expressed to apply 'notwithstanding any other Act ...' (s 77(1)). It would appear that the terms of this legislation would enable reserve residents to take fish, for example, with the use of any noxious substance or explosive. The Fisheries Act 1976 (Qld) is to be gradually phased out with the introduction of the Fishing Industry Organisation and Marketing Act 1982 (Qld). The latter Act deals with the taking of fish for commercial purposes. It makes arrangements for the marketing of fish and provides that a person may not take fish for commercial purposes unless he is the holder of a licence (s 36). Section 31 provides that a 'community' fisherman's licence may be granted. A 'community' is defined as 'the inhabitants of a reserve for the benefit of Aboriginals and Torres Strait Islanders'. The purpose of s 31 is to allow for community licences to a fluctuating group of Aboriginal people rather than a licence being taken out by a corporation or by individual persons.[3595] A feature of both the Fishing Industry Organisation and Marketing Act 1982 (Qld) and the Fisheries Act 1976 (Qld) is that Aborigines who are not 'inhabitants of a reserve',[3596] or who are not 'at the material time a resident of a reserve'[3597] are subject to all the provisions of the fisheries legislation, and are not able to take out a community licence under the Fishing Industry Organisation and Marketing Act 1982 (Qld). There is no indication that the Acts will be extended to apply to Aborigines not living on reserves. The Fisheries Act 1976 (Qld) and the Fishing Industry Organisation and Marketing Act 1982 (Qld) do not apply to the taking of fish for the purposes of a fishery within the Torres Strait area as provided by the Torres Strait Fisheries Act 1984 (Qld) s 5(2). The Torres Strait Fisheries Act 1984 (Qld) provides for the implementation of the Torres Strait Treaty, and for the conservation and management of Queensland's fisheries. The State Minister is empowered to exercise any of the powers and to perform any of the functions conferred on the Commonwealth Minister under Part V of the Torres Strait Treaty (cl 1(2)). However regard is to be had to the traditional ways of life of the traditional inhabitants including their rights in relation to traditional fishing (s 7).[3598]

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3591 id, para 11.45-49, 11.54.
3592 id, para 6.36-6.43. For the position of Marine Parks see id, Appendices, 163.
3593 The Bill would also have enabled Aboriginal people to apply for marine parks to be declared special management areas: see para 926.
3594 See para 928.
3595 cf the scheme in operation in the Northern Territory: para 952.
3596 Fishing Industry Organisation and Marketing Act 1982 (Qld) s 31.
3597 Fisheries Act 1976 (Qld) s 6.
3598 See also para 943-7.

958. ***The Problem of Dugong***. The issue of dugong hunting in Commonwealth waters off the Queensland coast, together with the operation of the Great Barrier Marine Park Act 1975 (Cth) and the Torres Strait Fisheries Act 1984 (Cth) (and related Acts) have already been discussed.[3599] The interrelation of these Acts is complicated. Under Queensland law, the Fisheries Act 1976 (Qld) provides that only reserve residents are permitted to hunt dugong, while Commonwealth law does not prohibit the taking of dugong. In certain areas under the zoning plans, no hunting and fishing of any kind (including the taking of dugong) is permitted. In other areas traditional hunting of dugong may be allowed subject to a permit being granted. Nothing in the Zoning Plan is to be construed as permitting the taking of any plant or animal protected under Commonwealth or Queensland law, nor as permitting any activity prohibited under Commonwealth law (cl 14, 15). Thus, if permission is given by the responsible authority for the taking of dugong in a particular zone, this would only permit the taking of dugong by residents of a trust area. (former reserves) in Queensland waters. An Aborigine living off a trust area who is prohibited from taking dugong would still be precluded from taking dugong, in Queensland waters, even if he had a permit to do so. In Queensland, particular problems have been raised about the taking of dugong by Aborigines not resident on a reserve.[3600] The Commission has been advised that since 1972 six Aborigines and Islanders not residents of the reserve have been convicted of taking dugong.[3601] The position in relation to dugong is particularly sensitive given their scarcity and their extremely low reproductive rate.[3602] The Queensland Fish Management Authority advises that an Interdepartmental Committee has been established to study the taking of dugong and turtles by Aborigines and Islanders. At the federal level research is also being conducted under the auspices of the CSIRO, the Great Barrier Reef Marine Park Authority, the Department of Primary Industry, the Australian National Parks and Wildlife Service, and the Department of Science and Technology's Marine Science and Technology Grant Scheme.

959. ***Marine Parks***. The Marine Parks Act 1982 (Qld) provides for the setting apart of tidal lands and tidal waters as marine parks. It applies, for example, to the inter-tidal zones between a cay (to which the Queensland national parks legislation would apply) and the surrounding reef (which would be likely to fall within the Great Barrier Reef Marine Park Act). Given the narrow geographical line between areas subject to the operation of these different Acts, questions of administration are minimised by the fact that the management of all three areas is undertaken by the Queensland National Parks Authority. No special provision is made for Aborigines and Torres Strait Islanders, either under the Marine Parks Act 1982 (Qld) itself nor under the regulations made under it. Draft Zoning plans prepared for the Capricornia section similarly make no provision for Aboriginal or Torres Strait Islanders and traditional fishing.[3603]

## New South Wales

960. ***Fisheries Generally***. Under the Fisheries and Oyster Farms Act 1935 (NSW) as amended, the only special recognition of traditional fishing rights is an exemption for Aborigines (as defined under the Aborigines Act 1969 (NSW)) from the requirement of an inland angling licence to fish in inland waters (s 25(a)). Thus neither Aborigines nor non-Aborigines are permitted, for example, to take fish for sale without a licence, catch undersized fish, use a net in certain areas, use dynamite, or take restricted species of fish.[3604] Similarly, the taking of oysters from certain Crown land and from public oyster reserves is prohibited unless taken for personal consumption in the immediate vicinity from which they are taken (s 83, 85). Specific problems are created in New South Wales because of the shortage of abalone, their commercial popularity, and pressures from commercial fishing interests. In 1980 when the Fisheries Department introduced abalone licences a licence was granted to the only two Aborigines who were applicants. Current policy is to renew existing licenses and not to create additional new licenses. Regulation 181 allows the taking of 5 crayfish or 15 abalone a day by an unlicenced person.[3605] Publicity was given to charges laid against Aborigines for alleged breach of this Regulation in several instances,[3606] and calls have been for the amendment of the

3599 See para 943-50.
3600 See para 891.
3601 Qld Department Harbours and Marine, (J Leech, Director), *Submission 498* (25 October 1985) Appendix B.
3602 Dugong are considered to need a 95% adult female survivorship to maintain the species.
3603 Premiers Department *Capricornia Section: Investigation of Tidal Lands and Tidal Waters of Queensland for the Declaration of a Marine Park*; vol 2, Draft Zoning Plan, Environment Science and Services, Spring Hill, August 1984.
3604 s 18, 19, 20, 22A, 25, 26, 29, 33, 34, 112, 116.
3605 cf Fisheries and Oyster Farms Act 1935 (NSW) s 25 for the licensing requirements.
3606 *Sydney Morning Herald*, 31 August 1983, 1 September 1983, 10 February 1984. In the first matter, *Police v Norman Patton*, *Police v Ronald Mason*, the court at first instance rejected the argument that the defendants were exercising customary rights to hunt fish and gather food, and should therefore not be subject to the Fisheries and Oyster Farms Act 1935 (NSW). The matter lapsed. Charges laid in a second matter were

Fisheries and Oyster Farms Act 1935 (NSW).[3607] It is interesting to compare the provisions of the New South Wales Act with the relevant Western Australian provisions. While Western Australia has a specific exemption for Aboriginal people, that exemption is subject to other provisions of the Act such those relating to size, netting, lobster fishing, the devices that may be used in catching fish, prohibitions on dynamite. In the result there may be little practical difference in the operation of the two Acts.

### Victoria and Tasmania

961. ***Fisheries Generally***. There are no special provisions for Aboriginal fishing under the Fisheries Act 1968 (Vic), nor under the Fisheries Act 1959 (Tas).

## Miscellaneous Restrictions Under Australian Legislation

962. ***Some Examples***. It is not intended to analyse the many other Acts which may restrict traditional hunting and fishing activities, but a few examples will indicate the nature of the provisions involved. For example:

- Firearms legislation in most states makes it an offence to use a firearm in a public place,[3608] or to possess a firearm on enclosed land,[3609] or to discharge a firearm on land owned by another without the owner's consent.[3610]

- Similarly the Draft Code of Practice for the Shooting of Kangaroos, issued by the Council of Nature Conservation Ministers in 1984 makes no provisions for traditional hunting.[3611]

- Under the Forests 1919 (WA) it is an offence to destroy or remove timber from a forest (s 45), to unlawfully possess forest products (s 51), or to hunt indigenous animals or birds (s 49) in a State forest. No special provisions are made for Aboriginal people.

- Under the Crown Lands Act 1929 (SA) it is an offence to remove timber, metals, soil, and sand from Crown land (s 275). A licence to remove such material is required (s 24). Section 272 prohibits the unauthorised use of Crown land. However merely traversing the land or camping temporarily on the land does not constitute unauthorised use (s 272(2)). No special attempt has been made to recognise Aboriginal interests under this Act.

- Similarly under the Forestry Act 1950 (SA) it is an offence to interfere with or to destroy property under the control of, or belonging to the Ministry or the Forestry Board (s 18). There is no special allowance for Aboriginals under this Act.

- The Forestry Act 1916 (NSW) makes it an offence to cut, obtain or damage any timber or tree or products in a state forest, timber forest or flora reserve, without lease or licence to so do. The Government may also make regulations prescribing the use of firearms, and the lighting of fires, in forestry areas and prohibiting or regulating the destruction or shooting of game in state forests, or timber reserves.[3612]

## Australian Legislation on Hunting, Fishing and Gathering: An Overview

963. ***Summary***. Before turning to questions of principle relating to Aboriginal hunting, fishing and gathering rights and their possible recognition, it is helpful to summarise the approaches taken in the Australian legislation and administrative practices described in this Chapter. Several situations need to be distinguished:

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dropped at the request of the Minister when it was learnt that the abalone were taken for a feast to celebrate the granting of the Wallaga Land Claim. *Sydney Morning Herald*, 10 February 1984.

3607 *NAC News* (February 1984) 14.

3608 eg Firearms and Dangerous Weapons Act 1973 (NSW) s 43, Firearms and Offence Weapons Act 1979 (Qld) s 73. On the question of safety see para 920.

3609 eg Firearms and Dangerous Weapons Act 1973 (NSW) s 44.

3610 eg, Firearms and Offensive Weapons Act 1979 (Qld) s 72; Firearms Act 1973 (WA) s 10, 10A(a). Under the Western Australian Act it appears that there is no specific exemption for Aborigines under s 8. See also para 983.

3611 Council of Nature Conservation Ministers, Draft Code of Practice for the Shooting of Kangaroos (Canberra July 1984) and cf National Police Working Party, *Submission 461* (13 November 1984) 4.

3612 s 36, 41, and cf Crown Land Act 1976(Tas) s 41-46; Forestry Act 1920 (Tas) s 46.

- exemptions for Aboriginal people from the application of the general law (whether fishing or hunting and foraging legislation);

- the management of resources on Aboriginal land;

- access to private land.

964. ***The Application of Hunting Legislation***.

- No special provision is made for traditional hunting by Aboriginal people under the Wildlife Act 1975 (Vic), the National Parks and Wildlife Act 1970 (Tas), the National Parks Authority Act 1976 (WA) or the National Parks and Wildlife Act 1974 (NSW). However s 100(2) of the New South Wales Act provides that exemptions may be made by regulation exempting classes of persons from the operation of the National Parks and Wildlife Act 1974 (NSW). As yet no regulations have been made.

- In the Northern Territory Aboriginal traditional hunting is not subject to conservation laws unless they are stated to expressly affect Aboriginal people and are made for the purposes of conserving wildlife (Territory Parks and Wildlife Conservation Act 1976 (NT) s 22).

- In South Australia regulations enable Aborigines to hunt protected animals for food but do not allow them to take animals in conservation reserves, even though Aborigine people may hunt on such reserves.[3613] But Aborigines cannot take protected plants such as quandongs, native oranges or native peaches without a permit. There are no similar regulations exempting Aborigines from the National Parks and Wildlife Act 1972 (SA) s 49 or from the Native Vegetation Management Act 1985 (SA) s 19, 20.

- In Queensland, Aborigines not resident on trust land are subject to all conservation laws, with no special provision being made.

- In Western Australia the Wildlife Conservation Act 1950 s 23 (WA) exempts Aborigines from conservation laws when hunting for food on land not being a native reserve or wildlife sanctuary. The Governor can suspend the operation of the section if he thinks the provision is being abused or that a species has become unduly depleted. In relation to nature reserves under this Act agreements have been made with tribal groups to enable them to take fauna under the Wildlife Conservation Act 1976 (WA) s 12D, 12E.

- Under Commonwealth law Aboriginal people are not subject to conservation laws unless those laws are expressly stated to apply to them (National Parks and Wildlife Conservation Act 1975 (Cth) s 70).

965. ***Aboriginal Land***. The grant of Aboriginal land and the hearing of land claims in the Northern Territory has been a catalyst for much anthropological research on traditional hunting and fishing, and has highlighted the importance of management of resources on Aboriginal land. It has demonstrated that there are various ways in which effective collaboration between the authorities and local Aborigines can be achieved. In the process a new balancing of interests has developed and continues to be refined. For example:

- Northern Territory conservation laws are capable of applying to Aboriginal land, but the right of Aborigines to use natural resources is preserved. The Conservation Commission of the Northern Territory may enter into arrangements with Land Councils to protect wildlife on Aboriginal land, as, for example, at Cobourg where there is formal power sharing with Aboriginal control of the Cobourg Preservation Sanctuary Board. The Land Councils are required to consult with traditional owners, whose consent is required before the Board can take certain action. The Board cannot restrict the traditional owners' right to use the sanctuary.[3614]

- At the Commonwealth level the Kakadu Management of Aboriginal land was the first model developed, preceding the Cobourg Plan of Management. It contains detailed provisions for Aboriginal

3613 See para 917.
3614 See para 915-6.

involvement at an informal level, rather than the formal structure provided for Cobourg. Under the Kakadu Plan of Management traditional hunting is preserved but may be proscribed where species are particularly endangered, after consultation with the Land Council.[3615]Amendments in 1985 to the National Parks and Wildlife Conservation Act 1975 (Cth) ensure greater decision making power for Aborigines.[3616]

- In Queensland, Aborigines living on trust lands are exempt from hunting and fishing legislation under the Community Services (Aborigines) Act 1984 (Qld) s 77 and its Torres Strait equivalent. This exemption allows for traditional hunting for consumption. Aborigines living at Aurukun or Mornington Island are able to hunt for sustenance under the Local Government (Aboriginal Lands) Act 1978 (Qld).

- In South Australia, in relation to the Pitjantjatjara Land, the Governor can make regulations restricting activities with adverse environmental consequences but only on the recommendation of the Anungu Pitjantjatjaraku under the Pitjantjatjara Land Rights Act 1981 (SA).[3617] Under the Maralinga Tjarutja Land Rights Act 1984 (SA) the equivalent provision has been altered to allow the Governor to make regulations restricting activities with adverse environmental consequences but only after consultation with the Maralinga Tjarutja. There are proposed amendments to enable joint management schemes to take place.

- In New South Wales legislative amendments which comes into effect in 1986 will exempt Aborigines and their dependants from certain provisions of the National Parks and Wildlife Act 1974 (NSW, provided the taking is for domestic purposes. The exemptions do not cover endangered fauna and do not permit the taking in national parks, on the lands managed by the National Parks and Wildlife Service, nor on lands to which Aborigines do not have a legal right of access.

- In Victoria under the Aboriginal Lands Claim Bill 1983 (Vic) Aboriginal claimants would be vested with full control of flora and fauna on Aboriginal land unless it has been declared protected, notable or endangered under the relevant legislation.

- In Western Australia, the Aboriginal Land Bill 1985 (WA) provided that laws of general application would apply to Aboriginal land. The wildlife laws in that State give wide exemptions to Aboriginal people. The Bill also envisaged joint Aboriginal and Government management and special management areas. The Bill was never enacted.

966. ***Access to Land***. In Queensland, Victoria, or Tasmania there are no access provisions enabling Aboriginal people to hunt on land belonging to another.[3618]

- In the Northern Territory under the Crown Lands Act 1979 (NT) s 24(2) Aboriginal inhabitants of the Northern Territory who ordinarily reside on the leased land (or on land excised since 1979 or who by tradition are entitled to use and occupy the land) are entitled to enter and to hunt for food and ceremonial purposes.

- In South Australia reservations in pastoral leases enable traditional hunting, fishing and gathering on some pastoral leased land: no traditional nexus is required. It is unclear whether these reservations will be preserved as pastoral leases are convened to perpetual leases.

- In New South Wales under the Aboriginal Land Rights Act 1983, s 47, the Land Council is able to negotiate with the owners of land to enable access by specified Aboriginal groups. There is an appeal to the Land and Environment Court where access cannot be negotiated with the owner. There is no reservation in favour of Aboriginal people in pastoral leases in New South Wales.

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3615 See para 911.
3616 See para 910.
3617 See para 920.
3618 See para 935.

- The Land Act 1933 (WA), s 106 enables Aboriginal people to enter onto unenclosed and unimproved pastoral lease land. No traditional nexus is required. The Western Australian Aboriginal Land Commissioner criticised s 106(2) and recommended that there should be no general right of access to Aboriginal people with no particular interest in the land. Instead he recommended that Aboriginal groups be able to apply to a tribunal which could grant access on conditions which protect the privacy and use of the landholders. The Land Commissioner's recommendations were included in the Aboriginal Land Bill 1985 (WA), at least in relation to public land.[3619]

967. ***The Application of Fishing Legislation***.

- There are no exemptions for traditional fishing under fisheries legislation in South Australia, Victoria or Tasmania.

- In New South Wales there is no exemption from general fisheries legislation, with the exception of inland anglers licences under the Fisheries and Oysters Farms Act 1935 (NSW).

- In Queensland the Community Services legislation exempts Aborigines living on reserves from fishing legislation; a similar provision is contained in the Fisheries Act 1976 (Qld). Community licences may be taken out by reserve residents under the Fishing Industry Organisation and Marketing Act 1982 (Qld).

- In Western Australia Aboriginal people engaged in traditional fishing are exempt from the Fisheries Act 1905 (WA). However the Government may restrict or limit this exemption if it is abused or the species is likely to become depleted. The exemptions for Aboriginal people do not prevent the Minister from gazetting regulations in relation to matters such as rock lobsters, illegal devices, and the taking of a particular species. A professional fisherman's licence has been issued to the Bardi Aboriginal Association to enable members of the Bardi community to collect Trochus shell for commercial purposes.

- In the Northern Territory Aborigines are only subject to fishing laws which expressly apply to them. However they are not authorised to trespass on leases or to interfere with traps or nets on another person's property, nor engage in a commercial activity under the Fish and Fisheries Act 1979 (NT) s 93. But s 14 of this Act enables community licences to be taken out and a new licence under reg 7b enables the distribution of fish through kin and wider clan groups.

- Under the Marine Parks Act 1982 (Qld) provisions made for the setting aside of tidal rivers and waters as marine parks. However the legislation does not require special account to be taken of Aboriginal interests.

- Under the Great Barrier Reef Park Marine Act (Cth) in Queensland there is no legislative requirement for consultation with Aboriginal people over and above the general public. There is no legislative requirement that Aborigines should be represented on the consultative committee or that special consideration should be given to traditional users, nor that they should be given priority over other uses of the Great Barrier Reef Marine Park area. However the policy of the Great Barrier Reef Marine Park Authority is to take into account such interests.

- The Torres Strait Treaty and implementing legislation protects the traditional fishing subject to the principle of conservation of the species. However where it is necessary to restrict traditional fishing in waters in order to conserve a species the parties must use certain endeavours to minimise the restrictive effect on traditional fishing. The Minister has considerable powers of regulation and is not required to consult with traditional fishing interests in making regulations. He has power to determine that particular methods do not constitute traditional fishing. The Torres Strait legislation enables community fishing (ie commercial fishing by traditional inhabitants) to take place. There may be difficulties with the Commonwealth legislation as it does not apply to private fishing within the Zone:

3619 See generally para 935-40.

the anomalous position could be created where private fishing may in certain circumstances take priority over traditional fishing.[3620]

968. ***Sea Closures***. There are further provisions to protect Aboriginal traditional fishing by way of sea closures in the Northern Territory; somewhat similar measures have been proposed for Western Australia.

- In the Northern Territory the Administrator after receiving a Report from the Aboriginal Land Commissioner, can close seas adjoining and within 2km of Aboriginal Land to non-Aboriginals not entitled to inhabit the seas.[3621] The Land Commissioner is required to report on the effect of closure on other interests, including commercial, recreational and environmental interests.

- In Western Australia the Land Commissioner rejected the vesting of the seabed adjacent to Aboriginal land. However he recommended that the Tribunal have the power to grant protection orders protecting traditional interests in circumstances where the use by others interferes with traditional fishing interests. In the making of a protection order the Tribunal would take into account other interests, including commercial, environmental and recreational interests. The Commissioners recommendations were substantially taken up in the Aboriginal Land Bill 1985 (WA).[3622]

969. ***Conclusion***. The review of legislation and administrative practice in this chapter reveals that:

- Under Commonwealth, Northern Territory, South Australia and Western Australia law, Aboriginal people are able to hunt substantially unrestricted by conservation laws. Certain exemptions apply in New South Wales and allowance is also made for residents of trust lands in Queensland. However in Tasmania and Victoria there is no special provision to take account of Aboriginal interests.

- In relation to traditional fishing activities there is in principle a recognition of traditional fishing under the Torres Strait legislation and the Great Barrier Reef Marine Park Authority Zoning Plans. At the State level, the experience varies considerably' Aboriginal people are allowed considerable scope to fish unrestricted by fishing laws and regulations in the Northern Territory and Western Australia, and residents of trust lands also have special rights in Queensland. But there is no special provision made in the other States.[3623] On the other hand there is an increasing understanding and appreciation of Aboriginal traditional fishing interests. Developments include the work of the Great Barrier Reef Marine Park Authority and research by the CSIRO, the Northern Territory Fisheries Authorities and the Australian Fisheries Industries Council. Research includes anthropological work on traditional fishing activities and considerable mapping of the seabed. The sea closure applications have stimulated interest in this area in much the same way as have land claim applications. The creation of community licences (such as reg 7b created on the initiative of the Northern Territories Department of Fisheries) is a novel method of recognition of Aboriginal traditional trading practices.

- In terms of Aboriginal land, different models have been developed, including the earlier Kakadu model and the more recent amendments to the National Parks and Wildlife Conservation Act 1975 (Cth) providing for formal structures for power sharing between Aboriginal traditional owners and conservation authorities.

- In South Australia, Western Australia and Northern Territory, Aboriginal people have substantially unrestricted access to pastoral land in order to hunt for food. Aboriginal access provisions in these States contrasts markedly with those in Queensland, Victoria and Tasmania. In Queensland, in particular, the failure to allow access denies the relevance of hunting and foraging for many traditional communities. In New South Wales Land Councils (and individual Aborigines in Western Australia) will be able to apply for access orders in certain circumstances.

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3620 See para 943-7.
3621 See para 953.
3622 Aboriginal Land Enquiry, *Report* (1984) para 11.29, 11.45-49, 11.54. See para 956 for proposals for legislation in WA.
3623 With the exception of Inland Anglers Licences in NSW. See para 960.

# 36. Securing Hunting, Fishing and Gathering Rights

970. ***Articulating Basic Principles***. As will be apparent from the review of Australian law and practice in Chapter 35, the Commonwealth and some States have demonstrated considerable willingness to recognise Aboriginal traditional hunting, fishing and gathering rights. However legislation in many of the States contains distinctions and omissions which are difficult to justify. Provisions protecting Aboriginal hunting and fishing rights in earlier legislation were omitted from later Acts, without apparent reason. Very often there is a considerable gap between legislative provisions and what appears to be Departmental policy. Departmental policy may be to refrain from prosecuting non-commercial breaches of wildlife and fisheries legislation by Aboriginal people, but the need for such a policy indicates that the legislation itself does not give due recognition to Aboriginal hunting, fishing or foraging rights. Moreover a general policy of non-prosecution may be unlawful, and it may well be applied erratically or inconsistently. The inconsistencies found in the legislative provisions of most States can be ascribed in part to the fact that there is no articulated, publicly available set of principles to guide legislators in the protection of legitimate Aboriginal interests. Before legislation can be amended to remove unjustified limitations on Aboriginal traditional hunting, fishing and gathering rights, the principles on which the recognition of these rights should be based must be established. This Chapter articulates these principles.

971. ***The Need for Recognition***. The recognition of customary hunting, fishing and gathering rights accords with — indeed, may be thought to be required by — the principle that Aboriginal people should have the right to retain and develop their traditional lifestyle and identity.[3624] In addition Article 1(2) of the International Covenant on Civil and Political rights states that: 'In no case may a people be deprived of its own means of subsistence'. Recognition also accords with the reality that food obtained by subsistence often forms an important part of the diet of many Aborigines in remote areas.[3625] Much present State legislation, if strictly enforced, would deny many Aborigines reasonable access to natural resources which are still important to their way of life. The practices of many State authorities in not prosecuting Aborigines for breaches of wildlife conservation and fishing provisions may be attributed both to the difficulties of policing large areas of inaccessible country, and to a realisation of the irrelevance and inappropriateness of these laws for Aboriginal people in such cases. That few Aborigines are charged and convicted for breaches of State wildlife and fishing laws was reflected in the fact that the Commission received few written submissions specifically calling for the recognition of hunting and fishing rights. However, during the Commission's Public Hearings the matter was raised on a number of occasions.[3626] However, the fact that administrative practice does not accord with legislative provisions is not an argument against reform. If anything, it strengthens the case *for* reform. The Canadian practice of issuing Ministerial directives to departmental officers that they not charge Indians with offences under the Migratory Birds Convention Act was strongly criticised by the Manitoba Court of Appeal,[3627] and guidelines providing for exemption from prosecution may be unlawful in Australia.[3628] While, as the review in Chapter 35 has shown, some Commonwealth, State and Territory laws do take account of legitimate Aboriginal needs, other legislation is in many cases demonstrably inadequate. If so, there is good reason for bringing legislation into line with existing practice and policy.

972. S***etting Out a Concerted Approach***. Attempts to argue for a common law right to hunt and fish in Australia are not likely to assist most of those Aboriginal people for whom traditional hunting and fishing for food remains a reality.[3629] Similarly, any attempt to limit customary hunting and fishing rights of Aboriginal people to Aboriginal land would benefit some Aborigines while leaving many others without protection. On the other hand proposals for an overriding or categorical form of recognition have rarely been made, and even more rarely adopted. In 1969, a Bill introduced into the House of Commons of Canada[3630] described the right of Canadian Indians to hunt and fish for food as 'a hereditary and inalienable perogative' (cl 1), and

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3624 See para 107.
3625 See para 885-7.
3626 See para 891-2.
3627 *R v Catagas* (1977) 81 DLR (3d) 396, 400-1, denying the executive the right to dispense with laws in favour of a particular group, as distinct from exercising a prosecutorial discretion in particular cases. By contrast, legislative provisions guaranteeing native hunting and fishing rights will be consistent with the principle of non-discrimination if they are a reasonable response to special needs: *R v Rocher* (1984) 55 AR 387.
3628 See para 474, 478.
3629 See para 894, 905.
3630 A Bill for an Act Respecting the Hunting and Fishing Rights of Indian Canadians (Bill C-124, introduced 30 October 1969).

provided that these rights were not to be diminished or in any way derogated from by any law of Canada (cl 2). The Bill would have bound the Crown in the right of Canada and in the right of a Province (cl 3). The Bill failed to reach the second reading stage, and there have been no subsequent attempts to reintroduce it or similar broadly based legislation.[3631] It is suggested that Aboriginal hunting fishing and gathering rights may more effectively be secured by a proper appraisal of Aboriginal needs and interests, in the context of the overall regime for management of the resource in question. The problem is that, in the area of resource management, some form of unitary, or at least co-operative, regime is necessary in any case where resources are scarce and demand threatens supply. In such cases it is necessary to consider a variety of factors, and Aboriginal interests, however important, are only one amongst these. Other factors include the need to take account of legitimate conservation interests, for example the need to protect, absolutely or regionally, endangered species, the need for effective management of natural resources, established pastoral or other residential interests, and commercial interests such as fisheries and tourism. The relative importance and nature of these needs and demands will vary in each situation. For example, commercial interests may have to be taken into account in consideration of traditional fishing; on the other hand commercial harvesting of Australian fauna is minimal and is not a significant factor.[3632] But in every case there is a need to recognise as a matter of principle the relations of Aboriginal people to the land and to their customary laws, and to take account of the fact that, although hunting, fishing and gathering practices have changed and adapted to new conditions, these traditions remain important, in many areas, both in their own fight and in terms of sustenance. The multitude of interests to be considered militates against an entrenched overriding recognition of hunting and fishing rights of a general character. But it is possible to articulate general principles which take due account of Aboriginal needs and interests and of other relevant interests. In developing these principles, the Commission has drawn on relevant Australian experience as set out in Chapter 35. In a number of cases the relevant authorities have developed working models which go to considerable lengths to respond to Aboriginal needs, and to balance conflicting interests with the underlying need for conservation of the resource in question. Special attention has also been given to the Canadian experience, for example, as represented by the James Bay and Northern Quebec Agreement.[3633]

973. ***A Legislative Response?*** Several submissions to the Commission called for specific legislation to protect traditional hunting and fishing interests or for some form of constitutional protection of these interests:

> It is evident from the discussion of the variety of Commonwealth and State or Territory legislation that applies to Aboriginal traditional hunting fishing and gathering rights, that it is time to consider specific and uniform legislation to protect these rights.[3634]

> I completely agree with the need for and propriety of legislative recognition of Aboriginal hunting and fishing rights. Personally, I would prefer a more durable approach than mere legislation, which can easily be changed, in favour of constitutional entrenchment or a 'manner and form' mechanism of entrenchment (eg, amendment or repeal only by a 75% vote in the House and Senate), or enabling legislation which implements a negotiated agreement or treaty.[3635]

> It is all very well, for example to entrench rights in a constitution but the precise manner in which that is done is very important. Do you adopt a s 35 approach or something a little more specific (such as Art 12 of the Natural Resources Transfer Agreement) or do you develop a detailed set of principles and rights which will then be used as the basis for further negotiations on resource management and harvesting between Aboriginal people and state and commonwealth governments?[3636]

However several submissions warned of the dangers of excessive legislative intrusion:

> The principle of co-operation and consultation between Aboriginal interests and those who administer wildlife legislation would be better served by a generous measure of goodwill than the subscription to a series of restrictive guidelines to such consultation no matter how carefully worded.[3637]

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3631 For subsequent Canadian legislative recognition see para 896-7.

3632 WA Conservator of Wildlife (I Crook) *Submission 446* (30 August 1984) 3.

3633 See para 896-7; and for the NZ experience, para 898.

3634 Northern Land Council (J Thomson) *Submission 473* (23 July 1984); and see National Police Working Party, *submission 461* (13 November 1984) 5.

3635 B Morse, *Submission 444* (27 August 1984) 5.

3636 N Bankes, *Submission 435* (19 July 1984) 2, 4. S 35 refers to the Canadian Constitution s 35 which incorporates and affirms existing treaty rights in general terms.

3637 NT Conservator of Wildlife (I Crook) *Submission 446* (30 August 1984) 4; and see also NT Conservation Commission (B Singer) *Submission 430* (29 June 1984).

These submissions raise several questions.

- whether there should be Aboriginal control, involvement or consultation in the management of resources in which they have a legitimate interest. This issue will be referred to again later in this Chapter.[3638]

- the extent to which there should be legislative guidelines. The Commission does not consider it necessary for detailed legislative provisions to intrude into the details of administration and management. However it is important that the principles set out in this Chapter receive legislative endorsement. This can be done without interfering with detailed resource management and administrative decision-making, which needs to be carried out in consultation with Aboriginal people. It is important that legislation inconsistent with these principles not be allowed to remain unamended. Examples of State and Commonwealth legislation that fail to meet these principles are given below. Supportive policy statements are not sufficient: particularly where policy and legislation conflict, legislative amendment is necessary.

- the question of federal legislative competence in asserting legitimate Aboriginal interests in resources under State or Territory management (eg by virtue of the special legislative power in s 51(26) of the Constitution) and the desirability of such federal action. This question will be referred to later in this Chapter.[3639] A more detailed examination of Commonwealth involvement in implementing the proposals contained in this Report is contained in Chapter 38.[3640]

The principles set out below are stated at this stage without specific regard to these questions of implementation, which can only be discussed after basic principles are established. It is proposed to clarify some questions of definition before developing a statement of principles.

## Some Definitional Problems

974. ***Questions of Definition***. Any principle of preference for traditional users, in respect of species or resources available for exploitation, leaves open a number of questions, in particular:

- what constitutes 'traditional hunting and fishing', a question which itself has two aspects;
    - whether the activities encompassed by the term 'traditional hunting and fishing' should be restricted to those conducted for the purpose of sustenance;
    - which changes in the technology of hunting or fishing should be regarded as consistent with traditional usage; and
- which Aborigines should benefit from the principle, and in particular whether there should be some requirement of a residential link with the area to be used.

975. ***The Purposes of 'Traditional Hunting and Fishing'***. Legislation based on notions of traditional hunting, fishing or foraging rights raises questions of definition and application. It has been said that the lack of a precise definition of traditional fishing 'presents difficulties for those working in the management and enforcement of wildlife provisions'.[3641] The emphasis on the purposes encompassed in the notion of traditional hunting and fishing has tended to be on 'domestic purposes', 'subsistence', 'consumption', or quite simply 'food' or 'sustenance'. It is suggested that the broader notion of 'subsistence' is to be preferred. Aborigines were sustained by the land not merely in the nutritional sense; its products were used, for example, in ceremony, exchange and in satisfying obligations to kin and family. While commercial harvesting enterprises involving large-scale accumulation of capital and labour should be excluded, it is not necessary to restrict activities to those carried on purely for the provision of food. Rights of access to resources or land should not therefore be unduly restricted to hunting for food, but should include the use of

3638 See para 994-1000.
3639 See para 1002-3.
3640 See para 1011-1030.
3641 ALRC ACL Field Report 9 *North Queensland* (July 1984) 28. For general issues of definition of Aboriginal customary laws see para 98-101. For issues of proof see ch 24 & 25.

the resource for ceremonial or religious purposes. In practice it appears that a wide interpretation is placed upon the right to enter the land for 'sustenance'[3642] or to enter the land 'to make and erect wurlies and to take and use for food, birds and animals ferae naturae'.[3643] It remains to be seen whether a broad interpretation is placed on the word 'consumption' in the Community Services (Aborigines) Act 1984 (Qld) s 77 and its Torres Strait equivalent.[3644] Traditional hunting and fishing should also include the taking of *introduced* feral species and should not preclude shifting dietary patterns.[3645]

976. ***Barter and Trade***. It is a more difficult question whether traditional hunting and fishing should also include hunting and fishing for barter and trade. RL Barsh argues that the:

> broader notion of subsistence [should include] pay back, gift giving, barter (especially between single women and men re their different catches), inter-community trade, and as sustenance for those unable to obtain their own (eg, the elderly). In other words, all activity short of sale to non-Aboriginal consumers or distributors.[3646]

But if such a broad approach is adopted there is a danger that exemptions for traditional hunting and fishing could be used to legitimise what are essentially unlicensed commercial activities. The Western Australian Director of Fisheries and Wildlife commented that:

> The care that has been taken in Western Australia in consideration of Aboriginal hunting rights stems from the dual need to recognise traditional and customary practices and at the same time to ensure that people of Aboriginal descent who have adopted European values do not abuse their privileges to the detriment of the overriding interests of conservation. There are cases on record of Aboriginal people involved in extensive parrot nest-robbing, of being exploited by aviculturalists to catch birds on the aviculturalist's behalf and of claiming exclusive rights to take flora, clearly for commercial purposes. The realities of the situation are that tribal and semi-tribal Aboriginal people have nearly total freedom to take wildlife for traditional purposes in this State ... The basic problems concern neither philosophy nor the wording of legislation. They centre on the problem of distinguishing between Aboriginals acting from traditional motives and those who use Section 23 to 'legitimise' clearly illegal activities.[3647]

In the Commission's view a distinction has to be drawn between hunting and fishing for local consumption, that is, for consumption within local family or clan groups (which should be regarded as traditional even though elements of barter or exchange are present), and trade, exchange or sale outside the local community, which should be treated in the same way as other commercial dealings with the species in question.[3648] If necessary the relevant legislation or regulations should state this distinction expressly, to avoid misunderstandings or arguments.

977. ***Traditional Hunting and Fishing Methods***. In principle, in determining whether an activity is 'traditional', attention should focus on the purpose of the activity rather than the method. Thus the question which methods or technologies are to be regarded as 'traditional' is, for most purposes, a subordinate one. In normal circumstances it is inappropriate to insist on dugouts, fishing spears and harpoons (though many Aborigines in remote communities continue to use these hunting methods). In the Northern Territory the use of firearms has been held to be consistent with traditional hunting.[3649] Chief Justice Forster held that the 'right to take or kill for food for ceremonial purposes', conferred by the Crown Lands Act 1931 (NT) s 24(2), includes the right to kill by shooting. In the Chief Justice's words:

> It has been common knowledge for many years that in the process of adaptation of old Aboriginal ways many Aboriginal people have adopted firearms as a method of killing, being more efficient for many purposes than spears or boomerangs or other traditional weapons.[3650]

Similarly in discussing the right of access for purposes of traditional hunting and fishing, the Western Australian Aboriginal Land Commissioner stated:

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3642 Land Act 1933 (WA) s 106(2); WA Conservator of Wildlife (I Crook) *Submission 446* (30 August 1984). cf para 921-2.
3643 The reservation in South Australian pastoral leases: para 939.
3644 See para 927. cf also the words 'gather food for domestic purposes': WA Aboriginal Land Bill 1985 (WA) cl 71(1).
3645 As suggested by J Altman, *Submission 433* (9 July 1984) 3; B Morse *Submission 444* (27 August 1984) 2.
3646 RL Barsh, *Submission 440* (4 August 1984) 3. cf B Morse, *Submission 444* (27 August 1984) 2; Kelso, 633.
3647 WA Conservator of Wildlife (I Crook) *Submission 446* (30 August 1984) 3.
3648 See para 985-7.
3649 *Campbell v Arnold* (1982) 13 NTR 7. cf *R v Rocher* [1983] 3 Canadian Native Law Reports 136, 139; *R v Prince* [1946] SCR 81, where the Canadian Supreme Court held the use of nightlights and guns to be consistent with traditional hunting and fishing.
3650 *Campbell v Arnold* (1982) 13 NTR 7, 9, and see National Parks and Wildlife Service NSW (DA Johnstone) *Submission 467* (6 February 1985) 1.

> If the right were confined narrowly by reference to traditional methods of hunting, fishing and foraging it would be meaningless to almost every Aboriginal person in Western Australia. The argument says that Aboriginal people should only enjoy such a right if they confine themselves to pre-settlement methods of hunting, fishing and foraging. In my view it is really an argument that they should not have rights of access for these purposes at all. I recommend that they should have those rights in certain circumstances, and that they should not be denied the use of modern technology such as vehicles, nylon lines, steel fish hooks, or rifles.[3651]

In direct contrast is the recommendation of the Arid Lands Review Committee (SA) to limit access to Aboriginals 'in bona fide pursuit of their traditional game, utilising traditional weapons and artifacts'.[3652] Such a recommendation is anachronistic and amounts to an argument against any access for the purposes of hunting and fishing. It has been rejected by the South Australian Department of Lands.[3653] It is Departmental policy in most States[3654] to treat the use of firearms as constituting traditional hunting and fishing. This is despite the fact that, for example, the National Parks and Wildlife Act 1972 (SA) reg 14 refers to hunting with traditional weapons.[3655] In all but special cases it is suggested that the purpose and underlying method rather than the technology used should be the decisive criterion. This may exclude particularly destructive technologies completely: Aborigines did not, for example, kill more than was needed for food at a particular time, so that the machine-gunning of herds of kangaroos (to take an extreme example) would *ipso facto* not be traditional. Other factors, such as whether the person was under his customary laws entitled (or disentitled) to kill the animal in question at the time, would also be relevant.

## A Statement Of Principles

978. ***An Ordering of Priorities***. An equitable resolution of legitimate claims to natural resources requires that there be a carefully articulated ordering of priorities. Where resources are not abundant, competition can become intense, and increasingly so as the number of competing user groups increases:

> The largest single factor in this shrinkage of wildlife resources, moreover is industry: habitat degradation through population, physical obstruction, reduction of forage, etc. What is the priority between conservation and industry? Unless industrial development is included in the equation, a priority favouring Aboriginal rights will fail.[3656]

In terms of the determination of priorities off Aboriginal land, the question becomes one of Aboriginal involvement in seeking appropriate exemptions from the operation of conservation laws, and in determining the relative importance of traditional hunting and fishing, and commercial, recreational and other interests. On Aboriginal land, Aboriginal Councils should be able to regulate the use of their land under their by-law making powers. This matter is returned to para 999. The Council's power to manage their land should however be subject to the overriding principle of conservation. The importance and relevance of the principle of conservation as a restriction on traditional hunting and fishing, whether such activities take place on Aboriginal land or off Aboriginal land, requires further elaboration.

979. ***Conservation — A Primary Concern***. That necessary conservation measures should restrict traditional hunting and fishing activities is recognised at the international level.[3657] The James Bay and Northern Quebec Agreement provides that the right to hunt, fish and trap any species of wild fauna shall be subject to the principle of conservation.[3658] In Victoria, the Aboriginal Land Claims Bill 1983 (Vic) (cl 13.4(b)) provides that Aborigines shall have full care and control of the flora and fauna on Aboriginal land other than notable and endangered wildlife and protected flowers and plants.[3659] The Supreme Court of Canada in *Jack*

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3651 Aboriginal Land Inquiry, *Report* (1984) para 11.9; cf para 11.27.
3652 See para 939.
3653 SA Department of Lands (WH Edwards) *Submission 405* (13 February 1986).
3654 eg NSW, QLD, WA, NT. See National Police Working Party, *Submission 461* (13 November 1984) 4. For the Great Barrier Reef Marine Park Authority's position see ALRC ACL *Field Report 9* (July 1984) 27.
3655 Department of Environment and Planning (SA) R*eport of the Interdepartmental Working Group on Aboriginal Hunting* (Chairman, D Barrington) unpublished, Adelaide 23 April 1985) 13. See para 865. The Department of Fisheries in the Northern Territory has sought advice on what is meant by the term 'use ... of those waters in accordance with Aboriginal tradition' in the Fish and Fisheries Act 1980 (NT) s 93. See para 951.
3656 ibid. For competition amongst user groups and pressures of allocation see DD Kelso, 'Subsistence Use of Fish and Game Resources in Alaska: Considerations in Formulating Effective Management Policies' in R Sabol (ed) *Transactions of the Forty-seventh North American Wildlife and Natural Resources Conference*, Wildlife Management Institute, Washington DC, 1982, 630, 630-40; GF Cook, 'Wildlife and Fishery Allocation 1982; Allocation for Subsistence, Commercial and Recreational Users' in Sabol (1982) 613, 622-9. Of course the situation may differ from species to species: id, 633.
3657 eg Torres Strait Treaty 1978, Art 14; see para 943.
3658 James Bay and Northern Quebec Agreement, Editeur Official du Quebec, Montreal, 1976, Art s 24.2.1; 24.3.11; 24.4.38(d). See para 896.
3659 See para 931 and see NSW National Parks and Wildlife Service NSW, (DA Johnstone) *Submission 467*(6 February 1985).

*v R*[3660] held that even if the fishing rights claimed were established, they would have been properly subordinated to the conservation of fish. Thus Justice Dickson found that Art 13 of the Terms of Union with British Columbia provided that Indian fishing rights for food, and to a limited extent for commercial purposes, should take priority over commercial or sport fishery. Nevertheless he considered that:

> Conservation is a valid legislative concern. The appellants concede as much. Their concern is in the allocation of the resource after reasonable and necessary conservation measures have been recognised and given effect to. They do not claim the right to pursue the last living salmon until it is caught. Their position, as I understand it, is one which would give effect to an order of priorities of this nature: (i) conservation; (ii) Indian fishing; (iii) non-Indian commercial fishing, or (iv) non-Indian sports fishing; the burden of conservation measures should not fall primarily upon the Indian fishery. I agree with the general tenor of this argument ... If there are to be limitations upon the taking of salmon here, then those limitations must not bear more heavily upon the Indian fishery than the other forms of the fishery. With respect to whatever salmon are to be caught, then priority ought to be given to the Indian fishermen, subject to the practical difficulties occasioned by international waters and the movement of the fish themselves. But any limitation upon Indian fishing that it is established is for a valid conservation purpose overrides the protection afforded the Indian fishery by art 13, just as such conservation measures override other taking of fish ... Considerable latitude should be given to the judgment of the fisheries officials in deciding the questions of when closure is required for conservation purposes and how that closure is to be effected. That does not, however, completely shield those measures from judicial review for constitutional competence.[3661]

Accordingly, in certain circumstances conservation measures must override traditional hunting and fishing interests. The following priorities appear to be justified:

(a) conservation and certain other identifiable overriding interests;[3662]

(b) traditional hunting and fishing;

(c) commercial and recreational hunting and fishing.[3663]

Such a scheme of priority is acknowledged in the management plan of the Kakadu National Park, where, subject to certain conservation restrictions, traditional hunting is permitted. At the same time recreational fishing is allowed, provided a fishing permit is held and that the taking of fish does not result in damage to the Park or interfere with the management of wildlife. Finally commercial fishing is not permitted except with the consent of the Director and subject to a permit.[3664] A scheme of priorities is adopted in the Torres Strait Treaty, where conservation and traditional fishing (as defined) are clearly and explicitly ranked above commercial fishing (in that where there is a conflict, conservation and traditional fishing interests will take precedence over commercial fishing) and there is an equally clear (though implicit) assumption that recreational fishing (ie fishing other than traditional fishing) will be, if not subordinated to, at least not given any preference over, traditional fishing.[3665] But, as has been seen,[3666] traditional fishing interests have in fact been subordinated to private fishing. The Commission proposes amendments to the Torres Strait Fisheries Act 1984 (Cth)[3667] to rectify the order of priorities. This problem also arose in the provisions relating to the management of the Great Barrier Reef Marine Park where, under the Marine National Park 'A' Zone for the Cairns and Cormorant Pass Zoning Plans, recreational fishing appears to have been accorded priority over traditional fishing.[3668] In view of the difficulties of implementation that can occur, it is desirable to say more about each of the interests represented in the ordering of priorities, and of their relative weight.

980. ***Conservation versus Traditional Hunting and Fishing Interests***. It has been concluded that in certain circumstances conservation measures may override traditional hunting and fishing interests. It may be necessary to prohibit the taking, including the taking by Aborigines for food, of certain endangered species, in particular those threatened with extinction.[3669] In this instance it is necessary to determine both the status of the species concerned, and the threat to the species posed by traditional hunting and fishing, before any

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3660 (1979) 100 DLR (3d) 193.
3661 id, 207-8; cf id, 197 (Laskin CJC).
3662 See para 983.
3663 The relative priorities of commercial vis-a-vis recreational hunting and fishing will depend on the circumstances, as was pointed out by, eg, RE Johannes, *Submission 434* (13 July 1984); RL Barsh, *Submission 440* (4 August 1984) 2. See para 984-8.
3664 Kakadu National Park Plan of Management, para 34.2.4, 34.2.5. See para 911.
3665 See para 943.
3666 See para 946.
3667 ibid. See para 1003.
3668 See para 950.
3669 National Police Working Party, *Submission 461* (13 November 1984) 6.

decisions can be made to restrict traditional hunting and fishing.[3670] This requires not only an accurate assessment of Aboriginal hunting and fishing practices but also an accurate assessment of other threats to the species, for example the taking by commercial or recreational fishermen, accidental trapping of dugong in shark nets, the destruction of feeding grounds, tourism and industrial development:[3671]

> Controls on the indigenous harvest of dugongs are unlikely to be effective unless corresponding efforts are made to reduce the incidental take and to eliminate illegal killing by white Australians. It is unrealistic to expect Aborigines and Islanders to restrict their traditional take unless white Australians and indigenous commercial fisherman are also seen to reduce the number of dugongs they kill. Conversely, professional fishermen are unlikely to take a responsible attitude while they consider that traditional fishermen can do whatever they like.[3672]

In this context, the Kakadu Plan of Management para 34.2.4 is of interest. It provides that:

> The traditional use by Aboriginals of areas within the Park for hunting or food gathering will be permitted. After investigation and research and after consultation with a representative of the Northern Land Council representing the traditional Aboriginal owners, periods during which and/or areas in which hunting and gathering of particular species will not be permitted may be prescribed if for instance the species:
>
> is officially designated as endangered, nationally rare, threatened or locally of rare or of unusual occurrence in the Park; and
>
> occurs in numbers significantly below the natural capacity of its range.

If restrictions have to be placed on traditional hunting and fishing practices, there should be regular monitoring and reassessment of the situation in consultation with those affected.[3673]

981. ***Local or Partial Restrictions in the Interests of Conservation***. It may also be appropriate to restrict the taking of a certain locally or regionally endangered species to a certain defined area. For example, traditional fishing and traditional hunting are allowed in most areas and permitted (subject to permit) in all but preservation zones under the zoning plans for the Cairns and Cormorant Parks section of the Great Barrier Reef Marine Park.[3674] The Wildlife Conservation Act 1950 (WA) s 23 exempts traditional hunting and fishing in certain circumstances but prohibits the taking of any species in nature reserves and wildlife sanctuaries. Similarly the James Bay and Northern Quebec Agreement provides that native people shall continue to have the fight to hunt in parks, reserves, wilderness areas and ecological reserves, but that:

> The creation or existence of wildlife sanctuaries shall operate to exclude all or part of such sanctuaries from the right to harvest but only with respect to those species for whose protection such sanctuaries are created and for such periods of time and/or season when such protection is required.[3675]

Restrictions may also take the form of limiting the purposes for which plants and animals may be taken or the equipment used.[3676] A permit system may be necessary.[3677] It may be appropriate to limit the numbers taken, or to create open and closed seasons in some circumstances. And it may be necessary to restrict

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3670 NT Conservation Commission (B Singer) *Submission 430* (29 June 1984) 2.

3671 H Marsh, B Barker-Hudson, G Heinsohn & F Kinbag, 27-29, 'Status of the Dugong in the Torres Strait Area: Results of an Aerial Survey and the perspective of Information on Dugong Life History and Current Catch Levels', James Cook University, Townsville, April 1984, 40-3; H Marsh, G Heinsohn, BET Hudson, 'Zoning the Far North Section of the Great Barrier Reef Marine Park for the Conservation and Management of Dugongs (Dugong Dugon)', Unpublished, James Cook University, Townsville, 1983 3. See SA Department of Planning and Environment *Report of the Interdepartmental Working Group on Aboriginal Hunting*, (Chairman, D Barrington) 23 April 1985, 8.

3672 Marsh, Barker-Hudson, Heinsohn and Kinbag, 44. cf National Police Working Party, *Submission 461* (13 November 1984) 6.

3673 cf the work of the Western Australian Department of Fisheries and Wildlife in relation to the preservation of the bilby, and the work of the CSIRO, the Great Barrier Reef Marine Park Authority and Dr Marsh in relation to the dugong. See further para 994-8.

3674 Thus under the Marine National Park A zone of the section of the Reef, traditional fishing and hunting may be permitted except in a Reef Appreciation Area or a Reef Research Area: Zoning Plans 7.2(g)(xii). See para 949-50.

3675 Art 24.3.6(b).

3676 See para 977.

3677 It is not proposed to comment on the relative merits of different types of restrictions. But the Commission notes the difficulties experienced with the introduction of the permit sytem for the taking of dugong at Hope Vale. See R Kenchington, 'Dugong Hunting in the Great Barrier Reef Marine Park' (1985) 16 *IUCN Bulletin* 7; H Marsh, A Smith, G Kelly, 'Dugong Hunting by Members of the Hope Vale Aboriginal Community and the Initial Reaction to the Great Barrier Reef Marine Park and the Dugong Permit System', James Cook University, Townsville, February 1984. For discussion of the merits and difficulties of the permit system for indigenous people see PH Pearse, Commission on Pacific Fisheries Policy, *Final Report, Turning the Tide, A New Policy for Canada's Pacific Fisheries*, Vancouver, September 1982, 177-8.

hunting and fishing to relatively or even strictly traditional methods or technologies in certain circumstances.[3678] The Conservation Commission of the Northern Territory stated that:

> Unless particular circumstances require it, the Conservation Commission would discourage any move toward defining hunting in terms of methods/technology of hunting until, at least, there is firm evidence that new technologies have resulted in a serious depletion of animal or plant stocks.[3679]

Such a restriction may ultimately be considered necessary for the preservation of the plains turkey in the Tanami Desert, or the dugong in waters controlled by the Great Barrier Reef Marine Park Authority. It has been argued that:

> The use of firearms to kill dugongs by Aborigines and Torres Strait Islanders living on reserves should be explicitly banned by law as the use of firearms substantially increases the rate at which dugongs can be caught by a hunting team and encourages sport-shooting.[3680]

The Torres Strait Fisheries Act 1984 (Cth) enables the use of specific equipment and fishing methods to be declared not to constitute traditional fishing (s 3(2)),[3681] but the Act fails to provide for any power to prohibit 'non-traditional' recreational hunting and fishing.[3682] It would be possible, for example, to allow the taking for use in traditional ceremonies and celebrations and to prohibit the harvesting of dugong for every day consumption.[3683]

982. ***Consistency of Conservation and Traditional Subsistence Activities in some Cases***. While the conservation of species is a first priority, in most cases its implementation need not exclude altogether traditional and long established subsistence activities. The balance struck by Art 20 of the Torres Strait Treaty[3684] is illustrative: it provides that the Governments concerned may adopt conservation measures provided that best endeavours are used to minimise any negative effects on traditional hunting and fishing.[3685] The distinction made in Queensland between on and off-reserve Aborigines for the purposes of exemptions from Queensland wildlife legislation appears to have little to do with conservation. Dissatisfaction with this distinction is well known:[3686]

> Consideration should also be given to amending the present Act ... For example, only some parts of Thursday Island and Abednego are classified as reserve. This means that although many Islanders resident on Thursday Island are legally allowed to hunt dugong others by dint of their residential address are not ... [M]easures dealing with only one component of the dugong problem are likely to be counterproductive as they will simply polarise the various protagonists in this complex and politically-sensitive issue. For example, we believe that the present absolute dichotomy between the hunting rights of indigenous people living on and off reserves in Queensland actually promotes illegal killing to supply dugong meat to urban Aborigines and Islanders.[3687]

The 'reserve resident' distinction as it applies in Queensland is an arbitrary one. It is also a distraction from the real issues: the status of each species, the restrictions needed to manage the species, and the need to identify the different interests affecting the species and to legislate accordingly. In this process it is hard to see how the 'reserve resident' distinction can be relevant.

983. ***Other Overriding Interests***. The regulation of Aboriginal hunting and fishing practices should take certain other overriding interests, for example, those of personal safety, into account.[3688] Under the James Bay and Northern Quebec Agreement the right of native people to harvest is subject to provisions relating to public safety in regard to the discharge of firearms, the setting of large traps or nets and to other dangerous activities having due regard for others lawfully in the vicinity (s 24.3.9). The right to possess poisons, firearms, automatic weapons, tracer bullets, non expanding ball ammunition, air guns and other similar equipment may also be regulated provided the regulation is directed to public security and not to harvesting activity (s 24.3.12). The Agreement also specifically provides that 'the right to harvest shall include the use

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3678 cf para 977, 980.
3679 NT Conservation Commission (B Singer) *Submission 430* (29 June 1984) 2.
3680 Marsh, Smith & Kelly, 19, 20.
3681 And see s 16.
3682 See para 946 where legislation to correct this anomaly is recommended.
3683 RE Johannes, *Submission 434* (9 July 1984). See para 980.
3684 See para 943.
3685 cf the minimum of controls or regulations that should be applied to native people under the James Bay Agreement, Art 20.3.30. See para 896.
3686 See ALRC *Field Report 9*, 45, and cf para 891.
3687 Marsh, Hudson, Heinsohn, Kinbag, 44, 45.
3688 National Police Working Party, *Submission 461* (13 November 1984) 5.

of present and traditional methods of harvesting except where such methods affect public safety' (s 24.3.14).[3689] Similarly questions of innocent passage, shelter and safety at sea should also take priority, as the Western Australian Aboriginal Land Commission pointed out in the context of sea closures.[3690]

984. ***Traditional Hunting and Fishing versus other Interests***. Obviously allocation of resources can be a complex matter. However, as a general principle Aboriginal traditional hunting and fishing should take priority over non-traditional activities, including commercial and recreational activities, at least where the traditional activity is carried on for subsistence purposes. Once this principle is established the precise allocation is a matter for the appropriate authority acting in consultation with Aboriginal and other user groups. Such a priority has, in one form or another, achieved a considerable degree of recognition in Australia and elsewhere. In Alaska under State legislation priority is given to 'subsistence' users, defined in broad terms as customary or traditional users for food, trade or barter in the making of handicrafts.[3691] Under Federal law in operation in Alaska, subsistence use is limited to consumption by rural Alaskans.[3692] The definition of 'conservation' under the James Bay Agreement accords the same priority to native hunting, fishing and trapping:

> 'Conservation' means the pursuit of the optimum natural productivity of all living resources and the protection of the ecological systems of the Territory so as to protect endangered species and to ensure primarily the continuance of the traditional pursuits of the Native people, and secondarily the satisfaction of the needs of non-Native people for sport hunting and fishing (s 24.1.5).

Section 24.3.30(c) provides that harvesting controls required by governments or the Coordinating Committee shall be 'less restrictive for Native peoples than for non-Natives'. The Agreement also provides that certain species of mammals, fish and birds shall be reserved for the exclusive use of native people. Animals that may be so reserved include beavers, foxes, polar bears, muskrats, porcupines, black bear, wolves, sturgeon and burbot.[3693] Priority for traditional fishing is already adopted in some Territory, State and Commonwealth legislation which, by exempting Aboriginal people from certain wildlife regulations, in effect give traditional hunting and fishing priority over commercial fishing and over recreational fishing.[3694] But other Australian legislation makes no provision at all for traditional hunting, fishing or foraging rights.[3695] In States where these rights remain important, Aborigines who rely on traditional foods are dependent on benign administrative practices, including non-prosecution, to maintain their preferred way of life.

985. ***Commercial Interests and Community Licences***. The Commission takes the view that hunting for local consumption within local family or clan groups should be regarded as traditional even though elements of barter or exchange may be present.[3696] Trade or exchange outside the community is however to be treated in the same way as commercial dealings. That traditional fishing should take priority over commercial interests has already been stated.[3697] This is the position for example, under the Torres Strait Treaty and its associated legislation.[3698] Given reasonable provision for traditional hunting and fishing claims along these lines, the exploitation of resources for commercial purposes, whether by traditional inhabitants or by others, becomes a matter for the relevant licensing or management authorities. One issue of interest for present purposes is access to community licences for commercial resource-harvesting on a local basis. Under the Torres Strait Treaty legislation, a community fishing licence may be issued to individual Aborigines. Legislation in Queensland and the Northern Territory,[3699] allows for Aboriginal people as a group to take out a community licence rather than being required to take a licence as a corporation or as individuals. The Northern Territory provisions apply to members of an Aboriginal community living in the vicinity of Aboriginal land and the

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3689 And see Western Arctic Claim *The Inuvialuit Final Agreement Entitlement* (COPE) Editeur Official du Quebec, Montreal, 1984, s 12 (36).

3690 Aboriginal Land Inquiry, *Report*, paras 11.20, 11.54, 11.55. cf Aboriginal Land Bill 1985 (WA) cl 83.

3691 See GE Cook 'Wildlife and Fishery Allocation 1982; Allocation for Subsistence, Commercial and Recreational Users' in R Sabol (ed) *Transactions of the Fifty-Seventh North American Wildlife and Natural Resources Conference*, Wildlife Management Institute, Washington, 1982, 617-22.

3692 id, 620.

3693 s 24.7.1. See para 896.

3694 See eg in terms of conservation measures National Parks and Wildlife Conservation Act 1975 (Cth) s 70(1), Territory Parks and Wildlife Conservation Act 1976 (NT) s 122, National Parks and Wildlife Act 1974 (SA) s 80.

3695 These include National Parks Authority Act 1976 (WA) (para 922); Wildlife Act 1975 (Vic) (para 931); National Parks and Wildlife Act 1970 (Tas) (para 933); Fisheries Act 1975 (SA) (para 954); Fisheries and Oyster Farms Act 1935 (NSW) (except for inland anglers licences) (para 960); Fisheries Act 1968 (Vic) (para 961), and Fisheries Act 1959 (Tas) (para 903). This criticism also applies to the position of 'nonreserve' residents in Queensland: para 927-8, 957.

3696 See para 976.

3697 See para 978.

3698 See para 943-7.

3699 Fishing Industry Organisation and Marketing Act 1982 (Qld) s 31, Fish and Fisheries Act 1980 (NT) s 14. See para 957, 951-2 respectively.

Queensland provisions apply to reserve or land trust residents. However the Northern Territory experience has been that a community licence, although facilitating commercial fishing by a local community, is not necessarily the best way to meet the needs of Aboriginal communities. In the Northern Territory (as distinct from the Torres Strait) community licences carry a relatively high licence fee, and permit fishing to be conducted on a commercial scale far exceeding what may be necessary or desired. In March 1984 the regulations were amended to enable an Aboriginal licence for non commercial fishing to be obtained.[3700] Regulation 7B provides that a Class D licence may be issued to a member of an Aboriginal community, on condition that the licensee shall not use gill-netting above a certain size or in certain waters, or 'supply or dispose of fish except to an Aboriginal community'. Regulation 7B is intended to enable Aboriginal people to trade within their community. A community licence under reg 7B has the advantage over a commercial licence under the Fish and Fisheries Act (NT) s 14. The renewal fee for the former is much less ($5). It may be that such a licence should be adopted elsewhere.

986. ***The Canadian Experience***. Similarly the James Bay Agreement refers to harvesting for personal and community use, as well as to commercial trapping and commercial fishing. However under this agreement what constitutes community use is fairly widely defined. Community use includes gift, exchange and the sale of all products consistent with current practices between native communities generally, and is not restricted to local groups. Community use does not include the exchange or sale of fish and meat to non natives (except in the case of commercial fisheries) (s 24.3.11). Native harvesting is given priority. Subject to the principle of conservation and subject to game populations, native people are guaranteed levels of harvesting equal to levels present at the time the Agreement came into affect (s 24.6.2). Under the Agreement the Government and the Coordinating Committee are required to ensure that in allocating wildlife resources for harvesting or non-native hunting above the guaranteed levels, the harvesting need of native people and the needs of non-natives for recreational hunting and fishing are taken into account, and that there shall always be some allocation of species for non-native sport hunting and sport fishing (s 24.6.3). In addition it is stated that the exercise of the right to harvest shall not require permits except where expressly stipulated. Where permits are necessary native people shall only be required to pay a nominal fee.[3701]

987. ***Resource Harvesting in Australia***. There are dangers in making comparisons with the Canadian and Alaskan situations, with their different historical and political contexts,[3702] including much greater involvement of indigenous people of those countries in commercial harvesting,[3703] and the resulting heavy competition for allocation of resources which are key matters in the negotiation for land claims.[3704] But there are several instances of Aboriginal involvement in commercial (as opposed to community resource) harvesting. For example, members of the Bardi community are involved in the commercial harvesting of trochus shell,[3705] and the Edward River community are involved in the breeding for sale of crocodiles. Resource harvesting on Aboriginal land for commercial as opposed to community use is regulated under the Kakadu Plan of Management (s 29.5.2). In instances such as these, some preference for Aboriginal people for community harvesting of a commercial or semi-commercial character may well be desirable. An advantage of such schemes is that they may assist in providing employment and work skills in areas where there is high unemployment and relatively little commercial activity.[3706] But they are distinct from the recognition of traditional hunting and fishing rights for subsistence or related purposes. This point was made strongly by the Director of Fisheries and Wildlife in Western Australia:

> Wildlife is rarely commercialised in Western Australia, the precedents are either historic or have been set in the face of overwhelming need to protect agriculture using sale of a product as a means of financing the control operation. There is a growing body of opinion in the community that even this level of commercialisation should be subject to review. I doubt whether any suggestion for Aboriginal preference in commercial ventures would add to the debate on traditional rights. Questions of preference in commercial situations are quite distinct from those of customary rights.

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3700 See para 951-2.

3701 s 24.3.18, and cf s 24.3.30(c). See para 896. A review of s 24 is currently being conducted by the Quebec Government. And see the Western Arctic Claim s 14. See para 1000.

3702 V Haysom, *Submission 445* (30 August 1984) 5.

3703 See Pearse, 151-8. For the Yukon Agreement see id, 243-51.

3704 Pearse, 245.

3705 Bardi Aborigines Association, 5, 6. See para 896.

3706 A Canadian lawyer gave the following reasons for some, perhaps even exclusive, commercial preference:

a. It is an area of economic activity more compatible with Aboriginal lifestyles in many cases, than, for example, non-renewable resource harvesting.

b. Capital investments are generally small ... and provide opportunity for small business development.

c. It makes use of peculiar Aboriginal knowledge of the resource.

N Bankes, *Submission 435* (19 July 1984) 4.

> Considering the difficulties of the distinction even in current operations and with existing legislation, perhaps it would be in the interests of clarity to keep them separate at all levels.[3707]

The Commission agrees with this view. Traditional harvesting should be distinguished from commercial fishing. Special programs may be desirable, but it is necessary to distinguish traditional activities based on local consumption in the broad sense from preferential commercial rights.

988. ***Recreational Hunting and Fishing***. As the preceding discussion would indicate, recreational hunting and fishing should be treated, at best, no more favourably than traditional activities: depending on the relative weight accorded to commercial harvesting it may accordingly rate rather low in the order of priorities. This was the view taken by the Court in *Jack v R*,[3708] and it is reflected in the Kakadu Plan of Management[3709] and the James Bay Agreement.[3710] The exact place of recreational vis-a-vis commercial fishing will depend on the circumstances,[3711] but it is hard to see that any justification exists for special measures for Aborigines engaged only in recreational hunting and fishing. It is true that the distinction between recreational compared with traditional hunting is hard to draw in particular cases: the method of hunting may be relevant in a dispute as to whether the hunting was recreational rather than undertaken for traditional subsistence purposes.[3712] That recreational fishing was originally given priority over traditional fishing in the Great Barrier Reef Marine National Park 'A' Zone under the Cairns and Cormorant Pass Zoning Plan was inappropriate.[3713] Thus while in most cases an Aborigine or Torres Strait Islander may wish to prove that he or she was engaging in traditional and not recreational fishing in order to come within an exemption from prosecution under certain wildlife legislation, it would have been necessary in a case of fishing in the Marine National Park 'A' Zone under the Cairns and Cormorant Pass Zoning Plan to establish that recreational (and not traditional) fishing was involved, so as to gain the benefits of s 7.2(c) and to avoid the permit requirements under s 7.2(9). The failure of the Torres Strait Fisheries Act 1984 (Cth) to cover private fishing, thus giving private fishing exemption from regulations applying to traditional fishing, also creates problems requiring amendment of the Act.[3714]

## Access to Land or Sea

989. ***Access to Pastoral and Crown Land***. Consistently with the principles outlined above, it is reasonable that Aborigines be accorded some access to traditional lands for the purposes of hunting, fishing and gathering, whether these lands are unalienated Crown lands or are subject to leasehold or other interests. It is to be hoped that such access will be maintained unimpaired in relation to South Australian perpetual and pastoral leasehold land. To deny such access, as occurs for example in Queensland,[3715] is to deny the reality of hunting and fishing rights. On the other hand where interests in the land are held by persons other than the Crown, conflicting claims and uses are likely, and it becomes necessary to take into account the interests of those affected, whether by negotiated access provisions, recourse to an appropriate tribunal or otherwise.[3716]

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3707 WA Conservator of Wildlife (I Crook) *Submission 446* (30 August 1984) 3; and see WA Fisheries Department (P Rogers, Acting Director) *Submission 501* (9 January 1986).

3708 See para 979.

3709 s 24.1.5, cf s 24.6.3. See para 911. But for criticism of the Great Barrier Reef Marine Park Zoning plans in this respect see para 849-50.

3710 s 34.2.4, 34.2.5; see para 896.

3711 See para 978. In Alaska the distinction has been made particularly difficult, for not only are methods similar but many subsistence users also hold commercial fishing licences and harvest extra food under special subsistence priority schemes: Cook, 622.

3712 See para 975-7.

3713 Cairns and Cormorant Pass Zoning Plan, National Park 'A' Zone s 7, 2(9), s 7, 2(c). See para 949-50.

3714 See para 946.

3715 See para 935.

3716 The National Police Working Party made the following recommendations:

(a) Suitable provision be made, allowing Aboriginals to enter onto pastoral lands for the purpose of traditional hunting, fishing or foraging rights with the consent of the owner.

(b) Where no consent is forthcoming, enabling provisions be available to provide for appeal to an appropriate authority, eg Ministers for Lands and Forestry.

(c) Where pastoral land is concerned, that Aboriginals not interfere in any way with pastures, crops, cattle or like animals that have been introduced to the area and comply with any other conditions agreed upon.

National Police Working Party, *Submission 461* (13 November 1984) 5-6.

The National Farmers' Federation submitted the following list of conditions which should attach to access: that those entitled to exercise the right be identifiable.

- that entry be by consent which shall not be unreasonably withheld.
- that the use of vehicles or firearms requires consent.
- that the landholder may impose reasonable conditions to safeguard his interests.
- and Aboriginals not interfere in any way with pastures crops, cattle or the animals that have been introduced to the area.

National Farmers Federation (W de Vos), *Submission 476* (11 April 1985) 3. And cf SA Department of Lands, para 939.

990. ***Traditional or other Nexus with Land***. A further definitional question, which has been resolved in different ways in different Australian Acts, is the need for a link between the hunting or other activity and the land or sea on which it is carried out. For example that link may have to be a residential one (so that non-residents with traditional affiliations do not qualify), or it may be that a demonstrated traditional right of foraging is sufficient. Alternatively some less substantial link may be enough. Where the land is Aboriginal land and the hunting is being carried out by those Aborigines entitled to hunt over the land, the link is obviously satisfied. Other cases are not so easily resolved. The Canadian experience suggests that a requirement based on residence or on traditional affiliations or use is necessary, as several submissions pointed out:

> While I agree that relating wildlife fights to residence or historical relations to the locale is administratively burdensome and poses difficulties for displaced groups in States such as New South Wales, I'm afraid it will become unavoidable. Wherever wildlife is scarce and restrictions must be imposed, indigenous groups themselves are likely to raise issues of relative entitlement. This has become a serious problem in managing Indian Salmon Fisheries in Washington State. As harvest continues to shrink, tribes intensify their arguments over who has the right to fish where. It has caused considerable friction, and forced the courts and wildlife managers to be more precise in demarcating traditional use areas. (Displaced groups can be assigned rights in otherwise unclaimed areas so that their exercise of rights does not displace other groups.)[3717]

> [S]ome difficulty has been experienced in this regard with the Natural Resource Transfer Agreement, 1930. Those agreements to some extent replace the restrictions of the treaties and provide for Indian game harvesting without references to additional use and occupancy. As a consequence some concerns have been raised as to over-harvesting, and Indians, say from southern Alberta, harvesting game in Northern Saskatchewan. Consequently, it would seem that the approach that Aborigines should be able to show that 'their use is consistent with traditions' deserves support.[3718]

991. ***Long Association with Land***. On the other hand, an emphasis on a traditional nexus with land may exclude numbers of Aborigines for whom bush food remains important. The Western Australian Land Commissioner, while rejecting claims to 'a general right to hunt, fish and forage over any other person's land' in the absence of some element of a residential, historical or traditional nexus,[3719] concluded that:

> it is more appropriate to consider the question of access to land to hunt, fish and forage by reference to the land which might be available for that purpose than to concentrate upon the protection of traditional interests. The latter course would exclude the aspirations of large numbers of Aboriginal people who live in areas of the State where their links with the pastoral land are by long association and no longer by tradition.[3720]

He thus recommended that Aboriginal people be granted access 'by virtue of traditional association with or long association by residence on or use of the land concerned'.[3721] In the circumstances of Western Australia this approach has much to recommend it. But the Aboriginal Land Bill 1985 (WA) itself referred to Aborigines 'who have entitlements in respect of the land in accordance with local Aboriginal tradition' (cl 74(a)). Where hunting, fishing or foraging rights are granted on the basis of traditional affiliations, residential requirements in addition to traditional affiliations are undesirable, since they are likely to distort, rather than recognise or reflect, Aboriginal perceptions and traditions. As the Northern Territory land claim experience has shown, neither residence nor traditional ownership necessarily implies the exclusive right to use land: though courtesy, at least, may require that permission be sought, it is never refused. In these circumstances it should be enough to limit access to land to those Aborigines who can demonstrate traditional attachment to the particular land, or at least that their use is consistent with tradition. To restrict entitlement to inhabitants of the Northern Territory is also inappropriate where there is movement by Aborigines over State borders. In the Northern Territory both the Crown Land Act (NT) s 24 as currently drafted, and the recommendation of Justice Toohey, extend the entitlement both to residents of the land and to 'Aboriginals entitled by Aboriginal tradition to the use or occupation of the leased land'.[3722] Where policies of dispersal and displacement have made such demonstrated attachment impossible or extremely difficult to demonstrate (for example in parts of Queensland), such a limitation may be too stringent, and access provisions based on long residential or historical links may be preferred. Thus the linking of access to land 'traditionally used for hunting purposes or to land giving access to any lands to be used', under s 48(1)

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3717 RL Barsh, *Submission 331* (4 August 1984) 3.
3718 N Bankes, *Submission 433* (19 July 1984) 6.
3719 Aboriginal Land Inquiry, (Commissioner P Seaman QC) *Report*, Perth, (1984) para 11.5.
3720 id, para 11.8.
3721 id, para 11.11.
3722 See para 937.

of the Aboriginal Land Rights Act 1983 (NSW), is inappropriate given the history of settlement in New South Wales,[3723] at least unless the term 'traditionally used' is taken to refer only to common use in the relatively recent past.[3724]

992. ***Sea Closures***. One way of recognising traditional fishing rights is to close the seas adjacent to Aboriginal land for the exclusive use of the land-holders, or others with rights to use that land or the adjacent sea. The Northern Territory legislation to this effect was described in Chapter 34.[3725] On the other hand, the Western Australian Aboriginal Land Commissioner rejected the vesting of the sea bed as a method of protecting Aboriginal fishing interests, preferring instead an order 'for protection of waters adjacent to Aboriginal land' in cases where Aboriginal applicants could show that use of the waters by others interfered with their traditional use.[3726] In making such an order the Tribunal should take into account the commercial recreational and environmental interests of the wider community, with protection orders effecting conservation and marine stock after consultation between the fisheries department and Aboriginal communites.[3727] The Aboriginal Land Bill 1985 (WA) substantially accepted these recommendations.[3728] The Commission favours this approach. It is regrettable that the proposals were rejected and that there are not ways to protect Aboriginal and Torres Strait Islander fishing interests from interference in seas adjacent to Aboriginal land in South Australia and Western Australia and adjacent to Aboriginal trust areas in Queensland. Legislative protection, along the lines indicated in Western Australia, would be desirable. The Great Barrier Reef Marine Park Authority should also be empowered to zone certain sections of the reef for the use and benefit of Aborigines. This approach has been advocated in relation to the traditional fishing areas adjacent to the Lockhart River and Bamaga communities.[3729] But draft zoning plans indicate that the Great Barrier Reef Marine Park Authority has not accepted this recommendation.[3730] It has been argued that there is a difficulty in doing this in that the aims and functions of the Authority are limited to balancing conservation of the reef with other uses generally — with no priority given to Aboriginal uses.[3731] It is said that the Act tinder which the Authority operates was not enacted for the benefit of Aborigines, as indicated by the absence of any recognition of traditional fishing interests in s 32(7). It is apparent that traditional fishing has not been given priority under the Act, nor does the Act envisage the closing of areas of the Reef for traditional fishing in the same way that it envisages closing off the Reef for scientific purposes under s 32(7)(a)(e), which requires the Authority to have regard to certain matters in the preparation of the zoning plans. It is recommended that the Act be amended to clarify the position by allowing the Minister to take into account, whether specific areas, adjacent to a trust area (for example Yarrabah, Hopevale, Lockhart River, Palm Island) be set aside for traditional fishing by members of that community.[3732] Ultimately there should be consideration of whether there may be a need for traditional fishing to protect areas of the sea adjacent to trust areas with the Torres Strait Protected Zone.

993. ***Traditional or other Nexus with the Sea***. Clearly, for the purposes of special protection and sea closures there needs to be some traditional association or special link with the sea, usually if not invariably involving areas of the sea adjacent to Aboriginal land.[3733] For example Aboriginal Land Bill 1985 (WA) was expressed in terms of those Aborigines having entitlements to the sea in accordance with local Aboriginal tradition (cl 86(1)).[3734]

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3723 See para 941. For a contrary view see National Farmers Federation (W de Vos), *Submission 476* (11 April 1985) 5.

3724 See NSW National Parks and Wildlife Service (D Johnstone, Director) *Submission 357* (6 February 1985) 5. cf B Morse. *Submission 444* (27 August 1984) 5: 'I agree that residential requirements are undesirable yet some nexus with the land is pertinent except where dislocation or development is such that a given Aboriginal community would be deprived of all wildlife harvesting rights through such a requirement'.

3725 See para 953.

3726 See para 956.

3727 Aboriginal Land Inquiry, *Report* (1984) para 11.25-29. The mining of petroleum oft shore would be in the same position so far as access was concerned as in the case of Aboriginal land: id, para 11.62.

3728 See para 956.

3729 Marsh, Heinsohn and Hudson, 9, 10.

3730 For example Great Barrier Reef Marine Park Authority Zoning Plans Map for the far Northern Section classifies Lockhart River as a General Use C-Zone.

3731 ALRC ACL *Field Report 9*, 31.

3732 Support for this proposition has come from the Department of Aboriginal Afairs (P Gulliver) *Submission 506* (13 March 1986) 2.

3733 The Western Australian Land Commissioner regarded Aboriginal people who no longer have traditional links with the sea as having the same rights and obligations as all other citizens. Aboriginal Land Inquiry, *Report* (1984) para 11.26.

3734 See para 956.

## Aboriginal Participation in Resource Management

994. ***Involving Aboriginal People in Resources Management***. In the implementation of the principles elaborated above, it is necessary to consider the role of Aboriginal people and their organisations in the management of the resources in question. Two situations need to be distinguished: the involvement of Aboriginal people in seeking either exemption from wildlife laws, or priority over commercial or recreational interests, and secondly, the involvement of Aboriginal people in the management of resources on Aboriginal land. These are dealt with in turn.

995. ***Consultation with Aboriginal People in the Setting of Priorities***. While it may be necessary to restrict traditional hunting and fishing for specific conservation reasons, such measures should only be taken after consultation with Aboriginal people affected. A genuine attempt should be made, where there are conflicting interests, to establish, in consultation with those Aboriginal people, the extent to which a particular species is threatened with extinction, and the likely impact of the numbers taken by Aborigines upon a species. Only when it is established that traditional hunting and fishing may endanger the species, whether generally or in the relevant area, should such hunting and fishing be limited. Reassessment and monitoring should take place, and there should be provision for restrictions to be lifted should circumstances warrant. This process occurs to some extent already: the principle that controls on Aboriginal hunting rights are best implemented in co-operation with Aboriginal land holders and organisations is supported in several States and at the federal level.[3735] The South Australian Interdepartmental Working Party on Aboriginal hunting recommended that this process should occur in relation to hunting in conservation reserves, and such an appraisal has been prepared in relation to the Gammon Ranges reserve in that State.[3736] Marsh gives the following account of a successful involvement of indigenous people in wildlife conservation programs:

> The Dugong Management and Public Education Programme developed by the Papua New Guinea Division of Wildlife provides an example of how such a programme might develop. In 1976, the dugong hunters at Daru vigorously denied that there was need for a dugong management programme. One year later, they requested that some form of management be implemented in their area. After many long and heated discussions they decided to form the Maza Wildlife Management area incorporating traditional hunting grounds. The local people elected a committee which made rules for running the area; these rules were made law by publication in the Government Gazette. Initially the Committee decided that all dugongs which were caught for sale had to be sold via the Daru market so that catch statistics could be kept and specimens collected for laboratory analysis. They also banned (very effectively) the capture of females with attendant young. In 1979, the use of gill nets to catch dugongs for sale was also banned, and by the time the programme was terminated (due to lack of funds) in 1981, the hunters were talking about banning the use of motorized craft for dugong hunting.[3737]

The NT Conservation Commission has sought the co-operation of the Warlpiri Aborigines in the management of spinifex as a food source for the hare wallaby through the regular use of fire.[3738] As this and similar experiences indicate,[3739] consultation and local involvement in management programs is necessary, not only because the local people are affected by the decisions and entitled to some say in them, but also because management of resources is likely to be more effective with local support.

996. ***Requiring Consultation: The Need for Legislation***. Even though there may be general support for consultation with Aboriginal people before controls are imposed on traditional hunting and fishing,[3740] the question is whether a requirement for such consultation should be written into legislation. In relation to Aboriginal land such a process of consultation is spelt out in the hunting provisions of the Kakadu Plan of Management (s 34.2.4)[3741] It is also spelt out in the James Bay Agreement's requirement that. the Provincial and Canadian Governments shall exercise their powers to pass wildlife legislation and regulations only upon

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3735 See A Chase, 'Dugongs and Australian Indigenous Cultural Systems. Some Introductory Remarks', and BET Hudson, 'The Dugong Conservation, Management and Public Education Program in Papua New Guinea', both in H Marsh (ed) *The Dugong: Proceedings of a Seminar Workshop held at James Cook University of North Queensland* (8-12 May 1979), James Cook University, Townsville, 1981.

3736 SA Department of Environment and Planning *Report of the Interdepartmental Working Group on Aboriginal Hunting*, (Chairman D Barrington) 23 April 1985.

3737 Marsh, Barker Hudson, Heinsohn and Kinbag, 44, 45.

3738 See C Loorham, 'The Warlpiri and the Rufous Hare-Wallaby. Aboriginal Land Rights and Wildlife Conservation in the Tanami Desert' *Habitat* (August 1985) 8. The work conducted by the Aboriginal people in the Tanami desert in conjunction with the Conservation Commission of the Northern Territory in relation to the hare wallaby and the bilby was also described by the Conservation Commission (B Singer) *Submission 430* (29 June 1984) 1, 2. See also Aboriginal Land Inquiry, *Report* (1984) para 4.64. cf the Anguvigak Wildlife Management Corporations' Program in Northern Quebec (*Taqralik* May 1983, 26), eg its program of research on the common eider.

3739 See generally Johannes, (1984) and (1986).

3740 NT Conservation Commission (B Singer) *Submission 430* (29 June 1984) 3; see para 915.

3741 See para 911.

the advice and after consulting with the Coordinating Committee (s 24.5.1, 24.5.2).[3742] A legislative example in relation to Aboriginal land in Australia is s 73(1)(c) of the Aboriginal Land Rights (Northern Territory) Act 1976 (Cth), which confers power on the Northern Territory Legislative Assembly with respect to:

> laws providing for the protection or conservation of, or making other provision with respect to, wildlife in the Northern Territory, including wildlife on Aboriginal land, and, in particular, laws providing for schemes for management of wildlife on Aboriginal land, being schemes that are to be formulated in consultation with the Aboriginals using the land to which the scheme applies, but so that any such laws shall provide for the right of Aboriginals to utilise wildlife resources.[3743]

By contrast, in establishing priorities under the general law (as opposed to matters relating to management of Aboriginal land) there is little, if any, requirement for consultation written into Federal or State legislation. The Torres Strait Fisheries Act 1984 (Cth) does not require the Minister to consult with the Islander members of the Joint Advisory Body or with other representatives of the traditional inhabitants before exercising his powers over the 'protected zone'.[3744] Nor is there any requirement for the Protected Zone Joint Authority to consult with the traditional inhabitants whose interests may be affected[3745] or any requirement that Islanders or the Department of Aboriginal Affairs be represented on the composition of the advisory bodies to the Protected Zone Joint Authority. Negotiations are currently underway to determine the composition of these advisory bodies. The Commission recommends that Islanders and the Department of Aboriginal Affairs both be represented on two such bodies; the proposed Torres Strait Fisheries Management Committee and the Torres Strait Fishing Industry and Islanders Consultative Committee. Given the clear expression of intent in the Torres Strait Treaty that there be consultation and involvement of traditional inhabitants, the Government should ensure the involvement of both the Department of Aboriginal Affairs and the indigenous inhabitants. Furthermore given the extremely complex legal provisions that surround the management of the Torres Strait Protected Zone, it is necessary that indigenous inhabitants receive adequate training and advice of their rights under the provisions of the Torres Strait Fisheries Act 1984 (Cth) and under any regulations and notices that may be issued, together with special representation to protect their interests if necessary. Neither the Great Barrier Reef Marine Park Act (Cth) nor the Regulations thereunder require consultation. Apparently the Great Barrier Reef Marine Park Authority has adopted a policy of consultation with Aboriginal people over and above the general statutory requirements of public consultation. But members of the Authority have argued against the view that this practice be given statutory recognition.[3746] While there is a general appreciation and interest by members of the Authority in the importance of consulting with Aboriginal people, it has been said to be neither necessary nor appropriate to write requirements for consultation into the Act, on the basis that, Aborigines are in no different position from the other interests (commercial, recreational, etc) that the Authority is required to take into account, and that there is no specific requirement in the governing Act to consult each of these other interests. In this respect the Act differs from Commonwealth legislation relating to Aboriginal land, where Aborigines are given a certain priority and there must be consultation and joint management.[3747] It has been argued that if the Commonwealth Government intended that Aboriginal interests be given priority over other uses of the Marine Park, this would have been specified in the Act. As a matter of statutory interpretation this argument has some force, but the issue for the Commission is one of policy, in the context of possible changes in Commonwealth laws. A further argument presented by the Authority against writing in a requirement for consultation is that it would create considerable administrative difficulties and would detract from the time available to consult with a range of other groups on other uses.[3748]

997. ***Commission's Conclusion***. The Commission has already recommended that Aborigines and Islanders engaged in traditional hunting and fishing for subsistence should have priority over commercial and recreational users of the reef. For this reason not only should consultation with Aborigines and Islanders be required under legislation such as the Great Barrier Reef Marine Park Act 1975 (Cth) s 32(2), but the legislation should be amended so as to require the relevant authority to take into account the implications of its operations, plans for Aborigines and Islanders. A similar approach was adopted by the Western Australian Aboriginal Land Commissioner in relation to the work of the Western Australian Environmental Protection

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3742 See para 896.
3743 See para 910, 915.
3744 See para 944-5.
3745 Torres Strait Fisheries Act 1984 (Cth) s 39.
3746 As reported in ALRC ACL *Field Report 9*, 29.
3747 See para 858.
3748 ALRC ACL *Field Report 9*, 30.

Authority. He recommended that the Environmental Protection Act 1971 (WA) be amended to broaden the definition of 'environment' to include the impact of any proposals on Aboriginal people, and thus to require due consideration of Aboriginal aspirations.[3749] Similarly, amendments, for example to the Great Barrier Reef Marine Park Act 1975 (Cth) s 32(2), should be sufficiently broad so that consideration is given for special areas to be zoned for traditional fishing in the same way as consideration is to be given for zoning for scientific purposes. Similar amend-merits should be made to the Marine Parks Act 1982 (Qld),[3750] While the Torres Strait Joint Advisory Body is required to include representatives of the traditional inhabitants, there is no such requirement for the Torres Strait Protected Zone Joint Authority body and related advisory bodies and the Great Barrier Reef Marine Park Authority's Consultative Committee. In the past the latter Committee has contained representatives from government, conservation, tourism, game, commercial and amateur fishing, and mining interests.[3751] The Commission recommends that at both State and federal level, legislation be amended

- to require consultation with Aboriginal people affected before steps are taken to restrict traditional hunting and fishing;

- to ensure that views of Aborigines whose traditional activities may be affected are taken into account in reaching any decision on the management of resources; and

- as far as possible to ensure Aboriginal representation on decision making bodies such as the Great Barrier Reef Marine Park Authority's Consultative Committee[3752] and on those Committees established to advise the Protected Zone Joint Authority.

Furthermore, as the Department of Aboriginal Affairs themselves, have advised, they do not know how effective discussions between the Great Barrier Reef Marine Park Authority and Aborigines and Islanders has been so far in relation to traditional fishing in waters off Queensland.[3753] The Commonwealth should immediately take steps to satisfy itself that consultations to date have been adequate and that Aborigines and Islanders have been fully informed of and understand the implications of the new laws and regulations governing their traditional fishing activities. Where necessary, the Department of Aboriginal Affairs will need to maintain an increased involvement in areas also falling within the province of other Commonwealth Departments such as the Department of Primary Industry to ensure that the interests of indigenous inhabitants are properly represented. As the Department of Aboriginal Affairs has submitted in relation to the Great Barrier Reef Marine Park Region:

> ... given the complexity of marine park management I would say Aboriginal communities stand in need of a special advocate to protect their interests.[3754]

998. ***Questions of Resources***. The processes of consultation recommended in the previous paragraph may well require additional resources. As one submission commented:

> I must commend your [the Commission's] emphasis on the principle of consultation when it comes to integrating interests of Government and different community groups. I can, however, see some procedural problems arising from your suggestion that it would be necessary to 'establish' that hunting is likely to endanger the species before excluding hunting. To do so in any legal sense would require resources far beyond those available to State agencies. Wildlife conservation management consists for the most part of taking pre-emptive actions against the possibility of detrimental change.[3755]

In other words, this process may require a knowledge of wildlife population and biology that may currently not exist,[3756] or which can only be discovered through the use of scientific and field resources that are not available. However, the requirements of consultation, or a preference for restrictions rather than outright

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3749 Aboriginal Land Inquiry, Report (1984) para 10.37-10.39.
3750 See para 959.
3751 See for example GBRMPA, *Annual Report 1982/83*, Townsville, 1983 9.
3752 See the Canadian suggestions that there be a 'formal consultative body' for Indian fishing interests and contractual arrangements for Indians to become directly involved in fish management: Pearse, 178, 179, 183.
3753 Department of Aboriginal Affairs (P Gulliver) *Submission 506* (13 March 1986) 2.
3754 ibid.
3755 WA Conservator of Wildlife (I Crook) *Submission 446* (30 August 1984) 3.
3756 cf RL Barsh, *Submission 440* (4 August 1984) 3; G Power 'Problems of Fisheries Management in Northern Quebec' (1979) 10 *Fisheries Management* 108. cf the lack of biological information on dugong or its total numbers in Australia.

prohibitions upon traditional use, do not prevent decisions being taken on the balance of available information and on the basis of an informed judgment. Consultation with Aborigines affected can, in the light of local knowledge of species, increase the fund of available information and further inform judgment. Measures taken in the light of proper consultation are also likely to be more effective, thereby possibly reducing costs of enforcement. Furthermore as an examination of the legislation detailed in Chapter 35 demonstrates, current legislation and departmental practice raise complex legal questions. Resources will be necessary to ensure that Aborigines and Islanders are to be fully informed of their legal position.

999. ***Consultation or Control***? The general recommendations made in paragraph 934 may also be criticised on the basis that they accord too little influence to Aboriginal people, that they provide for 'consultation' rather than 'control'. As one Canadian authority commented:

> I would question whether the term 'consultation' is strong enough, for is not the [issue one of] aboriginal *participation* in resource management decisions? ... [Flor a long time Canadian aborigines has distinguished between 'mere' consultation and meaningful involvement in decision making.[3757]

But the diversity of situations, problems and authorities in this field in Australia will have become clear from Chapter 35. As the Canadian experience shows, indigenous authority or control over particular resources can only be a matter for negotiations in the particular context (negotiations often subsumed in Canada under a wider discussion of self government or autonomy). The overriding need for unitary management of scarce resources also means that no general formula for Aboriginal control is likely to be acceptable — though the management of resources on Aboriginal land may be at least a partial exception to this. Boards of management should be entrusted with the management of Aboriginal land, including making regulations for its use. In doing so it has been suggested that Aborigines should be able to determine priorities as between, for example, community fishing and conservation. The claimants to the Jawoyn land claim, anticipating a successful resolution of the claim proposed a draft Jawoyn National Park Bill cl 26(7) which provided that the Board itself should determine priorities to be given to the following purposes:

(a) maintenance of the Aboriginal tradition of the traditional Aboriginal owners of the Park;

(b) nature conservation;

(c) public recreation;

(d) tourism;

(e) such other purposes as are determined by the Board.[3758]

This represents a significant development in terms of Aboriginal control of natural resources and activities on Aboriginal land. These proposals predate the 1985 Amendments to the National Parks and Wildlife Conservation Act 1975 (Cth) s 11(11A), 14A-14D. These amendments make detailed provision for the sharing of functions and decision making power between the Aboriginal controlled board and the Director of National Parks in relation to the preparation and implementation of management plans their monitoring and the provision of advice. Disputes are to be resolved by the Minister.[3759] Barsh would prefer greater indigenous control. He argues that:

> a far better course is to give each indigenous community *full ownership* of the wildlife in a clearly demarcated area, and permit the community to *set its own priorities*. The incentive to conserve rests with the fact that each community has a fixed portion that cannot be replaced. Within that share, the flexible re-allocation between, say consumption and export can be made over the years. This accords with a goal of self-determination or 'self-management'.[3760]

While Aborigines should as far as possible be given control over resources on Aboriginal land, this control should be subject to overriding principles of conservation, which should be a matter for ultimate determination by government. Recent amendments to the National Parks and Wildlife Conservation Act 1975 (Cth) referred to above reflect this principle. As para 979-80 conclude, conservation represents a

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3757 N Bankes, *Submission 435* (19 July 1984) 5.
3758 See para 913.
3759 See para 910-16.
3760 RL Barsh, *Submission 440* (4 August 1984) 3 (emphasis in original).

legitimate restriction on traditional hunting and fishing interests. Subject to this principle there is no reason why by-laws passed by Aboriginal councils should not, within appropriate limits, regulate the control of hunting and fishing on Aboriginal land under the council's jurisdiction. One limitation on this power, contained in the James Bay Agreement, is that by-laws made by Cree and Inuit local governments affecting hunting and fishing by natives (and in some areas by non-natives) must be 'more restrictive than those passed by the responsible Provincial or Federal Government' (s 24.5.3). The effect is to give the responsible Government a legislative veto in case of over-exploitation of resources, but not in the case of under utilisation.

1000. ***Forms of Joint Management of Aboriginal Land***. There are a variety of ways in which land use can be regulated. Under the James Bay Agreement, a Co-ordinating Committee was set up to review, manage, supervise and regulate the hunting, fishing and trapping of the land covered by the Agreement (s 24.4.1). The composition of this Committee, which consists of four representatives of each of the Cree Native party, the Inuit Native party, Quebec and Canada (s 24.4.2), and two members of the Naskapi Native Party, has already been described. Voting powers are so arranged as to give the relevant Governments, and the Indian groups, a substantial voice in those issues most of concern to them. However, these provisions have not been without their difficulties and the operation of s 24 is currently under review.[3761] Power states that:

> The weakest link in all the clauses and definitions in the agreement seems to be the method of decision making related to natural resources.[3762]

Apparently the lack of expert advice and experience has led to a tendency to contract out surveys which lack continuity and consistency, and lead to the 'accumulation of a lot of data of rather dubious value'. As a result decisions have sometimes been made on the basis of personality, or of political or other extraneous factors. In consequence some species of fish have been severely depleted and some indeed practically eliminated.[3763] The Western Arctic Claim (s 12-14)[3764] contains detailed provisions for the joint management of the Yukon North Slope and for wildlife harvesting and management of the Western Arctic Region. Clearly there is no one model for formal power sharing in relation to question of control and management of natural resources between government authorities and indigenous people. In Quebec, government policy recognises hunting and fishing rights in general, but:

> offers to negotiate separately with each nation the modalities of application of these rights in relation to land occupation and to needs. We feel that we cannot deal with these rights for all aboriginal peoples at once because again of the variety of situations. The rights are recognised but remain to be defined in each case.[3765]

Different models of joint management of Aboriginal land currently exist in Australia. For example, the Kakadu plan of management involves informal mechanisms for Aboriginal participation, whereas the Cobourg scheme focuses on formal mechanisms of participation with a board, composed of Aborigines and non-Aborigines, having policy as well as planning functions.[3766] Particularly in the Cobourg plan of management a structure is created that enables formal power-sharing to take place.[3767] Both plans of management are innovative and experimental. They involve participation by Aborigines as park rangers and cultural advisers. Advice is provided by bodies such as the Gagudja Association. They involve administrative and management challenges for Aboriginal and non-Aboriginal personnel alike. Similarly as has been seen the Jawoyn proposals and the amendments to the National Parks and Wildlife Conservation Act 1975 (Cth), anticipating a successful resolution to the claim, have put forward a proposal which, building on the Cobourg model, ensure a degree of Aboriginal control on Boards of Management and Aboriginal control over planning priorities.[3768] Negotiations have recently been completed pursuant to these amendments in relation to Aboriginal control of the Board of Management of Uluru National Park.[3769] These questions of co-operation and control are properly matters for negotiation between the relevant Aboriginal

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3761 SAGMAI, Goverment of Quebec (G Moisan) *Submission 460* (4 October 1984) 2. See para 896.
3762 Power (1979) 108.
3763 ibid.
3764 See para 896.
3765 SAGMAI, Government of Quebec (G Moisan) *Submission 460* (4 October 1984) 2. See also DC Frith, then Minister for Indian Affairs and Northern Development, *Submission 450* (31 August 1984) 3.
3766 See paras 911, 916 respectively.
3767 Of course, social and economic factors will influence the extent to which genuine power sharing taxes place. See SM Weaver 'Progress Report: The Role of Aboriginals in the Management of Cobourg and Kakadu National Parks, Northern Territory', North Australia Research Unit, Seminar, Darwin, July 30, 1984; 8.
3768 See para 910, 913.
3769 See para 912.

bodies and Commonwealth or State authorities. No single pattern of control or consultation can be stipulated, but the principle of close co-operation and collaboration remains a vital one.

## Conclusions

1001. S***ummary of Recommendations in this Part***. In this Part, the following recommendations are accordingly made:

- *General Recommendations*.

    - Recognition should reflect the wide variety of legitimate interests such as conservation, effective management of natural resources, pastoral and other residential interests and commercial interests. These interests mean that no overriding categorical recognition of traditional hunting, fishing and gathering practices is appropriate (para 972).

    - Given the need for unitary management of particular resources and in view of the extensive activity at State and Territory level, the Commission does not consider it necessary or appropriate for detailed legislation to be enacted. However a set of general principles should be adopted, with detailed resource management and administrative decisions made at the appropriate levels in consultation with Aboriginal people affected by these decisions (para 973, 978). State and Federal legislation inconsistent with these principles should be amended, as indicated in paragraph 1003.

    - Traditional hunting and fishing should not be limited to consumption for food or sustenance. The broader notion of subsistence (including ceremonial exchange, satisfaction of kin obligations) is to be preferred. Consumption within the local family or clan groups should be regarded as traditional, even though elements of barter or exchange are present. But trade, exchange or sale outside the local community should be treated in the same way as other commercial dealings with the species in question. Relevant legislation or regulations should state this distinction expressly, to avoid misunderstandings or arguments (para 976, 985-7).

    - Traditional hunting should not be limited to indigenous species but may include introduced fetal animals (para 975).

    - In determing whether an activity is ‘traditional’, attention should be focussed on the purpose of the activity rather than the method. However the method may be relevant in some cases (as will other factors such as whether the person was at the time under his customary laws entitled to kill the animal in question) (para 975, 977).

- *Priorities*

    - The following priorities are justified:

        1. conservation and other identifiable overriding interests;

        2. traditional hunting and fishing;

        3. commercial and recreational hunting and fishing (para 985).

    - Conservation principles represent a legitimate limitation on the fights of indigenous people to hunt and fish as do interests of safety, fights of innocent passage, shelter and safety at sea (para 979-983).

    - Necessary conservation measures may require restrictions on traditional hunting and fishing interests. While Aborigines should be given control over resources on Aboriginal land, this control should nonetheless be subject to the principal of conservation (para 979-81, 994-9).

- It may be necessary to prohibit or restrict traditional hunting or fishing by limiting the numbers taken, the methods by which or the areas in which they are taken, in the case of rare and threatened species (in particular those threatened with extinction). In this situation it is necessary to determine as far as possible in the circumstances both the status of the species concerned, and the threat to the species posed by traditional hunting and fishing, before long-term decisions are made to restrict traditional hunting and fishing (para 936, 981, 994-9). This requires not only an assessment of Aboriginal hunting and fishing practices but also an assessment of other threats to the species, for example commercial or recreational fishing. If restrictions are placed on traditional hunting and fishing practices, there should be regular monitoring and assessment of the situation in consultation with those affected (para 921, 995).

- As a matter of general principle, Aboriginal traditional hunting and fishing should take priority over non-traditional activities, including commercial and recreational activities, where the traditional activities are carried on for subsistence purposes (para 984, 988). Once this principle is established the precise allocation is a matter for the appropriate licensing and management authorities acting in consultation with Aboriginal and other user groups (para 915, 987-8, 994-5).

- Legislation in Queensland and the Northern Territory allowing for Aboriginal people as a group to take out community licences is preferable to the requirement that such a licence be taken out by a corporation or an individual (para 985).

- Preferential rights to resource harvesting on Aboriginal land for commercial as opposed to community use may well be desirable, since this may provide advantages such as local employment. But this is a distinct question from the recognition of traditional hunting and fishing rights for subsistence and related purposes. Resource harvesting for commercial purposes as such is a matter for the relevant management authorities. The distinction between traditional harvesting for use within the community as distinct from commercial fishing (preferential commercial rights) should be maintained (para 987).

- Recreational hunting and fishing should be treated, at best, no more favourably than traditional activities. The exact place of recreational viz-a-viz commercial fishing will depend on the circumstances, but it is hard to see that any justification exists for special measures for Aborigines who are engaged in recreational hunting and fishing. The Torres Strait Fisheries Act 1984 (Cth), the effect of which may well be to give private fishing exemption from regulations applying to traditional fishing should be amended along the lines proposed in para 1003, and care should be taken to ensure that there is no similar discrimination against traditional fishing, such as previously occurred under the Great Barrier Reef Marine National Park 'A' Zone in relation to the Cairns and Cormorant Pass Zoning Plans (para 988).

- *Access*. It is reasonable that Aborigines be accorded access to traditional lands for the purposes of hunting, fishing and gathering, whether these lands are unalienated Crown lands or subject to leasehold or other interests. However where interests in the land are held by persons other than the Crown, it is necessary to take account of those interests, whether by negotiated access provisions or otherwise (para 989).

- The linking of access rights to residents of a particular State or Territory creates difficulties (para 936-8).

- Where hunting and fishing or gathering rights are granted on the basis of traditional affiliation, additional residential requirements are undesirable since they are likely to distort rather than to recognise or reflect Aboriginal perceptions or traditions. Where policies of disbursement or displacement have made such attachment impossible or extremely difficult, then access provisions based on residential or historical nexus are to be preferred (para 990-1).

- *Sea Closures*. There should be provision for areas of the sea, adjacent to Aboriginal land to be preserved for traditional fishing. The recommendations of the Western Australian Aboriginal Land Commissioner in this respect have much to commend them. Such protection should extend to

Aboriginal and Torres Strait Islander fishing interests in seas adjacent to Aboriginal reserves in Queensland. The Great Barrier Reef Marine Park Act s 32(7) should be amended to ensure that traditional fishing interests, and hence the possibility of sea closures and sea protection orders, are specific matters to be taken into account by the Great Barrier Reef Marine Park Authority in preparing its zoning plans (para 992). Ultimately there should be consideration of the need to preserve for traditional fishing, areas of the sea adjacent to trust areas and within the Torres Strait Protected Zone.

- For the purposes of such provisions some traditional association or special link with the sea, primarily involving areas of the sea adjacent to Aboriginal land is necessary (para 993).

- *Consultation and Control*

    - At both State and federal level, legislation should be amended to require consultation with Aboriginal people affected where steps are to be taken to restrict traditional hunting and fishing, to ensure that views of those Aborigines affected are taken into account in reaching any decision on the management of resources (para 994-7).

    - In relation to the Torres Strait and Great Barrier Reef Marine Park regions the Government should satisfy itself that consultations so far have been adequate. The Department of Aboriginal Affairs should be involved in this process along with their Departments. Aborigines and Islanders should be fully informed of all the legal implications of restrictions on their traditional activities. Adequate resources should be provided to government authorities and to Aboriginal and Torres Strait Islander bodies to ensure that such consultation takes place (para 997).

    - As far as possible Aborigines should be represented on bodies such as the Great Barrier Reef Marine Park Authority Consultative Committee, and on bodies advising the Protected Zone Joint Authority. Where necessary the Department of Aboriginal Affairs should also be represented (para 998).

    - There is no general formula for Aboriginal control in the management of scarce resources. The responsibility of governments to legislate for conservation of resources does not exclude the role of Aborigines in conservation and management; this is especially so on Aboriginal land. Boards of management should be entrusted with the management of Aboriginal land, including the power to regulate its use. There is no reason why. Aboriginal local councils should not therefore be able to make by-laws regulating hunting and fishing on Aboriginal land; though it may be that this power should be limited to by-laws which are more restrictive than those passed by the responsible State or federal Government (para 999-1000).

    - There is thus no one model for formal power sharing in relation to the management of national resources. These questions of co-operation and control are properly matters for negotiation between the relevant Aboriginal bodies and Commonwealth or State authorities (para 999).

1002. ***The Commonwealth's Role***. The question whether these recommendations should receive detailed legislative endorsement has already been raised,[3770] as has the question of federal legislative involvement in areas of unitary resource management committed to the States and Territories. In determining. the Commonwealth's role in the implementation of the principles articulated in para 1001, two questions arise: the legislative competence of the Commonwealth in asserting Aboriginal interests in resources under State or Territory management, and the desirability of such Commonwealth involvement. Questions of fisheries beyond territorial limits apart, the conservation of natural resources is not specifically a matter of Commonwealth legislative competence under the Constitution. However, conservation provisions may be upheld as valid under a variety of powers, as the High Court's decision in the *Tasmanian Dam* case demonstrates.[3771] One of these powers is the Commonwealth's power to legislate for the people of the Aboriginal race for whom it is deemed necessary to make special laws, under s 51(26). The extent of this power is discussed in greater detail in Chapter 38.[3772] Even under the narrower view preferred by the

3770 See para 973.
3771 *Commonwealth v Tasmania* (1983) 46 ALR 625. cf *Murphyores Pty Ltd v Commonwealth* (1976) 136 CLR 1.
3772 See para 1012-1021.

minority of the High Court in the *Tasmanian Dam* case,[3773] the Commonwealth has extensive legislative power over the matters raised in this Chapter. In a number of ways the Commonwealth has demonstrated its determination to accord appropriate legislative recognition to Aboriginal customary hunting and fishing interests in projects or areas with which it is otherwise involved. These include the National Parks and Wildlife Act, the Kakadu Plan of Management, the Great Barrier Reef Marine Park and the Torres Strait Treaty provisions. But the question is whether federal legislative involvement should extend further into areas of State or Territory responsibility. In the Commission's view the principle of unitary management of resources is of such importance that such direct federal involvement is not desirable at this stage. However an agreed statement of principles along the lines set out in this Report should be adopted by the Commonwealth in relation to environment and resource matters within its own management or control. These principles should be taken up by the Commonwealth with the States and Territories, in an attempt to ensure more uniform adherence to them in the wide variety of circumstances in which they have to be applied. The work of the Great Barrier Reef Marine Park Authority and of Northern Territory and Commonwealth Wildlife authorities demonstrates that co-operative administrative arrangements with the States may well be effective. Certain States and the Northern Territory have also demonstrated similar willingness to recognise Aboriginal hunting and fishing interests in certain areas.

1003. ***Legislation Requiring Amendment.*** Consistently with this conclusion, legislation inconsistent with the principles set out in this Chapter should be appropriately amended by the competent legislature. Some legislation substantially accords with these principle (for example the National Parks and Wildlife Conservation Act 1975 (Cth), the Wildlife Conservation Act 1976 (WA), the Territory Parks and Wildlife Conservation Act 1976 (NT)) and accordingly requires little or no amendment. At the Commonwealth level the Great Barrier Reef Marine Park Authority Act 1975 and the Torres Strait Fisheries Act 1984 require some amendment. The Great Barrier Reef Marine Park Authority Act 1975 (Cth) should be amended:

- to require the Authority to consult with Aboriginal people both in relation to the preparation and amendment of zoning plans;

- to take account of the importance of traditional fishing and the desirability of minimising the effects of a zoning plan on traditional fishing;

- to require that consideration be given to setting aside specified areas near to trust areas belonging to an Aboriginal or Islander community specifically for traditional fishing;

- to require that traditional fishing be given priority over recreational interests, while at the same time ensuring that conservation has priority over traditional fishing;

- to require Aboriginal representation on the Authority's Consultative Committee.[3774]

The Torres Strait Fisheries Act 1984 (Cth) should also be amended to require appropriate consultation,[3775] and to ensure that priority is not inadvertently accorded to non traditional fishing.[3776] At present, much wildlife legislation in all States,[3777] fisheries provisions in all States,[3778] and access provisions in Queensland, Western Australia and New South Wales[3779] are inconsistent with the recommendations made in this Chapter. Provision should also be made for Aboriginal access to the waters adjacent to Aboriginal land in Western Australia and Queensland.[3780]

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3773 (1983) 46 ALR 625, 677-8 (Gibbs CJ), 756-7 (Wilson J), 854-7 (Dawson J).
3774 See para 995, 996.
3775 s 39 and para 944-5, 995, 996.
3776 See para 944-6.
3777 eg Wildlife Act 1975 (Vic); National Parks and Wildlife Act 1970 Tas); Fauna Conservation Act 1974 (Qld); National Parks Authority Act 1976 (WA); National Parks and Wildlife Act 1974 (NSW) (though regulations gazetted in January, 1986 substantially avoids the need for amendment of this Act); National Parks and Wildlife Act 1972 (SA) Native Vegetation Management Act SA (1985). See para 917, 918, 921, 927, 931, 933, 964.
3778 eg Fisheries Act 1971 (SA); Fisheries and Oyster Farms Act 1935 (NSW); Fisheries Act 1976 (Qld); Fishing Industry Organisation and Marketing Act 1982 (Qld); Fisheries Act 1905 (WA). See para 954, 955, 957, 961, 967.
3779 See para 935, 940, 941, 966.
3780 See para 956, 957-7, 968, 992.

# PART VIII:

# THE COMMISSION'S RECOMMENDATIONS AND THEIR IMPLEMENTATION

## 37. Summary of Recommendations

1004. ***Summary of Proposals in this Report***. This Part of the Report summarises the recommendations set out in Parts II-VII and discusses the two basic questions of implementation of these recommendations:

- whether they can and should be implemented by Commonwealth legislation under s 51(26) of the Constitution, and related federal/State issues (Chapter 38);

- the need for involvement of and consultation with Aboriginal people in any decisions about the recommendations, and in their implementation (Chapter 39).

The Commission's recommendations, as set out in Parts II-VII, should first be summarised.

1005. ***Basic Principles***. The Commission's general conclusions on the Reference, as set out in Parts I and II of this Report, may be summarised as follows:

*Scope for Recognition under the Existing Law*

- The scope for recognition of Aboriginal customary laws through common law rules for the recognition of local custom or communal native title is very limited (para 62-3), and is inadequate to deal with the questions raised by the Commission's Terms of Reference (para 63).

- The same conclusion applies to arguments for the recognition of Aboriginal customary laws through the re-examination of the status of Australia as a 'settled colony'. A reclassification of Australia as a 'conquered colony', were it to occur, would not as such bring about appropriate forms of recognition of Aboriginal customary laws and traditions as these exist now (para 68).

- Although Aboriginal customary laws and traditions have been recognised in some cases and for some purposes by courts (para 70-5) and in legislation (para 76-84), this recognition has, on the whole, been exceptional, uncoordinated and incomplete (para 85).

*Definitional Questions*

- It is not necessary, constitutionally or otherwise, to spell out a detailed definition of who is an 'Aborigine'. This question, so far as necessary, can be worked out as a case-by-case basis, in accordance with the broad approach so far taken in legislation and administrative practice and by the High Court (para 90-5).

- Nor is it necessary to frame a definition of 'traditional Aborigine' for the purposes of the recognition of Aboriginal customary laws. The application of any recommendations for recognition in appropriate cases is to be achieved by the substantive requirements of the provision in question (para 95).

- Torres Strait Islanders are a distinct group from Aborigines, and the recognition of their customary laws requires separate examination. However some at least of the recommendations in the Report are or may be appropriately applied to Torres Strait Islanders as well as to Aborigines (para 96).

- The Commission's Terms of Reference do not extend to South Sea Islanders (para 97).

- There existed, in traditional Aboriginal societies, a body of rules, values and traditions which were accepted as. establishing standards or procedures to be followed and upheld. Despite numerous changes, such rules, values and traditions continue to exist in various forms (para 99).

- These rules, values and traditions can properly be described as 'Aboriginal customary laws' (para 100-101).

- Narrow legalistic definitions of Aboriginal customary laws are unnecessary and inappropriate (para 101). It will usually be sufficient to identify Aboriginal customary laws in general terms where these are recognised for particular purposes. But the form of definition will depend upon the kind of recognition, and its purpose (para 101).

*General Considerations and Arguments about Recognition*

- Various objections to the recognition of Aboriginal customary laws have been made, including:

    - the problem of unacceptable rules and punishments (para 114)

    - secret aspects of Aboriginal customary laws (para 115)

    - loss of Aboriginal control over their laws (para 116)

    - the need to protect Aboriginal women (para 117)

    - the community divisiveness that recognition could cause (para 118)

    - the fact that Aboriginal customary laws have changed in many respects and no longer exist in their pristine form (para 119-121)

    - the declining importance and limited scope of Aboriginal customary laws (para 122, 124)

    - law and order problems in Aboriginal communities (para 123)

    - the difficulties of definition (para 126).

    These are either not objections to recognition as such (as distinct from considerations in framing proposals for recognition), or are not persuasive (para 217).

- On the contrary there are good arguments for recognising Aboriginal customary laws, including in particular:

    - the need to acknowledge the relevance and validity of Aboriginal customary laws for many Aborigines (para 103-5)

    - their desire for the recognition of their laws in appropriate ways (para 106)

    - their right, recognised in the Commonwealth Government's policy on Aboriginal affairs and in the Commission's Terms of Reference, to choose to live in accordance with their customs and traditions, which implies that the general law will not impose unnecessary restrictions or disabilities upon the exercise of that right (para 107)

    - the injustice inherent in non-recognition in a number of situations (para 110-11, 127).

*Discrimination, Equality and Pluralism*

- A particularly important argument against the recognition of Aboriginal customary laws is that it would be discriminatory or unequal, and would violate the principle of equality before the law (para 128).

But special measures for the recognition of Aboriginal customary laws will not be racially discriminatory, nor will they involve a denial of equality before the law or equal protection as those concepts are understood in comparable jurisdictions, if these measures:

- are reasonable responses to the special needs of those Aboriginal people affected by the proposals;
- are generally accepted by them; and
- do not deprive individual Aborigines of basic human rights, or of access to the general legal system and its institutions (para 158-165).

- In particular, to avoid problems of inequality or potential discrimination arising, measures for recognition should comply with certain guidelines:
  - They should, as special laws, only confer rights on those Aborigines who, in the particular context, experience the disadvantages or problems which are the reasons for the provision in question.
  - Aborigines should, wherever possible, retain rights under the general law (eg, to enter into Marriage Act marriages, to make wills).
  - Any legislation should be no more restrictive of rights under the general law than is necessary to ensure fidelity to the customary laws or practices being recognised.
  - Measures of recognition should not unreasonably withdraw legal protection or support from individuals (Aboriginal or non-Aboriginal) (para 165).

- Where the most appropriate remedy to a problem is not a recognition of customary law as such but some more general provision, it is necessary to consider whether that provision can legitimately be applied to some class of Aborigines only, or whether the reasons for the provision apply equally to all members of the community. If the latter, the Commission should draw attention to the problem, without making recommendations for legislation applicable only to the more limited class (para 165).

- These principles will also avoid or allay concerns at the recognition of Aboriginal customary laws based on arguments about the undesirability of legal pluralism or the diversity of laws (para 166-8).

- There is some risk nonetheless that proposals for the recognition of Aboriginal customary laws could be seen to be divisive or could be an affront to public opinion, either in isolation or if associated with other measures. Assessment of this risk, and of its relevance to the range of proposals for legislation, is primarily a matter for the Parliament as the people's representatives (para 169).

*Ensuring other Basic Rights*

- Australia is neither required to recognise Aboriginal customary laws in any general way, nor is it prohibited from doing so, by any international obligations on minority or indigenous rights (para 171-8). However, such recognition, provided it preserves basic individual rights, is consistent with the spirit of the International Covenant on Civil and Political Rights, and especially with Article 27 of the Covenant concerning the rights of ethnic, linguistic and cultural minorities (para 175-8).

- In securing basic human rights (including those specified in the Covenant), terms and ideas which imply a measure of cultural relativity may have to be applied by reference to the cultural community within which the case arose (including, by virtue of Art 27, a minority, ethnic or cultural group). But minority values, cannot as such justify the violation of basic human rights, any more than can majority values (para 184-92).

- The impact of human rights standards on proposals for the recognition of Aboriginal customary laws depends on the particular proposal, and cannot be discussed in the abstract. The Commission believes that the recommendations in this Report do not involve violations of basic human rights for Aborigines or for other Australians. On the contrary, the need to respect the human rights and cultural identity of Aboriginal people supports the case for appropriate forms of recognition of Aboriginal customary laws (para 192-3).

*The Commission's Approach*

- Aboriginal customary laws should be recognised, in appropriate ways, by the Australian legal system (para 194).

- The recognition of Aboriginal customary laws must occur against the background and within the framework of the general law (para 195).

- As far as possible, Aboriginal customary laws should be recognised by existing judicial and administrative authorities, avoiding the creation of new and separate legal structures, unless the need for these is clearly demonstrated (para 196).

- The issues of the extent and method of recognising Aboriginal customary laws need to be considered separately from any arguments about the federal system (para 197).

- Recognition of Aboriginal customary laws may take different forms, including:

    - codification or specific enforcement of customary laws;

    - specific or general forms of 'incorporation' by reference;

    - the exclusion of the general law in areas to be covered by customary laws;

    - the translation of institutions or rules for the purposes of giving them equivalent effect (eg marriage or adoption);

    - accommodation of traditional or customary ways through protection's in the general legal system (para 199-207).

- The Commission does not believe that, as a general principle, codification or direct enforcement are appropriate forms of recognition of Aboriginal customary laws (para 200-2). Nor, at the present time and except in limited circumstances, is the exclusion of the general law (para 203). Specific, particular forms of recognition are to be preferred to general ones. So are forms of recognition which avoid the. need for precise definitions of Aboriginal customary laws, a notion which is to be understood broadly rather than narrowly (para 208).

*Scope of the Report*

- Consistently with this approach, Parts III-VII of this Report examine the various areas in which recognition may be called for, and the ways in which this can best be achieved (para 209, 220). These areas include issues both of civil law and criminal law, of substantive law and of evidence and procedure (para 210), as well as consequential matters (para 214-16).

- However in view of the detailed work being done by other bodies, and by the Commonwealth Government itself, the Commission has treated the question of customary rights to land as outside the scope of its inquiry (para 212). For similar reasons no separate investigation of the legal protection of Aboriginal artworks and the Aboriginal heritage is undertaken in the Report (para 213).

1006. ***Marriage, Children and Family Propert***y. In Part III of this Report, the following recommendations were made for the recognition of Aboriginal customary laws in the area of marriage, children and family property:

*Recognition of Traditional Marriages: General Principles*

- It is not sufficient to leave the recognition of traditional marriages to the law on de facto relationships (para 245).

- The general law should not enforce Aboriginal marriage rules, including promised marriage rules (para 246, 251).

- Traditional Aboriginal marriages should be recognised for the purposes of particular laws (functional recognition), rather than being treated as a status equivalent to Marriage Act marriage for all or almost all purposes (para 257).

- Recognition should, in principle, extend to polygynous marriages where these exist in accordance with tradition (para 258-60).

- There should be no requirement of a minimum age for recognition (para 261).[3781]

- A relationship should not be recognised as a traditional marriage if one of the parties has never, at or before the time in question, consented to the relationship (para 262).

- Recognition should extend to any relationship between two persons which is recognised as a traditional marriage under the customary laws of an Aboriginal community of which one of those persons is a member, irrespective of whether the other person is a member of that or any other Aboriginal community (para 264-6).

- Recognition should be extended to a relationship, previously recognised as a traditional marriage, which continues after the parties cease to reside in the relevant community (para 267).

- A certificate as to the existence of a traditional marriage, given by the public officer of an Aboriginal council or like body, should be admissible as evidence of the facts stated in it (para 268).

- Recognition should be extended to traditional marriages already existing, but that legal effect of recognition should be prospective only (para 269).

- No residual provision, recognising traditional marriage for all purposes, is desirable. But it should be possible for other laws, including State and Territory laws, to recognise traditional marriage for the purposes of those laws (para 269, 324).

- Traditional marriages should be specifically recognised for the following purposes:

    - status of children (para 271).

    - adoption, fostering and child welfare laws, including both parental consent to adoption, and qualifications to adopt (para 272-9).

    - distribution of property on death (intestacy, family provision) (para 292, 294).

    - accident compensation (including workers' compensation, compensation on death, criminal injuries compensation and repatriation benefits) (para 297, 299, 300).

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3781 However one member of the Commission (Prof JR Crawford) would apply a minimum age for recognition, based on the minimum marriageable age under the Marriage Act 1961 (Cth) (presently 14 years for girls, 16 years for boys), in the same way as s 88D(3) of that Act does for foreign marriages. See para 261.

- statutory superannuation schemes (and private superannuation schemes established in the future) (para 301).

- for all purposes of the Social Security Act 1947 (Cth), with special provision being made for separate payment to spouses, and an associated regulation making power (para 310-2).

- spousal compellability and marital communications in the law of evidence (para 315-6).

- unlawful carnal knowledge, provided both consent and traditional marriage are proved (para 319).

- the Income Tax Assessment Act 1936 (Cth) and related legislation (para 322).

- Traditional marriages should not however be recognised for the following purposes:

  - variation of maintenance and property rights during a relationship (para 284-6) or on divorce (para 289-90).

  - bigamy (para 317).

  - rape in marriage (para 318).

  - powers under the Family Law Act 1975 (Cth) to grant injunctions with respect to domestic violence (para 321).

  - the Family Court's jurisdiction with respect to principal and ancillary relief (para 323).

*Distribution of Property*

- No change should be made to the laws governing the transfer of real or personal property in an attempt to accommodate Aboriginal ways of transfer (para 328, 330).

- Aboriginal people have the right to make a will and if they do the usual laws should apply (para 333). In particular there should be no special provision for informal wills by traditional Aborigines (para 335). In interpreting the words used in a will or other document, regard should be had to Aboriginal customary laws where relevant, but since this represents the common law rule, no legislative provision to this effect is necessary (para 336).

- Traditional marriages should be recognised for the purpose of intestacy legislation (para 338).

- Aborigines should be able to apply to have an intestate estate distributed in accordance with the traditions or customary laws of the deceased's community (para 340, 342).[3782]

- State and Territory legislation for family provision (testator's family maintenance) should allow for applications for family provision by persons related by blood, kinship or marriage to a deceased member of an Aboriginal community and who could at the time of the deceased's death, have reasonably expected support (including material support) from the deceased in accordance with the customary laws of that community (para 341).

- Claims for family provision should prevail, in clear cases of need, over claims for traditional distribution on intestacy (para 342).[3783]

*Aboriginal Child Custody, Fostering and Adoption*

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3782 One member of the Commission (Prof MR Chesterman) recommends that claims for traditional distribution even where the deceased Aborigine had made a will. See para 342.

3783 One member of the Commission (Prof MR Chesterman) recommends that claims for traditional distribution should prevail over claims for family provision. See para 342.

- There should be an Aboriginal child placement principle established by legislation, requiring preference to be given, in decisions affecting the care or custody of children, and in the absence of good cause to the contrary, to placements with:
    - a parent of the child;
    - a member of the child's extended family;
    - other members of the child's community (in particular, persons with responsibilities for the child under the customary laws of the community) (para 366).
- Where such a placement is not possible, preference should be given to placement with families or in institutions for Children approved by members of the relevant Aboriginal communities having special responsibility for the child, or by an Aboriginal child care organisation working in the area (para 365-6).
- In making these decisions account should be taken of the standards of child care and child welfare of the Aboriginal community to which the child belongs (para 365-6).
- An 'Aboriginal child' for this purpose should be defined as a child one of whose parents was Aboriginal (para 367).
- The placement principles should not apply to give a statutory preference to one parent over another (para 367).
- For the time being at least, the placement principles should not apply to decisions taken within the juvenile justice system. However this should be kept under review, to ensure that the guidelines are not avoided by treating civil custody issues as sentencing questions (para 367).
- Child welfare legislation should provide explicitly for consultation with the relevant Aboriginal custodians of a child and (unless they direct to the contrary) with the relevant Aboriginal child care agency, before placement decisions (except emergency decisions involving short-term placement) are made (para 373).
- Careful attention should be given to the possibility of devolving child care responsibilities to regional or local child care agencies by agreement, and with appropriate resources (para 371).
- Subject to this, there should be no change in existing judicial or administrative jurisdictions with respect to Aboriginal child custody cases. In particular, jurisdiction should not be specially conferred on the Family Court in custody cases involving Aboriginal children or children of traditional marriages (para 382).
- There should be no specific recognition of customary adoption (para 386).
- Consideration should be given to amending the Social Security Act 1947 (Cth) to ensure that child endowment and other benefits on account of the care of children are paid as nearly as possible to the person or persons with overall responsibility for the child or children in question without undue emphasis on the location of legal custody (para 390).

1007. ***The Criminal Law and Sentencing***. In Part IV of this Report the following recommendations were made for the recognition of Aboriginal customary laws in the area of the criminal law and sentencing.

*Intent and Criminal Law Defences*

- In the context of the present Reference, there is no special justification for changing existing criminal law 'defences' which contain an objective element (eg provocation, duress, self-defence and excessive self-defence) so as to eliminate the objective test, provided that the courts can take Aboriginal

customary laws into account in determining what the response of a 'reasonable' person would have been in the circumstances (para 426, 429, 431).

- Neither duress, coercion, mistake nor the defence of claim of fight are generally applicable defences which would exonerate Aborigines who commit offences under the influence of their customary laws (para 430, 433, 435). Whether there should be such a direct defence is a separate question.

- No special provision dealing with intoxication as an element in criminal liability is justified in the context of this Reference. However, the fact that a defendant was intoxicated should not' necessarily exclude the application of other provisions recommended in this Part for the recognition of Aboriginal customary laws, in determining criminal liability (para 438).

- Section 7(l)(b) of the Criminal Code 1983 (NT) should be kept under review, to ensure that it is not construed so as to bring about the conviction for murder of persons who lacked any intention to kill or do serious bodily harm at the relevant time (para 439).

- Legislation should provide that Aboriginal customary laws and traditions should be able to be taken into account, so far as they are relevant, in determining whether the defendant had a particular intent or state of mind, and in determining the reasonableness of any act, omission, or belief of the defendant. Evidence to prove these questions should be admissible, a result which would be achieved by the general provisions proposed in this Report for the proof of Aboriginal customary laws (para 441).

*An Aboriginal Customary Law Defence?*

- There is a distinction between a customary law defence applicable generally to offences of whatever kind, and a customary law defence to specific offences which are themselves a form of recognition of Aboriginal customary laws or of Aboriginal community authority. For example if it is sought to recognise land rights based on traditional Aboriginal occupation, it may also be appropriate to allow other persons to use the land provided their use is in accordance with or consistent with those traditions, and a specific customary law defence is one way of achieving this (para 446).

- A customary law defence should not be available in cases of homicide, or of life threatening assault (para 447). Nor should a general customary law defence be available in other cases for other, lesser, offences. Problems of conflicts between the two laws are best dealt with in other ways (para 450).

- A partial customary law defence should be created, similar to diminished responsibility, reducing murder to manslaughter. It should provide that, where the defendant is found to have done the act that caused the death of the victim in the well-founded belief that the customary laws of the Aboriginal community to which the defendant belonged required the act to be done, the defendant should be convicted of manslaughter rather than murder. The onus of proof in establishing these matters should lie on the defendant on the balance of probabilities (para 453).

*Aboriginal Customary Law Offences*

- It is undesirable in principle, as well as impractical, to seek to codify Aboriginal customary laws as a basis for criminal liability (para 461) or to enforce those laws by way of a general mandate to the criminal courts (para 462).

- In particular cases the 'incorporation' of Aboriginal customary laws as the basis for a particular offence may be desirable, especially to protect traditions, rules or sites from outside invasion or violation. Where problems arise, it is necessary to ask three questions:

    - whether the matter can be adequately dealt with by the community under any by-law making powers, and whether any amendment or extension of these powers is needed;

    - whether resort can or should be made to existing provisions under the general legal system;

- whether some additional specific measures of protection are required (para 462, 465)

- Consideration should be given to amending legislation such as the Cemeteries Act (NT) s 21 to allow for burials in accordance with Aboriginal customary laws, particularly in relation to burials on Aboriginal land, but possibly elsewhere also (for example on pastoral land), provided relevant permission's are obtained (para 466).

- Consideration should be given to enacting special measures to protect distinctive traditional designs and artwork (para 470).

*Procedural Alternatives*

- Attention should be given by prosecuting authorities to the appropriateness of declining to proceed in certain cases involving customary laws (para 475). But the use of prosecution discretions is not a principal way in which Aboriginal customary laws should be recognised in the criminal justice system (para 478).

- Prosecutorial discretions may be relevant in those cases where Aboriginal customary laws, without necessarily justifying or excusing criminal conduct, are a significant mitigating factor, and where the Aboriginal community in question has through its own processes resolved the matter and reconciled those involved. Factors relevant in such cases would include the following:

    - that an offence has been committed against the general law in circumstances where there is no doubt that the offence had a customary law basis;

    - whether the offender was aware he or she was breaking the law;

    - that the matter has been resolved locally in a satisfactory way in accordance with customary law processes;

    - that the victim of the offence does not wish the matter to proceed;

    - that the relevant Aboriginal community's expectations (or the expectations of each community, if there is more than one) are that the matter has been resolved and should not be pursued further;

    - that alternatives to prosecution are available, eg a diversion procedure;

    - that the broader public interest would not be served by engaging in legal proceedings (para 478).

- These factors should be taken into account by police and prosecuting authorities in deciding whether to bring or maintain prosecutions in such cases, and they should be incorporated in prosecution guidelines at State and Territory level (para 478).

- Formal diversion machinery, to divert offenders from the criminal justice system, is of limited relevance in customary law cases (para 488), though it may well be of value in the case of many minor offences (not necessarily involving customary laws) occurring in or involving members of Aboriginal communities (para 489).

- Careful attention should be given, in the design and operation of any diversion or mediation schemes which exist or which may be established, to make those schemes as relevant as possible to Aboriginal offenders.

- Consideration should also be given to a trial diversion scheme specifically involving Aboriginal offenders, in particular, young offenders, if such a scheme is sought by an Aboriginal group or community (para 489).

*Relevance of Aboriginal Customary Laws in Sentencing*

- Although the defendant's (or the victim's) consent to traditional Aboriginal dispute-resolving processes (eg spearing) is relevant in relation to bail, in sentencing and in prosecution policy, the recognition of this aspect of Aboriginal customary laws is not to be achieved through the existing law relating to consensual assault or through changes to that law (para 503).

- The courts do already recognise Aboriginal customary laws in the sentencing of Aboriginal offenders, to a considerable degree. In considering reform, it is helpful to build on the existing experience in this field, where necessary reinforcing or elaborating on it (para 491-7, 504).

- The courts have recognised a distinction, which in the Commission's view is fundamental, between taking Aboriginal customary laws into account in sentencing, on the one hand, and incorporating aspects of Aboriginal customary laws in sentencing orders, on the other (para 504). In applying that distinction, the following propositions have been recognised:

    - A defendant should not be sentenced to a longer term of imprisonment than would otherwise apply, merely to 'protect' the defendant from the application of customary laws including 'traditional punishment' (even if that punishment would or may be unlawful under the general law) (para 505).

    - Similar principles apply to discretions with respect to bail. A court should not prevent a defendant from returning to the defendant's community (with the possibility or even likelihood that the defendant will face some form of traditional punishment) if the defendant applies for bail, and if the other conditions for release are met (para 506).

    - Aboriginal customary laws are a relevant factor in mitigation of sentence, both in cases where customary law processes have already occurred and where they are likely to occur in the future (para 507-8).

    - Aboriginal customary laws may also be relevant in aggravation of penalty, in some cases, but only within the generally applicable sentencing limits (the 'tariff') applicable to the offence (para 509).

    - Within certain limits the views of the local Aboriginal community about the seriousness of the offence, and the offender, are also relevant in sentencing (para 510).

    - But the courts cannot disregard the values and views of the wider Australian community, which may have to be reflected in custodial or other sentences notwithstanding the mitigating force of Aboriginal customary laws or local community opinions (para 511).

    - Nor can the courts incorporate in sentencing orders Aboriginal customary law penalties or sanctions which are contrary to the general law (para 512-13).

    - In some circumstances, where the form of traditional settlement involved would not be illegal (eg community discussion and conciliation, supervision by parents or persons in loco parentis, exclusion from land) a court may incorporate such a proposal into its sentencing order (eg as a condition for conditional release or attached to a bond), provided that this is possible under the principles of the general law governing sentencing. Care is needed to ensure appropriate local consultation in making such orders, and flexibility in their formulation. In particular it is important that anyone into whose care the offender is to be entrusted, is an appropriate person, having regard to any applicable customary laws (eg is in a position of authority over him, and not subject to avoidance relationships), has been consulted and is prepared to undertake the responsibility (para 512).

    - An offender's opportunity to attend a ceremony which is important both to him and his community may be a relevant factor to be taken into account on sentencing, especially where

there is evidence that the ceremony and its associated incorporation within the life of the community may have a rehabilitative effect. However initiation or other ceremonial matters cannot and should not be incorporated in sentencing orders under the general law (para 515).

- The Commission endorses these principles which strike the right balance between the requirement that the courts cannot incorporate or require traditional punishments or other customary law processes to occur as a condition to the release of offenders or for the mitigation of punishment, and the need to take account of traditional Aboriginal dispute-settlement procedures and customary laws (para 516).

- A general legislative endorsement of the practice of taking Aboriginal customary laws into account is appropriate. It should be provided in legislation that, where a person who is or was at a relevant time a member of an Aboriginal community is convicted of an offence, the matters that the court shall have regard to in determining the sentence to be imposed on the person in respect of the offence include, so far as they are relevant, the customary laws of that Aboriginal community, and the customary laws of any other Aboriginal community of which some other person involved in the offence (including a victim of the offence) was a member at a relevant time (para 517).

- In addition it should be provided that, in determining whether to grant bail and in setting the conditions for bail, account shall be taken of the customary laws of any Aboriginal community to which the accused, or a victim of the offence, belonged (para 517).

- A sentencing discretion to take Aboriginal customary laws into account should exist even where a mandatory sentence would otherwise have to be imposed (in particular, in murder cases) (para 522).

*Related Evidentiary and Procedural Questions*

- Existing powers and procedures to call evidence or adduce material relevant to sentencing in Aboriginal customary law cases should be more fully used. These include in particular:

    - the prosecution's power to call evidence and make submissions on sentence (para 526)

    - the use of pre-sentence reports (para 529).

- Defence counsel should not be expected to represent the views of the local Aboriginal community or to make submissions on the relevance of Aboriginal customary laws contrary to the interests of or otherwise than as instructed by the accused (para 527).

- Separate community representation is, in most cases, not appropriate (para 528).

- To reinforce the need for proper information as a basis for sentencing, in cases where Aboriginal customary laws or community opinions are relevant, legislation should specifically provide that, where a member of an Aboriginal community has been convicted of an offence, the court may, on application made by some other member of the community or a member of the victim's community, give leave to the applicant or applicants to make a submission orally or in writing concerning the sentence to be imposed for the offence. The court should be able to give leave on terms (eg as to matters to be dealt with, or not dealt with in the statement) (para 531).

*Other Sentencing Issues*

- There is no reliable evidence of discriminatory sentencing practices in cases involving Aborigines at Supreme Court or District Court level in recent years although more detailed studies, properly controlled for the many variables, are needed (para 533).

- However the situation in some courts of summary jurisdiction (especially those staffed by justices of the peace) is different (para 534). Steps should be taken to ensure that justices of the peace sitting in ordinary courts of summary jurisdiction should no longer have power to imprison offenders, and that

default imprisonment is not used as a device where imprisonment itself is not an available sentencing option (para 534).

- Further attention needs to be given to associated problems of juvenile offending, and petrol-sniffing. However these are largely social problems, beyond the power of the criminal justice system to resolve (para 537).

- Alternative sentencing options for Aboriginal communities need to be developed, taking into account local circumstances and needs, and especially in conjunction with local justice mechanisms presently in existence or established in the future (para 539-41). But extended gaol sentences should not be served in local lock-ups, nor should local longer-term gaols be built in an attempt to deter local offenders (para 536, 641).

1008. ***Evidence and Procedure***. In Part V of this Report, the following recommendations were made for the recognition of Aboriginal customary laws in the area of evidence and procedure.

*Police Investigation and Interrogation*

- To the extent that the general law of police interrogation does not provide equivalent safeguards, there need to be special rules protecting Aboriginal suspects under police interrogation, to help ensure the reliability and voluntariness of confessions or admissions made (para 561-3).

- These rules should apply to all Aborigines whose difficulties of comprehension of their rights under interrogation, and of the meaning of what is said, warrant such protection (para 565). This is to be achieved by focussing on whether the suspect genuinely understood the caution and the questions, and was not merely deferring to authority in the answers given. No separate test based on 'disadvantage' is necessary (para 565).[3784]

- Admissions or confessions obtained in consequence of a contravention of the interrogation rules should not be admissible unless the court is satisfied that, in the circumstances, the suspect:

    - understood the caution (ie, understood that there was no requirement to answer questions and that any answers might be used in evidence);

    - understood the nature of the questions put;

    - did not answer merely out of deference to authority or suggestibility (para 565, 570).

- The interrogation rules should require the presence of a prisoner's friend when a suspect is in custody or is being interrogated in respect of a serious offence. There should be a preference for a prisoner's friend who has been nominated by the local Aboriginal legal aid organisation or who is a barrister or solicitor. If no such person is reasonably available, then a prisoner's friend may be another person chosen by the suspect. The prisoner's friend should not be a police officer, an accomplice in the suspected offence, or a person the police reasonably believe should be prevented from communicating with the suspect (eg with a view to destroying evidence or intimidating a witness) (para 568).

- The interrogation rules should require notification of an Aboriginal legal service in cases where the suspect is in police custody or where the offence in question is a serious one, unless interrogation is necessary without delay to avoid danger to persons or serious damage to property or unless the prisoner's friend present is a lawyer or Aboriginal legal service nominee (para 569).

- The interrogation rules should also apply to admissions given in the course of other investigatory steps (such as re-enactments or identity parades) which require the presence and co-operation of the suspect, but they should not prevent the admission of material evidence (para 571).

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3784 Two members of the Commission (Prof JR Crawford and Prof MR Chesterman) would apply the interrogation rules only to those Aborigines who, having regard to their level of education, fluency in the English language or other relevant characteristics, are specially disadvantaged in relation to the interrogation (para 565).

- Waiver ought not to be a separate aspect of the rules (para 572).

- The basic interrogation rules should be stated in legislation together with the associated admissibility rule (para 573).

*Committal Proceedings*

- No specific change is recommended (para 577), apart from the use of existing procedural powers in particular cases to avoid specific difficulties which may arise (para 578).

*Fitness to Plead*

- Legislation should provide that, in a criminal proceeding against an Aboriginal defendant who appears not to be fluent in English, the court should not accept a plea of guilt unless it is satisfied that the defendant sufficiently understands the effect of the plea, and the nature of the proceedings. If necessary, the court should adjourn the proceedings to allow legal advice or an interpreter to be provided, to assist in explaining the plea and its effect (para 585).

*Aborigines and Juries*

- No special provision excluding jury trial for Aborigines is justified (para 588-9).

- Attention should be given to jury selection procedures (including the preparation of jury-rolls) to help ensure that a multi-racial society is better reflected in the composition of juries. But there should be no specific requirement of Aboriginal representation on juries where Aboriginal defendants are on trial (para 594).

- The court should have power, on application by a party before the jury is empanelled, to make appropriate orders to ensure that a jury of a particular sex is empanelled, where under Aboriginal customary laws evidence to be given in the case can only be given to persons of that sex, the order is necessary to allow the evidence to be given, and having regard to other relevant matters (including other evidence to be given) the court considers the order should be made (para 595).

*Interpreters*

- Existing programs for the training and accreditation of Aboriginal interpreters should be supported and extended. The aim should be to ensure that interpreters are available where needed at all stages of the criminal justice process (ie during police interrogation, as well as in the courts) (para 600).

*Unsworn Statements*

- Legislation should provide that an Aboriginal defendant may give unsworn evidence unless the court finds that the defendant is not disadvantaged in relation to the giving of evidence in the proceeding, having regard to any relevant condition, characteristic or disability ‘of the defendant, and whether for this reason the defendant is likely to be unfairly prejudiced by cross-examination (para 604).[3785]

- This provision should not apply if the defendant is otherwise entitled to make an unsworn statement in the proceeding in question (para 604).

- The statement should be made by the defendant personally, or given by counsel on his or her behalf. Counsel should be able to remind the defendant of any other matter which should be referred to in the statement (para 604).

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3785 Two members of the Commission (Justice MR Wilcox and Professor AE-S Tay) would allow an unsworn statement to be made only where it is affirmatively shown that the Aboriginal defendant is disadvantaged in relation to the giving of evidence in the proceeding (para 604).

- The prosecutor should not be permitted to comment on the defendant's choice to give unsworn evidence,[3786] and any comment made by the judge should not suggest that that choice was made because the defendant believed he or she was guilty, or that unsworn evidence is necessarily less persuasive than sworn evidence (para 605).[3787]

*Dying Declarations*

- In order to resolve any doubts about the law, it should be declared that dying declarations made by Aborigines shall not, by reason of their adherence to traditional beliefs, be held inadmissible on grounds of any lack of belief in a religious sanction or supernatural judgment (para 576).

*Proof of Aboriginal Customary Laws*

- Legislation should provide that evidence given by a person as to a matter of Aboriginal customary laws or traditions is not inadmissible on the grounds that it is hearsay or opinion evidence if the person giving the evidence:

    - has special knowledge or experience of the customary laws of the community in relation to that matter; or

    - would be likely to have such knowledge or experience if such laws existed.

    It should also be stated that such evidence is admissible, notwithstanding that the question of Aboriginal customary law is the issue or a substantial issue in the case (para 642).

*Aboriginal Witnesses: Group Evidence and Authority to Speak*

- Lawyers, judges and administrators should be aware of problems for some Aboriginal people arising because under Aboriginal tradition they lack authority to speak, or to speak alone, on a particular matter (para 645).

- Courts and tribunals should be given express power to allow two or more members of an Aboriginal community to give evidence pertaining to the customary laws of that community together, where this is necessary or desirable (para 648).

*Secrecy, Confidentiality and Aboriginal Customary Laws*

- Legislation should confer specific power to hear evidence in camera, to exclude certain persons (eg members of the opposite sex to the witness) from the court or to take other steps to protect secret information, where this is necessary, on the balance of relevant considerations, in the interests of justice (para 656).

- There should be an express exemption in the Sex Discrimination Act 1984 (Cth) for acts done, and judicial, administrative or other restrictions imposed on the giving of information which relates to the religious, ritual or ceremonial life of Aboriginal communities in accordance with their traditions, as well as for customary law restrictions on entry to land for particular purposes (para 470, 656).

- The courts should have express power, where necessary, to protect confidential communications or records relating to the customary laws of an Aboriginal community. In some circumstances it may be necessary for the court to exclude certain evidence altogether. Before doing so the court should be required to weigh the likelihood of harm to interested persons, to the Aboriginal community concerned, and to any confidential relationship or class of such relationships, against the importance of the evidence, by whom it is called and the nature of the proceeding (para 661).

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3786 One member of the Commission (Justice MR Wilcox) would allow the prosecutor to comment on an election to give unsworn rather than sworn evidence (para 605).

3787 One member of the Commission (Justice MR Wilcox) would only prohibit comment to the effect that unsworn evidence is necessarily less persuasive than sworn evidence of other witnesses (para 608).

- There should be no special class of anthropologist-informant privilege (para 661).

*Privilege against Self-Incrimination*

- The courts should be given power to excuse a witness from answering a question which tends to incriminate the witness under his or her customary laws. This power should be exercised unless the court finds that the desirability of admitting the evidence outweighs the likelihood of harm to the witness, to some other member of the Aboriginal community concerned, or to the Aboriginal community itself (para 665).

*Assessors, Court Experts and the Proof of Aboriginal Customary Laws*

- No special provision should be made for assessors, or court experts, to assist in the proof of Aboriginal customary laws (para 672-5).

*Pre-sentence Reports*

- Legislation should expressly confer power on the court to adjourn to enable a pre-sentence report to be obtained from a person or persons with special expertise or experience, in any case where considerations of Aboriginal customary laws or traditions are relevant in sentencing (para 676).

1009. ***Local Justice Mechanisms for Aboriginal Communities***. The conclusions and recommendations contained in Part VI, relating to the establishment or continuation of local justice mechanisms in Aboriginal communities, are, for the reasons given in that Part, less precise and definite in a number of respects than the conclusions and recommendations in other parts of this Report. Those conclusions and recommendations can be summarised as follows:

*General Conclusions*

- Problems of 'law and order' on Aboriginal communities, and of local involvement in the criminal justice system, involve issues of local self-government or autonomy which extend beyond the recognition of Aboriginal customary laws, or increasing Aboriginal participation in local courts or police forces (para 689-90, 809-10). Schemes such as the Northern Territory Community Government Scheme are appropriate (para 760), although if Aboriginal communities are to exercise broader responsibilities, adequate support and enforcement powers are necessary (para 762).

- In many Aboriginal communities, unofficial methods of dispute resolution operate alongside the' general legal system. Local resolution of disputes in these kinds of ways should be encouraged and supported (para 720).

*Aboriginal Courts or Similar Bodies*

- There is only limited scope or demand for new official local justice mechanisms in Aboriginal communities (para 767, 813, 817).

- There should be no general scheme of Aboriginal courts established in Australia (para 767, 813, 817, 819, 838).

- Aboriginal courts or other official bodies may be appropriate in certain cases. If courts or similar bodies are set up it should only be at the instigation of and after careful consideration by members of the Aboriginal community concerned (para 805, 817). In considering such proposals, it is necessary to consider a wide range of alternatives, including special policing arrangements and dry area legislation. Justice mechanisms are only one avenue (para 756).

- In addition there are certain basic requirements for courts or similar official bodies (para 818):

- The local Aboriginal group should have power to draw up local by-laws, including by-laws incorporating or taking into account Aboriginal customs, rules and traditions.

- Appropriate safeguards need to be established to ensure that individual rights are protected, eg by way of appeal.

- The by-laws should, in general, apply to all persons within 'the boundaries of the community.

- If the court is to be run by local people, they should have power within broad limits to determine their own procedure, in accordance with what is 'seen to be procedurally fair by the community at large'.

- The community should have some voice in selecting the persons who will constitute the court, and appropriate training should be available to those selected. In minor matters there need be no automatic right to legal counsel, though the defendant in such cases should have the right to have someone (eg a friend) speak on his behalf.

- The court's powers should include powers of mediation and conciliation. A court which is receptive to the traditions, needs and views of the local people may be able. to resolve some disputes before they escalate, perhaps avoiding more serious criminal charges. The power to order compensation of some kind in such situations is one way of achieving this.

- Such courts will need appropriate support facilities.

- There should be regular reviews of the operation of any such court, undertaken in conjunction with the local community.

- In establishing such courts care should be taken to minimise conflict with or the undercutting of local kinship and authority structures. Special attention needs to be paid to the composition of the court, which may need to be variable depending on the identity of those involved in cases before the court (para 742, 758, 855-6).

- The Queensland Aboriginal courts should not be continued without broad local support (para 746). In addition:

  - the Community Services (Aborigines) Act 1984 (Qld) should be amended to clarify the arrangements for community self-government and to avoid overlap with ordinary local government arrangements (para 743, 746).

  - encouragement should be given to local Aboriginal councils to draft appropriate by-laws (rather than simply adopting a central model) (para 746).

- So far the Aboriginal Communities Act 1979 (WA) has been applied only to more remote communities. That scheme is not a recognition of Aboriginal customary laws or of traditional authority. The scheme may be more successful in less traditional communities. In reviewing the Act, consideration should be given to its extension to urban areas and town camps (para 753, 756).

- It is too early to assess the success of the Northern Territory Justice (Courts) Project. That project should be subject to an independent review in due course (para 764).

- The Yirrkala Scheme should, if it is still sought by the Yirrkala people, be adopted for a sufficient period (at least 3 years) on a trial basis. The Yirrkala people should be given independent advice and appropriate support in establishing the scheme (para 832).

- Consideration should be given, in any State or Territory where a local justice scheme is established, to a legislative provision allowing courts to defer to the operation of the scheme through, for example, adjournment or diversion (para 834).

- There is scope for administrative recognition of Aboriginal customary laws. For this and other reasons greater knowledge and understanding on the part of criminal justice professionals in their dealings with Aborigines is needed (para 835).

*Policing and Aboriginal Communities*

- Perhaps the greatest scope for administrative recognition rests with the police. In particular:
    - There needs to be better communication between police and local Aboriginal communities about policing arrangements for those communities (para 805, 807). Police liaison committees can assist, but they should have broad terms of reference and access to senior police on issues of policy (para 872).
    - There should be greater encouragement for some forms of self-policing, as an adjunct to regular police, including in urban areas (para 862-3, 866).
    - Police training on Aboriginal issues should not be confined to initial or induction courses. The emphasis should be on post-induction and further education courses (especially after officers have had some experience of policing in Aboriginal areas) (para 876-7).
- Police aide schemes should be seen as essentially temporary measures, with the longer term emphasis on self-policing, on increasing the number of Aborigines in regular forces, and on other measures (para 850, 865, 867).
- In particular, police aide schemes should not be introduced without a clear articulation of needs and aims (para 857) and clear local support (para 853). If they are introduced, there should be:
    - some facility for promotion of aides (after any necessary training) into the regular force (para 851, 854, 855).
    - provision for periodic review (para 865).
- Police aides should have adequate police powers and support, and should not be seen as second class police (para 853).
- There should be careful selection of police officers to serve in areas with large Aboriginal populations, including efforts to increase the number of women police officers serving in those areas (para 877).
- Aboriginal legal services should be encouraged and assisted to provide community legal education for Aboriginal communities (para 878).

*Implementation*

- No single approach or solution exists to the 'problems of law and order' in Aboriginal communities (para 838). Consideration should however be given to establishing a body to assist Aboriginal communities, police and government departments in the consideration of proposals, and in their implementation and review. Such a body should have an Australia-wide mandate, but could be a federal agency, a federal-State agency, a private body or preferably an Aboriginal agency linked to the Aboriginal legal services. Its terms of reference should not be limited to Aboriginal courts or justice mechanisms (para 839-41). This issue is discussed further in Chapter 39.
- In other respects, Commonwealth involvement in this area, in particular having regard to constitutional constraints, is necessarily indirect (para 808).

1010. ***Hunting, Fishing and Gathering Rights***. In Part VII of this Report, the following recommendations were made for the recognition of Aboriginal customary laws in relation to hunting, fishing and gathering rights.

*General Recommendations*

- Recognition should reflect the wide variety of legitimate interests such as conservation, effective management of natural resources, pastoral, and other residential interests and commercial interests. These interests mean that no overriding categorical recognition of traditional hunting, fishing and gathering practices is appropriate (para 972).

- Given the need for unitary management of resources and in view of the extensive activity at State and Territory level the Commission does not consider it necessary or appropriate for detailed legislation to be enacted. However a set of general principles should be adopted, with detailed resource management and administrative decisions made at the appropriate levels in consultation with Aboriginal people affected by these decisions (para 973, 978). State and Federal legislation inconsistent with these principles should be amended (para 1003).

- Traditional hunting and fishing should not be limited to consumption for food or sustenance. The broader notion of subsistence (including ceremonial exchange, satisfaction of kin obligations)is to be preferred. Consumption within the local family or clan groups should be regarded as traditional, even though elements of barter or exchange are present. But trade, exchange or sale outside the local community should be treated in the same way as other commercial dealings with the species in question. Relevant legislation or regulations should state this distinction expressly, to avoid misunderstandings or arguments (para 976, 985-7).

- Traditional hunting should not be limited to indigenous species but may include introduced feral animals (para 975).

- In deterring whether an activity is 'traditional', attention should be focussed on the purpose of the activity rather than the method. However the method may be relevant in some. cases (as will other factors such as whether the person was at the time under his customary laws entitled to kill the animal in question) (para 975, 977).

*Priorities*

- The following priorities are justified:

    1. conservation and other identifiable overriding interests;

    2. traditional hunting and fishing;

    3. commercial and recreational hunting and fishing (para 985).

- Conservation principles represent a legitimate limitation on the rights of indigenous people to hunt and fish as do interests of safety, rights of innocent passage, shelter and safety at sea (para 979-983).

- Necessary conservation measures may require restrictions on traditional hunting and fishing interests. While Aborigines should be given control over resources on Aboriginal land, this control should nonetheless be subject to the principal of conservation (para 979-81, 994-9).

- It may be necessary to prohibit or restrict traditional hunting or fishing by limiting the numbers taken, the methods by which or the areas in which they are taken, in the case of rare and threatened species (in particular those threatened with extinction). In this situation it is necessary to determine as far as possible in the circumstances both the status of the species concerned, and the threat to the species posed by traditional hunting and fishing, before long-term decisions are made to restrict traditional hunting and fishing (para 936, 981, 994-9). This requires not only an assessment of Aboriginal hunting and fishing practices but also an assessment of other threats to the species, for example commercial or recreational fishing. If restrictions are placed on traditional hunting and fishing practices, there should be regular monitoring and assessment of the situation in consultation with those affected (para 921, 995).

- As a matter of general principle, Aboriginal traditional hunting and fishing should take priority over non-traditional activities, including commercial and recreational activities, where the traditional activities are carried on for subsistence purposes (para 984, 988). Once this principle is established the precise allocation is a matter for the appropriate licensing and management authorities acting in consultation with Aboriginal and other user groups (para 915, 987-8, 994-5).

- Legislation in Queensland and the Northern Territory allowing for Aboriginal people as a group to take out community licences is preferable to the requirement that such a licence be taken out by a corporation or an individual (para 985).

- Preferential rights to resource harvesting on Aboriginal land for commercial as opposed to community use may well be desirable, since this may provide advantages such as local employment. But this is a distinct question from the recognition of traditional hunting and fishing rights for subsistence and related purposes. Resource harvesting for commercial purposes as such is a matter for the relevant management authorities. The distinction between traditional harvesting for use within the community as distinct from commercial fishing (preferential commercial rights) should be maintained (para 987).

- Recreational hunting and fishing should be treated, at best, no more favourably than traditional activities. The exact place of recreational viz-a-viz commercial fishing will depend on the circumstances, but it is hard to see that any justification exists for special measures for Aborigines who are engaged in recreational hunting and fishing. The Torres Strait Fisheries Act 1984 (Cth), the effect of which is to give private fishing an exemption from regulations applying to traditional fishing, should be amended along the lines proposed in para 1003 and care should be taken to ensure that there is no similar discrimination against traditional fishing, such as previously occurred under the Great Barrier Reef Marine National Park 'A' Zone in relation to the Cairns Cormorant Pass Zoning Plans (para 988).

*Access*

- It is reasonable that Aborigines be accorded access to traditional lands for the purposes of hunting, fishing and gathering, whether these lands are unalienated Crown lands or subject to leasehold or other interests. However where interests in the land are held by persons other than the Crown, it is necessary to take account of those interests, whether by negotiated access provisions or otherwise (para 989).

- The linking of access rights to residents of a particular State or Territory creates difficulties (para 936-8).

- Where hunting and fishing or gathering rights are granted on the basis of traditional affiliation, additional residential requirements are undesirable since they are likely to distort rather than to recognise or reflect Aboriginal perceptions or traditions. Where policies of disbursement or displacement have made such attachment impossible or extremely difficult, then access provisions based on residential or historical nexus are to be preferred (para 990-1).

*Sea Closures*

- There should be provision for areas of the sea adjacent to Aboriginal land to be preserved for traditional fishing. The. recommendations of the Western Australian Aboriginal Land Commissioner in this respect have much to commend them. Such protection should extend to Aboriginal and Torres Strait Islander fishing interests in seas adjacent to Aboriginal reserves in Queensland. The Great Barrier Reef Marine Park Act s 32 (7) should be amended to ensure that traditional fishing interests, and hence the possibility of sea closures and sea protection orders, are specific matters to be taken into account by the Great Barrier Reef Marine Park Authority in preparing its zoning plans. Ultimately there should be consideration of the need to preserve traditional fishing areas of the sea adjacent to trust areas within the Torres Strait Protected Zone (para 992).

- For the purposes of such provisions some traditional association or special link with the sea, primarily involving areas of the sea adjacent to Aboriginal land, is necessary (para 993).

*Consultation and Control*

- At both State and federal level, legislation should be amended to require consultation with Aboriginal people affected where steps are to be taken to restrict traditional hunting and fishing, to ensure that views of those Aborigines affected are taken into account in reaching any decision on the management of resources (para 994-7).

- The Government should satisfy itself that consultations in relation to the Torres Strait and Great Barrier Reef Marine Park regions have been adequate so far. The Department of Aboriginal Affairs should be involved in this process, along with other Departments. Aborigines and Islanders should be fully informed of the legal implications of restrictions on their traditional activities. Adequate resources should be provided to government authorities and to Aboriginal and Islander bodies to ensure that such consultation takes place (para 997).

- As far as possible Aborigines should be represented on bodies such as the Great Barrier Reef Marine Park Authority Consultative Committee, and on bodies advising the Protected Zone Joint Authority. Where necessary the Department of Aboriginal Affairs should also be represented (para 998).

- There is no general formula for Aboriginal control in the management of scarce resources. The responsibility of governments to legislate for conservation of resources does not exclude the role of Aborigines in conservation and management; this is especially so on Aboriginal land. Boards of management should be entrusted with the management of Aboriginal land, including the power to regulate its use. There is no reason why Aboriginal local councils should not therefore be able to make by-laws regulating hunting and fishing on Aboriginal land; though it may be that this power should be limited to by-laws which are more restrictive than those passed by the responsible State or federal Government (para 999-1000).

- There is thus no one model for formal power sharing in relation to the management of national resources. These questions of co-operation and control are properly matters for negotiation between the relevant Aboriginal bodies and Commonwealth or State authorities (para 999).

*Implementation*

- Given the need for unitary management of particular resources, no general Commonwealth legislative action is recommended. However an agreed statement of principles along the lines set out in this Report should be adopted by the Commonwealth and these principles taken up by the Commonwealth with the States and Territories in an attempt to ensure adherence to them.

- Commonwealth and State legislation inconsistent with the principles set out above should be appropriately amended. In particular the Great Barrier Reef Marine Park Authority Act 1975 (Cth) s 32(2) should be amended to require the Authority to consult with Aboriginal people and Torres Strait Islanders, to take account of the implications of its operations on those people, and to require that consideration be given to special zoned areas for traditional fishing in much the same way as zoning for scientific purposes. The Torres Strait Fisheries Act 1984 (Cth) s 39 should also be amended to require appropriate consultation, and to ensure that priority is not inadvertently accorded to non-traditional fishing (para 1003).

# 38. Federal-State Issues

1011. ***Separate Considerations***. As stated in para 220, the approach taken so far in this Report has been to consider whether, and in what ways, Aboriginal customary laws should be recognised, after consulting widely with Aboriginal people, their organisations, and others concerned. The question 'what should be done?' had to be considered first. Only after it has been answered should the second question, 'By which authority should it be done?', be dealt with.[3788] The need to draw a distinction between these two questions is clear. Questions of the recognition of Aboriginal customary laws need to be considered on their own merits, without being confused by consideration of almost equally difficult issues of federal constitutional law and federal-State relations. Hence Parts I-VII of this Report, apart from brief references to constitutional issues in relation to particular recommendations,[3789] have not considered in any detail the scope of the Commonwealth's constitutional powers to make special laws for the people of any race, nor how these powers should be exercised. Nor, again with limited exceptions, has the issue of federal-State relations in the implementation of the Commission's recommendations been considered.[3790] These questions must now be dealt with. This Chapter will discuss, first, the scope of constitutional power to implement the recommendations in this Report, and secondly, the broader implications of Commonwealth legislative involvement in this field, before outlining the Commission's approach.

## Scope and Limits of Constitutional Power

1012. ***The 'Races' Power***. Section 51 of the Constitution provides that the Commonwealth Parliament has power 'to make laws for the peace order and good government of the Commonwealth with respect to' an enumerated list of topics. For present purposes, the most important source of power is the 'races' power (s 51(26)), although the recommendations for the recognition of traditional Aboriginal marriage may also rely on s 51(21), the marriage power. It is also necessary to consider the scope of any other relevant powers, the express or implied prohibitions on Commonwealth power, including the scope of any implication protecting the structure of State courts or authorities, and the express guarantee of freedom of religion (s 116).

1013. ***Scope of the 'Races' Power***.[3791] Section 51(26) of the Constitution gives the Commonwealth Parliament:

> power to make laws for the peace, order, and good government of the Commonwealth with respect to ... the people of any race for whom it is deemed necessary to make special laws.

This power has existed in its present form only since 1967, when there was overwhelming support for a change to the Constitution to delete the words 'other than the Aboriginal race in any State', which specifically excluded 'the Aboriginal race in any State' from its operation.[3792] Since 1967 the Commonwealth Parliament has had concurrent power with the States to make laws with respect to Aborigines, although, as with other Commonwealth powers, the exercise of this power is subject to other limitations within the Constitution.[3793] Only in very recent times has the High Court provided guidance on the scope of s 51(26). This is a reflection of the very limited extent to which the Commonwealth had (until recent years) made use of the power. It is also significant that in the two cases, *Koowarta v Bjelke-Petersen*[3794] and *Commonwealth v Tasmania (the Tasmanian Dam Case)*[3795] which have considered the races power in any detail, the legislation which was the subject of challenge was upheld in reliance on the external

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3788 See para 197-8, 221.
3789 See especially para 595, 656, 808 (all relating to Chapter III of the Constitution).
3790 But see para 197, 366, 373, 566, 806, 1003.
3791 On the scope of s 51(26) see eg RJ Sadler, 'The Federal Parliament's Power to Make Laws "With Respect to ... the People of any Race ..."' (1985) 10 *Syd L Rev* 591; GJ Linden, 'The Corporations and Races Power' (1984) 14 *Fed L Rev* 219, 243-52; D Rose, 'Comment on the Corporations Power and the Races Power' (1984) 14 *Fed L Rev* 253, 255-7; J Terry, 'Damned Wilderness and Special Laws' (1983) 8 *ALB* 2; DF Jackson, 'Federalism in the Future: The Impact of Recent Developments' (1984) 58 *ALJ* 438, 446-7. See also C Howard, *Submission 65* (8 March 1978); KW Ryan, *Submission 101* (27 October 1978); G Sawer, 'The Australian Constitution and the Australian Aborigine' (1966-7) 2 *Fed L Rev* 17.
3792 See para 3.
3793 Senate Standing Committee on Constitutional and Legal Affairs, *Report on Aboriginals and Torres Strait Islanders on Queensland Reserves*, Canberra, AGPS, 1978, 3; Senate Standing Committee on Constitutional and Legal Affairs, *Two Hundred Years Later ...*, Canberra, AGPS, 1983, 79-93. For discussion of the reasons behind the constitutional alteration see Hon H Holt, Commonwealth of Australia, *Parl Debs (H of R)* 1 March 1967, 263.
3794 (1982) 39 ALR 417.
3795 (1983) 46 ALR 625.

affairs power rather than the races power. In Koowarta, Queensland challenged the constitutional validity of the Racial Discrimination Act 1975 (Cth). The Commonwealth, intervening, relied not only on the external affairs power[3796] but also on the races power to support the legislation. The Court, Justice Murphy dissenting, rejected s 51(26) as a source of power for the 1975 Act, on the basis that the Act was not a special law for a particular race, but a general law dealing with discrimination against persons of any race. For example, Chief Justice Gibbs stated:

> a law which applies equally to the people of all races is not a special law for the people of any one race.[3797]

In the *Tasmanian Dam Case* the High Court had to consider whether Commonwealth legislation seeking to prevent the construction of the Gordon-below-Franklin Dam by the Tasmanian Government was valid. The Commonwealth relied primarily on its powers to make laws with respect to external affairs, races and corporations, and members of the Court accordingly considered in detail the scope of each of these powers. The primary basis for the majority decision upholding the legislation was the external affairs power. However the majority also interpreted the races power widely. Justices Mason, Murphy, Brennan and Deane held that s 8 and s 11 of the World Heritage Properties Conservation Act 1983 (Cth) were a valid exercise of the races power.[3798] Chief Justice Gibbs and Justices Wilson and Dawson (dissenting) found the provisions invalid because they did not constitute special laws for the people of the Aboriginal race, but were of their nature general laws.[3799]

1014. ***'Special laws'***. The view of the majority in the *Tasmanian Dam Case* was that provisions based on s 51(26) need not be limited to dealing with special rights, special protection or special duties of a particular race. A law which protected and preserved matters relating to the history, culture or religion of a race, things which had a special significance to the people of the race, would be valid, even if the law was addressed to persons generally. Justice Mason said:

> A law which protects the cultural heritage of the people of the Aboriginal race constitutes a special law for the purpose of para (xxvi) because the protection of that cultural heritage meets a special need of that people ... [S]omething which is of significance to mankind may have a special and deeper significance to a particular people because it forms part of the cultural heritage. Thus an Aboriginal archaeological site which is part of the cultural heritage of people of the Aboriginal race has a special and deeper significance for Aboriginal people than it has for mankind generally ... [T]here is a special .need to protect sites for them [the Aboriginals], a need which differs from, and in one sense transcends the need to protect it for mankind.[3800]

Similarly Justice Deane said:

> A law protecting [Aboriginal sites] is, in one sense, a law for all Australians. It appears to me, however, on any approach to language, that a law whose operation is to protect and preserve sights of universal value which are of particular importance to the Aboriginal people is also a special law for those people.[3801]

1015. *'... With respect to the People of any Race'*. In the *Tasmanian Dam Case*, it was argued that the Act was not a law 'with respect to the people of' the Aboriginal race because it protected relics and artefacts which were primarily of archaeological significance. However the majority regarded the relics and artefacts as part of the cultural heritage of the Aboriginal race, something which was inseparable from a power to legislate for the people of the Aboriginal race. In the words of Justice Mason:

> The cultural heritage of a people is so much of a characteristic or property of the people to whom it belongs that it is inseparably connected with them, so that a legislative power with respect to the people of a race, which confers power to make laws to protect them, necessarily extends to the making of laws protecting their cultural heritage.[3802]

Similarly Justice Brennan said:

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3796 Constitution s 51(29), attracted in this case by the International Convention on the Elimination of All Forms of Racial Discrimination of 1966, which the Racial Discrimination Act 1975 (Cth) implemented. See para 152.

3797 (1982) 39 ALR 417, 429. See also Aickin J (id, 475); Stephen J (id, 447-8); Wilson J (id, 475-6).

3798 Deane J however considered the provisions involved a compulsory acquisition of property and, as there was no provision for 'just terms' (s 51(31)), they were, as drafted, invalid: (1983) 46 ALR 625, 829-33.

3799 Gibbs CJ (id, 677-8); Wilson J (id, 756-7); Dawson J (id, 854-7).

3800 id, 719.

3801 id, 818. Murphy J (id, 736-8) and Brennan J (id, 791-4) agreed. For the dissenting views see n 12. Gibbs CJ's view was particularly narrow: he suggested that s 51(26) applied only where the law conferred special legal rights or imposed duties on the people concerned or on other persons having dealings with such people. id, 677-8.

3802 id, 719.

> The kinds of benefits that laws might properly confer upon people as members of a race are benefits which tend to protect or foster their common intangible heritage or their common sense of identity. Their genetic inheritance is fixed at birth; the historic, religious, spiritual and cultural heritage are acquired and are susceptible to influences for which a law may provide. The advancement of the people of any race in any of these aspects of their group life falls within the power.[3803]

Justice Deane observed that the relationship between Aboriginal people and the land which they occupy lies at the heart of traditional Aboriginal culture.[3804] He continued:

> In my view, a law which protects those — and only those — endangered Aboriginal sites included in the 'cultural heritage' which satisfy the requirement that they are of particular significance to people of the Aboriginal race is not only a law with respect to Aboriginal sites. It is a law of a character which comes within the primary scope of the grant of legislative power to make laws with respect of people of any race for whom it is deemed necessary to make special laws ... A power to legislate 'with respect to' the people of a race includes the power to make laws protecting the cultural and spiritual heritage of those people by protecting property which is of particular significance to that spiritual and cultural heritage.[3805]

1016. *'For Whom it is Deemed Necessary'*. With the exception of Justice Murphy[3806] all members of the Court in Koowarta and the *Tasmanian Dam Case* who discussed the matter were of the view that s 51(26) could be used either for the benefit or to the detriment of members of a race, although Justice Brennan suggested that the principal object of the power was to confer benefits:

> The passing of the Racial Discrimination Act manifested the Parliament's intention that the power would hereafter be used only for the purpose of discriminatorily conferring benefits upon the people of a race for whom it is deemed necessary to make special laws. Where Parliament seeks to confer a discriminatory benefit on the people of the Aboriginal race, para (xxvi) does not place a limitation upon the nature of the benefits which a valid law may confer, and none should be implied.[3807]

Chief Justice Gibbs in the *Tasmanian Dam Case* expressed the generally accepted view that:

> 'for' in para (xxvi) means 'with reference to' rather than 'for the benefit of' — it expresses purpose rather than advantage.[3808]

It appears to be settled that it is for Parliament to deem it necessary to make the law, and that the courts' role is limited to determining whether the law answers the description of a 'special law for the people of any race ...'. This is supported by the High Court's general approach to constitutional interpretation which emphasises that judgments about, the desirability or policy of legislation are a matter for Parliament, and by the word 'deemed' in s 51(26).[3809]

1017. ***'Any Race'***. The question of what constitutes a 'race' was not considered in any detail by the Court in either *Koowarta* or the *Tasmanian Dam Case*. However there is no doubt that the Aboriginal people are a 'race' within the meaning of s 51(26). As Justice Murphy put it in the *Tasmanian Dam Case*:

> Whatever technical meaning 'race' might be given in other contexts, in the Australian Constitution it includes the Aborigines and Torres Strait Islanders and every sub-division of those peoples. To hold otherwise would be to make a mockery of the decision by the people to delete from s 51(26) the words 'other than the aboriginal race in any State' ... which was manifestly done so that Parliament could legislate for the maintenance, protection and advancement of the Aboriginal people.[3810]

Justice Deane expressed the broad and non-technical meaning of the words 'people of any race' which is implicit in the majority's view of the power, in the following way:

> The reference to 'people of any race' includes all that goes to make up the personality and identity of the people of a race: spirit, belief, knowledge, tradition and cultural and spiritual heritage. A power to legislate 'with respect to' a

3803 id, 793.
3804 id, 818.
3805 id, 819-20.
3806 Murphy J's view was that s 51(26) 'authorises any law for the benefit, physical and mental, of the people of the race for whom Parliament deems it necessary to pass special laws'. id, 737.
3807 id, 791.
3808 id, 677.
3809 See for example Gibbs CJ, id, 633.
3810 id, 737.

> people of a race includes the power to make laws protecting the cultural and spiritual heritage of those people by protecting property which is of a particular significance to their spiritual and cultural heritage.[3811]

1018. ***The Content or Subject Matter of Special Laws***. It is not yet clear what, if any, limits there are on the content or subject matter of a law based on the races power. Justice Stephen in *Koowarta's Case* implied that there are limits.[3812] Chief Justice Gibbs stated in *Koowarta* that the Parliament could make laws prohibiting discrimination against Aboriginal people based on race,[3813] and he has expressed the view extrajudicially that the races power would support a bill of rights for the people of a particular race.[3814] The subject matter of the legislation in the *Tasmanian Dam Case*, Aboriginal sites containing relics and artefacts, was such as to attract the 'races' power. The Senate Standing Committee on Constitutional and Legal Affairs in its Report, *Two Hundred Years Later ...,* which considered the feasibility of a compact or 'Makarrata' between the Commonwealth and Aboriginal people, concluded that the power extended to:

> for example, laws dealing with the language and culture of Aboriginal communities; laws for the protection of Aboriginal sacred sites and artefacts; laws recognising and giving effect to Aboriginal law; and laws protecting language rights so as to guarantee the assistance of interpreters to Aboriginal people involved with police, the courts or government departments. All such laws would be special laws for the Aboriginal people.[3815]

Having regard to the breadth of the majority view in the *Tasmanian Dam* case,[3816] this broad view of the power is clearly justified.

1019. *Other Commonwealth Powers*. Although the power to make special laws for people of the Aboriginal race under s 51(26) is the most important legislative power for present purposes, other Commonwealth powers may also be available, and should be briefly mentioned.

- *The Marriage Power (s 51(21))*. In terms of the Commission's recommendations the most important of these is the marriage power. The scope of the Commonwealth's marriage power has been the subject of extensive litigation in recent years, but all of it has related to the *Family Law Act 1975* (Cth) and the scope of the Family Court's jurisdiction with respect to Marriage Act marriage and its consequences. It is not clear whether the recognition of Aboriginal traditional marriages in Australian law, as recommended in Chapters 13 and 14, would be within the scope of the marriage power. It can be argued that the term 'marriage' in s 51(21) of the Constitution is not to be limited to marriage in the sense of permanent monogamous ceremonial marriage. The Commonwealth Parliament can certainly legislate under s 51(21) for the recognition of foreign marriages, which may have none of these characteristics. It seems an excessively refined view of the single word 'marriage' in the Constitution s 51(21) that it has different meanings in relation to foreign, as distinct from local, marriages. It would follow that the term 'marriage' extends to socially legitimised arrangements such as Aboriginal traditional marriages, a view supported by Justice Windeyer in the *Marriage Act Case*.[3817] On the other hand this view has only limited support in the literature.[3818] The drafters of the Constitution probably did not intend to give the Commonwealth legislative power over a vital aspect of Aboriginal social life through s 51(21), while denying it the power to make 'special laws' for Aboriginal people, under s 51(26), at all. But that is hardly relevant to the present legal meaning of the marriage power. If Aboriginal traditional marriages do come within the marriage power, then it would be no objection that the recommended legislation recognises traditional marriage as marriage under the general law for specific purposes only. The extent of recognition must be a matter for the Parliament. An analogy is void marriages, which are presently treated as 'marriages' for certain purposes under the Family Law Act 1975 (Cth), but as void or non-existent for other purposes.[3819] But even if traditional marriages were held not to be within the marriage power, it is clear that legislation recognising such marriages would be valid as a 'special law' within the races power.

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3811 id, 819-820. To similar effect id, 792-3 (Brennan J).
3812 (1982) 39 ALR 417, 447-8.
3813 id. 632.
3814 Sir Harry Gibbs, 'The Constitutional Protection of Human Rights' (1982) 9 *Monash L Rev* 1, 9.
3815 Senate Standing Committee on Constitutional and Legal Affairs, *Two Hundred Years Later ...*, AGPS, Canberra, 1983, 92.
3816 (1983) 46 ALR 625 (Mason, Murphy, Brennan and Deane JJ). For other support for the broader view see Sawer (1966-7) 23-5; KW Ryan, *Submission 101* (27 October 1978).
3817 *Attorney-General for Victoria v Commonwealth* (1961) 107 CLR 529, 577.
3818 cf JH Wade, 'Void and De Facto Marriages' (1981) 9 *Sydney L Rev* 356, 373-6 and works there cited.
3819 Family Law Act 1975 (Cth) s 60, 71.

- *The Territories Power (s 122)*. Under s 122 the commonwealth has a general power to legislate for federal Territories. This power is plenary and is not limited to the subject matters set out in s 51 of the Constitution. Thus the Commonwealth can make laws for the Territories which would normally be within the power of State legislatures.[3820] It can also, as it has done for example in the Northern Territory and on Norfolk Island, create a local legislature with its own legislative powers, although without limiting the Commonwealth's overriding authority. But while the Commonwealth's powers to legislate for a Territory are not limited by subject matter they are limited by certain other provisions in the Constitution.[3821] It is likely that s 116, preventing the Commonwealth from establishing a religion or prohibiting the free exercise of a religion, would apply with respect to a Territory.[3822] But it has been held that the Commonwealth may acquire property in a territory without providing 'just terms' (s 51(31)) as it would be required to do if it acquired property in a State.[3823] Clearly the Commonwealth's powers to pass laws under s 122 are very broad. From a constitutional point of view the proposals contained in this Report could be enacted for the Northern Territory in reliance on that power alone.[3824]

- *Other Powers.* Other powers could be relied on to implement specific proposals in this Report. These include taxation (s 51(2)), and social security (s 51(23)), in relation to the recommendations for the recognition of Aboriginal traditional marriages for the purposes of taxation and social security. The appropriations power (s 81) enables the Commonwealth to spend money `for the purposes of the Commonwealth'. Hence the Commonwealth could provide funding for the interpreters, training programs, or aboriginal community development projects generally.[3825]

1020. ***Constitutional Prohibitions or Guarantees***. for the purposes of the recommendations in this Report the most important constitutional restrictions are those imposed by the separation of judicial power, and its associated guarantees. These would prohibit or substantially restrict the Commonwealth from legislating directly for Aboriginal justice mechanisms in the States, other than mechanisms of a conciliation or mediation mind. The limitations imposed by Chapter III were discussed in detail in Chapter 31.[3826] Local justice mechanisms, if they were established in any State, would have to rely on State legislation for their implementation, although the commonwealth could provide funding for such mechanisms.[3827] The only other relevant guarantee is s 116 of the Constitution, which provides that:

> The Commonwealth shall not make any law for establishing any religion, or for imposing any religious observance, or for prohibiting the free exercise of any religion, and no religious test shall be required as a qualification for any office or public trust under the Commonwealth.

Section 116, and in particular the prohibition on establishment of any religion, has been very restrictively interpreted.[3828] It is most unlikely to present any problems, even if some aspects of Aboriginal customary laws constitute a 'religion' within the meaning of s 116 (as is no doubt the case).[3829]

1021. ***Conclusion***. Accordingly it is clear that, with limited exceptions, the Commonwealth has constitutional power to implement the recommendations in this report under s 51(26) of the Constitution, if necessary supplemented by other powers (s 51(2), s 51(21), s 51(39), s 122). The exceptions derive from the prohibitions or limitations on judicial power in Part III of the Constitution, rather than from any lack of power in s 51. They relate to:

- The Commonwealth's incapacity to establish bodies exercising judicial power in a State other than in accordance with Chapter III. In practice this excludes from Commonwealth legislative control proposals for 'independent' justice mechanisms such as Aboriginal courts or bodies performing

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3820 *Lamshed v Lake* (1958) 99 CLR 132.
3821 RD Lumb & KW Ryan, *The Constitution of the Commonwealth of Australia Annotated*, 3rd edn, Butterworths, Sydney, 1981, 392-3.
3822 PH Lane, *A Manual of Australian Constitutional Law*, 3rd edn, Law Book Co, Sydney, 1984, 435.
3823 *Teori Tau v Commonwealth* (1969) 119 CLR 564.
3824 But see para 1026 for the practice of treating the Northern Territory as a State for most federal-State purposes.
3825 On the scope of s 81 see *Victoria v Commonwealth* (1975) 134 CLR 338. See also Lumb and Ryan (1981) 308-1. The Commonwealth also has the power to make a grant to the States, subject to conditions, pursuant to s 96 of the Constitution.
3826 See para 806.
3827 See n 38.
3828 *Attorney-General (Victoria) and Black v Commonwealth* (1981) 55 ALJR 155.
3829 WEH Stanner, 'Religion, Totemism and Symbolism' (1962) in WEH Stanner, *White Man Got No Dreaming*, Australian National University Press, Canberra, 1979, 106. See also para 37, 99.

equivalent functions, since none of these proposals envisages the appointment of a judge or judicial officer with the tenure required by s 72 of the Constitution.[3830]

- The question whether the Commonwealth can confer powers on or regulate the procedures of State courts exercising State jurisdiction. The better view is that this does not present a problem.[3831]

- The incapacity of the Commonwealth under s 77(iii) of the Constitution to alter the 'structure' of State courts exercising federal jurisdiction. With one possible exception this does not present a problem in relation to the recommendations summarised in Chapter 37.[3832]

## Administrative and Political Constraints of the Federal System

1022. ***Administrative and Political Constraints***. More significant than questions of constitutional power are the administrative and political constraints of the federal system, a matter on which the Australian situation has much in common with that in Canada and the United States. In many areas at present, legislation affecting Aborigines is predominantly State or Territory legislation, and administrative involvement with Aborigines occurs through State or Territory agencies. There are exceptions to this generalisation (especially in the area of funding and employment schemes through the Commonwealth Departments of Aboriginal Affairs and Social Security),[3833] but in many other areas it remains true, and it is especially true of the criminal justice system. The police, the ordinary criminal courts, the prisons, probation and parole systems are all established under State or Territory law and run by State or Territory agencies. The same is true of the child welfare and juvenile justice systems. Many of the civil and criminal consequences of marriage (eg accident compensation, non-compellability) discussed in Chapter 14 are presently matters of State law. Thus very many of the questions considered in earlier Parts of this Report lie within existing fields of legal and administrative activity of the States and Territories. Commonwealth involvement in these areas would undoubtedly raise sensitivities.

1023. ***Service Delivery***. In the field of Aboriginal affairs, federal-State issues do not only concern legal standards or political power: they also raise questions about the most effective ways of delivering services in relation to scattered and diverse Aboriginal communities. In a country as large as Australia it is not obvious that a centralised system of service delivery is the best one, even given that substantial Commonwealth financial involvement is likely to continue. However the present Reference, and the recommendations set out in Chapter 37, are concerned with the principles and standards to be applied by courts and officials dealing with Aborigines in contexts where Aboriginal customary laws are relevant, rather than with questions of financial assistance or the provision of services. The recommendations would not change the identity or structure of the Commonwealth, State or Territory bodies which exercise power in such cases, but would prescribe certain standards to be followed in the exercise of these powers. Moreover care has been taken to ensure that these standards are formulated with sufficient flexibility to take into account variations in the customary laws of different Aboriginal communities and the differing extent to which customary laws and traditions are followed in different parts of Australia.[3834] For these reasons the argument about efficient service delivery has very limited relevance to the question whether legislation implementing the Commission's recommendations should be Commonwealth legislation.

1024. ***Consultation with the States during the Reference***. During the course of work on the Reference the Commission distributed its Research Papers and Discussion Papers to relevant State and Territory Government Departments, and sought to maintain regular contact with Ministers and their Departments and officers. A considerable number of submissions on the Reference came from State and Territory Ministers and officials.[3835] Submissions were received from, and a meeting held with, a National Police Working Party representing State police forces and the Australian Federal Police. The Commission was on several occasions

3830 See para 806, 822.
3831 See para 656, 806.
3832 The possible exception relates to the provision for juries (para 595), which might be thought to allow changes in the 'structure' of State courts. On balance the recommendation has been maintained nonetheless, on the ground that it is sufficiently analogous to existing powers and practices in relation to juries (see para 593) to pass muster in this respect.
3833 Other areas of Commonwealth involvement include the Aboriginal Land Rights (Northern Territory) Act 1976 (Cth), fisheries in the Great Barrier Reef and Torres Strait areas, and the Aboriginal and Torres Strait Islander Heritage (Interim Protection) Act 1983 (Cth).
3834 See para 123-6, 265-6.
3835 See list of submissions in Appendix 2.

invited by various States and the Northern Territory to comment on draft legislation or other proposals affecting Aborigines. The Commission made submissions to the Northern Territory Government during the drafting of the Northern Territory Criminal Code.[3836] The Commissioner-in-Charge of the Reference addressed a meeting of senior child welfare administrators from all States and the Northern Territory about work on Aboriginal child welfare issues in the Reference. Some of the Commission's Research Papers have been catalysts in some States to further research and reconsideration of policies relating to Aborigines. For example, the Commission's Research Paper 15 on Aboriginal hunting, fishing and foraging rights[3837] in part prompted the reactivation of a South Australian Inter-Departmental Working Party to consider proposals for reform of wildlife and Crown land legislation with respect to traditional hunting and fishing rights.[3838]

1025. ***State Concerns***. The Commission's work during the course of the Reference encouraged debate and, in some jurisdictions, the reconsideration of existing or the enactment of new legislation, including legislation at State and Territory levels. Different considerations may arise when the question of Commonwealth legislation is raised. State opposition to the enactment by the Commonwealth of legislation may be based on the view that this would intrude into traditional areas of State administrative and legislative responsibility, even if such legislation were valid as special legislation under s 51(26) of the Constitution.[3839] Opposition may thus be based on arguments of State rights rather than on a proper assessment of the value of the proposals. The merits of the arguments for the recognition of Aboriginal customary laws should not be allowed to be obscured by disagreements about federalism, or about the appropriate machinery to bring about reform.

## Implementation

1026. ***The Options***. Several different approaches could be taken to the implementation of the recommendations in this Report. The ultimate decision on implementation is, of course, not one for the Law Reform Commission. However the Commission has a responsibility to outline the constitutional powers which are available and the federal-State issues which arise, and to state its preferred approach.

- *Commonwealth Legislation to Cover the Field*. As outlined in para 1012-1021, the Commonwealth has extensive powers to make special laws for Aboriginal people. Relying on this power the Commonwealth could enact legislation for the recognition of Aboriginal customary laws and the related matters covered in this Report. This legislation could override or replace any existing State and Territory legislation which dealt with matters covered by the Commission's recommendations. It would be a uniform law applicable in all States and Territories.

- *Supplementary Commonwealth Legislation.* An alternative would be a more limited form of Commonwealth legislation. The legislation would still be based on the Commonwealth's constitutional powers under s 51(26), but would not exclude State and Territory legislation which already complied with or was consistent with the provisions of the Commonwealth legislation. This result could be achieved in a number of ways. The legislation could specifically state that State and Territory legislation would continue to operate alongside the Commonwealth legislation to the extent that the two were consistent. Alternatively, the Commonwealth legislation, or certain parts of it, could be excluded from applying in those States and Territories which had legislation enacting at least equivalent standards.

- *Commonwealth Legislation for the Territories Only*. A more limited approach would be for the Commonwealth to pass legislation for the Australian Capital Territory (and perhaps also the Northern Territory) which would be model legislation which the States might later adopt. The first legislation to recognise Aboriginal land rights in Australia, the Aboriginal Land Rights (Northern Territory) Act 1976 (Cth), followed this approach. While there are many Aborigines living in accordance with their customary laws in the Northern Territory who would benefit from this approach, it has little else to commend it. It precludes Aborigines living in the States from the benefits of the Commonwealth

3836 See para 439, 520.
3837 M Fisher, ACL Research Paper 15, *Aboriginal Customary Law: The Recognition of Traditional Hunting Fishing and Gathering Rights* (May 1984).
3838 See para 918. See also para 359, 365-8 for the impact of ACL RP4 on the debate about Aboriginal child care principles.
3839 cf the opposition to the Criminal Investigation Bill 1981 (Cth): *Seminar on Criminal Investigation Bill (Cth)*, Australian Institute of Criminology, Canberra, 1982, esp Chief Inspector K Glare, Mr T Rippon.

legislation, and it would be unlikely to lead to the desired goal of legislation for the recognition .of Aboriginal customary laws throughout Australia. Moreover the Northern Territory, though constitutionally a federal Territory under s 122, has since the Northern Territory Self Government Act 1978 (Cth) been treated for many purposes of federal-State relations as if it were a State.[3840] There is little to be said for drawing a distinction between the Northern Territory and the States, with respect to laws the Commonwealth has equal power to make under s 51 (26) and s 122.

- *Co-operative Federalism*. Another alternative is for the States and the Commonwealth to come to an agreement on the action that should be taken with respect to the matters dealt with in this Report. This might lead to legislation having Australia-wide coverage by way of a co-operative scheme, similar to that operating for the national regulation of companies and securities.[3841] The latter scheme involves the Commonwealth exercising its power to pass relevant legislation for the Australian Capital Territory, with each of the States passing identical legislation. In this way uniform national legislation is achieved. Setting up such schemes is however a problem. All the States and the Commonwealth have to agree on the approach to be taken and on the legislation to put it into effect.[3842] To be fully effective all States must participate and uniformity is lost as soon as the Commonwealth or any one State changes its legislation, as it is free to do, from the agreed form.

- *Commonwealth Legislation under Other Powers than s 51(26).* A fifth option is for Commonwealth legislation to be passed only in those specific areas within Commonwealth legislative power apart from s 51(26) (eg social security and, perhaps, traditional marriage), but for the Commonwealth to encourage the States and the Northern Territory to implement the recommendations so far as they concern all the other areas covered in this Report. In the Commission's view it is an inadequate response to the Terms of Reference. The likely result is that in these areas nothing, or nothing much, would be done.

1027. ***Cost Implications of Different Options***. Some additional costs will be incurred by the Commonwealth, the States and the Territories if the Commission's recommendations for the recognition of Aboriginal customary laws are implemented, whether this were to be done by Commonwealth legislation or by the States and Territories. From the Commonwealth perspective the funding of child welfare services for Aboriginal children, of Aboriginal legal services in relation to compliance with the interrogation rules, and of social security payments arising from the recognition of traditional marriages under the Social Security Act 1947 (Cth) are the most significant areas. Aboriginal child welfare and legal services are already areas of substantial federal financial involvement, and the provisions recommended in these fields, although they may involve some additional costs, can be justified as making the provision of these services more effective, in the interests of the Aboriginal people concerned.[3843] The cost implications for the Social Security Act 1947 (Cth) were discussed in Chapter 16.[3844] As a Departmental Working Group concluded, traditional marriages should be recognised for the purposes of the Act, even though this may increase costs to some degree.[3845] In many cases what would be involved is the reclassification of a benefit which is already paid as a special benefit, as the appropriate pension or other entitlement, so that the increase in costs is not likely to be significant. There will also be certain costs for the States and Territories. Some additional measures of consultation may be necessary under the proposed child placement principles, although in practice, the Commission has been told, such consultation is already occurring.[3846] Many of the recommendations relating to criminal law and evidence and procedure concern matters which arise now under the general law (eg fitness to plead, the exercise of sentencing discretions). The interrogation rules will place a greater workload on the police, although there may also be savings, if the rules are' complied with, through avoiding lengthy arguments about the reliability of confessional evidence. Overall, it is unlikely that legislation for the recognition of Aboriginal customary. laws Would create significant additional costs to the States and

3840 GR Nicholson, 'The Constitutional Status of the Self-Governing Northern Territory' (1985) 59 *ALJ* 698, 702-3.
3841 JR Nosworthy, 'Changes in Law and Procedure on the Corporate Scene' (1981) 55 *ALJ* 533, 535.
3842 The continuing debate over uniform defamation legislation, based on ALRC 11, *Unfair Publication: Defamation and Privacy*, AGPS, Canberra, 1979, is illustrative, as well as disillusioning.
3843 The importance of the work of Aboriginal legal aid organisations, and the need for increased support for it, are affirmed in the Harkins Report: JP Harkins, *Inquiry into Aboriginal Legal Aid*, 3 vols, AGPS, Canberra, 1985.
3844 See para 302-312.
3845 Department of Social Security, *Aboriginal Access to Departmental Programs and Services*, unpublished, Canberra, 1983, para 3.10, 3.17, 8.1.2.
3846 Standing Committee of Social Welfare Administrators, Working Party Report, *Aboriginal Fostering and Adoption, Review of State and Territory Principles, Policies and Practices*, Sydney, October 1983. See also para 359, 365-6.

Territories. The administrative and financial consequences of implementation are likely to be minor, and in any event they Should not stand in the way of implementation of the recommendations for the recognition of Aboriginal customary laws. The overriding consideration, in the Commission's view, is the desirability of enacting the provisions recommended in this Report. Arguments about the administrative and other costs of implementation do not outweigh this. Nor do they support the conclusion that legislation to implement the Report should be enacted by the States and the Northern Territory, rather than the Commonwealth.

1028. ***The Commission's Approach***. Taking into account the result of the 1967 Referendum, the fact that Aborigines. live in all States and Territories, and the special problems Aboriginal people face, the welfare of Aboriginal people in Australia is a national issue and one that should, as far as possible, be dealt with through a coherent national policy. This is particularly so at the level of the basic standards to be applied. The Commonwealth has a clear legislative responsibility, in cases where State or Territory laws do not establish adequate or appropriate rules responding to the special needs of Aboriginal people. This is the case even though it may be more efficient for the implementation of these standards to remain with existing State or Territory officials or bodies. Consistently with this principle, the recognition of Aboriginal customary laws as recommended in this Report should be carried through by means of a federal Act applicable in all States and Territories and relying on the full range of the Commonwealth's constitutional powers. This view was generally supported by Aboriginal people and their organisations, who looked to the Commonwealth to remedy deficiencies in the law and its administration as it applies to Aborigines, through the exercise of the constitutional power granted in 1967.[3847] A federal Act should not, however, preclude the operation of State and Territory laws which are capable of operating concurrently with the federal legislation and are consistent with the approach taken by the Commission. Thus, the Commission favours the second option outlined in paragraph 1029. Several techniques have been adopted, in the draft legislation set out in Appendix 1, to achieve this result.

- *General declaration of intent*. The draft legislation contains a declaration of Parliament's intent that the Act is not to affect the operation of a State or Territory law so far as that law furthers the objects of the Act and is capable of operating concurrently with it. This reduces the operation of s 109 of the Constitution in avoiding indirect or inferred inconsistency with the proposed legislation.

- *Exclusion by regulation*. In the case of the child placement principles recommended in Chapter 16, the Governor-General is given the power to exclude the operation of the provisions implementing the principles in relation to a State or Territory where the law of that State or Territory contains provisions to substantially the same effect as the child placement principles.

- *Residual provisions*. A number of the proposed provisions will apply only where the relevant State or Territory law does not make equivalent provision. This is the case, in the legislation set out in Appendix 1, with legitimation through traditional marriage, with the partial customary law defence to murder, with the sentencing discretion in murder cases and with the right to give unsworn evidence. Each of these will only apply if State or Territory law does not achieve the same result.

- *Additional powers*. A number of provisions confer powers upon courts or tribunals in terms which clearly do not affect, or (in cases where there may be doubt) are expressed not to affect other powers of the court or tribunal. These powers are thus supplementary, and do not supplant existing powers under State or Territory law. This is the case, in the legislation set out in Appendix 1, with the provisions relating to comprehension of a guilty plea, submissions on sentence, group evidence, confidential communications, and confessing a breach of customary laws.

The draft legislation, in the Commission's view, strikes the right balance between minimum interference in matters otherwise governed by State (or Northern Territory) law, on the one hand, and making adequate provisions for the recognition of Aboriginal customary laws, without regard to State or Territory boundaries, on the other hand.

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3847 eg Secretariat for National Aboriginal and Islander Child Care, *First Interim Report on the Aboriginal Fostering and Adoption Principles and its Implementation in the States of Australia*, Fitzroy, Victoria, 1985; A King & B King, *Transcript of Public Hearings* Mt Isa (23 April 1981) 1634, J Morgan, *Transcript* Cairns (5 May 1981) 2194-5.

1029. ***The Scope of Commonwealth Legislation***. Not all of the Commission's recommendations are included in the draft legislation set out in Appendix 1. The principal areas covered in the legislation are:

- the recognition of Aboriginal traditional marriages.(cl 10-13, 18, 23)
- legitimation of children of traditional marriages (cl 14-15)
- an Aboriginal child placement principle (cl 16, Schedule)
- traditional distribution of property (cl 17) and its relationship to family provision (cl 18)
- taking Aboriginal customary laws into account for the purposes of the criminal law, in particular:
    - in determining intention and reasonableness (cl 19)
    - in granting bail (cl 20)
    - by way of a partial defence reducing murder to manslaughter (cl 22)
    - in sentencing (cl 24)
- aspects of the laws of evidence and procedure, in relation to the recognition and proof of Aboriginal customary laws, and in particular:
    - determination of fitness to plead (cl 21)
    - the interrogation of Aboriginal suspects (cl 29)
    - confidential communications about customary laws (cl 30)
    - Aboriginal dying declarations (cl 31)
    - confessing breach of customary laws (cl 32)
    - the composition of juries (cl 33)
    - the right to make an unsworn statement (cl 34)
    - the proof of Aboriginal customary laws (cl 26, 27, 28).

On the other hand general legislation has not been recommended for:

- new Aboriginal community justice mechanisms
- the recognition of traditional hunting, and fishing and gathering rights.

In relation to community justice mechanisms a range of options is put forward for consideration by Aborigines and their organisations, and by State and Territory legislators. No one model is appropriate for all of Australia, and the Commonwealth's powers in this area are limited.[3848] In relation to hunting and fishing it is the orderly management of the resource that is important, and special laws dealing with one aspect of resource use (for example traditional hunting) in isolation from either laws for the management of the resource in question are accordingly undesirable. Instead certain guiding principles are suggested which should form the basis of State and Territory legislation,[3849] and amendments are proposed to various Commonwealth Acts in respect of resources which the Commonwealth manages or controls, which reflect these principles.

3848 See para 806-8, 817-19, 838.
3849 See para 970-3, 1001-3.

# 39. Implementation and the Future

## Consultation and Implementation

1030. ***Aboriginal Involvement in Implementing the Report***. The constitutional and administrative issues discussed in Chapter 38 are important. But more important is the point that the Commission's recommendations relate to matters that are the province of Aboriginal people themselves. The Commission in the course of the Reference consulted widely with Aboriginal people and organisations about the issues involved in the Reference.[3850] As far as possible, it sought the views and reactions of Aboriginal people to proposals in its Research and Discussion Papers. These views and reactions are set out in this Report, as is the Commission's assessment of its consultation process.[3851] The Commission found general support for the recognition of Aboriginal customary laws among the Aboriginal people with whom it consulted. But the Commission does not claim to speak on behalf of Aboriginal people. The proposals summarised in Chapter 37 are presented as the Commission's views as to what appears fair and workable at this time. These proposals are framed from the point of view of the general legal system, with the aim of achieving justice in cases where Aboriginal customary laws and traditions are relevant. Achieving this aim requires continuing consultation by Government with Aboriginal people and appropriate Aboriginal organisations. The importance of this continuing consultation should not be underestimated: there is a need to ensure that the proposals in this Report, when they are implemented, enjoy the broad support of the Aboriginal people. As Dr Bell has pointed out:

> Within Aboriginal organisations ... consultative programs have been developed which suit both the organisations and their constituents. It is possible to lock into these channels of communication to inform Aboriginal people of the proposals for recognition. Implementation pro grams should similarly use these channels.[3852]

Indeed a number of the Commission's proposals provide specifically for the involvement of relevant Aboriginal agencies (eg Aboriginal child care agencies in respect of the child placement principle and Aboriginal legal services in relation to many of the proposals in the area of the criminal law and sentencing, especially the interrogation rules).[3853]

1031. ***The Position of Torres Strait Islanders***. As was pointed out in para 96, Torres Strait Islanders are recognised as a separate group. Although their legal situation has been touched on in a number of different areas in this Report,[3854] they were not specifically included in the Terms of Reference. This exclusion may be justified on the basis of differences in the customary laws and traditions of Aborigines and Torres Strait Islanders. But the Commission's proposals do not seek to specify or codify those customary laws and traditions, but rather to respond to them in flexible and appropriate ways Generally speaking, the proposals are as capable of applying to Torres Strait Islanders as to Aborigines.[3855] Moreover it appears that many of the difficulties that Aborigines experience with the legal system and that are dealt with in this Report are also experienced by Torres Strait Islanders. Together these people represent the indigenous people of Australia, and they should as far as possible be dealt with 'equally in the proposed legislation. For these reasons it is the Commission's view that, while further inquiry may be needed into aspects of Torres Strait Islander customary laws, the recommendations in this Report should also be applied to Torres Strait Islanders, subject to consultation with them. The processes of consultation and involvement in the implementation of the Commission's proposals, outlined in para 1030, should accordingly include Torres Strait Islander people and their organisations.

1032. ***The Need for Continuing Review***. In the Commission's view the proposals in this Report are suitable for immediate implementation. But the changes that are occurring in Aboriginal communities, and also in Australian society and the legal system generally, require that legislation implementing the recommendations should be kept under review to ensure that it continues to meet the needs of Aboriginal people. For the

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3850 See para 8-15 for details of these consultations.

3851 See para 20, 217.

3852 D Bell, 'Questions of Implementation and Review' in Australian Law Reform Commission — Australian Institute of Aboriginal Studies, *Report of a Working Seminar on the Aboriginal Customary Law Reference*, Sydney, 1983, 89.

3853 See para 373-6, 527-30, 569, 676.

3854 See eg para 383 (customary adoption), 723-40 (Queensland Aboriginal and Islander courts), 890, 901, 943-7, 957-9 (seabed and fisheries rights).

3855 It is not clear whether there remain any traditional marriages among Torres Strait Islanders, but this will simply mean that the provision for recognition of traditional marriage will not need to be relied on.

reasons given in para 219, the Commission does not support a 'sunset clause' in the legislation. But continuing review should take place, to enable changes to occur. These need not involve modifications to existing provisions. New problems may arise where Aboriginal customary laws and traditions require recognition. Thus this Report and the implementation of its recommendations should not be regarded as a final resolution of the question of recognising Aboriginal customary laws in Australian law. As one commentator has said, in a slightly different context:

> ... it is fundamentally inappropriate to think in terms of 'settling' Aboriginal rights or claims. What we need is not a final accounting, like a proceeding in bankruptcy, but a process of political empowerment giving Aboriginal communities some time and security to establish for themselves who they are, what they want to achieve, and what kind of relationship they feel they can have with Australia.[3856]

1033. ***Limits on the Scope of the Report***. The Terms of Reference limit the Commission's inquiry to the recognition of Aboriginal customary laws and related matters. Although a broad view has been taken of Aboriginal customary laws and what constitutes 'recognition', many issues were raised during the course of the Reference which were beyond the scope of the inquiry, but are important to Aboriginal people and require further investigation. These include:

- *Aboriginal Criminology*. Only a small percentage of the offences committed by Aborigines are directly attributable to Aboriginal customary laws. The implementation of the recommendations in this Report will not solve all the problems for Aborigines coming into contact with the criminal justice system. Solutions are more likely to be found in reforms of the criminal law generally and in social and economic improvements. But there are too few detailed studies of cause and effect in this area, whether in terms of offending rates, the impact of imprisonment, or the prospects of different measures of rehabilitation. Insufficient work has been done on Aboriginal perceptions of imprisonment, or on how alternative sentencing measures work in Aboriginal communities.[3857] This makes the reform of the criminal justice system as it affects Aboriginal people, and monitoring the effectiveness or otherwise of any such reforms, much more difficult. A primary need is for a national collection of law and justice statistics which specifically identify Aboriginal offenders.[3858] Only in this way can an authoritative picture be developed of the type of offences committed by Aborigines and how they are dealt with by the courts. It might also enable further research into offences committed and more insight to be obtained into the reasons for them.

- *Alcohol and Aboriginal Offending.* Most offences committed by Aborigines involve alcohol or are alcohol-related. Aspects of the relationship between alcohol, offences and customary laws have been referred to in this Report. Further work needs to be done, by and in consultation with Aboriginal people, on the nature of Aboriginal drinking,[3859] on the effectiveness of existing legislative provisions, and on developing other approaches to the problem.

- *Petrol Sniffing among Aboriginal Juveniles*. As with alcohol, petrol sniffing is a cause of great concern in many Aboriginal communities. Petrol sniffing is not an offence but it often leads to other offences being committed, and has a significantly detrimental effect on health, the full scope of which has not been determined.[3860] It is an urgent problem, calling for research and action — though not necessarily for the imposition of new legal sanctions.[3861]

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3856 R Barsh, 'Indigenous Policy in Australia and North America', unpublished paper, December 1983, 12. See para 19-20.

3857 cf para 533-4, 538.

3858 This view was strongly endorsed in the Harkins Report: JP Harkins, *Inquiry into Aboriginal Legal Aid*, 2 vols, AGPS Canberra, 1985, Vol 1, 14. See also House of Representatives Standing Committee on Aboriginal Affairs, *Aboriginal Legal Aid*, AGPS, Canberra, 1980, 19-20; B Swanton (ed) A*borigines and Criminal Justice*, Australian Institute of Criminology, Canberra, 1984, 5.

3859 B Healey, T Turpin & M Hamilton, 'Aboriginal Drinking: A Case Study in Inequality and Disadvantage' (1985) 20 *Aust J Soc Issues* 191; L Baird, 'Aboriginals and Alcohol' (1985) 9 *Aboriginal Health Worker* 27; R O'Connor, 'Alcohol and Contingent Drunkenness in Central Australia' (1984) 19 *Aust J Soc Issues* 173; C Fua & L Lumsden, 'Aboriginal Alcohol Abuse and Crime in Queensland' in B Swanton (ed) *Aborigines and Criminal Justice*, Australian Institute of Criminology, Canberra, 1984, 6; J McCorquodale, 'Alcohol and Anomie: The Nature of Aboriginal Crime', id, 17. See also other references in para 436.

3860 See South Australian Aboriginal Customary Law Committee (Chairman: Judge JM Lewis) *Children and Authority in the North West*, Adelaide, 1984; J Downing, 'Treat the Causes not the Symptoms' (1985) 9 *Aboriginal Health Worker* 38; B Webster, 'Petrol Sniffing and Pregnancy' (1985) 9 *Aboriginal Health Worker* 46; T Nichols, 'Petrol Sniffing — now on TV' (1985) 9 A*boriginal Health Worker* 44, and esp M Brady, *Children without Ears. Petrol Sniffing in Australia*, Drug and Alcohol Services Council, Parkside, 1985.

3861 id, 30-1, 39-40.

- *Social Impact of Legal and Other Changes.* Where special rules or institutions are established by governments in Aboriginal communities, or general rules or institutions are changed in ways which may have significant impacts on them, studies need to be carried out in consultation with those communities about the effects of these changes.[3862] For example, properly founded assessments of how Aboriginal court systems affect traditional authority structures and the significance of relationships to kin and land in Aboriginal offending patterns are lacking.[3863] Anthropologists themselves acknowledge the need for greater knowledge about the ways in which legal practice is 'embedded within the social formation of different communities'.[3864]

1034. ***A New Agency***? Obviously there is an important role for existing bodies with expertise in these various fields. The Australian Institute of Criminology needs to be involved in a more detailed analysis of existing information, including more detailed studies of particular geographical areas and offences. The Australian Institute of Aboriginal Studies has an important role in sponsoring research and as a recorder and custodian of material. But there seems to be a broader range of needs, which are presently met, if at all, only in a decentralised and diffuse way. The specific requirements for consulting effectively with Aboriginal people and involving them in the implementation and review of proposals in this Report, discussed in para 1030-2, and the more general requirements for additional work to be done and measures to be taken in areas such as those listed in para 1033, together raise the question whether a new agency may not be necessary. Such an agency, under Aboriginal control, could be an intermediary between Australian governments and Aboriginal people in relation to legal and social issues. It could assist in tasks of education and training in these fields, and in the preparation and distribution of information (including information in Aboriginal, languages) to Aboriginal communities about available programs or proposals which may affect them. In these and in other ways it could assist in the important and difficult task of consultation with Aboriginal communities on such programs and proposals, and in collating and relaying the responses and demands of Aboriginal people. Of course, some of these functions are already performed by Aboriginal bodies in certain areas of Australia,[3865] and proposals for national organisations with at least some of these functions continue to be made.[3866] In Chapter 31 some of the possibilities for an agency to assist in the implementation of local justice mechanisms in Aboriginal communities were outlined.[3867] However despite the various needs, and in the absence so far of Aboriginal demands for such an agency, the Commission recommends that there be no official agency established to deal with these matters. In order to explain this conclusion, it is necessary to place the matters dealt with in this Report in a broader perspective.

## The Report in Context

1035. ***Balancing Considerations***. Undeniably the questions discussed in this Report are not ones on which there is likely to be a consensus. Not only have widely divergent views been expressed, but there are divergent principles and requirements to be reconciled in making particular proposals:

> One cannot but be conscious of the diversity of the views that have been expressed about the identification, extent and resolution of the problems involved in the mitigation of the effects which almost two centuries of alien settlement have had on the lives and culture of the Australian Aboriginals. Even among men and women of goodwill there is no obvious consensus about ultimate objectives. At most, there is a degree of consensus about some abstract generalised propositions: that, within limits, the Aboriginals are entitled to justice in respect of their homelands; that, within limits, those Aboriginals who wish to be assimilated within the ordinary community should be assisted in their pursuit of that wish; that, within limits, those Aboriginals who desire separately to pursue and develop their traditional culture and lifestyle upon their ancestral homelands should be encouraged, assisted and protected in that pursuit and development. It is in the identification and resolution of the problems involved in determining 'the limits' that consensus breaks down and that the greatest difficulties lie. The cause of the Aboriginal peoples will not be advanced if those difficulties are ignored. To the contrary, the difficulties will only. be exacerbated.[3868]

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3862 See eg Australian Institute of Aboriginal Studies, *Aborigines and Uranium, Consolidated Report to the Minister for Aboriginal Affairs on the Social Impact of Uranium Mining on the Aborigines of the Northern Territory*, AGPS, Canberra, 1984.

3863 For the review of the WA Aboriginal courts see para 757-8.

3864 J von Sturmer, *Submission 403* (February/March 1984) 5. cf P Sutton, *Submission 412* (27 April 1984) 1.

3865 eg the Institute for Aboriginal Development in Alice Springs: see pare 599.

3866 Proposals for a national Aboriginal and Islander legal services organisation are outlined in para 842. Work is also being done on another national Aboriginal and Islander consultative body to replace the now defunct National Aboriginal Conference. See L O'Donoghue, *Proposal for an Aboriginal and Islander Consultative Organisation*, Commonwealth Government Printer, Canberra, 1985.

3867 See para 838-43.

3868 *Gerhardy v Brown* (1985) 57 ALR 472, 534 (Deane J).

Inevitably the Commission has had to confront these difficulties, and to make its own assessment. In doing so, certain basic criteria have been adopted. Proposals for the recognition of Aboriginal customary laws should:

- be flexible enough to cope with change;
- interfere as little as possible in the way Aborigines choose to live their lives;
- allow maximum Aboriginal control over their customary laws;
- allow for the fact that the Commission, and non-Aborigines generally, are dealing in this area with matters over which they have a limited knowledge and understanding;
- maintain basic rights, including basic individual rights, while avoiding, as far as possible, ethnocentric judgments about Aboriginal cultures and traditions.

Adherence to these principles supports, for example:

- the rejection of codification and direct enforcement of customary laws as principal forms of recognition;
- a functional approach to the recognition of marriage;
- the rejection of a system of Aboriginal courts, while leaving open the possibility of establishing or retaining such courts in communities where they have general support;
- rejection of the incorporation of Aboriginal customary laws into sentencing orders;
- proposals to protect secrecy.

But there are other elements involved in reaching conclusions, including the matters listed in the Terms of Reference. The Commission has sought to avoid 'reinforcing pre-existing stereotypes and myths or creating new ones,[3869] and also to avoid ethnocentric judgments about Aboriginal customary laws, but it is not possible to avoid making judgments, even at the risk of a degree of ethnocentricity. To postulate, as the Terms of Reference do, that Aboriginal people have the right to maintain their cultural identity and to practise their customary laws is to assume that this right, and the limits on it, are externally determined, and is not a recognition so much of cultural autonomy as of a cultural subordination. Perhaps elements of ethnocentricity could only be avoided if recognition of Aboriginal customary laws was part of wider negotiations for autonomy conducted between Aboriginal people and government. Furthermore, the very question whether the general legal system does or does not recognise Aboriginal customary laws in a given context is likely to have some impact upon those laws. The impact may be no less real for being indirect. For example, the exercise of sentencing discretions can affect the nature and extent of 'traditional punishments'.[3870] What may appear an appropriate solution in one area may bring about unintended results in other areas. The Commission has as far as possible refrained from making recommendations that would have this effect. But conflicts between rules may be practically unavoidable. For example, the recognition of traditional marriage for the purposes of property distribution on death may conflict with other Aboriginal traditions, practices and perceptions (eg the idea that a wife is, compared with her husband's family, a 'stranger' and therefore less entitled). Where such conflicts occur, the Commission has proceeded on the basis that Aboriginal people should have access to benefits or rights under the general law, should they wish to avail themselves of them.[3871] But that premise itself involves a certain preference for individual freedom as opposed to the traditions of a group. As this example demonstrates; the translation of concepts and values between cultures is necessarily imprecise and difficult. As one submission put it:

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3869 J von Sturmer, *Submission 403* (February/March 1984).

3870 For an example of the balancing that is done by Aboriginal people in this context, see DB Rose, *Dingo makes us Human: Being In Purpose in Australian Aboriginal Culture*. PhD Thesis, Bryn Mawr College, Bryn Mawr, 1984. See para 508.

3871 See para 270.

> The men to whom I spoke found it very difficult to correlate particular aspects of their laws to the human 'European' Law, for the reason ... that their law is an extremely complex whole, and it is not possible to extract one piece without affecting the rest of the structure.[3872]

These difficulties are increased by continuing lack of knowledge of the ways in which Aboriginal societies are responding to the general legal system, and to a range of other factors, material and ideological, and by a persistent tendency on the part of non-Aboriginal Australians to assume that Aboriginal customary laws and traditions are now not merely changed but disappearing, transitory. There is an associated assumption that equality inevitably involves, sooner or later, an assimilation of lifestyles and values, and that Aborigines themselves generally want, or are prepared to accept, this state of affairs. Profound observers disagree:

> Various European things — our authority, our customs, our ideas and goods — are data, facts of life which the Aborigines take into account in working out their altered system. But I have seen little sign of its going much beyond that. Those Aborigines I know seem to be still fundamentally in struggle with us. The struggle is for a different set of things, differently arranged from those which most European interests want them to receive. Neither side has clearly grasped what the other seeks. All this issues in a dusty encounter to which nothing yet is particularly clear.[3873]

1036. ***A Change in Focus***? Issues of the relationship between Aboriginal people and the wider Australian community fall into a number of different categories. One such category involves the provision or delivery of government services of various kinds. Some of these (eg education, social security) may be of general application, although the special needs and characteristics of Aboriginal communities may require modification or adjustment in the way the service is delivered. A second category involves very basic questions of the position of Aboriginal people within the Australian community and society, including questions of the extent to which Aboriginal communities are entitled to determine their own future through the exercise of local autonomy or local self-government. So far, Aboriginal policy has usually been regarded not as raising issues of local autonomy or self government so much as involving programs for Aboriginal advancement, attempts at resolving problems of Aboriginal welfare, and the delivery of services to Aboriginal people. To question the adequacy of a 'service delivery' approach is not to deny the need for services, or, for that matter, the need for the reforms recommended in this Report. But it is necessary to treat questions of self-government and autonomy as separate and distinct matters, for negotiation between governments and Aboriginal people. Claims to autonomy or self-government are starting to be articulated by indigenous groups in international forums, and Australian Aboriginal groups have been active in this process.[3874] In Canada that change of focus, from services to self-government, has to a considerable extent been made. Developments in Canada include the following:

- *Self-government*. A Parliamentary Committee which reported in 1983 on *Indian Self-Government* recommended a significant change in the relationship between the Crown and the Indian people. It proposed that Indians be regarded as nations within Canada with considerable control, under the Constitution, of matters within their reserve borders, as well as direct funding to Indian First Nation Governments who would be free to make their own policies and set their own priorities.[3875] The Committee also recommended that the right of Indian people to self-government should be specifically stated and entrenched in the Constitution of Canada.[3876] Since the completion of the Report, an Indian Self-government Bill (Bill C52 of 1984) was introduced into the Parliament for discussion purposes; after discussion and criticism, a revised Bill has now been circulated for discussion.[3877]

- *Constitutional initiatives*. As part of the process of patriating the Canadian Constitution, a new Constitution Act 198*2* came into effect. Section 35 of the Constitution, as amended, provides:

  > (1) The existing Aboriginal and treaty rights of the Aboriginal peoples of Canada are hereby recognised and affirmed.
  >
  > (2) In this Act, 'Aboriginal peoples of Canada' includes the Indian, Inuit and Metis peoples of Canada.

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3872 Rev J Whitbourn, *Submission 269* (5 May 1981) (reporting discussions with the older Warlbiri and Alyawarra men at Warrabri (now Ali Curung)).

3873 WEH Stanner, 'Continuity and Change' (1958) in WEH Stanner, *White Man Got No Dreaming*, ANU Press, Canberra, 1979, 43.

3874 See T Simpson, 'UN Action on Aboriginal Rights' (1985) 16 *ALB* 11; L Barber & CM O'Connor, 'The 1984 Sub-Commission on Prevention of Discrimination and Protection of Minorities' (1985) 79 *AJIL* 168, 172.

3875 House of Commons, Special Committee on Indian Self-Government (Chairman: K Penner) *Report*. Ottawa, 1983.

3876 id, 141. See B Morse, 'Canadian Developments' (1985) 12 *ALB* 8, 8-9.

3877 id, 9. Individual native groups are also developing plans for self-government at Territorial level: see eg Nunavut Constitutional Forum, *Building Nunavut*, Inuvik, 1983.

> (3) For greater certainty, in subsection(1) 'Treaty Rights' includes rights that now exist by way of land claims, agreements, or may be so acquired.
>
> (4) Notwithstanding any other provision of this Act, the Aboriginal and treaty rights referred to in subsection (1) are guaranteed equally to male and female persons.

Section 37 of the Constitution requires a series of First Ministers Conferences, consisting of Aboriginal representatives, Provincial Premiers, the Prime Minister and the leaders of the two Territories, to discuss and seek to define Aboriginal and treaty rights. These meetings are continuing.

- ***Land claims***. In Canada as in Australia a primary claim made by indigenous people relates to land, but negotiations there have occurred as part of comprehensive claims settlements with elements extending well beyond land rights. For example the COPE (Committee of Original People's Entitlement) Settlement of the Claims of the Inuit people of the MacKenzie Delta area of the Western Arctic in Northern Canada involved the extinguishment of Aboriginal title over the traditional lands (approximately 435 000 square kilometres) of a group of Inuvialuit people in return for a much smaller but defined area, as well as specified sums of money for particular purposes. Provisions of the agreement cover surface and subsurface rights, ownership of certain waters, hunting and fishing rights and participation in wildlife management, future land 'use planning and environment decisions. Major negotiations have also taken place with the Council of Yukon Indians, the Yukon Territory Government and the Government of Canada.[3878]

It is clear that the indigenous peoples of Canada no longer seek merely the provision of finance for particular projects or the provision of services from the federal, provincial and territory governments. Their claims are now framed in terms of self-government or autonomy, qualified by reference to the circumstances and demands of the particular group. They seek the right to determine their own priorities, not to have them determined for them.[3879]

1037. ***Conclusion***. There are important similarities between Aboriginal people and Canadian Indians, and equally important differences (including important historical and demographic differences). But whatever the differences, the Canadian developments do demonstrate the potential for resolving problems through agreement on measures of self government in particular fields, and thus help to put this Reference into proper focus. The Commission's proposals are presented not only, or even principally, as a concession to Aboriginal claims or demands. The recognition of Aboriginal customary laws is not part of a negotiated and independent settlement of claims, nor is it as such a matter of self-government or autonomy. The recommendations are primarily a response to the legal system's search for justice in dealing with the Aboriginal people of Australia, a people with distinctive traditions and ways of life. Seen in this perspective, the recognition of Aboriginal customary laws has the aspect of a principled response to legal and cultural diversity, and not just of another government 'service'. In the search for a principled response to the question of the recognition of Aboriginal customary laws by the general legal system, it is proper to use the various agencies at hand, including both Aboriginal agencies such as legal services and child care agencies,[3880] and government bodies such as the Law Reform Commission. This applies both to the formulation of proposals and to their implementation. To go beyond that and to establish an official agency along the lines suggested in para 839-40 and 1034 would be to pre-empt the more basic issues of self-determination or self-government. An official agency, established by government or at its instigation, carries the risk that these basic issues become in effect a matter for unilateral determination rather than negotiation. An 'expert' body might effectively take over a decision-making role, with the result that any action would not be a reflection of Aboriginal views, priorities or initiatives. For these reasons, as well as those stated in para 838-42, the Commission does not recommend the establishment of an overarching Aboriginal agency. The initiative for such an agency must come from Aboriginal people.

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3878 See Morse, 9; and see further BW Morse, 'The Resolution of Land Claims' in BW Morse (ed), *Aboriginal Peoples and the Law: Indian, Metis and Inuit Rights in Canada*, Carleton University Press, Ottawa, 1985, 617; P Cummings, 'Canada's North and Native Rights', id, 695.

3879 See para 1030.

3880 In particular, the developing national co-ordinating bodies of legal services and child care agencies. See para 370, 842.

# APPENDIX A

# DRAFT LEGISLATION

- Draft Aboriginal Customary Laws (Recognition) Bill 1986
- Draft Aboriginal Customary Laws (Miscellaneous Amendments) Bill 1986
- Explanatory Notes to Draft Legislation

## ABORIGINAL CUSTOMARY LAWS (RECOGNITION) BILL 1986

## TABLE OF PROVISIONS

### PART I — PRELIMINARY

Clause



## PART II — FAMILY LAW

## PART III — CRIMINAL LAW



## PART IV — EVIDENCE



## PART V — MISCELLANEOUS



## SCHEDULE

# A BILL FOR An Act to make provision for the recognition of Aboriginal customary laws in certain cases, and for related purposes

BE IT ENACTED by the Queen, and the Senate and the House of Representatives of the Commonwealth of Australia, as follows:

## PART I — PRELIMINARY

### Short title

1. This Act may be cited as the *Aboriginal Customary Laws (Recognition) Act 1986*.

### Commencement

2. This Act shall come into operation on a day to be fixed by Proclamation.

### Principal object

3. The principal object of this Act is to make special provision for the recognition, for certain purposes, of the customary. laws of Aboriginal communities.

### Special measures

4. The provisions of this Act shall, for the purposes of sub-section 8(1) of the *Racial Discrimination Act 1975*, be taken to be special measures of the kind referred to in that sub-section.

### Operation of State and Territory laws

5. It is the intention of the Parliament that this Act is not to affect the operation of a law of a State or Territory in so far as that law furthers the objects of this Act and is capable of operating concurrently with this Act.

### Application to Territories

6. This Act extends to each external Territory.

### Act to bind Crown

7. This Act binds the Crown in right of the Commonwealth, each of the States, the Northern Territory and Norfolk Island.

### Interpretation

8. (1) In this Act, unless the contrary intention appears—

"Aboriginal community" means a community or group (including a kinship group) of Aborigines;

"Aborigine" means a person who is a member of the Aboriginal race of Australia;

"customary laws", in relation to an Aboriginal community, means the customary laws, traditions, customs, observances, practices and beliefs of the community;

"law", in relation to a part of Australia, includes the principles and rules of the common law and of equity in force in that part of Australia;

"legal proceeding" means a proceeding (however described) in a court (including in a court of a State or Territory) or in a tribunal authorised by law to hear and receive evidence;

"offence" means an offence against or arising under a law of the Commonwealth or a law of a State or Territory;

"police officer" means a member or special member of the Australian Federal Police or a member (however described) of the police force of a State or Territory and includes—

(a) a person who holds an office under a law of the Commonwealth, or under a law of a State or Territory, being an office the duties or functions of which are or include duties or functions of a member of the Australian Federal Police; and

(b) a person the duties and functions of whose office or employment include duties or functions of the same kind as the duties or functions of a member of the Australian Federal Police.

(2) A reference in this Act to a court, in relation to a legal proceeding in a tribunal authorised by law to hear and receive evidence, not being a court, is a reference to the tribunal.

### Members of Aboriginal communities

9. For the purposes of this Act, a person shall not be taken not to be a member of an Aboriginal community only because the person is for the time being not living in the Aboriginal community.

## PART II — FAMILY LAW

### Traditional marriage

10. (1) Where the relationship between 2 persons, not being of the same sex, is recognised as a traditional marriage under the customary laws of an Aboriginal community of which one of those persons is a member, then, subject to sub-sections (3) and (4), the 2 persons shall, for the purposes of this Act, be taken to be traditionally married to each other.

(2) Where—

(a) the relationship between 2 persons, not being of the same sex, who are not members of an Aboriginal community was, at a time when one of the persons was a member of an Aboriginal community, recognised as a traditional marriage under the customary laws of that community; and

(b) the relationship is still subsisting,

then, subject to sub-sections (3) and (4), the 2 persons shall, for the purposes of this Act, be taken to be traditionally married to each other.

(3) Persons whose marriage to each other was solemnised in accordance with a law of the Commonwealth or a law of a State or Territory, or whose marriage to each other is, under the *Marriage Act 1961*, recognised as valid in Australia, shall be taken not to be traditionally married to each other for the purposes of this Act.

(4) Where a person who, but for this sub-section, would be taken to be traditionally married to some other person had not, at or before the relevant time, consented to the relationship concerned, then, for the purposes of this Act, the 2 persons shall be taken not to be, or to have been, traditionally married to each other for the purposes of this Act at that time.[3881]

3881 Professor Crawford recommends that the following sub-clause be added at the end of cl 10 (see para 261):

"(5) Where, at a particular time, a marriage between 2 persons is not, because of the age of one or both of the parties, capable of being solemnised under the *Marriage Act 1961*, the 2 persons shall not be taken to be traditionally married to each other at that time for the purposes of this Act.".

## Certificate as to traditional marriage

11. In any legal proceeding, a certificate in writing given by the public officer of an Aboriginal Council established under the *Aboriginal Councils and Associations Act 1976*, or of a like body established by or under the law of a State or Territory, that 2 persons named in the certificate, being persons at least one of whom is a member of an Aboriginal community in the area in relation to which the Council or body was established, are or were, at a time specified in the certificate, traditionally married to each other is admissible as evidence that the 2 persons are, or were at that time, so married.

## Recognition of traditional marriages

12. (1) The provisions of a law of the Commonwealth, or of a State or a Territory, to the extent that that law makes provision for or with respect to a matter referred to in one of the following paragraphs, are provisions of a law to which this section applies:

(a) the adoption of persons;

(b) the fostering, guardianship or welfare o£ young persons;

(c) the operation of a will or other testamentary instrument;

(d) the distribution of the estate of a person upon the person dying intestate, either as to the whole or the person's estate or as to a part of it;

(e) the power of a court to make an order (by whatever name called) that provision for a person who is related to a deceased person be made out of the estate of the deceased person, being provision to which the person would not, but for the order, be entitled;

(f) the establishment and operation of a superannuation or retirement scheme or a like scheme;

(g) payments in respect of a grant, a scholarship or a pension or payments of a like kind;

(h) payments in respect of benefits due to a person under a law that relates to repatriation benefits, compensation in respect of war service or like benefits;

(j) compensation payable to persons who are related to a person who has died or been injured (whether the death or injury occurred in the course of employment or not);

(k) the compellability of a person to give evidence in a legal proceeding.

(2) Where—

(a) a right, power, duty or immunity (however described) is conferred or imposed by or under provisions of a law to which this section applies on a person who is married or on a class of persons that include persons who are married; and

(b) the same right, power or immunity (however described) is not conferred on a person, or the same duty is not imposed on a person, by or under the provisions of that law only because the person is or has been traditionally married,

the provisions of that law apply in accordance with their tenor to and in relation to the person mentioned in paragraph (b).

(3) Where—

(a) a power or function is conferred, or a duty is imposed, by or under provisions of a law to which this section applies; and

(b) the power or function would be exercised or would be exercised in a particular way, or the duty would be performed or would be performed in a particular way, in relation to a person who is married but would not be so exercised or performed in relation to some other person only because the other person is or has been traditionally married,

the provisions of that law apply in accordance with their tenor to and in relation to the other person.

(4) A person on whom a power or function is conferred, or a duty imposed, by sub-section (3) shall not refuse to exercise the power or function, or perform the duty, in relation to a person only because the person is not married or is or has been traditionally married.

(5) In a matter arising under provisions of a law to which this section applies, where

(a) a court, including a court of a State or Territory, has power under a law of a State or Territory to make an order (by whatever name called and whether in the exercise of a discretion or not); and

(b) the power of the court would not be exercised, or would not be exercised in a particular way, in relation to a person only because the person is or has been traditionally married,

the provisions of the law of the State or Territory by or under which the court may exercise that power apply according to their tenor to and in relation to the person.

(6) Where—

(a) because of this section, 2 or more persons would be entitled to a benefit or provision would be made for 2 or more persons; and

(b) but for this sub-section, fewer persons would be so entitled, or provision would be made for fewer persons,

the benefit shall be shared equally, or the provision shall be made equally, between all the persons.

(7) Sub-section (6) does not prevent the exercise of a power conferred by or under a law to which this section applies to apportion a benefit or provision but such an apportionment shall not be made having regard to the fact that a person who would, under that sub-section, share in the benefit or provision is not married or is or has been traditionally married.

(8) The preceding provisions of this section do not have effect to revoke a will or other testamentary instrument.

(9) The preceding provisions of this section do not apply to or in relation to—

(a) the adoption of a person before the commencement of this Act;

(b) an act done in relation to the fostering, guardianship or welfare of a young person before the commencement of this Act;

(c) the operation of a will or other testamentary instrument made before the commencement of this Act;

(d) the distribution of the estate of a person who died intestate before the commencement of this Act;

(e) an order of the kind referred to in paragraph (1)(e) made before the commencement of this Act;

(f) the entitlement of a person to a right or benefit under a superannuation or retirement scheme or a like scheme, being an entitlement that accrued before the commencement of this Act;

(g) an act done before the commencement of this Act in relation to a payment of a kind referred to in paragraph (1)(g) or (h);

(h) compensation payable to a person who is related to a person who has died or been injured before the commencement of this Act; or

(j) the compellability of a person to give evidence in a legal proceeding the hearing of which began before the commencement of this Act.

## Private superannuation

13. (1) Where—

(a) a right (however described) is conferred by or under a superannuation or retirement scheme, or a like scheme, that is established after the commencement of this Act on a person who is married or on a class of persons that includes persons who are married; and

(b) the same right is not conferred by or under the scheme on a person only because the person is or has been traditionally married,

then, by force of this section, that person has the same right under the scheme.

(2) Where—

(a) by virtue of this section, 2 or more persons would be entitled to a benefit, or provision would be made for 2 or more persons; and

(b) but for this sub-section, fewer persons would be so entitled, or provision would be made for fewer persons,

the benefit shall be shared equally, or the provision shall be made equally, between all the persons.

(3) Sub-section (2) does not prevent the exercise of a power conferred by or under an instrument establishing a superannuation or retirement scheme, or a like scheme, or making provision for or in respect of the rights of members of such a scheme, to apportion a benefit or provision but such an apportionment shall not be made having regard to the fact that a person who would, under that sub-section, share in the benefit or provision is not married or is or has been traditionally married.

(4) In a matter arising under such a scheme, where—

(a) a court, including a court of a State or a Territory, has power under a law of a State or Territory to make an order (by whatever name called and whether in the exercise of a discretion or not); and

(b) the power of the court would not be exercised, or would not be exercised in a particular way, in relation to a person only because the person is or has been traditionally married,

the provisions of the law of the State or Territory by or under which the court may exercise that power apply according to their tenor to and in relation to the person.

## Children of traditional marriages to be legitimate

14. (1) Where—

(a) the parents of a person are or were at any time traditionally married to each other;

(b) the person would be the legitimate child of those parents if their marriage to each other had at any time been solemnised in accordance with a law of the Commonwealth or a law of a State or Territory, or their marriage to each other were, under the *Marriage Act 1961*, recognised as valid; and

(c) but for this section, the person would not be taken to be the legitimate child of those parents,

the person is for all purposes the legitimate child of those parents and shall be taken to have been the legitimate child of those parents from the time of his or her birth.

(2) It is the intention of the Parliament that sub-section (1) is not to affect—

(a) the continuing operation of a law of a State or Territory in so far as that law provides for the making or altering of entries in a register;

(b) the continuing effect of the adoption of a person, whether the adoption took place before, or takes place after, the commencement of this Act; or

(c) anything done before the commencement of this Act.

(3) A legitimation under sub-section (1) is not affected by a failure to comply with a law so far as that law makes provision as mentioned in paragraph (2)(a).

## Declaration of legitimacy

15. The power of a court under section 92 of the *Marriage Act 1961* extends to making a declaration under that section in relation to a person, or to a parent, child or remoter ancestor or descendant of a person, who is declared by sub-section 14(1) to be a legitimate child.

## Adoption, &c., of Aboriginal children

16. (1) Subject to sub-section (2), a law of the Commonwealth, or of a State or Territory, to the extent that it makes provision with respect to—

(a) the adoption of persons; or

(b) the care, custody, control, placement, wardship, guardianship or protection of young persons,

is a law to which this section applies.

(2) Where the Governor-General is satisfied that a law of a State or Territory requires that the child placement principles, or principles that, in the opinion of the Governor-General, are substantially to the same effect as the child placement principles, are to be taken into account in connection with the exercise of a power or function conferred, or a duty imposed, by or under a law of a State or Territory that is a law to which this section applies, the Governor-General may by regulation declare that the last-mentioned law is not a law to which this section applies.

(3) A court or other body that, or a person who, is exercising a power or function or performing a duty conferred or imposed by or under a law to which this section applies in relation to an Aborigine shall, so far as is practicable, exercise the power or function, or perform the duty, as the case may be, in accordance with the child placement principles set out in the Schedule.

## Distribution on intestacy

17. (1) A person who, under the customary laws of an Aboriginal community of which a deceased person was a member, is entitled, or could reasonably expect, to take an interest in the intestate estate[3882] of the member may apply to the Supreme Court of the State of Territory in which the estate is situated for an order under this section.

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3882 Professor Chesterman recommends that sub-cl 17(1) be amended by omitting "intestate" (see para 342).

(2) Subject to sub-section (3), the application shall not be made more than 6 months after the day on which a court has made an order, by whatever name called, authorising a person (in this section called the administrator) to administer and distribute the estate in accordance with law.

(3) The court may extend the time prescribed under sub-section (2) on such conditions as are just, whether or not the time for making the application has expired, but the time shall not be extended if the estate has been fully distributed.

(4) The application shall include a plan showing the distribution of the estate in accordance with the customary laws of the Aboriginal community of which the deceased person was a member.

(5) A copy of the application shall be served on the administrator and on such other persons as the court directs.

(6) The court may order that the estate be distributed as specified in the order, being a distribution that accords with the customary laws of the Aboriginal community of which the deceased person was a member.

(7) The order has effect according to its tenor notwithstanding any other law of the State or Territory concerned.[3883]

(8) Subject to sub-section (9), but notwithstanding any distribution made by the administrator before the administrator had notice of the application, an order under this section may be made in respect of property that has been distributed.

(9) The order shall not be made so as to affect or disturb a distribution that was a proper distribution made for the purpose of providing for the welfare, education, maintenance or advancement of a person who was, immediately before the death of the deceased person, wholly or partly dependent on the deceased person for support.

(10) In this section, "estate" includes part of an estate.

## Family provision

18. The provisions of a law of a State or Territory, to the extent to which those provisions authorise the making of an order of the kind referred to in paragraph 12(1)(e), apply in accordance with their tenor to and in relation to the estate of a deceased person who dies after the commencement of this Act and, at the time of his or her death, is a member of an Aboriginal community and so apply subject to the following modifications:

(a) a person who is related by blood, kinship or marriage to the deceased person (including a person who is traditionally married to the deceased person), being a person who—

(i) but for this paragraph, would not be entitled to make an application under the provisions of that law for an order (by whatever name called)' that provision be made in his or her favour out of the estate of the deceased person; and

(ii) could, at the time of the deceased person's death, have reasonably expected, in accordance with the customary laws of the Aboriginal community, to have received support (including material support) from the deceased person,

is entitled to make an application of the kind referred to in subparagraph (i);

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3883 Professor Chesterman recommends that sub-cl 17(7) be omitted and the following sub-clause be substituted (see para 342):
"(7) The order has effect according to its tenor notwithstanding the provisions of—
(a) any will made by the deceased person; or
(b) any other law of the State or Territory concerned.".

(b) an application may be made under the provisions of that law in respect of the estate of the deceased person at any time before—

(i) the expiration of 12 months after the day on which the deceased person died; or

(ii) such later day as is provided for by the provisions of that law.[3884]

# PART III — CRIMINAL LAW

## Questions of intention and reasonableness

19. Where a person or body (including a court or a jury) has the function of determining whether a person (in this section referred to as the accused) who was, at the relevant time, a member of an Aboriginal community is guilty of an offence, the matters that person or body shall have regard to in determining a question as to—

(a) the intention or state of mind of the accused at a particular time; or

(b) the reasonableness of an act or omission by, or a belief of, the accused,

include the customary laws of that Aboriginal community so far as they are relevant.

## Bail

20. Where a person or body has, under a law of the Commonwealth or a law of a State or Territory, power to grant bail to a person (in this section referred to as the accused) in respect of an offence, the matters that the person or body shall take into account in determining whether to grant bail to the accused and the conditions on which bail is to be granted include, if the accused or a victim of the offence is a member of an Aboriginal community, the customary laws of that community so far as they are relevant.

## Court may refuse to accept plea

21. (1) In a legal proceeding, being a prosecution for an offence, the court shall not accept or admit a plea of guilt by a defendant who is an Aborigine and appears to the court not to be fluent in the English language unless the court is satisfied that the defendant sufficiently understands the nature of the proceeding and the effect of a plea of guilt.

(2) The court may, for the purposes of sub-section (1), adjourn the proceeding to allow the defendant to obtain legal advice or the services of an interpreter.

(3) Sub-section (1) is not intended to limit any other power of the court.

(4) The validity of a criminal proceeding, or of a finding or determination made in, a verdict given in or a sentence passed in a criminal proceeding, shall not be called into question on the ground of a failure to comply with sub-section (1) to any greater extent than it would have been able to have been called into question if this Act had not been passed.

## Homicide

22. Where—

(a) a person (in this section referred to as the accused) is tried for murder or wilful murder;

(b) the accused is found to have done an act that caused the death;

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3884 Professor Chesterman recommends that cl 18 be amended by adding at the end the following sub-section (see para 342):

"(2) Where an order made under section 17 is inconsistent with an order made under sub-section (1) on an application made after the first-mentioned order was made, the order made under sub-section (1), to the extent of the inconsistency, is of no effect.".

(c) the accused proves that he or she did that act in the well-founded belief that the customary laws of an Aboriginal community of which the accused was, at the relevant time, a member required that that act be done by the accused (whether alone or with other persons); and

(d) but for this section, the accused would be found guilty of murder or wilful murder,

the accused shall not be found guilty of murder or wilful murder but shall be found guilty of manslaughter.

## Carnal knowledge, &c.

23. (1) Where a law of a State or a Territory provides that, in relation to a prosecution for an offence of a sexual nature on a female who has not attained a particular age (whether or not it is necessary to prove any other matter in relation to the offence), it is a defence that, at the relevant time, the defendant was married to the female, then, by force of this section, it is a defence to such a prosecution if the defendant proves that—

(a) he honestly believed that the female consented to the act constituting the offence; and

(b) at the relevant time, he was traditionally married to the female.

(2) Sub-section (1) applies only to and in relation to a prosecution for an offence committed after the commencement of this Act.

## Sentencing

24. (1) Where a person who is or was at a relevant time a member of an Aboriginal community is convicted or found guilty of an offence, the matters that the court shall have regard to in determining the sentence to be imposed on the person in respect of the offence include, so far as they are relevant—

(a) the customary laws of that Aboriginal community; and

(b) the customary laws of any other Aboriginal community of which some other person involved in the offence (including a victim of the offence) was a member at a relevant time.

(2) A court may, having regard to the matters referred to in subsection (1), impose on a member of an Aboriginal community who has been convicted or found guilty of an offence a lesser penalty than that otherwise provided for by law.

(3) Where a member of an Aboriginal community has been convicted of an offence, the court may, on application made by a person who is—

(a) a member of the community;

(b) a victim of the offence or a member of his or her family; or

(c) if a victim of the offence is a member of an Aboriginal community-a member of that community,

give leave to the person to make a submission orally or in writing to the court concerning the penalty that should be imposed for the offence.

(4) Leave may be given on such terms as are just.

(5) The court may adjourn the proceeding to enable the application to be made.

(6) This section is not intended to limit any other power of the court.

### Effect of intoxication

25. Sections 19, 22, 23 and 24 apply notwithstanding that the person concerned was intoxicated at the relevant time.

## PART IV — EVIDENCE

### Customary law a question of fact

26. A question concerning the existence or content of the customary laws of an Aboriginal community is a question of fact and not a question of law.

### Evidence of customary laws

27. (1) Evidence adduced in a legal proceeding (whether in respect of a matter arising under this Act or not) as to the existence or non-existence, or as to the content, of the customary laws of an Aboriginal community in relation to a matter is not inadmissible in the proceeding only because it is hearsay evidence or is evidence of an opinion if the person giving the evidence—

(a) has special knowledge or experience of the customary laws of the community in relation to that matter; or

(b) would be likely to have such knowledge or experience if such laws existed.

(2) Sub-section (1) applies notwithstanding that the evidence relates to a fact in issue in the proceeding.

### Group evidence

28. (1) Where, in a legal proceeding, evidence is to be given about the customary laws of an Aboriginal community, the court may give directions enabling 2 or more members of that community to give the evidence together.

(2) Sub-section (1) is not intended to limit any other power of the court.

### Interrogation, &c., of Aboriginal suspects

29. (1) in this section—

"admission" means a representation (including an oral representation, an express or implied representation and a representation to be inferred from conduct) made by a person who is or becomes the defendant in a legal proceeding that is a prosecution for an offence, being a representation—

(a) made otherwise than in the course of giving evidence in the proceeding in which evidence of the representation is sought to be given; and

(b) that is adverse to the person's interest in the outcome of the proceeding;

"offence" includes suspected offence;

"other investigative action", in relation to an offence, means an identification parade, a re-enactment of an event or any other action for which the presence and co-operation of a person suspected of having committed the offence is needed;

"prescribed legal aid body", in relation to a suspect, means a body that provides legal assistance for Aborigines, is prescribed for the purposes of this section and can conveniently provide legal assistance to the suspect;

"prisoner's friend", in relation to a suspect, means a person (not being a police officer) who—

(a) has been nominated by a prescribed legal aid body;

(b) is a barrister or solicitor; or

(c) if no such person is reasonably available, has been chosen by the suspect,

not being

(d) a person concerned in the commission of the offence; or

(e) a person believed on reasonable grounds by the police officer in charge of investigating the offence to be a person with whom the suspect should be prevented from communicating in order to prevent—

(i) the escape of the suspect or of an accomplice;

(ii) the loss, destruction or fabrication of evidence of, or relating to, the offence; or

(iii) intimidation or harassment of a person who is likely to be called to give evidence in a legal proceeding concerning the offence;

"serious offence" means an offence punishable, in the case of a person who has not been previously convicted of the offence, by a term of imprisonment exceeding 6 months;

"suspect", in relation to an offence, means a person who is suspected by a police officer of having committed the offence.

(2) Where the police officer in charge of investigating an offence has reasonable grounds for believing that a suspect who is in custody in respect of the offence is an Aborigine, the police officer shall, as soon as practicable after the suspect is taken into that custody—

(a) notify a representative of a prescribed legal aid body; and

(b) tell the suspect that that has been done.

(3) Where the police officer in charge of investigating a serious offence has reasonable grounds for believing that a suspect is an Aborigine, the police officer shall not—

(a) question the suspect or cause or permit the suspect to be questioned by a police officer; or

(b) take any other investigative action or cause or permit any other investigative action to be taken by a police officer,

in connection with the investigation of the offence unless

(c) the suspect has been told in a language in which the suspect is fluent that he or she need not answer any questions, or say or do anything, in connection with the investigation and that anything that he or she might say may be used in evidence; and

(d) a prisoner's friend is present.

(4) If the prisoner's friend is not a person of the kind mentioned in paragraph (a) or (b) of the definition of "prisoner's friend" in sub-section (1), the police officer shall not be taken to have complied with sub-section (3) unless the police officer has also notified a representative of the prescribed legal aid body before acting as mentioned in paragraph (3)(a) or (b).

(5) Sub-sections (2) and (4) does not apply if, to the knowledge of the police officer, the suspect had made arrangements for a barrister or solicitor to be present.

(6) Sub-sections (2), (3) and (4) do not apply if—

(a) the police officer believes on reasonable grounds that it is necessary for the suspect to be questioned, or for the other investigative action to be taken, without delay in order to avoid danger of the death of, or injury to, a person or serious damage to property; or

(b) the questioning of the suspect, or the taking of the other investigative action, is authorised by a provision of some other Act, an Act of a State or an Act or Ordinance of a Territory, being a provision prescribed for the purposes of this paragraph.[3885]

(7) In a legal proceeding that is a prosecution for an offence, where the suspect is a defendant—

(a) if sub-section (2) applies in relation to the offence- evidence of an admission made by the suspect after the time when sub-section (2) was to be complied with but before it was complied with; or

(b) if sub-section (3) applies in relation to questioning or other investigative action in relation to the offence — evidence of an admission made by the suspect in the course of the questioning or other investigative action before that sub-section was complied with,

is not admissible to prove the existence of a fact intended by the suspect to be asserted by the admission and, if it is otherwise admitted, may not be used for that purpose, unless the court finds that, at the time when the admission was made, the suspect—

(e) understood that he or she need not answer any questions, or say or do anything, in connection with the investigation and that anything that he or she said or did might be used in evidence;

(f) understood the nature of the questions put and statements made in the course of the questioning or the nature of the other investigative action, as the case may be; and

(g) did not make the admission merely through a desire to comply with the perceived wishes of a person in authority.

(8) The preceding provisions of this section are not intended to affect the operation of any other law under which evidence of an admission is inadmissible in a legal proceeding.

## Confidential communications

30. (1) In this section—

"confidential communication or record" means a communication or a record (whether or not in writing) that relates to the customary laws of an Aboriginal community, being a communication made or record prepared in such circumstances that—

(a) the person who made or prepared it; or

(b) the person to whom it was made or for whom it was prepared,

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3885 Professors Crawford and Chesterman recommend that sub-cl 29(6) be omitted and the following sub-clause substituted (see para 565):

"(6) Sub-sections (2), (3) and (4) do not apply if—

(a) having regard to the suspect's level of education, fluency in the English language or other relevant characteristics, the special provision made by that sub-section is not necessary to ensure that the suspect is not specially disadvantaged in relation to the interrogation or other investigative action; or

(b) the police officer—

(i) believes on reasonable grounds that it is necessary for the suspect to be questioned, or for the other investigative action to be taken, without delay in order to avoid danger of the death of, or injury to, a person or serious damage to property; or

(ii) is authorised to question the suspect, or to take the other investigative action, by a provision of some other Act, an Act of a State or an Act or Ordinance of a Territory, being a provision prescribed for the purposes of this paragraph.".

was under an obligation not to disclose its contents to some other person, whether the obligation arose under a law, in accordance with the customary laws of the Aboriginal community or otherwise, and whether it was express or implied;

"interested person" in relation to a confidential communication or record, means a person by whom, to whom or about whom the communication was made or the record prepared.

(2) In a legal proceeding, where, on the application of an interested person or of a member of the Aboriginal community concerned, the court finds that the undesirability of giving evidence of a confidential communication or record outweighs the desirability of admitting the evidence in the proceeding, the court shall direct that the evidence not be given in the proceeding.

(3) The reference in sub-section (2) to the undesirability of giving evidence of a confidential communication or record is a reference to the undesirability of giving that evidence because of the likelihood that giving the evidence would cause harm to—

(a) an interested person;

(b) a member of the Aboriginal community concerned;

(c) the Aboriginal community concerned;

(d) the relationship in the course of which, or for the purposes of which, the confidential communication was made or was prepared; or

(e) relationships of the kind mentioned in paragraph (d),

having regard to the extent of that. harm.

(4) For the purposes of sub-section (2), the matters that the court shall take into account include—

(a) the importance of the evidence in the proceeding;

(b) if the proceeding is a prosecution for an offence- whether the evidence is to be adduced by the prosecution or by a defendant;

(c) the nature of the relevant offence, cause of action or defence and the nature of the subject-matter of the proceeding; and

(d) the powers of the court (whether under this Act or otherwise) to limit or prohibit publication of the evidence.

(5) In addition to any other power of the court, the court may give directions prohibiting or limiting publication of evidence of a confidential communication or record.

(6) Where evidence of a confidential communication or a confidential record is to be given, the court may give directions requiring that persons specified in the direction, or persons included in a class of persons specified in the direction, are not to be in the precincts of the court.

(7) A person shall not knowingly contravene or fail to comply with a direction given under this section.

Penalty:

(8) In the case of a confidential record, the court may, for the purposes of this section, examine the record and make such inferences from it as are proper.

(9) This section is not intended to limit any other power of the court.

## Dying declarations

31. In a legal proceeding, where—

(a) evidence of a statement made by an Aborigine is adduced otherwise than from the Aborigine;

(b) because of the Aborigine's expectation of the imminence of his or her death, evidence of the statement would, if the Aborigine had held a religious belief of a particular kind, be admissible in the proceeding to prove the existence of a fact intended by the Aborigine to be asserted by the statement notwithstanding that the evidence is hearsay evidence; and

(c) the Aborigine did not have a religious belief of that kind,

the evidence is not inadmissible only because the Aborigine did not have a belief of that kind.

## Confessing breach of customary law

32. (1) In a legal proceeding, where, on the application of a witness who is a member of an Aboriginal community, the court finds that evidence to be given by the witness would tend to show that the witness has contravened, failed to comply with or acted inconsistently with the customary laws of that community, the court shall not require the witness to give the evidence unless the court finds that the desirability of admitting the evidence in the proceeding outweighs the undesirability of giving it.

(2) The reference in sub-section (1) to the undesirability of giving evidence is a reference to the undesirability of giving the evidence because of the likelihood that giving the evidence would cause or result in harm to the Aboriginal community, the witness or some 'other member of the Aboriginal community, having regard to the extent of that harm.

(3) For the purposes of sub-section (1), the matters that the court shall take into account include—

(a) the importance of the evidence in the proceeding;

(b) if the proceeding is a prosecution for an offence — whether the evidence is adduced by the prosecution or by a defendant;

(c) whether the witness is a party to the proceeding;

(d) the nature of the relevant offence, cause of action or defence and the nature of the subject-matter of the proceeding; and

(e) the powers of the court, whether under this Act or otherwise, to limit or prohibit publication of the evidence.

(4) Sub-section (1) does not affect any other right of a person to decline to give evidence in a legal proceeding.

## Juries

33. (1) In a legal proceeding, on application by a party made before a jury is empanelled, the court may make orders ensuring that the jury comprises only persons of a particular sex if the court is satisfied that—

(a) evidence to be given in the proceeding is or includes information that, under the customary laws of an Aboriginal community, may only be revealed to persons of that sex; and

(b) if the order were not made, the evidence would not be given.

(2) In determining whether to make such an order, the matters that the court shall take into account include—

(a) the importance of the evidence in the proceeding;

(b) if the proceeding is a prosecution for an offence- whether the evidence is to be adduced by the prosecution or by a defendant;

(c) whether, if the order is made, other evidence (including, in the case of a prosecution for an offence, evidence given by the victim of the offence) that would otherwise be given would not be given;

(d) the nature of the relevant offence, cause of action or defence and the nature of the subject-matter of the proceeding; and

(e) the powers of the court (whether under this Act or otherwise) to limit or prohibit publication of the evidence.

## Accused may give evidence without being sworn

34. (1) In this section—

"sworn evidence" means evidence given by a person who, before he or she gave it, had sworn an oath or made an affirmation that the evidence to be given would be true;

"unsworn evidence" means evidence that is not sworn evidence.

(2) In a legal proceeding, being a prosecution for an offence, a defendant who is an Aborigine may give unsworn evidence unless the court, on application by the prosecutor, determines that the defendant is not disadvantaged in relation to the giving of evidence in the proceeding.[3886]

(3) For the purposes of sub-section (2), the matters that the court shall take into account include—

(a) any relevant characteristic or condition of the defendant, including age, personality, traditional beliefs, fluency in the English language, education and any mental, intellectual or physical disability to which the defendant is. or appears to be subject;

(b) whether, because of a characteristic referred to in paragraph (a), the defendant will be unfairly prejudiced if he or she is cross-examined; and

(c) the nature of the relevant offence or defence.

(4) Except with the leave of the court, a defendant who has given unsworn evidence in a proceeding may not give sworn evidence in the proceeding.

(5) In giving unsworn evidence, the defendant may read from a document or may use notes and, where a legal practitioner appears for the defendant, the legal practitioner may help the defendant to prepare the statement or notes.

(6) Where the defendant cannot read from a statement in writing, the legal practitioner may, with the leave of the court, read the statement to the court.

(7) After unsworn evidence has been given, the legal practitioner may, with the leave of the court, question the defendant as though in examination-in-chief and answers so adduced shall be taken to be part of the unsworn evidence given by the defendant.

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3886 Justice Wilcox and Professor Tay recommend that sub-cl 34(2) apply to an Aborigine only where "the court, on application by the defendant, determines that the defendant is disadvantaged in relation to the giving of evidence in the proceeding".

(8) A defendant shall not be cross-examined in relation to unsworn evidence that he or she has given under this section.

(9) Unsworn evidence given under this section by a defendant in a proceeding may not be used for or against any other defendant in the proceeding.

(10) Sub-sections (8) and (9) do not apply if the defendant gives sworn evidence.

(11) Where, under the provisions of a law of the Commonwealth or of a State or Territory, it is an offence to give false or misleading evidence in a legal proceeding, the provisions of that law apply in accordance with their tenor to and in relation to a person giving unsworn evidence under this section in a proceeding to which that law applies.

(12) Where, in a proceeding, a defendant has given unsworn evidence under this section and has not also given sworn evidence, reference shall not be made by the prosecutor to the fact that the defendant failed to give sworn evidence, and any reference that is made to that fact[3887] shall not suggest that—

(a) the defendant did not give sworn evidence, or did not offer himself or herself for cross-examination, because the defendant believed that he or she was guilty of the offence concerned; or

(b) unsworn evidence is, only because it is unsworn evidence or is not subject to cross-examination, necessarily less persuasive than sworn evidence.[3888]

(13) The preceding provisions of this section do not apply if, under the law in accordance with which the legal proceeding is being conducted, the defendant may make an unsworn statement in the proceeding.

# PART V — MISCELLANEOUS

### Jurisdiction of courts

35. (1) Where a court of a State or Territory has jurisdiction with respect to a matter referred to in section 12 or 18, that court is invested with federal jurisdiction, or, if the court is a court of a Territory, jurisdiction is conferred on it to the extent that the Constitution permits, in respect of matters arising under that section.

(2) The jurisdiction invested and conferred by sub-section (1) is invested and conferred within the limits (other than limits as to subject matter) of the several jurisdictions of the courts concerned, whether those limits are as to locality or otherwise.

### Regulations

36. The Governor-General may make regulations, not inconsistent with this Act, prescribing matters—

(a) required or permitted by this Act to be prescribed; or

(b) necessary or convenient to the prescribed for carrying out or giving effect to this Act.

# SCHEDULE

Sub-section 16(3)

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3887 Justice Wilcox recommends that sub-cl 34(12) be amended by omitting "reference shall not be made by the prosecutor to the fact that the defendant failed to give sworn evidence, and any reference that is made to that fact" and substituting "any reference that is made to the fact that the defendant failed to give sworn evidence" (see para 605).

3888 Justice Wilcox recommends that sub-cl 34(12) be amended by omitting paragraph (b) and substituting the following paragraph (para 604):
"(b) unsworn evidence is, only because it is unsworn evidence or is not subject to cross-examination, necessarily less persuasive than evidence adduced from other persons in the proceeding.".

# ABORIGINAL CHILD PLACEMENT PRINCIPLES

## Interpretation

1. (1) In these Principles—

"Aboriginal child" means a child whose parents are, or one of whose parents is, an Aborigine;

"prescribed Aboriginal child welfare body", in relation to an Aboriginal child, means the body, if any, that is, in accordance with the regulations, the prescribed Aboriginal child welfare body in relation to the class of children to which the child belongs;

"responsible person", in relation to an Aboriginal child, means—

(a) a person who, in accordance with the customary laws of the Aboriginal community of which the child is a member, has an interest in, or responsibility for, the welfare of the child; or

(b) in the case of a child who is, under the law of a State or Territory, in the custody of a person who is not a parent of the child or a member of an Aboriginal community — a person who, in accordance with the customary laws of the Aboriginal community of which a parent of the child is a member, has an interest in, or responsibility for, the welfare of the child.

(2) A reference to a child in these principles, in their application by virtue of section 16 in relation to a law of a State or Territory, is a reference to a person who, for the purposes of that law, is a child.

## Care of parents

2. An Aboriginal child should remain in the care of his or her parents except in special circumstances.

## Responsible person

3. An Aboriginal child who is not to be in the care of at least one of his or her parents should, unless special circumstances exist, be in the care of a responsible person.

## Aboriginal communities

4. Where an Aboriginal child is not to be in the care of at least one of his or her parents or of a responsible person, the choice of the person in whose care the child is to be placed should be made having regard to—

(a) the desirability of the child being in the care of a person who is a member of an Aboriginal community; and

(b) the desirability of the child being able to establish and maintain contact with his or her parents, the responsible persons and the Aboriginal community of which the child is or was a member.

## Matters to be taken into account

5. In assessing the welfare, best interests or other circumstances of an Aboriginal child who is or has been at any time a member of an Aboriginal community, due regard should be had to—

(a) the support (including emotional and spiritual support as well as material support) that may be expected to be given to the child by the responsible persons and by other persons who are members of that community;

(b) the benefits to the child that may be expected to arise from being brought up with knowledge and experience of the customary laws of that community;

(c) the difficulties (including emotional and spiritual difficulties) that may be expected to arise, both immediately and later, if the child's contacts with his or her parents, responsible persons or that community were to be terminated or restricted; and

(d) the standards of child care and child welfare in that community,

and undue weight should not be given to considerations of material provision.

## Consultation

6. Before any step is taken in relation to the allocation of the care of an Aboriginal child, appropriate consultations in relation to the welfare, best interests and other circumstances of the child should take place with—

(a) the child's parents;

(b) the responsible persons; and

(c) unless the child's parents or the responsible persons otherwise direct in writing, the prescribed Aboriginal child welfare body.

# ABORIGINAL CUSTOMARY LAWS (MISCELLANEOUS AMENDMENTS) BILL 1986

## TABLE OF PROVISIONS

# A BILL FOR An Act to make amendments to certain Acts to make provision for the recognition of Aboriginal customary laws, and for related purposes

BE IT ENACTED by the Queen, and the Senate and the House of Representatives of the Commonwealth of Australia, as follows:

## PART I — PRELIMINARY

### Short title

1. This Act may be cited as the Aboriginal Customary Laws (Miscellaneous Amendments) Act 1986.

### Commencement

2. This Act shall come into operation immediately after the commencement of the *Aboriginal Customary Laws (Recognition) Act 1986.*

## PART II — AMENDMENT OF THE COMPENSATION (COMMONWEALTH GOVERNMENT EMPLOYEES) ACT 1971

### Principal Act

3. The *Compensation (Commonwealth Government Employees) Act 1971*[3889] is in this Part referred to as the Principal Act.

### Interpretation

4. Section 5 of the Principal Act is amended by omitting from subsection (1) the definition of "spouse".

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3889 No. 48, 1971, as amended. For previous amendments see No. 136, 171; No. 22, 1972; Nos. 105 and 216, 1973; No. 92, 1974; Nos. 37, 157 and 166, 1976; No. 68, 1978; Nos. 111 and 155, 1979; No. 74, 1981; No. 98, 1982; No. 78, 1984; and No. 95, 1985.

# PART III — AMENDMENT OF THE FAMILY LAW ACT 1975

## Principal Act

5. The *Family Law Act 1975*[3890] is in this Part referred to as the Principal Act.

## Powers of court in custodial proceedings

6. Section 64 of the Principal Act is amended by inserting after subparagraph (1)(bb)(v) the following sub-paragraph:

"(va) if the child is an Aborigine-the extent to which the child placement principles set out in the Schedule to the *Aboriginal Customary Laws (Recognition) Act 1986* have been observed in relation to the proposal to exercise the powers of the court ;".

# PART IV — AMENDMENTS OF THE GREAT BARRIER REEF MARINE PARK ACT 1975

## Principal Act

7. *The Great Barrier Reef Marine Park Act 1975*[3891] is in this Part referred to as the Principal Act.

## Object of Act

8. Section 5 of the Principal Act is amended by inserting after paragraph (1)(b) the following paragraph:

"(ba) the people of the Aboriginal race of Australia, or of the Torres Strait Islander race, for whom it is necessary to make special laws ;".

## Membership of Committee

9. Section 22 of the Principal Act is amended by inserting after subsection (4A) the following sub-section:

"(4B) The Minister shall, where practicable, appoint as a member of the Committee at least one member of an Aboriginal community, or a Torres Strait Islander community, that has traditional associations with the Great Barrier Reef or the Great Barrier Reef Region.".

## Termination of appointment of members of Committee

10. Section 27 of the Principal Act is amended by inserting after subsection (2A) the following sub-section:

"(2B) If a member of the Committee appointed in accordance with sub-section 22(4B) ceases to be a member of a community of a kind referred to in that sub-section, the Minister may terminate the appointment of the member.".

## Zoning plans

11. Section 32 of the Principal Act is amended—

(a) by omitting from paragraph (7)(d) "and" (last occurring);

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3890 No. 53, 1975, as amended. For previous amendments see Nos. 37, 63, 95 and 209, 1976; No. 102, 1977; No. 23, 1979; No. 2, 1982; Nos. 67 and 72, 1983; Nos. 63, 72 and 165, 1984; and Nos. 65, 166 and 193, 1985.

3891 No. 85, 1975, as amended. For previous amendments see No. 37, 1976; Nos: 36 and 140, 1978; No. 155, 1979; No. 70, 1980; No. 80, 1982; No. 97, 1983; No. 63, 1984; and Nos. 65, 166 and 193, 1985.

(b) by adding at the end of sub-section (7) the following paragraphs:

"(f) the recognition of the right of traditional inhabitants to continue traditional fishing and the desirability of minimising the adverse effects of the plan on traditional fishing; and

(g) the reservation of areas, or of parts of areas, of the Great Barrier Reef Region that are contiguous to a Trust Area within the meaning of the *Community Services (Aborigines) Act 1984* of the State of Queensland or the *Community Services (Torres Strait) Act 1984* of the same State for the purpose of traditional fishing by members of Aboriginal communities, or Torres Strait Islander communities, in the Trust Area.";

(c) by inserting after sub-section (7) the following sub-sections:

"(7A) Where, in the preparation of the plan, the objects referred to in paragraphs (7)(a), (e) and (f) are in conflict, regard shall primarily be had to the objects referred to in paragraphs (7)(a) and (e).

"(7B) Where, the preparation of the plan, the object referred to in paragraph (7)(d) is in conflict with an object referred to in paragraph (7)(f), regard shall primarily be had to the object referred to in paragraph (7)(f)"; and

(d) by adding at the end the following sub-sections:

"(15) The Minister shall not, under sub-section (13), accept or alter a plan if the plan, or the plan as so altered, would materially and prejudicially affect traditional inhabitants in the carrying out of traditional fishing unless the Minister is satisfied that—

(a) the traditional inhabitants or their representatives have been consulted in relation to the plan or the alteration; and

(b) the prejudicial effects of the plan, or of the plan as so altered, on traditional fishing have, so far as practicable, been minimised.

"(16) In this section—

'traditional fishing' means the taking, by a traditional inhabitant, of the living natural resources of the Great Barrier Reef Region (including dugong and turtle) for the purposes of

(a) consumption by traditional inhabitants or their dependants; or

(b) use by traditional inhabitants in the traditional activities of the Aboriginal or Torres Strait Islander community concerned,

but does not include the taking of those resources

(c) for commercial purposes; or

(d) for barter

(i) with a person who is, or at a place that is, not in the vicinity of the Great Barrier Reef Region; or

(ii) with a person who is not a member of the Aboriginal community or the Torres Strait Islander community concerned;

'traditional inhabitant' means a member of the Aboriginal race, or of the Torres Strait Islander race, who has traditional associations with areas in the vicinity of the Great Barrier Reef Region in relation to

(a) the person's subsistence; or

(b) the person's cultural, ceremonial or religious activities.".

# PART V — AMENDMENT OF THE INCOME TAX ASSESSMENT ACT 1936

## Principal Act

12. The *Income Tax Assessment Act 1936*[3892] is in this Part referred to as the Principal Act.

## Application

13. Section 159H of the Principal Act is amended by inserting after sub-section (3) the following sub-section:

"(4) Where, during any period, a man and a woman would be taken to be, or would have been taken to have been, traditionally married to each other for the purposes of the *Aboriginal Customary Laws (Recognition) Act 1986*, this Subdivision applies in relation to each of them as if they had been or were legally married to each other during that period.".

## Transitional

14. The amendment of the Principal Act effected by this Part applies in relation to the year of income commencing on 1 July next succeeding the commencement of this Act and in relation to subsequent years of income.

# PART VI — AMENDMENT OF THE SEX DISCRIMINATION ACT 1984

## Principal Act

15. The *Sex Discrimination Act 1984*[3893] is in this Part referred to as the Principal Act.

16. The Principal Act is amended by inserting after section 37 the following section:

### Aboriginal customs and traditions

"37A. (1) Nothing in Division 1 or 2 affects—

(a) an act or practice done or engaged in by or on behalf of a member of an Aboriginal community in accordance with the customary laws and traditions of the community, being an act or practice that is necessary to avoid injury to the susceptibilities of members of the community concerning the performance of religious, ritual or ceremonial obligations or activities in accordance with those customary laws and traditions;

(b) the imposition of a restriction or prohibition (whether by order of a court or otherwise) for the purpose of limiting access to information concerning, or a thing connected with—

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3892 No. 27, 1936, as amended. For previous amendments see No. 88, 1936; No. 5, 1937; No. 46, 1938; No. 30, 1939; Nos. 17 and 65, 1940; Nos. 58 and 69, 1941; Nos. 22 and 50, 1942; No. 10, 1943; Nos. 3 and 28, 1944; Nos. 4 and 37, 1945; No. 6, 1946; Nos. 11 and 63, 1947; No. 44, 1948; No 66, 1949; No. 48, 1950; No. 44, 1951; Nos. 4, 28 and 90, 1952; Nos. 1, 28 45 and 81, 1953; No. 43, 1954; Nos. 18 and 62, 1955; Nos. 25, 30 and 101, 1956; Nos. 39 and 65, 1957; No. 55, 1958; Nos. 2, 70 and 85, 1959; Nos. 17, 18, 58 and 108, 1960; Nos. 17, 27 and 94, 1961; Nos. 39 and 98, 1962; Nos. 34 and 69, 1963; Nos. 46, 68, 101 and 115, 1964; Nos. 33, 103 and 143, 1965; Nos. 50 and 83, 1966; Nos. 19, 38, 76 and 85, 1967; Nos. 4, 60, 70, 87 and 148, 1968; Nos. 18, 93 and 101, 1969; No. 87, 1970; Nos. 6, 54 and 93, 1971; Nos. 5, 46, 47, 65 and 85, 1972; Nos. 51, 52, 53, 164 and 165, 1973; No. 216, 1973 (as amended by No. 20, 1974); Nos. 26 and 126, 1974; Nos. 80 and 117, 1975; Nos. 50, 53, 56, 98, 143, 165 and 205, 1976; Nos. 57, 126 and 127, 1977; Nos. 36, 57, 87, 90, 123, 171 and 172, 1978; Nos. 12, 19, 27, 43, 62, 146, 147 and 149, 1979; Nos. 19, 24, 57, 58, 124, 133, 134 and 159, 1980; Nos. 61, 92, 108, 109, 110, 111, 154 and 175, 1981; Nos. 29, 38, 39, 76, 80, 106 and 123, 1982; Nos. 14, 25, 39, 49, 51, 54 and 103, 1983; Nos. 14, 47, 115, 123 and 124, 1984; and Nos. 49, 65, 104, 123, 129, 168, 173 and 174, 1965.

3893 No. 4, 1984, as amended. For previous amendments see No. 72, 1984; and No. 65, 1985.

(i) the performance of the religious, ritual or ceremonial activities of an Aboriginal community in accordance with the customary laws or traditions of the community, being a restriction or prohibition that is necessary to avoid injury of the kind mentioned in paragraph (a); or

(ii) the customary laws of an Aboriginal community, being a restriction or prohibition that is necessary to ensure conformity with those customary laws; or

(c) the imposition of a restriction concerning entry onto land for a particular purpose or at a particular time, being a restriction that conforms to the customary laws of an Aboriginal community with interests or associations with the land.

"(2) In sub-section (1), 'Aboriginal community' and 'customary laws', in relation to an Aboriginal community, and references to a member of an Aboriginal community, have the same respective meanings as in the *Aboriginal Customary Laws (Recognition) Act 1986.*".

# PART VII — AMENDMENTS OF THE SOCIAL SECURITY ACT 1947

## Principal Act

17. *The Social Security Act 1947*[3894] is in this Part referred to as the Principal Act.

## Interpretation

18. Section 6 of the Principal Act is amended—

(a) by inserting in the definition of "de facto spouse" in sub-section (1) "but does not include a traditional spouse" after "legally married to that other person";

(b) by inserting in paragraph (a) of the definition of "married person" in sub-section (1) "or a traditional spouse" after "(not being a de facto spouse)";

(c) by omitting the definition of "spouse" from sub-section (1) and substituting the following definition:

"'spouse' includes a de facto spouse and a traditional spouse;";

(d) by inserting after the definition of "supporting parent's benefit" in sub-section (1) the following definition:

"'traditional spouse' means a person who is traditionally married to some other person for the purposes of the *Aboriginal Customary Laws (Recognition) Act 1986*;"; and

(e) by inserting after sub-section (1A) the following sub-section:

"(1B) A person shall not, for the purposes of this Act, be taken to be legally married to some other person only because the 2 persons are traditional spouses of each other.".

## Manner of payment of unemployment benefit and sickness benefit

19. Section 123 of the Principal Act is amended by adding at the end the following sub-section:

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3894 No. 26, 1947, as amended. For previous amendments see Nos. 38 and 69, 1948; No. 16, 1949; Nos. 6 and 26, 1950; No. 22, 1951; Nos. 41 and 107, 1952; No. 51, 1953; No. 30, 1954; Nos. 15 and 38, 1955; Nos. 67 and 98, 1956; No. 46, 1957; No. 44, 1958; No. 57, 1959; No. 45, 1960, No. 45, 1961; Nos. 1 and 95, 1962; No. 46, 1963; Nos. 3 and 63, 1964; Nos. 57 and 152, 1965; No. 41, 1966; Nos. 10 and 61, 1967; No. 65, 1968; No. 94, 1969; Nos. 2 and 59, 1970; Nos. 16 and 67, 1971; Nos. 1, 14, 53 and 79, 1972; Nos. 1, 26, 48, 103 and 216, 1973; Nos. 2, 23 and 91, 1974; Nos. 34, 56, 101 and 110, 1975; Nos. 26, 62 and 111, 1976; No. 159, 1977; No. 128, 1978; No. 21, 1979 (as amended by Nos. 37 and 98, 1982); No. 130, 1980; No. 61, 1981; No. 159, 1981 (as amended by No. 98, 1982); No. 170, 1981; Nos 37, 98 and 148, 1982; Nos. 4 and 36, 1983; No. 69, 1983 (as amended by No. 78, 1984); Nos 46, 78, 93, 120, 134 and 165, 1984; and Nos. 24, 52, 95 and 120, 1985.

"(3) Where—

(a) the rate of an unemployment benefit or of a sickness benefit is increased under sub-section 112(2);

(b) the beneficiary and the spouse of the beneficiary are traditionally married to each other within the meaning of the *Aboriginal Customary Laws (Recognition)Act 1986*; and

(c) the beneficiary is not living apart from the spouse,

the Secretary may authorise payment to the spouse of the whole or part of the amount by which the rate of benefit is so increased and payment shall be made accordingly."

20. The Principal Act is amended by inserting after section 146 the following section:

### Modification of Act to take account of traditional Aboriginal marriages

"146A. Where a person who is entitled to a benefit under this Act is, by virtue of —

(a) being the traditional spouse of 2 or more persons; or,

(b) being the spouse of a person and the traditional spouse of 1 or more other persons,

to be taken for the purposes of this Act to be married to 2 or more persons at a particular time, the provisions of this Act that, but for this subsection, would determine the rate of benefit payable to the person apply in relation to that benefit with such modifications, omissions and additions, if any, as are prescribed.".

## PART VIII — AMENDMENTS OF THE TORRES STRAIT FISHERIES ACT 1984

### Principal Act

21. The *Torres Strait Fisheries Act 1984* [3895] is in this Part referred to as the Principal Act.

22. Section 13 of the Principal Act is repealed and the following section substituted:

### Consultation with traditional inhabitants

"13. (1) Before exercising a power under this Act so as to affect the interests of traditional inhabitants who are Australian citizens, the Minister shall seek the views of representatives of those inhabitants, including, where appropriate, the views of members of the Joint Advisory Council established under Article 19 of the Torres Strait Treaty.

"(2) The Minister may, at any other time, consult representatives of the traditional inhabitants, including the members of the Joint Advisory Council, on any matter relating to the administration of this Act.".

23. Section 39 of the Principal Act is repealed and the following section substituted:

### Consultation with traditional inhabitants

"39. Before exercising a power under this Act so as to affect the interests of traditional inhabitants who are Australian citizens, the Protected Zone Joint Authority shall seek the views of representatives of those inhabitants, including, where appropriate, the views of members of the Joint Advisory Council established under Article 19 of the Torres Strait Treaty.".

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3895 No. 23, 1984, as amended. For previous amendments see No. 152, 1984; and No. 29, 1985.

**Contravention of notices under section 16**

24. Section 44 of the Principal .Act is amended by inserting after subclause 4 the following sub-section:

(4A) Where—

(a) an action or omission by a traditional inhabitant constitutes a contravention of paragraph (1)(b); and

(b) if the act or omission had been done or omitted to have been done by a person who was not a traditional inhabitant, the act or omission would not have constituted an offence against or arising under this Act or against or arising under a law of the State of Queensland that relates to fishing in the Protected Zone,

the traditional inhabitant shall not be taken to have committed an offence by reason of the act or omission.".

NOTES

# DRAFT ABORIGINAL CUSTOMARY LAWS (RECOGNITION) BILL 1986

# DRAFT ABORIGINAL CUSTOMARY LAWS (MISCELLANEOUS AMENDMENTS) BILL 1986

## EXPLANATORY NOTES TO DRAFT LEGISLATION

## OUTLINE

1. The purpose of the Aboriginal Customary Laws (Recognition) Bill 1986 is to specify various ways in which the customary laws of Aboriginal communities should be recognised by Australian law, including Commonwealth, State and Territory law.

2. The proposed legislation is based upon a report and recommendations of the Law Reform Commission (ALRC 31, *The Recognition of Aboriginal Customary Laws* (1986)) which was the product of extensive consultations with Aboriginal people, and of a thorough review of Australian law and practice and of developments in comparable overseas countries.

3. With very limited exceptions, Aboriginal customary laws have never been recognised by Australian law. On British settlement in 1788 Aborigines were, in theory, if not always in practice, treated as British subjects, subject to British laws and with no legal recognition given to their laws or traditions.

4. In this Bill, special provision is made for the recognition of the customary laws of Aboriginal communities for certain purposes. In recognising Aboriginal customary laws and traditions, the Bill does not exempt Aboriginal people from the application of the general Australian law. Instead it seeks to reduce conflicts between the two systems of laws, for example, through the exercise of sentencing discretions and the creation of a partial customary law defence (reducing a charge of murder to manslaughter in some cases). It provides special protection's for Aboriginal people in those areas where failure to recognise their traditions and customs has produced injustice (for example, recognition of child care responsibilities and protection's in relation to evidence and procedure). It allows for the recognition of customary laws to take place without incorporating Aboriginal customary laws as part of Australian law and without enforcing customary rules as such. For example, traditional marriages are recognised for certain purposes, but Aboriginal marriage rules are not directly enforced.

5. Under the Bill, provision for recognition of Aboriginal customary laws is made in the following cases:

- the recognition of Aboriginal traditional marriages for certain purposes (cl 10-13, 18, 23)
- legitimation of children of traditional marriages (cl 14-15)
- an Aboriginal child placement principle (cl 16, Schedule)
- provision for an application for traditional distribution of property (cl 17) and for the recognition of Aboriginal customary laws in relation to family provision (cl 18)
- enabling the courts to take Aboriginal customary laws into account for the purposes of the criminal law, in particular,
    - in determining intention and reasonableness (cl 19)
    - in granting bail (cl 20)
    - by way of a partial defence reducing murder to manslaughter (cl 22)
    - in sentencing (cl 24)

- regulating aspects of the laws of evidence and procedure in relation to the recognition and proof of Aboriginal customary laws, in respect of
    - the determination of fitness to plead (cl 21)
    - the interrogation of Aboriginal suspects (cl 29)
    - confidential communications about customary laws (cl 30)
    - Aboriginal dying declarations (cl 31)
    - self-incrimination under Aboriginal customary laws (cl 30)
    - the composition of juries (cl 33)
    - the right to make an unsworn statement (cl 34)
    - the proof of Aboriginal customary laws (cl 26, 27, 28).

The Aboriginal Customary Laws (Miscellaneous Amendments) Bill makes further provisions for the recognition of Aboriginal customary laws for the purposes of specific Commonwealth laws, and consequential amendments to other Commonwealth laws as a result of the provisions of the Aboriginal Customary Laws (Recognition) Bill.

## NOTES ON CLAUSES

## DRAFT ABORIGINAL CUSTOMARY LAWS (RECOGNITION) BILL 1986

### Clauses 1 and 2 — Short title and commencement

1. These clauses set out the short title and commencement of the Bill. The Bill, when enacted, will come into operation on a date to be fixed by the Governor-General by Proclamation.

### Clause 3 — Principal object

1. This clause states the principal object of the Bill, which is to make special provisions for the recognition of the customary laws of Aboriginal communities for the purposes specified in the Bill.

### Clause 4 — Special measures

1. This clause expresses the Parliament's determination that the provisions of the Bill are necessary in order to provide real equality for Aboriginal people who follow their customary laws and traditions, and that accordingly the provisions constitute special measures within the meaning of s 8(1) of the Racial Discrimination Act 1975 (Cth), corresponding to art 1(4) of the Convention on the Elimination of all Forms of Racial Discrimination set out in Schedule 1 to that Act.

2. *Reference*: Report, para 158-65.

### Clause 5 — Operation of State and Territory laws

1. This clause states the intention of Parliament that the Bill is not to override State or Territory laws making similar or further provision for the recognition of Aboriginal customary laws. The Bill is intended to be complementary to such State or Territory legislation.

2. *Reference*: Report, para 1028.

## Clause 6 — Application to Territories

1. The Bill applies to each Territory.

## Clause 7 — Act to bind Crown

1. An Act is presumed not to bind the Crown unless there is specific provision in the Act to that effect. This clause provides that the legislation is to bind the Crown in all its Australian capacities.'

## Clause 8 — Interpretation

1. This clause defines a number of expressions used generally throughout the Bill:

- *'Aboriginal community'*: No precise definition of an Aboriginal community is attempted, but the Bill is aimed at recognising the customary laws of Aboriginal people living in distinct communities or groups. See also cl 9.

- *'Aborigine':* As with other Australian legislation, no attempt is made to define 'Aborigine' by reference to 'quantum of blood' or otherwise. Instead, language taken from the Constitution, and based on the scope of Commonwealth constitutional power under s 51(xxvi), is used, specifying that an Aborigine is a member of the Aboriginal race of Australia.

  *Reference*: Report, para 95.

- *'customary laws'*: Similarly, no detailed attempt is made to define the customary laws of Aboriginal communities, or to define their content. Where a person relies upon Aboriginal customary laws under the Bill, it will be necessary to prove their existence through appropriate evidence in the case. Customary laws are defined broadly as the laws, traditions, customs, observances, practices and beliefs of the community in question.

  *Reference*: Report, para 99-101.

- *'legal proceeding'*: The definition of 'legal proceeding' includes proceedings in tribunals authorised by law to hear and receive evidence, even though these may not be courts (for example, the Aboriginal Land Commissioner under the Aboriginal Land Rights (Northern Territory) Act 1976 (Cth)). This applies in particular in relation to the evidentiary and procedural provisions in Part IV of the Bill.

## Clause 9 — Members of Aboriginal communities

1. Clause 9 makes it clear that a person may remain a member of an Aboriginal community even though the person is, for the time being, not living in the community. Whether a person remains a member of the community in question in these circumstances will be a question of fact in each case.

## Clause 10 — Traditional marriage

1. Clause 10 defines traditional marriage for the purposes of the Bill. Later provisions of the Bill (especially cl 12) then extend recognition to traditional marriages as so defined.

2. The basic definition requires that the two persons in question (a man and a woman) be parties to a relationship which is recognised as a traditional marriage under the customary laws of an Aboriginal community to which at .least one of them belongs. The recognition, once extended, continues while the relationships subsists (cl 10(2)).

3. Where persons who are traditionally married are also married under the Marriage Act 1961 (Cth), there is no need to extend recognition to the traditional marriage, since all the legal consequences of traditional marriage dealt with in the Bill will already be covered. Sub-cl (3) excludes the recognition of traditional marriages in this case.

4. Sub-clause (4) prevents the recognition of a relationship as being a traditional marriage at a particular time if, at or before that time, either of the parties to the relationship did not consent to it. This is consistent with art 23(3) of the International Covenant on Civil and Political Rights 1966, art 13(b) of the Australian Bill of Rights Bill 1986 (Cth), and s 23(1)(d) of the Marriage Act 1961 (Cth).

5. *Reference*: Report, para 260, 262, 264-9.

### Clause 11 — Certificate as to traditional marriage

1. This clause provides a method of proving the existence of a traditional marriage, through the provision of a register maintained by an Aboriginal council, whether established under Commonwealth, State or Territory law. In the absence of detailed official provisions for the maintenance and accuracy of such a register (which are not practical), a certificate as to traditional marriage under the clause is only evidence of a traditional marriage and is not conclusive.

2. *Reference*: Report, para 268.

### Clause 12 — Recognition of traditional marriages

I. This clause provides for the recognition of traditional marriages, as defined in cl 10, for the purposes of Australian laws of the kind described in sub-cl (1). Its effect is that, where, under a law that meets one of the descriptions in sub-cl (1), legal consequences are attached to marriage, the same legal consequences are attached to traditional marriage (sub-cl (2)). Sub-clauses (3)-(7) make consequential provision for the exercise of powers or discretions under such laws in cases where traditional marriage is recognised under this clause. Powers or discretions under such laws may continue to be exercised, but they may not be exercised in such a way as to negate the effect of the clause in recognising traditional marriage as equivalent to marriage for the purposes of the law in question.

2. Sub-clause (8) makes it clear that the recognition brought about by this clause does not revoke a will (as marriage under the Marriage Act 1961 (Cth) would do).

3. Sub-clause (9) is transitional. The effect of cl 12 is to recognise both existing traditional marriages and traditional marriages entered into in future, but in respect of traditional marriages existing when the proposed legislation comes into force, the effect of the recognition is prospective only.

4. *Reference*: Report, para 275, 278, 290-4, 299-301, 315-16, 320, 322.

### Clause 13 — Private superannuation

1. This clause recognises traditional marriage for the purposes of superannuation or retirement schemes, as having the same effect as other legally recognised marriages.

2. *Reference*: Report, para 301.

### Clause 14 — Children of traditional marriages to be legitimate

1. This clause legitimises the children of a traditional marriage (who are illegitimate under the existing law, except in the Northern Territory). Sub-clauses (2)-(3) make consequential provision for registration of birth in cases where a child is legitimised by sub-cl (1). State or Territory laws for the registration of births will apply to children legitimated under sub-cl (1), but the legitimation will not be affected by failure to comply with those laws.

2. *Reference*: Report, para 271.

### Clause I5 — Declaration of legitimacy

1. This clause extends the powers of a court under the Marriage Act 1961 (Cth) s 92 to make a declaration of legitimacy on application by a person concerned.

## Clause 16 — Adoption, &c., of Aboriginal children

1. This clause makes provision for the principles set out the Schedule, referred to as the 'child placement principles', to be applied in the exercise of powers by courts or other bodies pursuant to child welfare or adoption legislation. The effect of the provision is that courts or other bodies having to make decisions involving the custody, guardianship or protection of young persons under such laws will need to consider whether the principles have been satisfied in the particular case. The child placement principles set out in the Schedule do not require any particular decision to be made in such a case, but they do require that the matters specified as relevant should have been considered.

2. Legislation in the Northern Territory (Community Welfare Act (NT) s 69) and in Victoria (Adoption Act 1984 (Vic) s 50) makes provision substantially to the same effect as the child placement principles in respect of decisions involving Aboriginal children. This clause is only concerned to ensure that the child placement principles ate taken into account in these cases: it does not substitute a federal guarantee for a guarantee with equivalent effect contained in State or Territory legislation. Accordingly, where State or Territory legislation does provide that principles which are to substantially the same effect as the child placement principles are to be taken into account in the making of child welfare decisions involving Aboriginal children (whether or not they are also to be taken into account in relation to other children), the Governor-General may by regulation declare that the State or Territory law is not a law to which the section applies. If, as a result of repeal of or changes in the State or Territory law in question, it ceases to provide such a guarantee, the declaration may be revoked: Acts Interpretation Act 1901 (Cth) s 33(3).

3. *Reference*: Report, para 366-8, 373.

## Clause 17 — Distribution on intestacy

1. This clause allows an application to be made for a court-ordered traditional distribution of property if an Aboriginal person dies intestate (without making a will), and the applicant would have been reasonably entitled to expect to share in the deceased's estate in accordance with the customary laws of the Aboriginal community to which the deceased belonged. Applications for traditional distribution are to be made within six months of the date on which the administrator of the deceased's estate was appointed, or, in exceptional circumstances, at a later time allowed by the court.

2. Sub-clauses (4)-(8) provide for the information necessary to support the application for traditional distribution to be produced to the court and to the administrator of the estate, and gives the court power to make an order for traditional distribution which will prevail over the distribution that would otherwise be made under the general law of intestacy. However, an order may not affect or disturb a distribution already made for the benefit of any person who was before the deceased's death dependent on the deceased.

3. *Reference*: Report, para 338-40, 343.

## Clause 18 — Family provision

1. This clause allows a person related by blood, kinship or marriage (including traditional marriage) to a deceased member of an Aboriginal community, and who could reasonably have expected, at the time of the deceased's death and in accordance with the customary laws of the community in question to receive support, including material support, from the deceased, to make an application for family provision. It parallels the power of persons related to a deceased who should have been but were not provided for in a will or on intestacy to make an application for family provision under testator's family maintenance legislation.

2. *Reference*: Report, para 341-2.

## Clause 19 — Questions of intention and reasonableness

1. This clause confirms the rule in criminal trials that, in deciding whether the defendant had a particular intention, or in assessing the reasonableness of an act or omission of the defendant where this is necessary (for example, in assessing the reasonableness of acts for the purpose of determining whether a defendant was

provoked to commit a particular offence), the court or jury may take into account, as far as they are relevant, the customary laws of the Aboriginal community to which the defendant belonged.

2. *Reference*: Report, para 416-8, 441.

### Clause 20 — Bail

1. This clause provides that, in considering whether or not to grant bail to a person in respect of an offence, the court or other body determining the bail application may take into account, as far as they are relevant, the customary laws of an Aboriginal community to which the defendant or a victim of the offence belongs.

2. *Reference*: Report, para 506-7, 516-7.

### Clause 21 — Court may refuse to accept plea

1. In order to deal with those exceptional cases where an Aboriginal defendant is not fluent in the English language and appears not to understand, even in a basic way, the nature of the criminal proceedings or the effect of a guilty plea, this clause gives the court power to refuse to accept a plea of guilt. In those circumstances, a 'not guilty' plea would be entered, and the prosecution would be required to prove its case.

2. This clause applies whether or not the Aboriginal defendant is legally represented. However the assurance of the defendant's counsel that the requisite degree of understanding was present would be highly relevant. The court may adjourn to enable the defendant to take legal advice, or to enable an interpreter to be obtained, to assist in explaining the proceeding and the nature of the plea (sub-cl (2)).

3. This power does not limit any other power the court may have to refuse to accept a guilty plea (sub-cl (3)), and failure to exercise the power is not a ground of appeal after verdict (sub-cl (4)).

4. *Reference*: Report, para 585.

### Clause 22 — Homicide

1. This clause creates a special defence to a charge of murder, analogous to provocation, having the effect of reducing the verdict to one of manslaughter. In consequence, the court would have a discretion as to the sentence to be imposed, even in those States and Territories where the sentence for murder or wilful murder is a mandatory life sentence.

2. The accused must show, on the balance of probabilities, that he or she did the act in question in the well-founded belief that the customary laws of the Aboriginal community to which the accused belonged at the time required that the accused do the act. It is not sufficient that the accused have believed that customary laws required the act to be done: there must have been some basis for that belief. If the accused shows this, a murder verdict will be reduced to manslaughter, in recognition of the conflict of obligations that was involved. The defendant remains criminally responsible for the act, but the court has the power to pass an appropriate sentence.

3. *Reference*: Report, para 453.

### Clause 23 — Carnal knowledge, &c

1. This clause recognises traditional marriage for the purposes of those State or Territory laws where marriage is a defence to a charge of unlawful carnal knowledge. As with recognition of traditional marriage for the other purposes specified in cl 12, the effect of the provision is to give traditional marriage the same legal effect as marriage under the general law.

2. In order for the defence to apply, the defendant must show, on the balance of probabilities, he honestly believed that the girl concerned consented to sexual intercourse, and that at the relevant time he was traditionally married to her.

3. *Reference*: Report, para 319-20.

## Clause 24 — Sentencing

1. This clause provides that, in sentencing a member of an Aboriginal community convicted of an offence, the court may take into account the customary laws of a community to which the defendant belonged, and also the customary laws of any Aboriginal community to which the victim of the offence (if any) belonged, so far as either or both may be relevant. The provision is consistent with much judicial practice.

*Reference*: Report, para 516-17.

2. Under the Bill the power to take customary laws into account in mitigation of sentence applies also to an offence for which there would not otherwise be a sentencing discretion (sub-cl (2)). Thus, it applies even in relation to a murder charge in a jurisdiction where there is no sentencing discretion in murder cases. Whether the sentence should be reduced, in such cases, would be a matter for the judge exercising his or her discretion consistently with the jury's finding of guilt.

*Reference*: Report, para 522.

3. In considering the exercise of this discretion, or any other sentencing discretion, the court may, on application, allow another member of the community in question, a victim of the offence or a member of his or her family, or a member of an Aboriginal community to which the victim belonged to make a submission to the court as to the appropriate sentence. This provision specifically allows for a practice which has in fact often been followed, both in courts of summary jurisdiction and in higher courts, in cases where Aboriginal customary laws have been relevant. In such cases, restricting the opportunity to make submissions on sentence to the Crown and the defendant has sometimes resulted in misleading or untrue impressions of the traditions or opinions of the community in question influencing the sentence passed. The provision is intended to assist the court in determining a proper basis for the sentence in such cases.

*Reference*: Report, para 525-31.

4. Sub-clauses (4) to (6) make consequential provision.

## Clause 25 — Effect of intoxication

1. This clause confirms that cl 19 (questions of intention and reasonableness), 22 (homicide-the partial defence), 23 (carnal knowledge) and 24 (sentencing) are capable of applying notwithstanding that the accused was intoxicated at the relevant time. This does not mean that the presence of alcohol is irrelevant: it may, for example, negate one of the elements required to be made out for the purposes of one of those provisions. But it does not automatically exclude them.

*Reference*: Report, para 437.

## Clause 26 — Customary law a question of fact

1. This clause makes it clear that the existence or content of the customary laws of an Aboriginal community is a question of fact and not of law. The rules of precedent will not apply to a finding about the customary laws of a particular community.

2. *Reference*: Report, para 622, 642.

## Clause 27 — Evidence of customary laws

1. This clause overcomes the operation of certain technical rules of the law of evidence which may have the effect of excluding evidence about Aboriginal customary laws on the ground that the person giving it is not academically qualified as an expert, or that the evidence relates to a fact in issue in the proceeding. Under the provision, a person may give evidence about the customary laws of an Aboriginal community, even though the evidence might be based on or contain elements of hearsay or an opinion, if the person giving the

evidence either has special knowledge or experience of the customary laws of the community in question in relation to the matter on which evidence is given or would be likely to have such knowledge or experience if the customary laws of the community existed. The weight to be given to such evidence is a matter for the court.

2. *Reference*: Report, para 642.

## Clause 28 — Group evidence

1. This clause allows the court to permit several members of an Aboriginal community to give evidence together in testifying about the customary laws of their community. It has been found in practice that this procedure may allow persons to speak with greater confidence and authority about matters which, under the customary laws of the community, are not particularly or exclusively their concern, or as to which they do not, alone, have authority to speak. The provision does not limit any other power of the court.

2. *Reference*: Report, para 648.

## Clause 29 — Interrogation, &c. of Aboriginal suspects

1. This clause lays down some procedures to be followed in the interrogation of Aboriginal suspects by the police. The procedures are intended to assist the police in conducting investigations into suspected offences. Compliance with the procedures will go a considerable way to ensuring the voluntariness of a confession obtained, and thus its admissibility in subsequent proceedings. The procedures are also intended to provide secure guarantees for Aboriginal suspects under interrogation so that they will, as far as possible, be in a position to chose freely whether to speak or be silent. In cases involving traditional Aborigines, cultural factors, and especially deference to the wishes or perceived wishes of persons in authority, are frequently a reason why that choice does not really exist in practice.

2. *Definitions*: sub-cl (1) sets out certain definitions, including:

- *'admission':* a statement adverse to a person's interest in the outcome of the proceeding, where the statement is relied on to prove the truth of what was asserted, and not merely the fact that the statement was made.

- *'other investigative action'*: includes identification parades and re-enactments. The extension of the interrogation rules to identification parades and re-enactments will not affect the admissibility of evidence obtained during the course of an identification parade or re-enactment unless the evidence is an admission as defined. For example, evidence of the discovery of a murder weapon, or other forensic evidence, found in the course of a re-enactment would not be affected.

- *'prescribed legal aid bodies'*: a body that provides legal assistance for Aborigines and which can conveniently provide legal assistance to the suspect in question. To assist in the identification of these bodies (in practice they will be the Aboriginal legal aid organisations existing throughout Australia), they will be identified in regulations.

- *'prisoner's friend':* the 'prisoner's friend' is a person whose function is to help the suspect in understanding the questions and in exercising the choice freely to speak or be silent. To this end, the prisoner's friend must be a person (other than a police officer) who has been nominated by a prescribed legal aid body (for example, an Aboriginal field officer) or who is a barrister or solicitor or, if no such person is reasonably available, any other person chosen by the suspect. Sub-para (d) and (e) exclude certain persons from acting as prisoner's friends who are suspected of involvement in the offence or who may provide illicit assistance to the suspect, such as in escaping or in fabricating evidence.

- *'serious offence'*: an offence punishable, in the case of a first offender, by imprisonment of more than six months.

3. The interrogation rules, as spelt out in sub-cl (2)-(6), contain three basic requirements.

- *Notification of a prescribed legal aid body*. Where an Aboriginal suspect is in custody in respect of an offence, or is being questioned in respect of a serious offence and the prisoner's friend present is neither a lawyer nor a representative of a legal aid body, the police office in charge of the investigation must notify a representative of a prescribed legal aid body that the suspect is in custody, and tell the suspect that has been done (sub-cl (2), (4)). This requirement does not apply if the police officer is aware that the suspect has made arrangements for a barrister or solicitor to be present (sub-cl (5)). The notification requirement, which parallels existing requirements in police standing orders in some States, is intended to ensure that a lawyer or legal aid body will be informed of the interrogation, and will be available to act as a prisoner's friend, and, if instructed, to take such other action as may be necessary.

- *Caution requirement.* Where an Aboriginal suspect is being interrogated, whether or not the suspect is in custody in a technical sense, in respect of a serious offence, the interrogation or other investigative action may not take place before the suspect has been cautioned, in a language in which the suspect is fluent, that there is no requirement to answer questions or say or do anything, and that anything that might be said may be used in evidence (para (3)(c)). This provision reinforces the existing requirement of a caution, while aiming to ensure that the caution is delivered in a language the suspect understands.

- *Prisoner's friend*. In addition, a prisoner's friend must be present during the interrogation of or other investigative action concerning a suspect suspected of a serious offence (para (3)(d)).

However, these provisions do not apply in cases of emergency or in cases where the questioning or other action is specifically authorised by some other legislation prescribed for the purposes of the provision (sub-cl (6)).

4. The point of the interrogation rules is to help ensure that admissions and confessions made by Aboriginal suspects are made 'in the free choice of the right to speak or remain silent'. Under this clause, either the rules must be complied with or a relatively strict test for the voluntariness of an admission must be satisfied. Thus, only if it is established that the suspect

- understood that he or she need not answer questions and that anything said might be used in evidence;

- understood the nature of the questions put or statements made, or the nature of the investigative action; and

- did not make the admission merely through a desire to comply with the perceived wishes of a person in authority, irrespective of the facts,

will the admission be admissible. If this test is satisfied, there is no reason to exclude the admission even though the rules have not been complied with (sub-cl (7)).

5. Sub-clause 29(8) makes it clear that the requirements of the clause are additional to any general requirements under the law of evidence for the admissibility of an admission or confession.

6. *Reference*: Report, para 565, 567-73.

## Clause 30 — Confidential communications

1. This clause provides some protection for confidential material communicated to another person, whether orally or in writing, about the customary laws of an Aboriginal community, where the communication was a confidential one, under the customary laws of the Aboriginal community in question or otherwise. In these circumstances, a person who made the communication, or to whom the communication was made, or to whom the communication related, may apply to the court or tribunal to prevent evidence of the communication being given in a legal proceeding. If an application is made, the court has a discretion to order that the evidence not be given, taking into account the circumstances specified in sub-cl (2): harm to

persons interested in the communication, to the Aboriginal community in question or its members or to the relationship (such as the relationship between anthropologist and informant) concerned in the making of the communication. Against these factors, the court has to weigh the need for the evidence in question, by whom the evidence has been called, (especially in a criminal case), and other relevant factors. For example, it would be relevant that the confidential communication was only indirectly related to the legal proceeding, or that evidence of it could be obtained in another way. Instead of directing that evidence not be given under this power, the court may give directions prohibiting or limiting publication of evidence of a confidential communication or record, thus seeking to protect the confidence without excluding it altogether. Restriction orders may also involve the exclusion of a certain class of persons from the court, if this is necessary in order to allow the evidence to be freely given: sub-cl (6).

2. The provision is not intended to limit any other power of the court: sub-cl (9).

3. *Reference*: Report, para 656, 661.

## Clause 31 — Dying declarations

1. As a result of earlier decisions of Australian courts, it is not entirely clear whether the 'dying declarations' exception to the hearsay rule, to the extent that it survives in the law of the States or Territories, is applicable to traditional Aborigines. If the exception does not apply because of an imputed lack of belief in the hereafter (which was, at one stage at least, regarded as necessary for the exception), the rule cannot be justified. This clause puts it beyond doubt that the absence of a religious belief of a particular kind does not render-an Aboriginal dying declaration inadmissible, if it would otherwise have been admissible.

2. *Reference*: Report, para 611.

## Clause 32 — Self-incrimination under Aboriginal customary laws

1. At common law there is a privilege against self-incrimination on various grounds, most importantly, that the evidence in question would tend to show that the witness has committed a criminal offence. The common law rule has been replaced in a number of States by legislation, but the underlying principle, that a person should not be forced to incriminate or herself himself in legal proceedings, continues to be respected.

2. At present this principle does not extend to incrimination under Aboriginal customary laws. An Aboriginal witness should not be required to incriminate him or herself under the customary laws of the community to which the witness belongs unless there is some overriding reason to require this. Accordingly, the court is given a discretion to excuse a member of an Aboriginal community from giving evidence which would tend to show that the witness has contravened the customary laws of the community in question. In such a case, the question need not be answered unless the court finds that the desirability of admiring the evidence outweighs the likelihood of harm to the witness, to the community in question or to some other member of the community if the question is answered. Sub-cl (2) spells out some of the factors relevant in determining whether this is the case. If particular, it may be that the court's power to restrict or prohibit publication of evidence, or some other power of the court, may prevent harm flowing from the question being answered, or reduce it to such an extent that the question ought to be answered.

3. The court's power under sub-cl (1) is additional to any other right of a person to decline to give evidence in a legal proceeding, for example, on the grounds of self-incrimination under the general law: sub-cl (4).

4. *Reference*: Report, para 665.

## Clause 33 — Juries

1. In a number of cases, counsel acting for a traditionally oriented Aboriginal defendant have sought an order that the jury comprise only members of the accused's sex, in order that evidence of matters that which may be restricted to members of that sex under Aboriginal customary laws that can be given. It is far from clear that a court has power to make such an order under the general law, although various techniques have been

adopted in practice, in the cases where this issue has arisen, to bring about this result. Clause 33 confers express power to make an order of this kind if it is necessary to do so.

2. The power is restricted to cases where the court is satisfied that the evidence will not be given if the order is not made, and the court is required to take into account the factors specified in sub-cl (2), including, in particular, whether the making of the order would restrict evidence to be given by other witnesses in the proceeding (such as evidence given by or on behalf of a victim of the alleged offence).

3. *Reference*: Report, para 595.

## Clause 34 — Accused may give evidence without being sworn

1. Clause 34 confers a special right upon Aboriginal defendants accused of an offence to give unsworn evidence unless the court determines, on application by the prosecution, that the defendant is not disadvantaged in relation to the giving of evidence in the proceeding. In some cases traditionally oriented Aboriginal defendants may be unable to cope with cross-examination, not necessarily because of their involvement in the offence, but because of linguistic or other difficulties in responding to cross-examination in the alien atmosphere of a courtroom. The factors which may cause such problems are indicated in general terms in sub cl (3), as matters the court should take into account in determining whether unsworn evidence may be given.

2. Sub-cl (4)-(11) set out the regime for the giving unsworn evidence. These provisions have the following features:

- the defendant may read from a document or use notes in giving unsworn evidence, and the document or notes may be prepared with the assistance of the defendant's lawyer (sub-cl (5)):

- the defendant's lawyer may, if the defendant is unable to read from a statement, with leave of the court, read the statement instead (sub-cl (6));

- the lawyer may also, with leave of the court, question the defendant about the matter, in order to elicit the defendant's story (sub-cl (7));

- unsworn evidence is not subject to cross-examination (sub-cl (8));

- unsworn evidence may not be used for or against any other defendant in the proceeding (sub-cl (9));

- the relevant federal, State or Territory law of perjury applies to unsworn evidence under this provision, in the same way as it would apply to sworn evidence (sub-cl (11));

- the prosecution may not comment on the defendant's election to give unsworn evidence, but the trial judge may do so, as may counsel for any other defendant, provided that any comment does not suggest that the defendant gave unsworn evidence because of a belief in his or her guilt, or that unsworn evidence is, just because it is unsworn evidence, necessarily less persuasive than sworn evidence (sub-cl (12)).

3. This clause is intended to be supplementary to the provisions of State or Territory law for unsworn statements, and accordingly it only applies where a defendant has no right to give unsworn evidence or to make an unsworn statement under the general law in the proceeding in question: sub-cl (13)).

4. *Reference*: Report, para 603-5.

## Clause 35 — Jurisdiction of courts

1. This clause confers jurisdiction upon State or Territory courts to the extent necessary ito the provisions of the Bill. The Bill does not transfer jurisdiction from one court or body to another, as distinct from laying

down provisions which a court or body with jurisdiction in a matter has to apply, or take into account, in exercising jurisdiction in cases where Aboriginal customary laws are relevant.

## Clause 36 — Regulations

1. This section confers a regulation-making power to the extent necessary to give effect to the legislation.

## Schedule — Aboriginal child placement principles

1. As provided for in sub-cl 16(3), in certain circumstances courts or other bodies exercising powers under child welfare or similar legislation must act in accordance with the Aboriginal child placement principles in making decisions involving Aboriginal children. These principles are set out in the Schedule.

2. *Interpretation*. Certain terms are specially defined for the purposes of the Schedule. In particular:

- *'prescribed Aboriginal child welfare body'*: a child welfare agency prescribed as the appropriate Aboriginal child welfare agency in relation to the class of children to which the child in question belongs. In practice, the agency would be one of the Aboriginal child care agencies now established around Australia, which specialise in Aboriginal child care issues.

- *'responsible person'*: a person who has a responsibility for the welfare of the child in question under the customary laws of the Aboriginal community of which the child is a member, or in a case of a child who is in substitute care, a person who has such responsibilities under the customary laws of an Aboriginal community to which a parent of the child belongs.

3. The principles state that, except for special circumstances, an Aboriginal child should remain in the care of his or her parents (cl 2), or, if the child is not to remain in the care of one or other of the parents, in the care of a responsible person (cl 3). If neither kind of placement is possible the choice of a person to whom custody will be given is to be determined having regard to

- the desirability of the child being in the care of a member of an Aboriginal community, and

- the desirability of the child establishing or maintaining contact with the child's parents, the responsible persons and the Aboriginal community of which the child is or was a member (cl 4).

These principles recognise the experience, in Australia as in comparable countries, of alienation and consequent difficulties experienced by Aboriginal children taken away from their own parents and communities, especially where these children are institutionalised.

4. Clause 5 specifies matters to be taken into account in determining whether special circumstances exist for the purposes of cl 2, 3 and 4. It emphasises the need to take account of

- the support (including the emotional and spiritual support) that the responsible person and members of the child's community may be expected to give;

- the benefits which may flow to a child from being brought up within the child's own community rather than outside it;

- the difficulties that may arise if the child is brought up in isolation from his or her cultural and family background.

It also provides that undue weight should not be given to considerations of material provision, where the factors specified above conflict with such considerations (cl 5).

5. Clause 6 requires consultation to take place, in making decisions with respect to the welfare and long term placement of an Aboriginal child, with the child's parents, the responsible persons and (unless the parents or responsible persons otherwise direct in writing) the relevant Aboriginal child welfare body. This provision is

intended to ensure that as much information as possible is available to the decision-maker, in particular, information about the relevant Aboriginal community and its proposals for the child's welfare.

6. *Reference*: Report, para 366-8, 373.

# DRAFT ABORIGINAL CUSTOMARY LAWS (MISCELLANEOUS BILL) 1986

## Clauses 1 and 2 — Short title and commencement

1. These clauses set out the short title and commencement of the Bill, which will come into operation as soon as the Aboriginal Customary Laws (Recognition) Act 1986 does so.

## Clauses 3 and 4 — Amendment of the Compensation (Commonwealth Government Employees) Act 1971

1. These clauses repeal the definition of 'spouse' in the Compensation (Commonwealth Government Employees) Act 1971, so as to delete the provision concerning Aboriginal traditional spouses from the Act. Traditional marriage will be recognised for the purposes of the Act as a result of the enactment of the Aboriginal Customary Laws (Recognition) Bill 1986 cl 12. An overlapping special definition in the 1971 Act is accordingly unnecessary.

2. *Reference:* Report, para 297.

## Clauses 5 and 6 — Amendment of the Family Law Act 1975

1. Clause 6 inserts in the Family Law Act 1975 s 64(1) a reference to the Aboriginal child placement principles set out in the Schedule to the Aboriginal Customary Laws (Recognition) Bill 1986. In some cases it will be necessary for the Family Court or other courts exercising jurisdiction under the Family Law Act 1975, when making custody or similar decisions involving the welfare of Aboriginal children, to apply these principles. There have already been cases in the Family Court where these considerations have been raised. The principles give no priority to one parent over another in decisions involving a child, but they may be relevant in cases between a parent and some other party in relation to a child.

2. *Reference*: Report, para 366-8.

## Clauses 7 and 8 — Amendments of the Great Barrier Reef Marine Park Act 1975

1. Clauses 7 and 8 are preliminary clauses, leading to cl 9-11 which make various amendments to the Great Barrier Reef Marine Park Act 1975 to allow for the appropriate recognition of the traditional hunting and fishing activities of Aborigines and Torres Strait Islanders in the Great Barrier Reef Marine Park. As a preliminary to these changes, s 5 of the 1975 Act is amended to insert a reference to the special power in s 51(xxvi) of the Constitution on which these special provisions may be based.

## Clauses 9 and 10 — Membership of committee and termination of appointment of members of committee

1. This clause provides that, where practicable, the Minister should appoint at least one Aboriginal or Torres Strait Islander representative, being a person with traditional associations with the Great Barrier Reef Region, as a member of the consultative committee advising the Minister under the Act (cl 9). The Minister is given power to terminate the appointment of such a member if that that person ceases to be a member of an Aboriginal or Torres Strait Islander community in the Region (cl 10).

## Clause 11 — Zoning plans

1. This clause adds additional provisions to s 32 of the Act, which provides for zoning plans in the Great Barrier Marine Park Region. These additions allow the Minister specifically to consider the need to ensure

that the right of traditional inhabitants to continue traditional fishing in the Region is maintained as far as possible, and in particular to take into account whether specific areas, close to a trust area belonging to an Aboriginal or Torres Strait Islander community, should be set aside for traditional fishing by members of that community.

2. Proposed sub-s 32(7A) and (7B) are inserted to establish priorities as between conflicting or potentially conflicting considerations to be taken into account by the Minister under the Act. In particular, conservation of the natural resources of the Region takes priority over traditional fishing activities, in the event that conflict occurs. On the other hand, the rights of traditional inhabitants to maintain their way of life based on traditional fishing take priority over commercial and recreational uses of the area (sub-cl 7B)).

3. Proposed sub-s 32(15) requires the Minister, before accepting or altering a zoning plan which materially and prejudicially affects traditional inhabitants in carrying out traditional fishing, to ensure that consultations have occurred, in relation to the plan or the alteration, with the traditional inhabitants or their representatives and that the prejudicial effects of the plan or the alteration have, so far as practicable, been minimised. It provides some security to traditional inhabitants that their traditional fishing activities will not be interfered in without appropriate consultation and consideration of alternative means of achieving the same ends.

4. Proposed sub-s(16) defines relevant terms for the purposes of s 32 as amended. In particular, 'traditional fishing' is defined to mean the taking of the living natural resources of the Region for consumption or use in traditional activities within the community concerned, but excluding the taking of resources for commercial purposes (whether or not within that community) or for barter or exchange outside the community or with persons from outside the community. Traditional fishing is subsistence activity in a broad sense, excluding commercial and similar activities.

5. *Reference*: Report, para 949-50, 1002.

## Clauses 12 and 13 — Amendment of the Income Tax Assessment Act 1936

1. Clause 13 amends the Income Tax Assessment Act 1936 so as to recognise traditional marriage for the purposes of spouse rebates under the Act. Provision is made now in other parts of the Act for dealing with consequential matters, including the amount of rebate in respect of plural spouses (see especially s 159H(3), 159J(5A)).

2. Recognition applies only to income tax years commencing after the legislation comes into force.

3. *Reference*: Report, para 322.

## Clause 15 and 16 — Amendment of the Sex Discrimination Act 1984

1. Clause 16 amends the Sex Discrimination Act 1984 by inserting a proposed s 37A in the Act. Based on an analogy with s 37, which protects religious beliefs and observances, the purpose of cl 37A is to allow recognition of the separate domains of knowledge and ceremonial activity of Aboriginal men and women under Aboriginal customary laws. The existence of these separate domains may give rise to situations in which, unless an exemption were obtained from the Human Rights Commission, the Act would be contravened. This applies, for example, to situations involving

- women's or men's ceremonial activities (for example, by way of ritual or dance) which under Aboriginal customary laws, are intended to be witnessed by members of the same sex only

- restrictions imposed on access to information by reference to sex (or in part to sex). This would cover restrictions on information lodged in a library (such as the library of the Australian Institute of Aboriginal Studies) where persons of a particular sex were restrained from using or having access to certain material

- court orders restricting the publication or hearing of certain evidence to members of the same sex because of constraints under Aboriginal customary laws.

Orders or restrictions of this kind have already been made or imposed, whether with an authorisation from the Human Rights Commission or otherwise, but it is desirable that specific provision be made for them.

2. *Reference*: Report, para 595, 656.

## Clause 17 and 18 — Amendments of the Social Security Act 1947

1. These provisions amend the Social Security Act 1947 so as to recognise Aboriginal traditional marriages for the purposes of the Act.

2. In particular, s 6 of the Act is amended by substituting definitions of 'married person' and 'spouse', and adding a new definition of 'traditional spouse', so as to make it clear that traditional spouses within the meaning of the Aboriginal Customary Laws (Recognition) Bill 1986 count as spouses for the purposes of the Act (cl 18).

3. *Reference*. Report, para 310.

## Clause 19 — Manner of payment of unemployment benefit and sickness benefit

1. This clause inserts in s 123 of the Act a provision allowing the Secretary of the Department of Social Security to authorise separate payments to be made to a traditional spouse of a person in receipt of unemployment benefits or sickness benefits. Separate payments to spouses are more consistent with Aboriginal customary laws, as well as helping to ensure that the benefit payment is used to support the persons it is intended to benefit.

2. *Reference*: Report, para 306, 310.

## Clause 20 — Modification of Act to take account of traditional Aboriginal marriages

1. This clause inserts a proposed s 146 in the Social Security Act 1947 (Cth), enabling the Act to be modified by Proclamation to cope with difficulties or anomalies arising from the existence of plural traditional marriages, or plural marriages one of which is a traditional marriage, where more than 1 qualifying spouse exists as a result of the amendments brought about by this Bill. This will prevent undesirable aggregation of payments in the hands of one pensioner or beneficiary, and enable modifications to the assets test or other requirements for a pension or benefit to be made to deal with this special situation.

2. *Reference*: Report, para 305, 308-10.

## Clause 21 to 23 — Amendments of the Torres Strait Fisheries Act 1984

1. Clause 22 and 23 amend, respectively, s 13 and 39 of the Torres Strait Fisheries Act 1984 to require consultation with representatives of the traditional inhabitants of the Torres Strait area before, respectively, the Minister or the Protected Zone Joint Authority exercise powers under the Act which adversely affect the interests of traditional inhabitants. This provision is consistent with the spirit of the Torres Strait Treaty itself, which sets aside the Protected Zone in large part to protect the interests of traditional inhabitants of the Zone.

2. *Reference*: Report, para 996-7, 1002.

## Clause 24 — Contravention of notices under section 16

1. As a side effect of the agreed distribution of legislative authority in the Torres Strait area between the Commonwealth and Queensland, arising from the Torres Strait Treaty, anomalies can arise because of the fact that Commonwealth legislation applies to traditional fishing but not to recreational or other non-commercial fishing. The jurisdictional distribution could inadvertently discriminate against traditional inhabitants by subjecting them to a liability to which they would not be subject (for example, because there is

no equivalent rule for recreational fishing under Queensland law) if they were not engaged in traditional fishing. This contradicts the basic purpose of the Act and the Torres Strait Treaty.

2. Accordingly, cl 24 inserts in s 44 of the Act a new provision absolving a traditional inhabitant from liability under the Act if the liability exists only because the defendant is a traditional inhabitant, and no equivalent general liability exists under Commonwealth or Queensland law. Thus, if it is necessary to regulate non-commercial fishing in the Protected Zone, Commonwealth and Queensland law will need to make the same provisions dealing with traditional inhabitants and other persons fishing in the Zone.

3. *Reference:* Report, para 943-6, 1002.

# APPENDIX B
# COURSE OF THE INQUIRY

- Field Trip and Related Reports
- Program of Public Hearings
- Consultants Meetings
- Aboriginal Customary Law Research Papers, Discussion Papers and Seminar Papers
- List of Written Submissions to the Commission

## Field Trips

(i) *Northern Territory*, 13-16 June 1977. Report by Justice MD Kirby.
(ii) *Western Australia*, 13-14 December 1977. Report by Justice MD Kirby.
(iii) *The Pitjantjatjara (Part of NT, SA and WA)* Field Report 1, May 1978. Report by Daryl Gunter.
(iv) *The Pitjantjatjara*, Field Report 2, May 1978. Report by Bryan Keon Cohen.
(v) *Northern Territory: Top End*, Field Report 3, June/July 1978. Report by Bryan Keon-Cohen.
(vi) *Kimberleys and Part of Northern Territory.* Field Report No 4, June/July 1978. Report by Daryl Gunter.
(vii) *North West Reserve of SA*. Report by Bruce Debelle, accompanying Mr Lewis SM on circuit.
(viii) *The Cape York Peninsula, Queensland*. Field Report 5, July/August 1979. Report by Bryan Keon-Cohen.
(ix) *The Torres Strait Islands, Queensland*. Field Report 6, July/August 1979, Report by Bryan Keon-Cohen.
(x) *Darwin, Pt Keats and Alice Springs*. November/December 1979. Draft report on Alice Springs by Bryan Keon-Cohen.
(xi) *Sydney*. January/February 1980. *Draft* Report by Bryan Keon-Cohen and Paul Peters.
(xii) *Yirrkala, Groote Eylandt and Darwin*, November 198 I. Report by Peter Hennessy.
(xiii) *Alice Springs*, May 1982. Report by Peter Hennessy and Fiona Howarth.
(xiv) *Central Australia*, Field Report 7, October 1982. Report by James Crawford, Diane Bell, Peter Hennessy and Alice Tay.
(xv) *Eastern Goldfields (WA)*, Field Report 8, May 1983. Report by Ian Cunliffe and Peter Hennessy.
(xvi) *North Queensland*, Field Report 9, July 1984, Report by Peter Hennessy and Mary Fisher.
(xvii) *Alice Springs, Darwin, Groote Eylandt, Yirrkala*, September/October 1985. Peter Hennessy and Mary Fisher.

## Overseas Trips

(i) *Papua New Guinea*, September 1977. Report by Russell Scott entitled 'The Village Courts of Papua New Guinea'.
(ii) US, Canada and UK, April/May 1980 (Bruce Debelle).
(iii) US (Washington, New York), April 1982. On a trip to give a paper at the Annual Conference of the American Society of International Law, Dr Crawford had 3 days of discussions with officials from Government and U.S. Indian organizations.
(iv) Canada, US, September 1983. Professor Crawford attended a conference of the XIth International Congress of Anthropological and Ethnological Sciences: Commission on Folk-Law and Legal Pluralism in Vancouver, and also had discussions in Washington and Ottawa.

## Public Hearings

## Transcript

| Venue | Date | Transcript |
|---|---|---|
| Adelaide: | Tuesday, 17 March 1981 | 1-123 |
| Pt Augusta: | Wednesday, 18 March 1981 | 124-208 |

## Transcript-in-Confidence

| | | |
|---|---|---|
| Yuendumu: | Thursday, 16 April 1981 | 1462-1471 |
| Kowanyama: | Monday, 27 April 1981 | 1888-1945 |

## Transcript of Women's Meetings

| | | |
|---|---|---|
| Alice Springs: | Monday, 13 April 1981 | 1 |
| Amata: | Tuesday, 14 April 1981 | 47-59 |
| | Wednesday, 15 April 1981 | 59-66 |
| Aurukun: | Tuesday, 28 April 1981 | 67-91 |
| Broome: | Wednesday, 25 March 1981 | 92-107 |
| Derby: | Friday, 27 March 1981 | 108-115 |
| Doomadgee: | Thursday, 23 April 1981 | 116 |
| Fitzroy Crossing: | Tuesday, 31 March 1981 | 117-138 |
| Bayulu: | Wednesday, 1 April 1981 | 139-148 |
| Junjuwah: | Tuesday, 21 April 1981 | 149-163 |
| Kowanyama: | Tuesday, 28 April 1981 | 164-198 |
| La Grange: | Thursday, 26 March 1981 | 199-227 |
| Maningrida: | Wednesday, 8 April 1981 | 228-244 |
| One Arm Point: | Saturday, 28 April 1981 | 245-263 |
| Peppimenarti: | Monday, 6 April 1981 | 264-281 |
| Strelley: | Monday, 23 March 1981 | 282-299 |
| Turkey Creek: | Wednesday, 1 April 1981 | 300-318 |
| Yuendumu: | Thursday, 16 April 1981 | 319-334 |

## Consultants Meetings

(a) *General*
Sydney, August 1980

(b) *Regional*
Darwin, May 1982
Adelaide, September 1982
Canberra, December 1982
Perth, May 1983
Brisbane, June 1983
Melbourne, November 1983
Sydney, June 1983

As well as these formal meetings regular contact was maintained with consultants throughout the course of the Reference.

## Research Papers

During the initial phase of the reference several papers were prepared as a basis for discussion within the Commission. A number of these did not advance to the stage of publication and distribution for comment. For completeness, a full list of papers written, whether in draft or final form, is set out below:

(i) Research Paper, *The Nature of Customary Law* (Bryan Keon-Cohen) December 1978.
(ii) Working paper, *Policing in Aboriginal Communities* (Daryl Gunter) December 1978.
(iii) Working paper, *Punishment in Aboriginal Communities* (Daryl Gunter) March 1979.
(iv) Research Paper, *American Indian Tribal Courts* (Paul Peters) May 1979.
(v) Research Paper, *Basic Issues* (Bryan Keon-Cohen)June 1979.
(vi) Research Paper, *Solutions: The Field of Choice* (Bryan Keon-Cohen) July 1979.
(vii) Research Paper, *Demography of Aboriginals and Torres Strait Islanders* (Daryl Gunter) August 1979.

(viii) Research Paper, *Queensland's Aboriginal Courts* (Bryan Keon-Cohen) September 1979.
(ix) Working paper, *Historical Development* (prepared for Discussion Paper) (Bryan Keon-Cohen) November 1979.
(x) Research Paper, *The Position of Customary Law in Tanzania* (Paul Peters) December 1979.
(xi) Research Paper, *The Canadian Experience* (Paul Peters) February 1980.
(xii) *Overview of A CL Public Hearings* (Peter Hennessy) June 1981.
(xiii) Working paper, *Aboriginal/Police Relations* (Peter Hennessy) September 1981.
(xiv) Working paper, *Aboriginal Land Rights* (Peter Hennessy) September 1981.

In January 1982 a comprehensive program was formulated to produce 15 research papers on the major issues which arise in the Reference. The list of research papers is set out below.

RP 1 *Promised Marriage in Aboriginal Society* (Peter Hennessy) April 1982.
RP 2 *The Recognition of Aboriginal Customary or Tribal Marriage: General Principles* (James Crawford) March 1982.
RP 3 *The Recognition of Aboriginal Tribal Marriage: Areas for Functional Recognition* (James Crawford and Peter Hennessy) June 1982.
RP 4 *Aboriginal Customary Law: Child Custody, Fostering and Adoption* (James Crawford and Fiona Howarth) August 1982.
RP 5 *Aboriginal Customary Law: Traditional and Modem Distributions of Property* (Peter Hennessy) August 1982.
RP 6 *Aboriginal Customary Law and the Substantive Criminal Law* (James Crawford and Chris Kirkbright) March 1983.
RP 6A *Appendix: Cases on Traditional Punishments and Sentencing* (James Crawford and Peter Hennessy) September 1982.
RP 8 *Aboriginal Customary Law: A General Regime of Recognition* (James Crawford) December 1982.
RP 9 *Separate Institutions and Rules for Aboriginal People: Pluralism and Reverse Discrimination* (James Crawford) November 1982.
RP 10 *Separate Institutions and Rules for Indigenous Peoples — International Prescriptions and Proscriptions* (James Crawford) November 1982.
RP 11/12 *Aboriginal Customary Law and Local Justice Mechanisms: Principles, Options and Proposals* (Peter Hennessy) February 1984.
RP 13 *Aboriginal Customary Law: Problems of Evidence and Procedure* (Peter Hennessy) March 1983.
RP 14 *The Proof of Aboriginal Customary Law* (James Crawford) April 1983.
RP 15 *Aboriginal Customary Law: The Recognition of Traditional Hunting and Fishing Rights* (Mary Fisher) May 1984.

## Discussion Papers

1. ALRC, Discussion Paper No 17, *Aboriginal Customary Law — Recognition?*, November 1980.
2. ALRC, Discussion Paper No 18, *Aboriginal Customary Law — Marriage, Children and the Distribution of Property*, August 1982.
3. ALRC, Discussion Paper No 20, *Aboriginal Customary Law — The Criminal Law, Evidence and Procedure*, March 1984.

## Seminar Papers

In the early stages of the Aboriginal Customary Law Reference, a number of seminars were organised to consider the scope and methodology of the Reference. Reports of these seminars are detailed below:

- *Report on a Seminar on the Methodology of Reform*, Faculty of Law, NSW Institute of Technology, 15 October 1977.

- *Report on Seminar*, Department of Indonesian and Malaysian Studies, Sydney University, 28 October 1977.

- *Report on Seminar at Australian Institute of Criminology*, Canberra, 1-3 November 1977.

A later seminar was organised jointly by the Law Reform Commission and the Australian Institute of Aboriginal Studies.

- *Report of a Working Seminar on the Aboriginal Customary Law Reference*, Sydney, May 1983.

## Written Submissions

| | | |
|---|---|---|
| 1 | Mr AR Welsh, PNG | 1977 |
| 2 | Mr NFK O'Neill, PNG Law Reform Commission | 10 February 1977 |
| 3 | Commissioner for Community Relations (Hon AJ Grassby) | 11 February 1977 |
| 4 | Mr W Clifford, Australian Institute of Criminology | 17 February 1977 |
| 5 | Mr LL Davies, Aboriginal Legal Service, WA | 17 February 1977 |
| 6 | Prof WEH Stanner | 20 February 1977<br>24 February 1977 |
| 7 | Mr PR Slade | 28 March 1977 |
| 8 | Sergeant M Gilroy, NT Police | 10 March 1977 |
| 9 | Justice JH Wootten, Supreme Court, NSW | 15 March 1977 |
| 10 | Mr PA Hamilton, Victorian Aboriginal Legal Service | 21 March 1977 |
| 11 | Justice CF Tallis, Supreme Court of North West Territories, Canada | 29 April 1977<br>4 May 1977 |
| 12 | Mr B Johnston, Aboriginal and Torres Strait Islanders Legal Service, Cairns | 12 May 1977 |
| 13 | Commissioner for Community Relations (Hon AJ Grassby — material prepared by Ms L Lippmann) | 12 May 1977 |
| 14 | Justice J Toohey, Aboriginal Land Commissioner | 26 May 1977 |
| 15 | Australian Mining Industry Council (Mr GP Phillips) | 17 May 1977 |
| 16 | Mr RG Kimber | 12 June 1977<br>10 July 1977<br>19 September 1977 |
| 17 | Justice WAN Wells, Supreme Court, SA | March 1977 |
| 18 | Mr TI Pauling, SM, Darwin | June 1977 |
| 19 | Mr FE Abdullah, Magistrates Association, Kenya | 30 June 1977 |
| 20 | Mr J Huelin, Aboriginal Legal Service, WA | 6 July 1977 |
| 21 | Mr S McGill, Northern Land Council | 11 July 1977<br>24 August 1977 |
| 22 | Dr K Maddock | 31 October 1977 |
| 23 | Justice I Thompson, Chief Justice, Nauru | 19 September 1977 |
| 24 | Prof RM Berndt | 18 October 1977 |
| 25 | Mr G Eames, Central Land Council | 10 June 1977 |
| 26 | Mr I Barker QC | June 1977 |
| 27 | Mr TI Pauling, SM, Darwin | June 1977 |
| 28 | Mr S Jones | June 1977 |
| 29 | Ms P Gray and Mr R Williams | June 1977 |
| 30 | Mr G Sargent, Nhulunbuy | 14 July 1977 |
| 31 | Justice J Toohey, Aboriginal Land Commissioner | 23 September 1977 |
| 32 | Mr AR Welsh, PNG | 30 October 1977 |
| 33 | Prof TGH Strehlow | 14 July 1977 |
| 34 | Northern Territory Police (Cmr WJ McLaren) | 15 July 1977 |

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| 35 | Mr HA Wallwork | 22 July 1977<br>3 August 1977 |
| 36 | Mr WH Goudie | 1 August 1977 |
| 37 | Mr P Loftus | 10 August 1977 |
| 38 | Ms L Hastwell, North Australian Aboriginal Legal Aid Service | 18 August 1977 |
| 39 | Mr I Barker QC | 8 September 1977 |
| 40 | Ambassador B Dexter | 28 September 1977 |
| 41 | Dr N Williams | 15 October 1977 |
| 42 | Mr PA Haslam | 19 October 1977 |
| 43 | Justice JF Fogarty, Family Court | 26 October 1977 |
| 44 | Mr J Goldring | 1 November 1977 |
| 45 | Prof B Boettcher | 2 November 1977 |
| 46 | Mr A Chase | 3 November 1977 |
| 47 | Attorney-General's Department (Cth) | 7 November 1977 |
| 48 | Mr N Wallace | 7 November 1977 |
| 49 | Ms M Dyer | 16 November 1977 |
| 50 | Mr WJ Moore | December 1977 |
| 51 | Mr N Wallace | 20 January 1978 |
| 52 | Ms M Bain | 30 January 1978 |
| 53 | Mr H Picton-Smith, Solicitor-General, Fiji | 30 January 1978 |
| 54 | Mr J Goldring | February 1978 |
| 55 | Mr N Wallace | 3 February 1978 |
| 56 | Mr A Ligertwood | 9 February 1978 |
| 57 | Mr N Wallace | 10 February 1978 |
| 58 | Ms M Bain | 18 February 1978 |
| 59 | Mr D Hore-Lacy, North Australian Aboriginal Legal Aid Service | 20 February 1978 |
| 60 | Ms M Bain | 1 March 1978 |
| 61 | Ms J Skuse | 1 March 1978 |
| 62 | Rev W Douglas, United Aborigines Mission, Kalgoorlie | 4 March 1978 |
| 63 | Ms P Ditton, Central Australian Aboriginal Legal Service | 6 March 1978 |
| 64 | Mr P Haslam | 8 March 1978 |
| 65 | Prof C Howard | 8 March 1978 |
| 66 | Mrs K Strehlow | 10 March 1978 |
| 67 | Ms S Stacy | 13 March 1978 |
| 68 | Dr K Maddock | 12 February 1978 |
| 69 | Assoc Prof RL Barsh, University of Washington, Seattle | 17 March 1978 |
| 70 | Justice TU Tuivaga, Supreme Court, Fiji | 20 April 1978 |
| 71 | Mr AR Welsh, PNG | 24 April 1978 |
| 72 | Fr K McKelson, La Grange | 24 April 1978 |
| 73 | Ms M Dyer | 27 April 1978 |
| 74 | Mr AH Angelo, Victoria University of Wellington, NZ | 28 April 1978 |
| 75 | Mr AD Fenbury, Aboriginal Legal Service, WA | 15 May 1978 |
| 76 | Rev D Belcher, Indulkana | June 1978<br>30 June 1978 |
| 77 | Justice J Toohey, Aboriginal Land Commissioner (enclosed submission from Pt Keats community) | 7 June 1978 |
| 78 | Mr RD Kimber | 7 June 1978 |
| 79 | Prof TGH Strehlow | 8 June 1978 |
| 80 | Dr N Williams | 13 June 1978 |
| 81 | Fr K McKelson | 14 June 1978 |
| 82 | Justice I Thompson, Chief Justice, Nauru | 15 June 1978 |

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| 83 | Commissioner for Community Relations, Cth (Hon AJ Grassby) | 19 June 1978 |
| 84 | Prof B Boettcher | 5 July 1978 |
| 85 | Mr CN Perkins, Department of Aboriginal Affairs | 7 July 1978 |
| 86 | Prof RM Berndt | 11 July 1978 |
| 87 | Justice J Toohey, Aboriginal Land Commissioner | 13 July 1978 |
| 88 | Mr T Griffiths, Department of Aboriginal Affairs | 27 July 1978 |
| 89 | Mr DW McLeod | 28 July 1978 |
| 90 | Northern Territory Police (Supt A Grant) | 24 August 1978 |
| 91 | Mr J Huelin, Aboriginal Legal Service, WA | 25 August 1978 |
| 92 | Mr G Blitner, Northern Land Council | 25 August 1978 |
| 93 | Mr P Coe, Aboriginal Legal Service, Redfern | 26 September 1978 |
| 94 | Mr J Doolan, MLA, NT | 28 September 1978 |
| 95 | Mr M De Graaf | 4 October 1978 |
| 96 | Mr JA Newfong | 5 October 1978 |
| 97 | Justice SJ Jacobs, Supreme Court, SA | 6 October 1978 |
| 98 | Justice T Berger, Canada | 6 October 1978 |
| 99 | Prof DE Sanders, University of British Columbia, Vancouver | 18 October 1978 |
| 100 | Prof RM Berndt | 24 October 1978 |
| 101 | Prof KW Ryan | 27 October 1978 |
| 102 | Mr M De Graaf | 27 October 1978 |
| 103 | Canadian High Commission, Canberra | July 1978<br>November 1978 |
| 104 | Mr A Ligertwood | September 1978 |
| 105 | Dr H Middleton | 8 November 1978 |
| 106 | Mrs K Strehlow | 22 November 1978 |
| 107 | Department of Aboriginal Affairs (Mr BK Thomas) | 23 November 1978 |
| 108 | Mr G Bartholomew | 24 November 1978 |
| 109 | Dr P Sack | 29 November 1978 |
| 110 | Dr P Sack | 12 December 1978 |
| 111 | Mr RD Marika, Yirrkala | 14 December 1978 |
| 112 | Prof S Conn, University of Alaska | 19 January 1979 |
| 113 | Ms F Bandler and Mr J Horner | 2 January 1979 |
| 114 | Dr HC Coombs | 2 January 1979 |
| 115 | Prof G Blainey | 8 January 1979 |
| 116 | Mr MJ Foley | 31 January 1979 |
| 117 | Mr D Scott | 1 February 1979 |
| 118 | Hon I Medcalf, Attorney-General, WA | 16 February 1979 |
| 119 | Ms F Bandler and Mr J Horner | 20 February 1979 |
| 120 | Mr J Huelin, Aboriginal Legal Service, WA | 7 March 1979 |
| 121 | Mr J Huelin, Aboriginal Legal Service, WA | 1 May 1979 |
| 122 | Australian Mining Industry Council | March 1979 |
| 123 | Justice B Nicholson, Chief Justice of Western Samoa | 11 June 1979 |
| 124 | Prof H Dagmar, Catholic University, Nijmegen | 22 June 1979 |
| 125 | Mr D Penny, Department of Aboriginal Affairs | 3 July 1979 |
| 126 | Mr G Gleeson, Premier's Department, NSW | 27 July 1979 |
| 127 | Women's Electoral Lobby, Darwin (Ms A Rebegetz) | July 1979 |
| 128 | Dr K Maddock | June, August 1979 |
| 129 | Dr K Maddock | August 1979 |
| 130 | Mr C McDonald | 28 August 1979 |
| 131 | Mr G Galvin, CSM, Darwin | 5 June 1979<br>31 August 1979 |

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|---|---|---|
| 132 | Mr RD Kimber | 8 June 1979<br>22 June 1979 |
| 133 | Dr Betty Meehan | 19 June 1979 |
| 134 | Assistant Commissioner A Grant, NT Police | 19 June 1979 |
| 135 | Mr P Kenyon, Peppimenarti | 20 June 1979 |
| 136 | Prof CD Rowley | 3 July 1979 |
| 137 | Mr Gerry Blitner, Northern Land Council | 3 July 1979 |
| 138 | Ms Winifred Hilliard, Ernabella, NT | 13 August 1979 |
| 139 | Mr M De Graaf | 27 August 1979 |
| 140 | Mr TI Pauling, SM, Darwin | 9 November 1979 |
| 141 | Mrs H L'Orange, International Year of the Child National Committee | 4 October 1979 |
| 142 | Mrs B Hocking | 20 November 1979 |
| 143 | Legal Aid Commission, ACT | 21 September 1979 |
| 144 | Northern Land Council (Mr A Palmer) | 7 August 1979 |
| 145 | Mr A Vandenberg | 22 August 1979 |
| 146 | Prof C Tatz | 17 September 1979 |
| 147 | Dr D Craig, Duke University, North Carolina | 30 April 1980 |
| 148 | Mr E Rayment, Aboriginal Land Trust, NSW | 19 February 1980 |
| 149 | Mr D Brown, Department of Aboriginal and Islanders Advancement, Qld | 5 February 1980 |
| 150 | Mr RD Kimber | 3 February 1980 |
| 151 | Mr E Rayment, Aboriginal Land Trust, NSW | 10 April 1980 |
| 152 | Mrs K Strehlow | 7 January 1980 |
| 153 | Prof JG Starke QC | 24 January 1980 |
| 154 | Prof RM Berndt | 7 May 1980 |
| 155 | Mrs L Barnes | 3 April 1980 |
| 156 | Br S O'Rourke | 13 May 1980 |
| 157 | Dr HC Coombs | 28 May 1980 |
| 158 | Hon I Medcalf QC, Attorney-General, WA | 30 May 1980 |
| 159 | Mr I Ramsay | 1980 |
| 160 | Prof Colin Tatz | 17 June 1980 |
| 161 | Mr D Barnett, Department of Aboriginal and Islanders Advancement, Lockhart River | 9 June 1980 |
| 162 | Mr C McDonald | 24 April 1980 |
| 163 | Chief Justice Sir William Forster, Supreme Court, NT | 24 April 1980 |
| 164 | Tasmanian Police (Mr KH Viney) | 16 July 1980 |
| 165 | Mr P Ruddock, MP | 27 August 1980 |
| 166 | Mr J von Sturmer, Australian Institute for Aboriginal Studies | 5 June 1980<br>18 June 1980 |
| 167 | Dr SS Richardson | 5 September 1980 |
| 168 | Mr HT Spicer, SM, Mareeba, Qld | 30 July 1980 |
| 169 | Assistant Commissioner Grant, NT Police | 10 June 1980 |
| 170 | Mr G Robinson, Dept of Law, Darwin | 18 August 1980 |
| 171 | Prof RM Berndt | 19 August 1980 |
| 172 | Dr K Maddock | 22 August 1980 |
| 173 | Mr A Ligertwood | 11 September 1980 |
| 174 | Prof KW Ryan | 15 September 1980 |
| 175 | Dhanbul Assn (Yirrkala) | 1 October 1980 |
| 176 | Mr P Killoran, Department of Aboriginal and Islanders Advancement, Qld | 8 September 1980 |
| 177 | Mr JPM Long, Department of Aboriginal Affairs (Cth) | 22 August 1980 |
| 178 | Chief Justice W Forster, Supreme Court, NT | 25 September 1980 |
| 179 | Justice J Toohey, Aboriginal Land Commissioner | 14 October 1980 |

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| 180 | Dr SS Richardson | 3 & 24 October 1980 |
| 181 | Attorney-General's Department (Cth) | 8 September 1980 |
| 182 | Mr WR Withers, MLC, WA | 28 September 1980 |
| 183 | South Australian Police | July 1980 |
| 184 | Department of Community Welfare, SA | 21 October 1980 |
| 185 | Justice J Muirhead, Supreme Court, NT | 28 August 1980 |
| 186 | Victorian Police (Cmr SI Miller) | 18 August 1980 |
| 187 | New South Wales Police (Cmr JT Lees) | 21 August 1980 |
| 188 | Northern Territory Police (Asst Cmr Grant) | 23 September 1980 |
| 189 | Mr W Clifford, Australian Institute of Criminology | 19 December 1980 |
| 190 | Prof S Conn, University of Alaska | 1980 |
| 191 | Justice J Toohey, Aboriginal Legal Commissioner | 24 November 1980 |
| 192 | North Australian Aboriginal Legal Aid Service (Mr KM Curnow) | 4 February 1981 |
| 193 | Chief Justice I Thompson, Chief Justice, Noumea | January 1981 |
| 194 | Mr DW McLeod | 23 January 1981 |
| 195 | Ms D Bell | 6 February 1981 |
| 196 | Mr M Hislop, Department of Aboriginal Affairs | 6 February 1981 |
| 197 | Mr W Lanhupuy, Northern Land Council | 17 February 1981 |
| 198 | Mr M H Milne, Department of Aboriginal Affairs, Peninsula Area Office, Cairns | 17 February 1981 |
| 199 | Mr WR Withers, MLC, WA | 17 February 1981 |
| 200 | Victorian Police | 23 February 1981 |
| 201 | Mr G Tongerie, Department for Community Welfare, Adelaide | 16 January 1981 |
| 202 | Prof RM Berndt | 3 February 1981 |
| 203 | Mr M Jennings, Attorney-General, Kiribati | 18 February 1981 |
| 204 | Mr LM Kenney, JP, Ballina | 12 February 1981 |
| 205 | Mr P Peters, Nijmegen, Holland | 18 February 1981 |
| 206 | Mr RD Kimber | 28 February 1981 |
| 207 | Mr DW McLeod | 12 March 1981 |
| 208 | Mr P Roberts | 5 March 1981 |
| 209 | Mr R Santen, Giles, WA | 10 January 1981 |
| 210 | Mr B Kramer, Mimili, NT | 15 January 1981 |
| 211 | Mr J Baker, Department of Aboriginal Affairs, Bunbury | 3 February 1981 |
| 212 | Mr M Hislop, Department of Aboriginal Affairs | 6 February 1981 |
| 213 | Mr BG Lindner | 10 February 1981 |
| 214 | Commissioner for Community Relations (Hon AJ Grassby) | 11 February 1981 |
| 215 | Mr Michael Steuart | 14 February 1981 |
| 216 | Northern Territory Police (Cmr McAulay, Asst Cmr Grant) | 19 February 1981 |
| 217 | Justice H Zelling, Supreme Court, SA | 5 December 1980 |
| 218 | Assoc Prof Getches, Uni of Colorado | 22 January 1981 |
| 219 | Mr FJ Gormly QC | 11 February 1981 |
| 220 | Mr HL Ayling SM, Gunnedah, NSW | 2 March 1981 |
| 221 | Fr MJ Wilson, Santa Teresa | 14 March 1981 |
| 222 | Mr M Posa, National Civic Council, SA | 17 March 1981 |
| 223 | Prof S Conn, University of Alaska | 10 January 1981 |
| 224 | Hon J Kennett, Minister Responsible for Aboriginal Affairs, Vic | February, March 1981 |
| 225 | Judge R Grubb, Licensing Court, SA | 23 March 1981 |
| 226 | Mr DW McLeod | 28 March 1981 |
| 227 | Dr MM Brandl | 25 February 1981 |
| 228 | Dr T Gavranic | 24 February 1981 |
| 229 | Mr DW McLeod | 29 March 1981 |

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| 230 | Mr N Wallace | 1 April 1981 |
| 231 | Mr DJ Sivewright | 24 March 1981 |
| 232 | Hon H Allison, Minister for Aboriginal Affairs, SA | 31 March 1981 |
| 233 | Dr S Roberts, University of London | 6 April 1981 |
| 234 | New South Wales Police (Asst Cmr Abbott) | 2 April 1981 |
| 235 | Mr RD Blackmore, Senior Special Magistrate, Sydney | 16 April 1981 |
| 236 | Mr G McIntyre, Aboriginal and Torres Strait Islanders Legal Service, Cairns | 7 April 1981 |
| 237 | Tasmanian Aboriginal Centre (S Clark) | 10 April 1981 |
| 238 | Mr S Brumby, Peppimenarti | 11 April 1981 |
| 239 | Mr DW McLeod | 14 April 1981 |
| 240 | Mr A B Pittock | 16 April 1981 |
| 241 | Mr DW McLeod | 17, 19 and 21 April 1981<br>17 May 1981 |
| 242 | Mrs BM MacIntyre | 23 April 1981 |
| 243 | Mr GS Coulthard, President Davenport Council, Pt Augusta | 18 April 1981 |
| 244 | Mr J Hocknull | 21 April 1981 |
| 245 | Department of Aboriginal Affairs (Cth) (Mr JPM Long) | 26 April 1981 |
| 246 | Department for Community Welfare, Port Augusta, SA (Mr DL Busbridge) | 18 March 1981<br>8 April 1981 |
| 247 | Maori Women's Welfare League, Perth | 20 March 1981<br>8 June 1981 |
| 248 | Mrs E Bruen | 20 March 1981 |
| 249 | Mr R Bropho, Aboriginal Fringedwellers, Swan Valley | 24 March 1981 |
| 250 | Peppimenarti Community, NT | 6 April 1981 |
| 251 | Mr TM Irelandes | 8 April 1981 |
| 252 | United Aborigines Mission, Perth | 9 April 1981 |
| 253 | Kowanyama Community, Qld | 15 April 1981 |
| 254 | Aboriginal Treaty Committee (Dr HC Coombs) | 16 April 1981 |
| 255 | Mr M Martin, Ventnor, New Jersey, USA | 21 April 1981 |
| 256 | Ms Elizabeth Harper, Angurugu, NT | 21 April 1981 |
| 257 | Moiyunda Association, Mornington Island | 23 April 1981 |
| 258 | SA Police (Asst Cmr Giles) | 24 April 1981 |
| 259 | Dr J Crawford | 27 April 1981 |
| 260 | Mrs V McCallum | 27 April 1981 |
| 261 | Quaker Race Relations C'ttee (Ms E Edwards) | 28 April 1981 |
| 262 | Dr HC Coombs | 29 April 1981 |
| 263 | Justice JA Miles, PNG Supreme Court | 29 April 1981 |
| 264 | Mr D Hope, Aboriginal Task Force, SAIT | 30 April 1981 |
| 265 | ACT Young Liberals (Ms B Matijevic) | 1 May 1981 |
| 266 | Mr D Vachon, Pitjantjatjara Council | 1 May 1981 |
| 267 | Energy Resources of Aust (Mr BG Fisk) | 4 May 1981 |
| 268 | Dr Goodwin — Gill, UN Commissioner for Refugees (and Dr Hugo Idoyaga) | 4 May 1981 |
| 269 | Rev J Whitbourn, Warrabri, NT | 5 May 1981 |
| 270 | Mr HH Marshall, British Institute of International & Comparative Law | 5 May 1981 |
| 271 | Judge J Lewis, District Court, SA | 5 May 1981 |
| 272 | Mossman Gorge Community, Qld | 6 May 1981 |
| 273 | Mr W Goss & Mr B Harrison | 7 May 1981 |
| 274 | Mr AJ Cannon, SM, Elizabeth, SA | 8 May 1981 |
| 275 | Mr WJ Faulds, Crown Counsel, Tas | 8 May 1981 |
| 276 | Women Lawyers Association NSW (Ms D Maclean) | 11 May 1981 |

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| 277 | Hon Haddon Storey, QC, Attorney-General, Victoria enclosing submission by Mr G Golden, Attorney-General's Department | 11 May 1981 |
| 278 | Fr FS Newbecker, Edward River | May 1981 |
| 279 | Dr KR Makinson | 14 May 1981 |
| 280 | Mr JL Smith | May 1981 |
| 281 | Prof DHN Johnson | 15 May 1981 |
| 282 | Aboriginal Children's Research Project, NSW (Mr C Milne) | 15 May 1981 |
| 283 | Victorian Aboriginal Legal Service | 20 May 1981 |
| 284 | Mr K Palmer, Western Desert Project, SA | May 1981 |
| 285 | Mr David Filmer | 16 May 1981 |
| 286 | Mrs PA Gardiner | 20 May 1981 |
| 287 | Fr MJ Wilson, Santa Teresa | 20 May 1981 |
| 288 | Department of Community Welfare Services, Vic (Ms Firebrace) | 20 May 1981 |
| 289 | Mr S Murray, Dandenong and District Aborigines Co-op | 27 May 1981 |
| 290 | Ms R Bishop | 27 May 1981 |
| 291 | Mr G Gierz | 28 May 1981 |
| 292 | Dr NN Singh | 29 May 1981 |
| 293 | Office of Women's Affairs (Ms K Taperell) | 29 May 1981 |
| 294 | Ms B Hoffman, Mr K Ryan, Ms H van der Schaff | 29 May 1981 |
| 295 | Mr P Haslam | 15 June 1981 |
| 296 | Tasmanian Police (Cmr MJ Robinson) | 16 June 1981 |
| 297 | Mr DL Busbridge, Dept for Community Welfare, SA | 21 May 1981 |
| 298 | Mr Nipper Tabagee, Noonkanbah | 3 June 1981 |
| 299 | Human Rights Bureau (Cth) (Mr PH Bailey) | 5 June 1981 |
| 300 | Prof JG Starke QC | 5 May 1981 |
| 301 | Queensland Law Society (Sub-Committee established to consider Aboriginal Customary Law Reference) | 22 June 1981 |
| 302 | Prof IA Shearer | 23 June 1981 |
| 303 | Women's Advisory Council, NSW (Ms J Owen) | 16 June 1981 |
| 304 | Mr G Tambling, MHR, NT | 18 June 1981 |
| 305 | Director General of Social Security, (Cth) (Mr AJ Ayers) | 19 June 1981 |
| 306 | Dr HC Coombs | 14 July 1981 |
| 307 | Mr M De Graaf | 14 July 1981 |
| 308 | Central Australian Aboriginal Legal Aid Service (Ms P Ditton) | 21 July 1981 |
| 309 | Mr W Bird, National Aboriginal Conference | 28 July 1981 |
| 310 | Mr Lupton | 21 July 1981 |
| 311 | Ms BH Palmer | 28 August 1981 |
| 312 | Mr P Jovanovic | 2 November 1981 |
| 313 | Mr RS O'Regan | 23 November 1981 |
| 314 | Mr SK Jerrard, Action for Aboriginal Rights | 2 December 1981 |
| 315 | Department of Aboriginal Affairs (Mr JPM Long) | 21 January 1982 |
| 316 | Assistant Commissioner A Grant (NT Police) | |
| 317 | Prof RM Berndt | 8 March 1982 |
| 318 | Justice Elizabeth Evatt, Chief Judge, Family Court of Australia | 8 March 1982 |
| 319 | Mr, CA Ratcliffe | 15 March 1982 |
| 320 | Justice RA Blackburn, Chief Judge, Supreme Court, ACT | 5 January 1982<br>5 April 1982 |
| 321 | Department of Aboriginal Affairs, Darwin (Mr LG Wilson) | 15 March 1982<br>27 March 1982 |
| 322 | National Society of Labor Lawyers, (Ms D Merryfull) | 5 April 1982 |
| 323 | Sir William Forster, Chief Justice, Supreme Court, NT | 7 April 1982 |

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| 324 | Department of Law, NT (Mr JG Flynn) | 16 April 1982 |
| 325 | Northern Territory Public Trustee | 16 April 1982 |
| 326 | President, Workmen's Compensation Tribunal, NT | 29 April 1982 |
| 327 | Commissioner for Employees Compensation (Cth) (Mr BJ Dwyer) | 3 May 1982 |
| 328 | Mr R Keating, North Australian Aboriginal Legal Service | 10 May 1982 |
| 329 | Department of the Chief Minister, NT (Mr EG Quinn) | 12 May 1982<br>17 May 1982 |
| 330 | Northern Territory Insurance Office | 13 May 1982 |
| 331 | Hon J Robertson, Minister for Community Development, NT | 18 May 1982 |
| 332 | Ms P Ditton | 20 May 1982 |
| 333 | Department of Social Security (Cth) | 20 May 1982 |
| 334 | Fr MJ Wilson, Nelen Yubu Missiological Unit | 25 May 1982 |
| 335 | Hon J Burdett MLC, Minister for Community Welfare, SA | 27 May 1982 |
| 336 | Mr D Ahenakew, National Chief, Assembly of First Nations, Canada | 2 June 1982 |
| 337 | Office of Women's Affairs (Cth) (Ms K Taperell) | 22 July 1982 |
| 338 | Dr D Bell | July 1982 |
| 339 | Office of Aboriginal Liaison, NT (Mr JD Gallacher) | 30 July 1982 |
| 340 | Department of Social Security (Cth) (Mr JT O'Connor, Mr D Hall) | 4 August 1982<br>17 August 1982 |
| 341 | Hon Terry White, Minister for Welfare Services, Qld | 17 August 1982 |
| 342 | Department of Social Security, Darwin (Mr PJ Marts) | 26 August 1982 |
| 343 | Ms P Ditton | 2 September 1982 |
| 344 | Commissioner for Community Relations (Hon AJ Grassby) | 6 September 1982 |
| 345 | Ms H Cory | September 1982 |
| 346 | Human Rights Commission (Mr PH Bailey) | September 1982 |
| 347 | Hon Pauline Toner, Minister for Community Welfare Services (Vic) | 10 September 1982 |
| 348 | Dept of Capital Territory (Mr AS Blunn) | 24 September 1982 |
| 349 | South Australian Police | 24 September 1982 |
| 350 | Mr J Kimpton | 28 September 1982 |
| 351 | Mr D Collins MLA, NT | 1 October 1982 |
| 352 | Mr N Wallace | 4 October 1982 |
| 353 | Justice SJ Jacobs, Supreme Court, SA | 6 October 1982 |
| 354 | Ms B Pearce | 11 October 1982 |
| 355 | Mr G Tambling MHR, NT | 11 October 1982 |
| 356 | Mr W Clifford, Australian Institute of Criminology | 12 October 1982 |
| 357 | Mr J Zion, Solicitor, Navajo Nation | 9 November 1982 |
| 358 | Law Society of New South Wales | 16 November 1982 |
| 359 | Prof DHN Johnson | 29 October 1982 |
| 360 | Dr A Sunder Das | 7 November 1982 |
| 361 | Minister for Social Security (Cth) (Hon FM Chaney) | 15 November 1982 |
| 362 | Mr J Tomlinson | 25 November 1982<br>January 1983 |
| 363 | Human Rights Commission (Mr PH Bailey) | 7 December 1982 |
| 364 | Mr RG Kimber | 15 December 1982 |
| 365 | Dept of Community Welfare, SA (Mr I Cox) | 17 December 1982 |
| 366 | Justice JA Nader, Supreme Court, NT | 17 December 1982 |
| 367 | Mr C Lamb, Department of Foreign Affairs | 30 December 1982 |
| 368 | Federation of Aboriginal Women | 10 January 1983 |
| 369 | Justice H Zelling, Supreme Court, SA | 26 January 1983 |
| 370 | Department of Aboriginal Affairs (Mr JC Taylor) | 2 February 1983 |
| 371 | Ms M Brady | 9 February 1983 |

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| 372 | Dr P Sutton | 16 March 1983 |
| 373 | Mr G Neate | 9 April 1983 |
| 374 | Assoc Prof B Morse and Mr R Chisholm | 17 January 1983 |
| 375 | Assoc Prof R Barsh, University of Washington, Seattle | 10 May 1983 |
| 376 | Fr K McKelson | 21 May 1983 |
| 377 | Mrs G Smalley | 21 May 1983 |
| 378 | Mr H Wallwork QC | 2 June 1983 |
| 379 | Mr N Bourne MP, PNG | 15 June 1983 |
| 380 | Mr R Chisholm | June 1983 |
| 381 | Ms J Tommy | 14 July 1983 |
| 382 | Miss D Ross | 15 July 1983 |
| 383 | Dr J yon Sturmer | 25 July 1983 |
| 384 | Mr J Wauchope, Department of Aboriginal Affairs (Cth) | 25 July 1983 |
| 385 | Mr B Keon-Cohen | 31 August 1983 |
| 386 | Dr SM Poulter, University of Southhampton | 10 October 1983 |
| 387 | Mr J Taylor | 21 May 1983 |
| 388 | Mr J Taylor | 11 October 1983 |
| 389 | Mr B Keon-Cohen | 17 October 1983 |
| 390 | Mr N Andrews, Central Land Council | 31 October 1983 |
| 391 | Mr J Kimpton | 7 November 1983 |
| 392 | Mr RG Kimber | 12 April 1983<br>12 November 1983 |
| 393 | Family Law Council (Justice JF Fogarty) | 28 November 1983 |
| 394 | Attorney-General's Department (Cth) (Mr JM Hunter) | 4 January 1984 |
| 395 | Central Australian Aboriginal Legal Aid Service (Ms P Ditton) | 10 January 1984 |
| 396 | Dr P Sutton | 29 November 1983<br>18 January 1984 |
| 397 | Assoc Prof K Maddock | 7 February 1984 |
| 398 | Mr C McDonald, North Australia Aboriginal Legal Aid Service | 20 February 1984 |
| 399 | Mr G Woodman, University of Birmingham | February 1984 |
| 400 | Dr P Sack | 24 February 1984 |
| 401 | Mr N Wallace | 27 February 1984 |
| 402 | Dr O Jessep | 8 March 1984<br>13 March 1984 |
| 403 | Dr J von Sturmer | February & March 1984 |
| 404 | Mr JR Goudie, Department of Indian & Northern Affairs, Canada | 8 February 1984 |
| 405 | Dr HC Coombs | 15 March 1984 |
| 406 | Office of Child Care, Department of Social Security (Cth) | 23 March 1984 |
| 407 | Mr J Richstone, Inuit Committee on National Affairs, Canada | 29 March 1984 |
| 408 | Prof RM Berndt | 3 April 1984 |
| 409 | Assoc Prof D Case, University of Alaska | 13 April 1984 |
| 410 | Assoc Prof R Barsh, University of Washington, Seattle | 18 April 1984 |
| 411 | Justice WJ Kearney, Aboriginal Land Commissioner | 19 March 1984<br>1 May 1984 |
| 412 | Dr P Sutton | 27 April 1984 |
| 413 | Mr Y Bamwine | 30 April 1984 |
| 414 | Assoc Prof K Maddock | May 1984 |
| 415 | Mr B Kissane, Victorian Aboriginal Legal Service | 9 May 1984 |
| 416 | Director General, Department of Community Welfare Services, Victoria | 9 May 1984 |
| 417 | Northern Land Council (Ms J Thompson) | 16 May 1984 |
| 418 | Mr Greg James QC | 21 May 1984 |

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| 419 | Attorney-General, Northern Territory (Hon J Robertson) | 17 May 1984 |
| 420 | Justice J Muirhead, Supreme Court, NT | 18 May 1984 |
| 421 | Fr K McKelson, La Grange | 20 May 1984 |
| 422 | Mrs M Hilton | 12 April 1984 |
| 423 | Justice WJ Kearney, Aboriginal Land Commissioner | 31 May 1984 |
| 424 | Dept of Community Welfare, WA (Mr K Maine) | 1 June 1984 |
| 425 | Minister for Aboriginal Affairs Queensland (Hon RC Katter) | 4 June 1984 |
| 426 | Mrs K Hazlehurst, Australian Institute of Criminology | 7 June 1984 |
| 427 | Minister for Aboriginal Affairs, NSW (Hon G Paciullo) | 29 June 1984 |
| 428 | Mr R Oades | 18 June 1984 |
| 429 | Department of Lands & Surveys, WA (Mr BL O'Halloran) | 19 June 1984 |
| 430 | Conservation Commission, NT (Mr B Singer) | 29 June 1984 |
| 431 | Mrs M Hilton | July 1984 |
| 432 | Department of Chief Minister, NT (Mr P Carroll) | 3 July 1984 |
| 433 | Dr J Altman | 9 July 1984 |
| 434 | Mr RE Johannes | 9 July 1984 |
| 435 | Assoc Prof N Bankes, University of Calgary, Alberta | 19 July 1984 |
| 436 | Hon RC Katter, Minister for Northern Development and Aboriginal and Islander Affairs, Qld | 25 July 1984 |
| 437 | Dr HC Coombs | 31 July 1984 |
| 438 | Mr RG Kimber | 20 March 1984<br>18 August 1984 |
| 439 | Mr M Harris, Department for Community Welfare, SA | 8 June 1984 |
| 440 | Assoc Prof R Barsh, University of Washington, Seattle | 4 August 1984 |
| 441 | Miss D Ross | 8 August 1984 |
| 442 | Department of Aboriginal Affairs (Mr P MacKenzie) | 16 August 1984<br>3 September 1984 |
| 443 | Justice J Toohey, Federal Court of Australia | 23 August 1984 |
| 444 | Assoc Prof B Morse, University of Ottawa, Ontario | 27 August 1984 |
| 445 | Mr V Haysom, Nova Scotia, Canada | 30 August 1984 |
| 446 | Conservator of Wildlife, Department of Fisheries and Wildlife, WA (Mr I Crook) | 30 August 1984 |
| 447 | Mr A Smith | 2 September 1984 |
| 448 | Ms J Devitt, Bureau of the Northern Land Council | 3 September 1984 |
| 449 | Professor RM Berndt | 11 September 1984 |
| 450 | Hon DC Frith, Minister for Indian Affairs and Northern Development, Canada | 31 August 1984 |
| 451 | Mr M De Graaf | 13 September 1984 |
| 452 | National Parks & Wildlife Service, Queensland (Mr HS Curtis) | 25 September 1984 |
| 453 | Mr A Gray, International Work Group for Indigenous Affairs, Denmark | 7 July 1984 |
| 454 | Minister for Aboriginal Affairs (Cth) (Hon C Holding) | 26 September 1984 |
| 455 | Mr AJ Murray, Parliamentary Counsel, Queensland | 28 May 1984 |
| 456 | Mr M Sides | 1 June 1984 |
| 457 | Mrs B Hocking | 25 September 1984 |
| 458 | Mr N Wareham, Attorney-General's Department (Cth) | 24 September 1984 |
| 459 | National Police Working Party | 18 September 1984 |
| 460 | Mr G Moisan, SAGMAI, Government of Quebec | 4 October 1984 |
| 461 | National Police Working Party | 13 November 1984 |
| 462 | Dr J von Sturmer | 4 December 1984 |
| 463 | Mr P Griffin | 5 December 1984 |
| 464 | Dr P Sutton | 13 December 1984 |
| 465 | Ms P Ditton | 1 January 1985 |

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| 466 | Ms C Baldwin, Great Barrier Reef Marine Park Authority | 11 January 1985 |
| 467 | National Parks Wildlife, NSW (Mr DA Johnstone) | 6 February 1985 |
| 468 | Mr GS Lester | 19 February 1985 |
| 469 | Assoc Prof K Maddock | 12 March 1985 |
| 470 | Dr O Jessep | 14 March 1985 |
| 471 | Dr J MacPherson, Dept of Justice, Saskatchewan | 6 March 1985 |
| 472 | Mr GS Lester | 19 February 1985 |
| 473 | Bureau of the Northern Land Council (Ms J Thomson) | 23 July 1985 |
| 474 | Mr PG McHugh | 12 March 1985 |
| 475 | Dr O Jessep | 26 March 1985 |
| 476 | National Farmers Federation | 11 April 1985 |
| 477 | Mr S Mam, National Aboriginal Conference, Qld | 17 April 1985 |
| 478 | Assoc Prof K Maddock | 24 April 1985 |
| 479 | Mr R Jingle, Weipa South | 30 April 1985 |
| 480 | Yarrabah Community Council (Mr BC Barlow) | 7 May 1985 |
| 481 | Ms L Roberts, Cabinet Sub-Committee on Aboriginal Police and Community Relations, WA | 29 May 1985 |
| 482 | Dr HC Coombs | 5 June 1985 |
| 483 | Hon K Wilson, Minister with Special Responsibility for Aboriginal Affairs, WA | 5 June 1985 |
| 484 | Hon K Wilson, Minister with Special Responsibility for Aboriginal Affairs, WA | 5 June 1985 |
| 485 | Mr R Butler, Nomads Group, Strelley | 23 July 1985 |
| 486 | Mr PB Keris, Village Courts Secretariat, PNG | 14 August 1985 |
| 487 | Assoc Prof B Morse, University of Ottawa, Ontario | 15 August 1985 |
| 488 | Mr L Lucas, Department of Justice, PNG | 29 August 1985 |
| 489 | Dr P Sutton, SA Museum | 10 September 1985 |
| 490 | Mr JPM Long, Commissioner for Community Relations | 12 September 1985 |
| 491 | Dr D Bell | 16 September 1985 |
| 492 | Ms L Roberts, Secretary, Special Cabinet Committee on Aboriginal Police & Community Relations, WA | 21 August 1985 |
| 493 | Mr D de Yong, Department of Social Welfare, Alberta | August 1985 |
| 494 | Mr R Chisholm | 29 August and 14 September 1985 |
| 495 | Dr N Williams, on Behalf of Yolngu Clan leaders, Yirrkala | 25 September 1985 |
| 496 | Ms KM Hazlehurst, Australian Institute of Criminology | 1 October 1985 |
| 497 | Mrs A Nelson Napururla and Mrs B Nabarula | 7 October 1985 |
| 498 | Department of Habours and Marine, Queensland (Mr J Leech) | 25 October 1985 |
| 499 | Mr D Hore-Lacy | 14 November 1985 |
| 500 | Mr C Loorham, Central Australian Aboriginal Legal Aid Service | 19 November 1985 |
| 501 | Fisheries Department, WA (Mr P Rogers) | 9 January 1986 |
| 502 | Mr RE Johannes, CSIRO | 7 January 1986 |
| 503 | Professional Association of Applied Anthropology and Sociology, WA | 20 January 1986 |
| 504 | National Police Working Party | 31 January 1986 |
| 505 | Department of Lands, South Australia (WJ Edwards) | 13 February 1986 |
| 506 | Department of Aboriginal Affairs (Cth) (Mr P Gulliver) | 13 March 1986 |

# TABLE OF CASES

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# Bibliography

**NOTE**: *Items are listed under the Parts of the Report in which they appear (if more than one, under each of them), as follows*:

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Part II: General Principles
Part III: Marriage, Children and Family Property
Part IV: Criminal Law and Sentencing
Part V: Evidence and Procedure
Part VI: Justice Mechanisms in Aboriginal Communities
Part VII: Aboriginal Hunting, Fishing and Gathering Rights
Part VIII: Summary of Recommendations and their Implementation

Under each Part books and articles are listed separately from official papers and reports, and official papers and reports are listed under the relevant jurisdiction.

## Part I: Introduction

### Books and Articles


ABORIGINES FRIENDS ASSOCIATION, *Seventy-Fifth Annual Report*, Aborigines Friends Association, Adelaide, 1933.

AKERMAN, K, 'The Renascence of Aboriginal Law in the Kimberleys' in RM Berndt & CH Berndt (ed) *Aborigines of the West*, University of Western Australia Press, Perth, 1980, 234.

ALLEN, CK, *Law in the Making*, 7th edn, Oxford University Press, Oxford, 1964.

ALLOTT, AN, 'The Judicial Ascertainment of Customary Law in British Africa' (1957) 20 *Modern Law Review* 244.

ALLOTT, AN, *New Essays in African Law*, Butterworths, London, 1970.

BALL, RE, 'The Economic Situation of Aborigines in Newcastle, 1982' (1985) 1 *Australian Aboriginal Studies* 2.

BELL, D, *Daughters of the Dreaming*, McPhee, Gribble, Sydney, 1983.

BELL, D, 'Aboriginal Women and the Recognition of Customary Law in Australia', in Commission on Folk Law and Legal Pluralism, *Papers of the Symposium on Folk Law and Legal Pluralism, XIth International Congress of Anthropological and Ethnological Sciences*, Vancouver, Canada, August 19-23, 1983, Ottawa, 1983, vol 1, 491.

BELL, D, 'Re Charlie Jakamarra Limbiari. Report to the Court', unpublished report tendered in *R v Charlie Limbiari Jagamara*, unreported, Northern Territory Supreme Court, 28 May 1984.

BELL, D & DITTON, P, *Law: The Old and The New. Aboriginal Women in Central Australia Speak Out*, 2nd edn, Aboriginal History, Canberra, 1984.

BENNETT, JM & CASTLES, AC, *A Source Book of Australian Legal History*, Law Book Co, Sydney, 1979.

BERNDT, CH, 'Digging sticks and spears, or the two-sex model' in F Gale (ed) *Women's Role in Aboriginal Society*, Australian Institute of Aboriginal Studies, Canberra, 1974, 39.

BERNDT, CH, 'Aboriginal Women and the Notion of "The Marginal Man"' in RM Berndt and CH Berndt (ed) *Aborigines of the West*, University of Western Australia Press, Perth, 1980, 28.

BERNDT, RM, 'Groups with Minimal European Associations' in H Sheils (ed) *Australian Aboriginal Studies*, Oxford University Press, Melbourne, 1963, 387.

BERNDT, RM, 'Law and Order in Aboriginal Australia' in CH Berndt and RM Berndt (ed) *Aboriginal Man in Australia. Essays in Honour of EP Elkin*, Sydney, Angus & Robertson, Sydney 1965, 166.

BERNDT, RM & BERNDT, CH, *Arnhem Land. Its History and its People*, Cheshire, Melbourne, 1954.

BERNDT, RM & BERNDT, CH, *The World of the First Australians*, 4th rev edn, Rigby, Adelaide, 1985.

BLACKSTONE, W, *Commentaries on the Laws of England*, Clarendon Press, Oxford, 1765, vol 1.

BLAINEY, G, *Triumph of the Nomads*, rev edn, Sun Books, Melbourne, 1983.

BRIDGES, B, 'The Aborigines and the Law: New South Wales 1788-1855' (1970) 4 *Teaching History* 40.

BRIDGES, B, 'The Extension of English Law to the Aborigines for Offences Committed Inter Se, 1829-1842' (1973) 59 *Journal of the Royal Australian Historical Society* 264.

BROPHO, R, *Fringedweller*, Alternative Publishing Cooperative Limited, Sydney, 1980.

BUTLIN, NG, *Our Original Aggression Aboriginal Populations of Southeastern Australia 1788-1850*, George Allen & Unwin, Sydney, 1983.
CASTLES, AC, *An Australian Legal History*, Law Book Co, Sydney, 1982.
CLIFFORD, W, 'An Approach to Aboriginal Criminology' (1982) 15 *Australian and New Zealand Journal of Criminology* 3.
COLLINS, D, *An Account of the English Colony in NSW*, T Cadell Jnr & W Davies, London, 1789, vol 1.
COOMBS, HC, DEXTER, BG & HIATT, LR, 'The Outstation Movement in Aboriginal Australia' in E Leacock and R Lee (ed) *Politics and History in Band Societies*, Cambridge University Press, Cambridge, 1982, 427.
CRANSTON, R, 'The Aborigines and the Law: An Overview' (1973) 8 *University of Queensland Law Journal* 60, 61.
CRAWFORD, J, *The Creation of States in International Law*, Oxford, Clarendon Press, 1979.
CRAWFORD, J, 'The Australian Law Reform Commission's Reference on the Recognition of Aboriginal Customary Law' (1984) 17 *Verfassung und Recht in Ubersee* 133.
CRIBBIN, J, *The Killing Times*, Fontana, Sydney, 1984.
CURR, EM, *The Australian Race*, John Ferres, Government Printer, Melbourne, 1887, vols I-IV.
DAGMAR, H, *Aborigines and Poverty*, Katholicke Universitet Nijmegen, Netherlands 1978.
DEBELLE, B, 'Aborigines, the Law and the Future' (1981) 57 (11) *Current Affairs Bulletin* 4.
DEBELLE, B, 'Aboriginal Customary Law' in G Nettheim (ed) *Human Rights for Aboriginal People in the 1980s*, Legal Books, Sydney, 1983, 63.
DETMOLD, MJ, *The Australian Commonwealth*, Law Book Co, Sydney, 1985.
DIXON, RMW, *The Languages of Australia*, Cambridge University Press, 1980.
EGGLESTON, EM, *Fear, Favour or Affection. Aborigines and the Criminal Law in Victoria, South Australia and Western Australia*, Australian National University Press, Canberra, 1976.
ELKIN, AP, 'Aboriginal Evidence and Justice in North Australia' (1947) 17 *Oceania* 173.
ELKIN, AP, 'The Kopara: the Settlement of Grievances' (1951) 2 *Oceania* 191.
ELKIN, AP, 'Aboriginal Policy 1930-1950: Some Personal Associations' (1957) 1 *Quadrant* 29-30.
ELKIN, EP, *The Australian Aborigines*, rev edn, Angus & Robertson, Sydney, 1979.
ELLIS, VR, *Trucanini*, Australian Institute of Aboriginal Studies, Canberra, 1981.
EVANS, R, SANDERS, K & CRONIN, K, *Exclusion, Exploitation and Extermination: Race Relations in Colonial Queensland*, Australian and New Zealand Book Co, Sydney, 1973.
EVATT, E, 'The Acquisition of Territory in Australia and New Zealand' in CH Alexandrowicz (ed) *Grotian Society Papers 1968*, The Hague, Nijhoff, 1970, 16.
FLOOD, J, *Archaelogy of the Dreamtime*, Collins, Sydney, 1983.
FRAME, A, 'Colonizing Attitudes towards Maori Custom' (1981) *New Zealand Law Journal* 105.
GALE, F, *Urban Aborigines*, ANU Press, Canberra, 1972.
GALE, F (ed) *We are Bosses Ourselves: The Status and Role of Aboriginal Women Today*, Australian Institute of Aboriginal Studies, Canberra, 1983.
GALE, F & WUNDERSITZ, J, *Adelaide Aborigines. A case study of urban life 1966-1981*, Australian National University Press, Canberra, 1982.
GILBERT, K, *Living Black*, Penguin, Ringwood, 1977.
HALL, VH, *Dreamtime Justice*, Rigby, Adelaide, 1962.
HAMILTON, A, 'Aboriginal Women: The Means of Production' in J Mercer (ed) *The Other Half*, Penguin, Sydney, 1975, 167.
HASLUCK, P, *Black Australians*, Melbourne University Press, Melbourne, 1942.
HASSELL, K, *The Relations Between the Settlers and Aborigines in South Australia, 1836-1860*, Libraries Board of South Australia, Adelaide, 1966.
HIATT, LR, *Kinship and Conflict*, Australian National University, Canberra, 1965.
HENNESSY, P, 'Aboriginal Customary Law and the Australian Criminal Law: An Unresolved Conflict' in B Swanton (ed) *Aborigines and Criminal Justice*, Australian Institute of Criminology, Canberra, 1984, 336.
HOCKING, B, 'Does Aboriginal Law Now Run in Australia?' (1979) 10 *Federal Law Review* 161.
HOCKING, B, 'Is Might Right? An Argument for the Recognition of Traditional Aboriginal Title to Land in the Australian courts' in E Olbrei (ed) *Black Australians: The Prospects for Change*, Students Union, James Cook University, Townsville, 1982, 207.
HOCKING, B, 'Aboriginal Land Rights: War and Theft' (1985) 20(9) *Australian Law News* 22

HOOKEY, J, 'The Gove Land Rights Case: A Judicial Dispensation for the Taking of Aboriginal Lands in Australia?' (1972) 5 *Federal Law Review* 85.
HOOKEY, J, 'Settlement and Sovereignty' in P Hanks and B Keon-Cohen (ed) *Aborigines and The Law*, George Allen and Unwin, Sydney, 1984, 1.
KABERRY, PM, *Aboriginal Woman, Sacred and Profane*, Border Press, New York, 1973.
KIRBY, MD, 'TGH Strehlow and Aboriginal Customary Law' (1980) 7 *Adelaide Law Review* 172.
KIRBY, MD, 'Should we Recognise Aboriginal Tribal Laws?' in *Reform the Law*, Oxford University Press, Melbourne, 1983, 121.
KOLIG, E, *The Silent Revolution*, Institute for the Study of Human Issues, Philadelphia, 1981.
KRIEWALDT, MC, 'The Application of the Criminal Law to the Aborigines of the Northern Territory of Australia' (1960) 5 *University of Western Australia Law Review* 1.
LENDRUM, SD, 'The Coorong Massacre: Martial Law and the Aborigines at First Settlement' (1977) 6 *Adelaide Law Review* 26.
LESTER, GS, 'The Territorial Rights of the Inuit of the Canadian Northwest Territories: A Legal Argument', PhD Thesis, York University, 2 vols, 1981.
LESTER, GS, *Inuit Territorial Rights in the Canadian Northwest Territories*, Tungavik Federation of Nunavut, Ottawa, 1984.
LESTER, GS & PARKER, G, 'Land Rights. The Australian Aborigines Have Lost a Legal Battle But ...' (1973) 11 *Alberta Law Review* 189.
LITCHFIELD, MR, 'Confiscation of Maori Land' (1985) 15 *Victoria University of Wellington Law Review* 335.
LOGAN JACK, R, *North West Australia*, Simpkin Marshall, Hamilton Kent and Co Ltd, London, 1921.
LOOS, N, *Invasion and Resistance: Aboriginal-European Relations on the North Queensland Frontier 1861-1897*, Australian National University Press, Canberra, 1982.
LOVEDAY, P (ed) *Service Delivery to Outstations*, Australian National University, North Australia Research Unit, Darwin, 1982.
LYONS, G, 'Official Policy towards Victorian Aborigines 1957-1974' (1983) 1/2 *Aboriginal History* 61.
McINTRYE, G, 'Aboriginal Land Rights — a Definition at Common Law' in E Olbrei (ed) *Black Australians: The Prospects for Change*, Students Union, James Cook University, Townsville, 1982, 207.
MADDOCK, K, *The Australian Aborigines*, 2nd edn, Penguin, Ringwood, 1982.
MADDOCK, K, 'Aboriginal Customary Law' in P Hanks & B Keon-Cohen (ed) *Aborigines and the Law*, George Allen & Unwin, Sydney, 1984, 212
MISNER, RL, 'Administration of Criminal Justice on Aboriginal Settlements' (1974) 7 *Sydney Law Review* 257.
MULVANEY, DJ, *The Prehistory of Australia*, rev edn, Penguin, Ringwood, 1975.
NEEDHAM, JS, *White and Black in Australia*, National Missionary Council for Australia, London, 1935.
PETERSON, N, 'Buluwandi: A Central Australian Ceremony for the Resolution of Conflict', in RM Berndt (ed) *Australian Aboriginal Anthropology*, University of Western Australia Press, Perth, 1970, 200.
PRIESTLEY, LJ, 'Communal Native Title and the Common Law: Further Thoughts on the Gore Land Rights Case' (1974) 6 *Federal Law Review* 150.
REECE, RHW, *Aborigines and Colonists: Aborigines and Colonial Society in New South Wales in the 1830s and 1840s*, Sydney University Press, Sydney, 1974.
REES, N, 'What do we Expect?' (1983) 8 *Aboriginal Law Bulletin* 10.
REYNOLDS, H, *Aborigines and Settlers: The Australian Experience 1788-1939*, Cassell Australia, Sydney, 1972.
REYNOLDS, H, *The Other Side of the Frontier*, Penguin, Ringwood, 1982.
RILEY, R, 'Aboriginal Law and its Importance for Aboriginal People' in HW Finkler (comp) *Papers of the Symposium on Folk Law and Legal Pluralism, XIth International Congress of Anthropological and Ethnological Sciences, Vancouver, Canada, August 19-23, 1983*, Ontario, 1983, 1110.
ROWLEY, CD, *Outcasts in White Australia*, Penguin, Ringwood, 1972.
ROWLEY, CD, *The Destruction of Aboriginal Society*, Penguin, Ringwood, 1978.
RYAN, L, *The Aboriginal Tasmanians*, University of Queensland Press, St Lucia, 1981.
SANSOM, B, *The Camp at Wallaby Cross*, Australian Institute of Aboriginal Studies, Canberra, 1980.
SANSOM, B, 'The Aboriginal Commonality' in RM Berndt (ed) *Aboriginal Sites, Rights and Resource Development*, University of Western Australia Press, Perth, 1982, 117.
SCHAPPER, H, *Aboriginal Advancement to Integration: Conditions and Plans for Western Australia*, Australian National University Press, Canberra, 1970.

SHARP, RL, 'People without Politics' in VF Ray (ed) *Systems of Political Control and Bureaucracy in Human Societies*, University Of Washington Press, Seattle, 1958, 1.
STANNER, WEH, 'Durmugam: A Nangiomeri' (1959) in WEH Stanner, *White Man Got No Dreaming*, Australian University Press, Canberra, 1979, 67.
STANNER, WEH, 'Religion, Totemism and Symbolism' (1962), in WEH Stanner, *White Man Got No Dreaming*, Australian University Press, Canberra, 1979, 106.
STANNER, WEH, 'The History of Indifference thus Begins' (1963) in WEH Stanner, *White Man Got No Dreaming*, Australian National University Press, Canberra, 1979, 165.
STREHLOW, TGH, *Aranda Traditions*, repr, Melbourne University Press, Melbourne, 1968.
STREHLOW, TGH, 'Geography and the Totemic Landscape in Central Australia: a Functional Study' in RM Berndt (ed) *Australian Aboriginal Anthropology*, University of Western Australia Press, Perth, 1970, 92.
STREHLOW, TGH, *Aboriginal Customary Law*, Strehlow Research Foundation, Pamphlet No 5, Adelaide, 1978.
SUTTON, P, 'How Many Languages are There?' *Aboriginal News* 2(1) (1975).
SUTTON, P, 'People with Politics: Management of Land and Personnel on Australia's Cape York Peninsula' in NW Williams and ES Hunn (ed) *Resource Managers: North American and Australian Hunter-Gatherers*, Westview Press, Colorado, 1982, 155.
THOMSON, D, *Donald Thomson in Arnhem Land*, Currey O'Neil, South Yarra, Victoria 1983.
WACHON, D, 'Customary Law: The ALRC Discussion Paper' (1981) 6 *Legal Services Bulletin* 229.
WALLER, L & ROWLEY, CD, 'Elizabeth Eggleston' (1976) 3 *Monash University Law Review* 1.
WHEELER, GC, *The Tribe and Intertribal Relations in Australia*, John Murray, London, 1910.
WILLIAMS, NM, *Two Laws: Managing Disputes in a Contemporary Aboriginal Community*, unpublished, Canberra, 1983.
WILSON, P, *Black Death White Hands*, George Allen and Unwin, Sydney, 1982.
YOUNG, E, *Tribal Communities in Rural Areas*, Development Studies Centre, Australian National University, Canberra, 1981.

## Official Papers and Reports

***Australia — Federal***

ABORIGINAL DEVELOPMENT COMMISSION, *Annual Report 1980-81*, AGPS, Canberra, 1982.
ABORIGINAL LAND RIGHTS COMMISSION, *First Report* (Commissioner, Justice EA Woodward) AGPS, Canberra, 1973; *Second Report*, AGPS, Canberra, 1974.
AUSTRALIAN INSTITUTE OF ABORIGINAL STUDIES, *Aborigines and Uranium, Consolidated Report to the Minister for Aboriginal Affairs on the Social Impact of Uranium Mining on the Aborigines of the Northern Territory*, AGPS, Canberra, 1984.
AUSTRALIAN LAW REFORM COMMISSION Report No 2, *Criminal Investigation*, AGPS, Sydney, 1975.
AUSTRALIAN LAW REFORM COMMISSION — AUSTRALIAN INSTITUTE OF ABORIGINAL STUDIES, *Report of a Working Seminar on the Aboriginal Customary Law Reference*, Sydney, 1983.
BLEAKLEY, JW, *The Aboriginals and Half-Castes of Central Australia and North Australia*, Commonwealth of Australia, Parl Paper 21 / 1929.
COOMBS, HC, *The Role of the National Aboriginal Conference*, AGPS, Canberra, 1984.
COMMISSION OF INQUIRY INTO POVERTY, Research Report, *Aboriginals and Islanders in Brisbane* (JW Brown, R Hirschfield, D Smith) AGPS, Canberra, 1974.
COMMISSION OF INQUIRY INTO POVERTY, Research Report, *A Study of Aboriginal Poverty in Two Country Towns*, AGPS, Canberra, 1975.
COMMISSION OF INQUIRY INTO POVERTY, Second Main Report, *Law and Poverty in Australia* (Commissioner: R Sackville) AGPS, Canberra, 1975.
COMMITTEE OF REVIEW (Chairman: Professor CA Gibb) *The Situation of Aborigines on Pastoral Properties in the Northern Territory*, AGPS, Canberra, 1973.
COUNCIL FOR ABORIGINAL AFFAIRS, *Report on Arnhem Land* (HC Coombs, WEH Stanner & BG Dexter), AGPS, Canberra, 1975.
DEPARTMENT OF ABORIGINAL AFFAIRS, Town Campers Assistance Program, *Annual Report*, AGPS, Canberra, 1985.
DEPARTMENT OF ABORIGINAL AFFAIRS, *Aboriginals in Australia Today*, AGPS, Canberra, 1981.

DEPARTMENT OF ABORIGINAL AFFAIRS, *Aboriginal Social Indicators 1984*, AGPS, Canberra, 1984.
HAWKINS, G & MISNER, R, *Restructuring the Criminal Justice System in the Northern Territory* (3rd Report), Canberra, 1974.
HOUSE OF REPRESENTATIVES STANDING COMMITTEE ON ABORIGINAL AFFAIRS, *Present Conditions of Yirrkala People*, AGPS, Canberra, 1974.
HOUSE OF REPRESENTATIVES STANDING COMMITTEE ON ABORIGINAL AFFAIRS, *Interim Report, Alcohol Problems with Aboriginals*, Northern Territory Aspects, AGPS, Canberra, 1976.
HOUSE OF REPRESENTATIVES STANDING COMMITTEE ON ABORIGINAL AFFAIRS, *Aboriginal Legal Aid*, AGPS, Canberra, 1980.
HOUSE OF REPRESENTATIVES STANDING COMMITTEE ON ABORIGINAL AFFAIRS, S*trategies to Help Overcome the Problems of Aboriginal Town Camps*, AGPS, Canberra, 1982.
INITIAL CONFERENCE OF COMMONWEALTH AND STATE ABORIGINAL AUTHORITIES, *Aboriginal Welfare*, AGPS, Canberra, 1937.
INQUIRY INTO ABORIGINAL LEGAL AID (JP Harkins), *Report* vol 1 *General Issues*, vol 2 *Legal Aid in the States*, vol 3 *Appendixes*, AGPS, Canberra, 1985.
NATIONAL POPULATION INQUIRY, *Population & Australia. A Demographic Analysis and Projection*, AGPS, Canberra, 1975
O'DONOGHUE, L, *Proposal for an Aboriginal and Islander Consultative Organisation*, Commonwealth Government Printer, Canberra, 1985.
SENATE STANDING COMMITTEE ON CONSTITUTIONAL AND LEGAL AFFAIRS, *Two Hundred Years Later ... Report on the Feasibility of a Compact or 'Makarrata' between the Commonwealth and Aboriginal People*, AGPS, Canberra, 1983.

***New South Wales***

ABORIGINAL CHILDREN'S RESEARCH PROJECT (NSW), Discussion Paper No 3, *Assimilation and Aboriginal Child Welfare — the NSW Community Welfare Bill*, Sydney, 1983.
ABORIGINAL CHILDREN'S RESEARCH PROJECT (NSW), *Draft Principal Report*, Sydney, 1982.
DEPARTMENT OF HEALTH, 'Aboriginal Mortality in NSW Country Regions 1980/81' (unpublished) Sydney, October 1983.
SELECT COMMITTEE ON THE CONDITIONS OF THE ABORIGINALS, *Report*, Votes & Proceedings (Legislative Council) 1845.
SELECT COMMITTEE ON THE NATIVE POLICE FORCE, *Report*, Votes and Proceedings (Legislative Assembly) 1856-7.

***Queensland***

SELECT COMMITTEE ON THE NATIVE POLICE FORCE AND THE CONDITIONS OF THE ABORIGINALS GENERALLY, *Report*, Votes & Proceedings, 1861.

***South Australia***

SELECT COMMITTEE OF THE LEGISLATIVE COUNCIL ON THE ABORIGINALS, *Report*, SA Parl Papers No 165, 1980.

***Victoria***

SELECT COMMITTEE ON THE ABORIGINALS, *Report*, Votes and Proceedings (Legislative Council) no D8, 1859.

***Western Australia***

LAVERTON ROYAL COMMISSION 1975-76, *Report*, WA Government Printer, Perth 1976.
ROYAL COMMISSION APPOINTED TO INVESTIGATE, REPORT AND ADVISE UPON MATTERS IN RELATION TO THE CONDITION AND TREATMENT OF ABORIGINES, *Report*, WA Parl Paper 2/1935.

***Great Britain***

HOUSE OF COMMONS, Select Committee on Aborigines (British Settlements), *Report*, House of Commons Parl Paper 425, 1837.

***United States of America***

TASK FORCE THREE, Federal Administration and Structure of Indian Affairs, *Final Report to the American Indian Policy Review Commission*, US Government Printing Office, Washington, 1976.

***Other***

GROOTE EYLANDT ABORIGINAL TASK FORCE, *Report*, Angurugu, 1985.

NATIONAL TRACHOMA AND EYE HEALTH PROGRAM, *Report*, Royal Australian College of Opthalmologists, Sydney, 1980.

## Part II: General Principles

### Books and Articles

AGUDA, A, 'Discriminatory Statutory Provisions and Fundamental Rights Provisions of the Constitutions of Botswana, Lesotho and Swaziland' (1972) 89 *South African Law Journal* 299.

ALLOTT, A, 'The Judicial Ascertainment of Customary Law — British Africa' (1957) 20 *Modern Law Review*, 244.

ALTMAN, JC, *Aborigines and Mining Royalties in the Northern Territory*, Canberra, Australian Institute of Aboriginal Studies, 1983.

ANDERSON, E, 'The Indigenous People of Saskatchewan: Their Rights under International Law' (1981) 7 *American Indian Journal* No 1, 4.

ANNIS, M, 'Indian Education: Bilingual Education — A Legal Right for Native Americans' (1982) 10 *American Indian Law Review* 333.

ARTHUR, BH, 'The Significance of Twenty Years' (1984) 14 *Victoria University of Wellington Law Review* 295.

BARSH, RL, 'The Indian Child Welfare Act of 1978: A Critical Analysis' (1980) 31 *Hastings Law Journal* 1237.

BARSH, RL, 'Indigenous North America and Contemporary International Law' (1983) 62 *Oregon Law Review* 73.

BARTHOLOMEW, GW, 'Recognition of Polygamous Marriages in America' (1964) 13 *International and Comparative Law Quarterly* 1022.

BAYEFSKY, AF, 'The Human-Rights Committee and the Case of Sandra Lovelace' [1982] *Canadian Yearbook of International Law* 244.

BELL, D & DITTON, P, *Law: The Old and the New Aboriginal Women in Central Australia Speak Out*, 2nd edn, Aboriginal History, Canberra, 1984.

BENNETT, G, *Aboriginal Rights in International Law, London, Royal Anthropological Institute of Great Britain and Northern Ireland*, Occasional Paper 37, 1978.

BERNDT, RM, (ed) *Aborigines and Change: Australia in the '70s*, Australian Institute of Aboriginal Studies, Canberra, 1977.

BEYTAGH, FX, 'Equality under the Irish and American Constitutions: A Comparative Analysis' [1983] *Irish Jurist* 56.

BROWNLIE, I, *Principles of Public International Law*, Oxford, Clarendon Press, 3rd edn, 1979.

BROWNLIE, I, 'The Rights of Peoples in Modern International Law' (1985) 9 *Bulletin of the Australian Society of Legal Philosophy* 104.

CAPOTORTI, F, Special Rapporteur, Sub-Commission on Prevention of Discrimination and Protection of Minorities, *Study on the Rights of Persons belonging to Ethnic, Religious and Linguistic Minorities*, UN Doc E/CN 4 Sub 2/384/Rev 1, 1979.

CAPOTORTI, F, 'I Diritti dei Membri di Minoranze: verso una Dichiarazione delle Nazione Unite?' (1981) 64 *Rivista di Diritto Internazionale* 30.

CASSESE, A, 'The Self-Determination of Peoples' in L Henkin (ed) *The International Bill of Rights. The Covenant on Civil and Political Rights*, Columbia University Press, New York,1981, 92.

CHARLESWORTH, M, *The Aboriginal Land Rights Movement*, 2nd edn, Hodja Educational Resources Cooperative, Richmond, 1984.

CLIFFORD, W, 'An Approach to Aboriginal Criminology' (1982) 14 *Australian and, New Zealand Journal of Criminology* 3.

COHEN, C, 'Affirmative Action and the Rights of the Majority', in C Fried (ed) *Minorities: Community and Identity*, Springer-Verlag, Berlin, 1983, 353.

COHEN, FS, *Handbook of Federal Indian Law*, 1982 edn, Michie, Charlottesville.

COMAROFF, JL & ROBERTS, S, *Rules and Processes*, University of Chicago Press, Chicago, 1981.
COTRAN, E, 'The Place and Future of Customary Law in East Africa', in *East African Law Today*, British Institute of International and Comparative Law, Stevens and Sons, London, 1966, 72.
COUNCIL OF EUROPE, *'Collected Edition of the Travaux Preparatoires'*, Martinus Nijhoff, The Hague, 1975.
DAVIES, B, 'Implementing the Indian Child Welfare Act' (1982) 16 *Clearinghouse Review* 179.
DAVIES, M, 'Aboriginal Rights in International Law: Human Rights' in B Morse (ed) *Aboriginal Peoples and the Law: Indians, Metis and Inuit Rights in Canada*, Carleton University Press, Ottawa, 1985, 745.
DE MONTIGNY, Y, 'L'ONU et la protection internationale des minorities depuis 1945' (1978) 13 *La Revue Juridique Themis* 389.
DICKEY, A, 'The Mythical Introduction of "Law" to the Worora Aborigines' (1976) 12 *University of Western Australia Law Review* 350.
DINSTEIN, Y, 'Collective Human Rights of People and Minorities' (1976) 25 *International and Comparative Law Quarterly* 102.
DINSTEIN, Y, 'The Right to Life, Physical Integrity and Liberty' in L Henkin (ed) *The International Bill of Rights: The Covenant on Civil and Political Rights*, Columbia University Press, New York, 1981, 114.
EDWARDS, R (ed) *The Preservation of Australia's Aboriginal Heritage*, Australian Institute of Aboriginal Studies, Canberra, 1975.
EGGLESTON, E, 'Prospects for United Nations Protection of Human Rights of Indigenous Minorities' (1970-3) 5 *Australian Year Book of International Law* 68.
EGGLESTON, E, *Fear Favour or Affection. Aborigines and the Criminal Law in Victoria, South Australia and Western Australia*, Australian National University Press, Canberra, 1976.
ELKIN, AP, *The Australian Aborigines*, rev edn, Angus and Robertson, Sydney, 1979.
EPSTEIN, AL, 'The Reasonable Man Revisited' (1973) 7 *Law & Society Review* 643.
EVANS, G, 'Benign Discrimination and the Right to Equality' (1974) 6 *Federal Law Review* 26.
GARBER, L & O'CONNOR, CM, 'The 1984 UN Sub-Commission on Prevention of Discrimination and Protection of Minorities' (1985) 79 *American Journal of International Law* 168.
GOLD, ME, 'Equality before the Law in the Supreme Court of Canada: A Case Study' (1980) 18 *Osgoode Hall Law Journal* 336.
GOLD, ME, 'Canadian Bill of Rights' (1982) 60 *Canadian Bar Review* 137.
GOLDMAN, AH, *Justice and Reverse Discrimination*, Princeton University Press, Princeton NJ, 1979.
GREEN, LC, 'Human Rights and Canada's Indians' (1971) 1 *Israel Year Book on Human Rights* 156.
GUERRERO, MP, 'Indian Child Welfare Act of 1978: A Response to the Threat to Indian Culture caused by Foster and Adoptive Placements of Indian Children' (1979) 7 *American Indian Law Review* 51.
GUMBERT, M, *Neither Justice Nor Reason. A Legal and Anthropological Analysis of Aboriginal Land Rights*, University of Queensland Press, St Lucia, 1984.
HANKS, P & KEON-COHEN, B (ed) *Aborigines and the Law*, George Allen and Unwin, Sydney 1984.
HANTKE, J, 'The 1982 Session of the UN Sub-commission on Prevention of Discrimination and Protection of Minorities' (1983) 77 *American Journal of International Law* 651.
HIATT, LR, *Kinship and Conflict. A Study of an Aboriginal Community in Northern Arnhem Land*, Australian National University Press, Canberra, 1965.
HIGGINS, R, 'Derogations from Human Rights Treaties' (1976-7) 48 *British Yearbook of International Law* 281.
HOEBEL, EA, *The Law of Primitive Man*, Harvard University Press, Cambridge, Massachusetts, 1954.
HOGG, PW, 'The Canadian Bill of Rights — Equality before the Law — *AG Can v Lavell*' (1974) 52 *Canadian Bar Review* 263.
HOOKER, MB, *Legal Pluralism. An Introduction to Colonial and Neo-colonial Laws*, Oxford, Clarendon Press, 1975.
KATZ, AM, 'Benign Preference: An Indian Decision and the *Bakke* Case' (1977) 25 *American Journal of Comparative Law* 611.
KELLY, JB, 'National Minorities in International Law' (1973) 3 *Denver Journal of International Law and Policy* 253.
KEON-COHEN, B & MORSE, B, 'Indigenous Land Rights in Australia and Canada' in B Hanks & B Keon-Cohen (ed) *Aborigines and the Law*, George Allen & Unwin, Sydney, 1984, 74.
KIRBY, MD, 'TGH Strehlow and Aboriginal Customary Law' (1980) 7 *Adelaide Law Review* 172.
KLEIN, RM, '*Morton v Mancari*: Achieving the Landmark Status Denied De Funis?' (1974) 2 *Ohio Northern Law Review* 371.

KRYGIER, M, 'Discrimination and Anti-Discrimination Law, Affirmative Action and Human Rights' (1980) 24 *Quadrant* 4.
LERNER, N, *The UN Convention on the Elimination of All Forms of Racial Discrimination*, Sijthoff & Noordhoff, Alphen van den Rijn, 2nd edn, 1980.
LONG J, 'From the Commissioner for Community Relations' (1983) 6 *Human Rights* 7.
LYONS, N, 'Constitutional Issues in Native Law' in B Morse (ed) *Aboriginal Peoples and the Law: Indian, Metis and Inuit Rights in Canada*, Carleton University Press, Ottawa, 1985, 408.
McINNES, S, 'The Inuit and the Constitutional Process: 1978-81' in IAL Getty & AS Lussier (ed) *As Long as the Sun Shines and Water Flows. A Reader in Canadian Native Studies*, University of British Columbia Press, Vancouver, 1983, 317.
McKEAN, WA, 'The Meaning of Discrimination in International and Municipal Law' (1970) 44 *British Yearbook of International Law* 178.
McKEAN, WA, *Equality and Discrimination under International Law*, Oxford, Clarendon Press,1983.
McMEEKIN, DH, 'Red, White and Gray: Equal Protection and the American Indian' (1969) 21 *Stanford Law Review* 1236.
MADDOCK, K, 'Two Laws in One Community' in RM Berndt (ed) *Aborigines and Change: Australia in the '70s*, Australian Institute of Aboriginal Studies, Canberra, 1977, 13.
MADDOCK, K, 'Aboriginal Land Rights Traditionally and in Legislation: A Case Study' in MC Howard (ed) *Aboriginal Power in Australian Society*, University of Queensland Press, St Lucia, 1982, 55.
MADDOCK, K, *The Australian Aborigines*, 2nd edn, Penguin, Ringwood, 1982.
MADDOCK, K, 'Owners, Managers and the Choice of Statutory Traditional Owners by Anthropologists and Lawyers' in N Peterson & M Langton (ed) *Aborigines, Land and Land Rights*, Australian Institute of Aboriginal Studies, Canberra, 1983, 211.
MADDOCK, K, *Your Land is our Land*, Penguin, Ringwood, 1983.
MADDOCK, K, 'Aboriginal Customary Law' in P Hanks & B Keon-Cohen (ed) *Aborigines and the Law*, George Allen & Unwin, Sydney, 1984, 212.
MAROUSEK, LA, 'The Indian Child Welfare Act of 1978 — Provisions and Policy' (1980) 24 *South Dakota Law Review* 98.
MEGGITT, M J, *Desert People. A Study of the Walbiri Aborigines of Central Australia*, Angus and Robertson, Melbourne, 1974.
MERON, T, 'The Meaning and Reach of the International Convention on the Elimination of All Forms of Racial Discrimination' (1985) 79 *American Journal of International Law* 283.
MODEEN, T, *The International Protection of National Minorities in Europe*, Acta Academiae Aboensis, Ser A, Vol 37, No 1, 1969.
MORRIS, JHC, *Dicey and Morris on the Conflict of Laws*, 10th edn, London, Stevens, 1980.
NATIONAL ABORIGINAL CONFERENCE, 'The Australian Aboriginal Position Paper on Indigenous Ideology and Philosophy', Paper presented to the World Council of Indigenous Peoples, Third General Assembly, Canberra, May 1981, in RJ Moore (ed) *A Report on the Organisation of the 3rd General Assembly WCIP*, Canberra, National Aboriginal Conference, 1981.
NEATE, G 'Keeping secrets secret' (1982) 5 *Aboriginal Law Bulletin* 1, 17.
NETTHEIM, G, 'The Relevance 'of International Law' in P Hanks & B Keon-Cohen (ed) *Aborigines and the Law*, George Allen and Unwin, Sydney, 1984, 50.
PARTLETT, D, 'Benign Racial Discrimination: Equality and Aborigines' (1979) 10 *Federal Law Review* 238.
PETERSON, N, *Aboriginal Land Rights: A Handbook*, Australian Institute of Aboriginal Studies, Canberra, 1981.
PETERSON, N & LANGTON, M, *Aborigines, Land and Land Rights*, Australian Institute of Aboriginal Studies, Canberra, 1983.
POLLIS, A & SCHWAB, P, 'Human Rights: A Western Construct of Limited Applicability', in A Pollis & P Schwab (ed) *Human Rights. Cultural and Ideological Perspectives*, Praeger, New York, 1980, 1.
POLYVIOU, PG, *The Equal Protection of the Laws*, London, Duckworth, 1980.
POULTER, S, *Legal Dualism in Lesotho*, Morija, Lesotho, 1979.
RAMCHARAN, BG, 'Equality and Non-discrimination' in L Henkin (ed) *The International Bill of Rights. The Covenant on Civil and Political Rights*, Columbia University Press, New York, 1981, 246.
READ, JS, 'Customary Law under Colonial Rule' in MF Morris and JS Read (ed) *Indirect Rule and the Search for Justice*, Oxford, Clarendon Press, 1972, 166.
RE, L & BROWN A, *Flying South*, William Collins, Sydney, 1986.

REES, N, 'What do We Expect?' (1983) 8 *Aboriginal Law Bulletin* 10.
ROBERTSON, AH, *Human Rights in Europe*, Manchester UP, Manchester, 2nd edn, 1977, 281.
ROWLEY, CD, *Outcasts in White Australia*, Penguin, Ringwood, 1972.
ROWLEY, CD, *The Destruction of Aboriginal Society*, Penguin, Ringwood, 1978.
ROWSE, T, 'Liberalising the Frontier. Aborigines and Australian Pluralism' (1983) 42 *Meanjin* 71.
SACKETT, L, 'Liquor and the Law: Wiluna, Western Australia' in RM Berndt (ed) *Aborigines and Change. Australia in the '70s*, Canberra, Australian Institute of Aboriginal Studies, 1977, 90.
SANDERS, DE, 'The Bill of Rights and Indian Status' (1972) 7 *University of British Columbia Law Review* 81.
SANDERS, DE, 'The Indian Act and the Bill of Rights' (1974) 6 *Ottawa Law Review* 397.
SANDERS, DE, 'Aboriginal Peoples and the Constitution' (1981) 19 *Alberta Law Review* 410.
SANDERS, DE, 'The Indian Lobby' in K Banting and R Simeon (ed) *And No One Cheered. Federalism, Democracy and the Constitution Act*, Methuen, Toronto, 1983, 301.
SAWER, G, 'The Australian Constitution and the Australian Aborigine' (1966) 2 *Federal Law Review* 17.
SCHAPERA, I, 'Tswana Concepts of Custom and Law' (1983) 27 *Journal of African Law* 141.
SCHEFFLER, HW, 'Rites and Rights' (1984) 2 *Australian Aboriginal Studies* 40.
SMALL, C (ed) *Justice in Indian Country*, American Indian Training Program, Oakland, 1980.
SOHN, LB, 'The Rights of Minorities' in L Henkin (ed) *The International Bill of Rights. The Covenant on Civil and Political Rights*, New York, Columbia University Press, 1981, 270.
STOLJAR, S, 'How can Feud-Law be Law Properly So-Called' (1978) 13 *University of Western Australia Law Review* 262.
STONE, J, 'Justice not Equality' in E Kamenka & AE-S Tay (ed) *Justice*, Edward Arnold, London, 1979, 97.
STREHLOW, TGH, *Aboriginal Customary Law*, Strehlow Research Foundation, Pamphlet No 5, Adelaide, 1978.
SWARTZ, MJ, 'Cultural Sharing and Cultural Theory: Some Findings of a Five-Society Study' (1982) 84 *American Anthropologist* 314.
TARNOPOLSKY, WS, *The Canadian Bill of Rights*, 2nd rev ed, McClelland and Stewart, Toronto, 1975.
TARNOPOLSKY, WS, 'The Historical and Constitutional Context of the Proposed Canadian Charter of Rights and Freedoms' (1981) 44 *Law and Contemporary Problems* 169.
TATZ, C, *Aborigines and Uranium and Other Essays*, Heinemann, Richmond, 1982.
TATZ, C, 'Aborigines and Civil Law' in P Hanks & B Keon-Cohen (ed) *Aborigines and the Law*, George Allen & Unwin, Sydney, 1984, 103.
TAY, A E-S, 'Law and Legal Culture' (1983) 27 *Bulletin of the Australian Society of Legal Philosophy* 15.
THOMSON, JA, 'Human rights Treaties as Legislation: *Gerhardy v Brown*, Reverse Discrimination and the Constitution' [1985] *Australian Current Law* AT 16.
THORNBERRY, P, 'Is there a Phoenix in the Ashes? International Law and Minority Rights' (1980) 15 *Texas International Law Journal* 421.
TOYNE, P & VACHON, D, *Growing Up the Country*, Penguin, Ringwood, 1984.
TWINING, W, 'Law and Anthropology. A Case Study in Interdisciplinary Collaboration' (1973) 7 *Law and Society Review* 571.
VACHON, D, 'Customary Law: The ALRC Discussion Paper' (1981) 6 *Legal Service Bulletin* 229.
VANDERPAN, ML, 'In re DLL and CLL Minors: Ruling on the Constitutionality of the Indian Child Welfare Act' (1981) 26 *South Dakota Law Review* 67.
VIERDAG, EW, *The Concept of Discrimination in International Law*, Nijhoff, The Hague, 1973.
WEAVER, SM, 'The Status of Indian Women' in JL Elliott (ed) *Two Nations, Many Cultures. Ethnic Groups in Canada*, Prentice-Hall, Scarborough, 1983, 56.
WEISSBRODT, D, 'Indigenous Populations' (1985) 13 *Aboriginal Law Bulletin* 12.
WENTWORTH, WC, 'The Position of the Aboriginals in Law and Society' (1969) 2 *Justice* 20.
WILKIE, M, *Aboriginal Land Rights in New South Wales*, Alternative Publishing Co-operative Ltd, Sydney, 1985.
WILSON, P, *Black Death. White Hands*, George Allen and Unwin, Sydney, 1982.
WHITLAM, EG, 'Australian International Obligations on Aborigines' (1981) 53 *Aust Q* 433.
WHITLAM, EG, 'Australia's International Obligations' in G Nettheim (ed) *Human Rights for Aboriginal People in the 1980s*, Legal Books, Sydney, 1983, 11.
WOODWARD, AE, 'Land Rights and Land Use: A View from the Sidelines' (1985) 59 *Australian Law Journal* 413.

## Official Papers and Reports


***Australia — Federal***

ABORIGINAL CUSTOMARY LAW COMMITTEE, *Preliminary Report* (Chairman, Judge JM Lewis) Adelaide, September 1979,

ABORIGINAL CUSTOMARY LAW COMMITTEE, *Children and Authority in the North-West* (Chairman, Judge JM Lewis) Adelaide, August 1984

ABORIGINAL LAND RIGHTS COMMISSION, *Second Report* (Commissioner: AE Woodward) AGPS, Canberra, 1974.

ABORIGINAL LAND COMMISSIONER, *Uluru (Ayers Rock) National Park and Lake Amadeus/Luritja Land Claim*, AGPS, Canberra, 1980.

ABORIGINAL LAND COMMISSIONER, *Finnis River Land Claim*, AGPS Canberra, 1981.

ABORIGINAL LAND COMMISSIONER, *Daly River (Malak Malak) Land Claim*, AGPS, Canberra, 1982.

AUSTRALIAN INSTITUTE OF MULTICULTURAL AFFAIRS, *Multiculturalism for all Australians*, AGPS, Canberra, 1982.

BRAZIL, P & MITCHELL, B (eds) *Opinions of Attorneys-General of the Commonwealth of Australia*, vol 1, AGPS, Canberra, 1981.

COMMISSION OF INQUIRY INTO POVERTY, Second Main Report, *Law and Poverty in Australia* (Commissioner: R Sackville) AGPS, Canberra, 1975.

DEPARTMENT OF ABORIGINAL AFFAIRS, *Report on a Review of the Administration of the Working Definition of Aboriginal and Torres Strait Islander*, unpublished, Canberra, 1981.

DEPARTMENT OF HOME AFFAIRS, *Protection of Aboriginal Folklore and the Control and Protection of Cultural Property*, Working Party, Report, unpublished, Canberra, 4 December 1981.

HOUSE OF REPRESENTATIVES SELECT COMMITTEE ON VOTING RIGHTS OF ABORIGINES, *Report*, Parl Paper 2, 1961.

HOUSE OF REPRESENTATIVES STANDING COMMITTEE ON ABORIGINAL AFFAIRS, *Alcohol Problems of Aboriginals*, AGPS, Canberra, 1978.

HOUSE OF REPRESENTATIVES STANDING COMMITTEE ON ABORIGINAL AFFAIRS, *Report on Aboriginal Legal Aid*, AGPS, Canberra, 1980.

HOUSE OF REPRESENTATIVES STANDING COMMITTEE ON ABORIGINAL AFFAIRS, *Strategies to help overcome the Problems of Aboriginal Town Camps*, AGPS, Canberra, 1982.

PARLIAMENTARY COMMITTEE OF ENQUIRY, *The Role of the NACC*, AGPS, Canberra 1976.

SENATE STANDING COMMITTEE ON CONSTITUTIONAL AND LEGAL AFFAIRS, *Two Hundred Years Later ... Report on the Feasibility of a Compact, or 'Makarrata'. between the Commonwealth and Aboriginal People*, AGPS, Canberra, 1983.

SENATE STANDING COMMITTEE ON CONSTITUTIONAL AND LEGAL AFFAIRS, *Reforming the Law*, AGPS, Canberra, 1979.

TOOHEY, Justice J, *Seven Years On. Report to the Minister for Aboriginal Affairs on the Aboriginal Land Rights (Northern Territory) Act 1976 and Related Matters*, AGPS, Canberra, 1984.

***New South Wales***

SELECT COMMITTEE OF THE LEGISLATIVE ASSEMBLY UPON ABORIGINES, *First Report, Aboriginal Land Rights and Sacred and Significant Sites* (Chairman: MF Keane MP) Sydney, 1980.

***South Australia***

ABORIGINAL CUSTOMARY LAW COMMITTEE, (Chairman: Judge JM Lewis) *Preliminary Report* Adelaide, September 1979.

ABORIGINAL CUSTOMARY LAW COMMITTEE, (Chairman: Judge JM Lewis) *Children and Authority in the North West Adelaide*, August 1984.

***Western Australia***

ABORIGINAL LAND INQUIRY, (Commissioner: P Seaman QC) *Report* Perth, 1984.

***Papua New Guinea***

LAW REFORM COMMISSION OF PAPUA NEW GUINEA, Report No 7, *The Role of Customary Law in the Legal System*, Waigani, November 1977.

***Canada***

FIRST MINISTERS' CONFERENCE ON ABORIGINAL CONSTITUTIONAL AFFAIRS, *Constitutional Accord on Aboriginal Rights*, Ottawa, 1983.

***United States***

HOUSE OF REPRESENTATIVES, *Report together with Dissenting Views to Accompany HR 12533*, 95th Congress, 2d Session, Washington, 1978.

UNITED STATES COMMISSION ON CIVIL RIGHTS, *Indian Tribes. A Continuing Quest for Survival*, Washington, US Government Printing Office, 1981.

***United Nations***

*United Nations Yearbook 1952*, United Nations, New York, 1953.

VIEWS OF THE HUMAN RIGHTS COMMITTEE under Art 5(4) of the Optional Protocol concerning Communication NOR.6/24 (30 July 1981), *Report of the Human Rights Committee*, GAOR 36th Sess, Supp No 40 (A/36/40), Annex XVIII.

***United Kingdom***

HOUSE OF COMMONS, Select Committee on Aborigines (British Settlements), *Report*, House of Commons Parl Paper 425, 1837.

## Part III: Marriage, Children and Family Property

### Books and Articles

AKERMAN, K, 'Material Culture and Trade in the Kimberleys Today' in RM Berndt & CH Berndt (ed) *Aborigines of the West*, University of Western Australia Press, Perth, 1980, 243.

ALTMAN, JC, *Aborigines and Mining Royalties in the Northern Territory*, Australian Institute of Aboriginal Studies, Canberra, 1983.

ALTMAN, JC & NIEUWENHUYSEN, J, *The Economic Status of Australian Aborigines*, Cambridge University Press, Cambridge, 1979.

AUSTIN, J, 'The Destruction of Aboriginal Families' *Nunga News* (July 1976) 2-3.

AMERICAN INDIAN LAWYER TRAINING PROGRAM, *Indian Child Welfare Act of 1978. A Law for our Children*, Washington, 1979.

BAILEY, RJ, 'Legal Recognition of De Facto Relationships' (1978) 52 *Australian Law Journal* 174.

BARSH, RL, 'The Indian Child Welfare Act of 1978: A Critical Analysis' (1980) 31 *Hastings Law Journal* 1287.

BARTHOLEMEW, GW, 'Recognition of Polygamous Marriages in America' (1964) 13 *International and Comparative Law Quarterly* 1022.

BEKKER, JC, 'Grounds of divorce in African customary marriages in Natal' (1976) 9 *Comparative and International Law Journal of Southern Africa* 346.

BELL, D, 'Desert Politics: Choices in the "Marriage Market"' in M Etienne & E Leacock (ed) *Women and Colonisation. Anthropological Perspectives*, Praeger, New York, 1980, 239.

BELL, D, *Daughters of the Dreaming*, McPhee Gribble, Melbourne, 1983.

BELL, D, 'Re Charlie Jakamarra Limbiari. Report to the Court', unpublished report tendered in *R v Charlie Limbiari Jagamara*, unreported, NT Supreme Court, 28 May 1984.

BELL, D & DITTON, P, *Law: The Old and the New. Aboriginal Women in Central Australia Speak Out*, 2nd edn, Aboriginal History, Canberra, 1984.

BERNDT, CH & BERNDT, RM, *Pioneers and Settlers*, Pitman Australia, Carlton, Victoria, 1978.

BERNDT, CH & BERNDT, RM, 'Aborigines' in FJ Hunt (ed) *Socialisation in Australia*, Australia International Press and Publications, Melbourne, 1978, 126.

BERNDT, RM, 'Tribal Marriage in a Changing Social Order' (1961) 5 *University of Western Australia Law Review* 326.

BERNDT, RM & BERNDT, CH, *Arnhem Land: Its History and Its People*, Cheshire, Melbourne, 1954.

BERNDT, RM & BERNDT, CH, *The World of the First Australians*, 4th rev edn, Rigby, Adelaide, 1985.

BLANCHARD, EL & BARSH, RL, 'What is Best for Tribal Children?' (1980) 25 *Social Work* 350.

BRANDL, M, 'The Aboriginal Children and Families Heritage Project' (1980) 5 *Australian Child and Family Welfare* 20.

BROOME, R, *Aboriginal Australians*, George Allen & Unwin, Sydney, 1982.
BUTHOD, T, 'Children: An Analysis of Cases Decided Pursuant to the Indian Child Welfare Act of 1978' (1982) 10 *American Indian Law Review* 311.
CARROLL, L, 'Muslim Law in South Asia: The Right to Avoid an Arranged Marriage Contract During Minority' (1981) 23 *Journal of the Indian Law Institute* 149.
CHARTIER, C & MERCREDI, O, 'The Status of Child Welfare Services for Indigenous Peoples of Canada; The Problem, the Law, and the Solution' (1982) 5 *Canadian Legal Aid Bulletin* 163.
CHISHOLM, R, 'Aboriginal Self-Determination and Child Welfare: A Case Conference' (1982) 17 *Australian Journal of Social Issues* 258.
CHISHOLM, R, 'The NSW Community Welfare Act 1982: Opportunities for Aboriginal Involvement' (1982) 5 *Aboriginal Law Bulletin* 13.
CHISHOLM, R, 'Destined Children. Aboriginal Child Welfare in Australia: Directions of Change in Law and Policy' (Part 1) (1985) 14 *Aboriginal Law Bulletin* 6; (Part 2) (1985) 15 *Aboriginal Law Bulletin* 7.
CHISHOLM, R, *Black Children: White Welfare? Aboriginal Child Welfare Law and Policy in New South Wales*, Social Welfare Research Centre; Reports & Proceedings No 52, Kensington, 1985.
COMAROFF, JL & ROBERTS, S, *Rules and Processes*, University of Chicago Press, London, 1981.
COOMBS, HC, BRANDL, MM, SNOWDON, WE, *A Certain Heritage. Programs for and by Aboriginal Families in Australia*, Centre for Research and Environmental Studies, Australian National University, Canberra, 1983.
CRAIG, WM & SCOTT, MFC, 'The Maintenance of Concubines' (1962) 1 *University of Tasmanian Law Review* 685.
CRAWFORD, J, *Australian Courts of Law*, Oxford University Press, Melbourne, 1982.
CRETNEY, SM, 'The Law relating to Unmarried Partners from the Perspective of a Law Reform Agency' in JM Eekelaar & SN Katz (ed) *Marriage and Cohabitation in Contemporary Societies*, Butterworths, Toronto, 1980, 357.
CUNLIFFE, I, 'Consent and Sexual Offences Law Reform in New South Wales' (1984) 8 *Criminal Law Journal* 271.
DAGMAR, H, *Aborigines and Poverty*, Katholieke Universiteit, Nijmegen, 1978.
DAVIES, B, 'Implementing the Indian Child Welfare Act' (1982) 16 *Clearinghouse Review* 179.
DEECH, R, 'The Case against Legal Recognition of Cohabitation' in JM Eekelaar and SN Katz (ed) *Marriage and Cohabitation in Contemporary Societies*, Butterworths, Toronto, 1980, 300.
ELKIN, AP, *The Australian Aborigines*, rev edn, Angus & Robertson, Sydney, 1979.
EVATT, E, WATSON, R & MCKENZIE, D, 'The Legal and Social Aspects of Cohabitation and the Reconstituted Family as a Social Problem' in JM Eekelaar & SN Katz (ed) *Marriage and Cohabitation in Contemporary Societies*, Butterworths, Toronto, 1980, 399.
FINLAY, HA, *Family Law in Australia*, 3rd edn, Butterworths, Sydney, 1983.
FISCHLER, RS, 'Protecting American Indian Children' (1980) 25 *Social Work* 341.
FREEDMAN, M, 'Chinese Family Law in Singapore: The Rout of Custom' in JND Anderson (ed) *Family Law in Asia and Africa*, Allen & Unwin, London, 1968, 49.
FRY, HK, 'Australian Marriage Rules' (1933) 25 *Sociological Review* 3.
GALE, F, 'The Impact of Urbanisation on Aboriginal Marriage Patterns', in RM Berndt (ed) *Australian Aboriginal Anthropology*, University of Western Australia Press, Perth, 1970, 305.
GAMBLE, H, *The Law relating to Parents and Children*, Law Book Company, Sydney, 1981.
GOBBO, JA, BYRNE, D & HEYDON, JD (ed) *Cross on Evidence*, 2nd Australian edn, Butterworths, Sydney, 1979.
GOODALE, JC, 'Marriage Contracts among the Tiwi' (1962) 1 *Ethnology* 452.
GUERRERO, MP, 'Indian Child Welfare Act of 1978: A Response to the Threat to Indian Culture caused by Foster and Adoptive Placements of Indian Children' (1979) 7 *American Indian Law Review* 51.
HAHLO, HR, 'The Matrimonial Regimes of South Africa' in JND Anderson (ed) *Family Law in Asia and Africa*, Allen & Unwin, London, 1968, 143.
HAMILTON, A, 'The Role of Women in Aboriginal Marriage Arrangements' in F Gale (ed) *Women's Role in Aboriginal Society*, 3rd edn, Australian Institute of Aboriginal Studies, Canberra, 1978, 29.
HAMILTON, A, 'Gender and Power in Aboriginal Australia', in N Grieve & P Grimshaw (ed) *Australian Women*, Oxford University Press, Melbourne, 1981, 76.
HAMILTON, A, *Nature and Nurture. Aboriginal Child-Rearing in North-Central Arnhem Land*, Australian Institute of Aboriginal Studies, Canberra, 1981.
HARDINGHAM, IJ, *Intestate Succession*, Law Book Co, Sydney, 1978.

HARDINGHAM, IJ, NEAVE, MA & FORD, HAJ, *Wills and Intestacy*, Law Book Co, Sydney, 1983.
HEPPELL, M, & WRIGLEY, JJ, *Blackout in Alice*, Australian National University Press, Canberra, 1981.
HIATT, LR, 'Authority and Reciprocity in Australian Aboriginal Marriage Arrangements' (1967) 6 *Mankind* 468.
HIATT, LR, *Kinship and Conflict*, Australian National University Press, Canberra, 1965.
HIPPLER, A & CONN, S, 'The Village Council and its Offspring: A Reform for Bush Justice' (1975) 5 *University of California at Los Angeles Law Review* 22.
HUNT, FJ (ed) *Socialisation in Australia*, Australia International Press and Publications Pty Ltd, Melbourne, 1978.
JAMROZIK, A, *Empowerment and Welfare: The Issues of Power Relationships in Services for Aborigines*, Occasional Paper No 2, NSW Ministry for Aboriginal Affairs, 1982.
JESSEP, O, 'Customary Family Law, The Courts and the Constitution in Papua New Guinea' (1984) 3 *Lawasia* (NS) 1.
JOHNSTON, P, 'The Crisis of Native Child Welfare' (1982) 5 *Canadian Legal Aid Bulletin* 175.
JONES, MT, 'Indian Child Welfare: A Jurisdictional Approach' (1979) 21 *Arizona Law Review* 1123.
KABERRY, PM, *Aboriginal Women, Sacred and Profane*, George Rutledge and Sons, London, 1939.
KARSTEN, IGF, 'Child Marriages' (1969) 32 *Modern Law Review* 212.
KOVAKS, D, 'Maintenance in the Magistrates' Courts: How Fares the Forum?' (1973) 47 *Australian Law Journal* 725.
KOVAKS, D, 'Getting Blood out of Stones: Problems in the Enforcement of Maintenance Orders from Magistrates' Courts' (1974) 1 *Monash University Law Review* 67.
KRIEWALDT, MC, 'The Application of the Criminal Law to the Aborigines of the Northern Territory of Australia' (1960) 5 *University of Western Australia Law Review* 1.
LIMPRECHT, J, 'The Indian Child Welfare Act — Tribal Self-Determination Through Participation in Child Custody Proceedings' [1979] *Wisconsin Law Review* 1202.
LONG, J, 'Polygyny, Acculturation and Contact: Aspects of Aboriginal Marriage in Central Australia' in RM Berndt *Australian Aboriginal Anthropology*, University of Western Australia Press, Perth, 1970, 292.
MACDONALD, JA, 'The Spallumcheen Indian Band By Law and its Potential Impact on Native Indian Child Welfare Policy in British Columbia' (1983) 4 *Canadian Journal of Family Law* 75.
MCRAE, H, 'Reform of Family Law in Papua New Guinea' in D Weisbrot, A Paliwala and A Sawyer (ed) *Law and Social Change in Papua New Guinea*, Butterworths, Sydney, 1982, 127.
MADDOCK, K, *The Australian Aborigines*, rev edn, Penguin, Ringwood, 1982.
MAROUSEK, LA, 'The Indian Child Welfare Act of 1978: Provisions and Policy' (1980) 25 *South Dakota Law Review* 98.
MATTHEWS, P, 'Marital Rape' (1980) 10 *Family Law* 221.
MEGGITT, MJ, 'Marriage Among the Walbiri of Central Australia: A Statistical Examination' in RM Berndt & CH Berndt (ed) *Aboriginal Man in Australia. Essays in Honour of AP Elkin*, Angus & Robertson, Sydney, 1965, 146.
MEGGITT, MJ, *Desert People. A Study of the Walbiri Aborigines of Central Australia*, Angus & Robertson, Melbourne, 1974.
MORSE, BW, 'Indian Child Welfare: Options for change in Ontario. Final Report', unpublished, Ottawa, May 1981.
MORSE, BW, 'Native Indian and Metis Children in Canada: Victims of the Child Welfare System' in GK Verma & C Bagley, *Race Relations and Cultural Differences*, Croom Helm, London, 1983, 259.
MORSE, BW, 'The Child and Family Services Bill. Impact upon the Indian People of Ontario', unpublished, Ottawa, 1984.
MOSSMAN, MJ & SACKVILLE, R, 'Cohabitation and Social Security Entitlement', in *Essays on Law and Poverty: Bail and Social Security*, Australian Government Publishing Service, Canberra, 1977, 80.
NEAVE, MA, 'The Position of Ex-nuptial Children in Victoria' (1976) 10 *Melbourne University Law Review* 330.
O'CONNOR, D, 'Rape Law Reform — The Australian Experience' (1977) 1 *Criminal Law Review* 305.
O'DONNELL, C & CRANEY, J (ed) *Family Violence in Australia*, Longman Cheshire, Melbourne, 1982.
PALK, SNL, 'Informal Wills: From Soldiers to Citizens' (1976) 5 *Adelaide Law Review* 382.
PALMER, K, *Grey Earth and Clean Sand*, Western Desert Project, Flinders University of South Australia, Adelaide, 1982.
PIDDINGTON, R, 'Irregular Marriages in Australia' (1970) 40 *Oceania* 329.

REAY, M, 'Aboriginal and White Australian Family Structure: An Enquiry into Assimilation Trends' in M Reay (ed) *Aborigines Now: New Perspectives in the Study of Aboriginal Communities*, Angus and Robertson, Sydney, 1964, 19.
ROSE, F, 'The Australian Aboriginal Family: Some Theoretical Considerations' in *Forschen und Wirken. Festschrift zur 150-Jahr-Fier der Humboldt Universitat zu Berlin*, vol 3, Dt Verlag der Wissenschaften (in Komm), Berlin, 1960, 415.
RUBIN, N, 'Customary Family Law in Southern Africa: Its Place and Scope', in JND Anderson (ed) *Family Law in Asia and Africa*, Allen and Unwin, London, 1968, 255.
SACKVILLE, RM & LANTERI, A, 'The Disabilities of Illegitimate Children in Australia: A Preliminary Analysis' (1970) 44 *Australian Law Journal* 5.
SAMUELS, A, 'Legal Recognition and Protection of Minority Customs in a Plural Society in England' (1981) 10 *Anglo-American Law Review* 241.
SANDERS, D, *Family Law and Native People*, Canadian Law Reform Commission, Background Paper, Ottawa, 1975.
SANSOM, B, *The Camp at Wallaby Cross*, Australian Institute of Aboriginal Studies, Canberra, 1980.
SANSOM, B & BAINES, P, 'Aboriginal Child Placement in the Urban Context' in Commission on Folk Law and Legal Pluralism, *Papers of the Symposium on Folk Law and Legal Pluralism, XIth International Congress of Anthropological and Ethnological Sciences, Vancouver, Canada, August 19-23, 1983*, Ottawa, 1983, vol 2, 1083.
SCUTT, JA, 'Consent in Rape: The Problem of the Marriage Contract' (1979) 3 *Monash University Law Review* 255.
SHAPIRO, W, 'Local Exogamy and the Wife's Mother in Aboriginal Australia' in RM Berndt, *Australian Aboriginal Anthropology*, University of Western Australia Press, Perth, 1970, 51.
SHAPIRO, W, *Social Organisation in Aboriginal Australia*, St Martin's Press, New York, 1979.
SHYLLON, FO, 'Immigration and the Criminal Courts' (1971) 34 *Modern Law Review* 135.
SOMMERLAD, E, 'Homes for Blacks: Aboriginal Community and Adoption', in C Picton (ed) *Proceedings of the First Australian Conference on Adoption* Committee of the First Australian Conference on Adoption, Clayton, Victoria, 1976, 160.
SOMMERLAD, E, 'Aboriginal Children Belong in the Aboriginal Community: Changing Practices in Adoption' (1977) 12 *Australian Journal of Social Issues* 167.
SUTTON, P, 'Aboriginal Customary Marriage — Determination and Definition' (1985) 12 *Aboriginal Law Bulletin* 13.
WAMSER, G, 'Child Welfare under the Indian Child Welfare Act 1978: A New Mexico Focus' (1980) 10 *New Mexico Law Review* 413.
WILSON, P, *Black Death: White Hands*, George Allen & Unwin, Sydney, 1982.

## Official Papers and Reports

***Australia — Federal***

ATTORNEY-GENERAL'S DEPARTMENT, *A Maintenance Agency for Australia. Report of the National Maintenance Inquiry*, AGPS, Canberra, 1984.
AUSTRALIAN INSTITUTE OF ABORIGINAL STUDIES, *Aborigines and Uranium. Consolidated Report to the Minister of Aboriginal Affairs on the Social Impact of Uranium Mining on the Aborigines of the Northern Territory*, AGPS, Canberra, 1984.
AUSTRALIAN LAW REFORM COMMISSION, Report No 18, *Child Welfare*, AGPS, Canberra, 1981.
AUSTRALIAN LAW REFORM COMMISSION, ACL Research Paper 4 (JR Crawford & FM Howarth) *Aboriginal Customary Law: Child Custody, Fostering and Adoption*, Sydney, 1982.
AUSTRALIAN LAW REFORM COMMISSION, Discussion Paper, ACTLR4, *Domestic Violence in the ACT*, AGPS, Canberra, 1984.
AUSTRALIAN LAW REFORM COMMISSION, Report No 30, *Domestic Violence*, AGPS, Canberra, 1986.
PARLIAMENTARY JOINT SELECT COMMITTEE ON THE FAMILY LAW ACT, *Family Law in Australia*, AGPS, Canberra, 1980.
DEPARTMENT OF SOCIAL SECURITY (A Jordan), Research Paper 18, *As His Wife. Social Security Law and Policy on De Facto Marriage*, Canberra, 1981.
DEPARTMENT OF SOCIAL SECURITY, *Aboriginal access to Departmental Programs and Services*, unpublished, Canberra, 1983.

HOUSE OF REPRESENTATIVES, STANDING COMMITTEE ON ABORIGINAL AFFAIRS, *Strategies to Help Overcome the Problems of Aboriginal Town Camps*, AGPS, Canberra, 1982.
HOUSE OF REPRESENTATIVES, STANDING COMMITTEES ON ABORIGINAL AFFAIRS, *The Effects of Asbestos Mining on the Baiyulgil Community*, AGPS, Canberra, 1984.
ROYAL COMMISSION ON HUMAN RELATIONSHIPS, *Final Report*, AGPS, Canberra, 1977.
STANDING COMMITTEE OF SOCIAL WELFARE ADMINISTRATORS, Working Party Report, *Aboriginal Fostering and Adoption, Review of State and Territory Principles, Policies and Practices*, Sydney, October 1983.

***New South Wales***
ABORIGINAL CHILDREN'S RESEARCH PROJECT (NSW), Discussion Paper No 3, *Assimilation and Aboriginal Child Welfare — the NSW Community Welfare Bill*, Sydney, 1982.
ABORIGINAL CHILDREN'S RESEARCH PROJECT (NSW), *Draft Principal Report*, March 1982.
ANTI-DISCRIMINATION BOARD, Report on Discrimination in Legislation, Sydney, 1978.
MINISTRY FOR ABORIGINAL AFFAIRS, Occasional Paper No 2 (Jamrozik, Z), *Empowerment and Welfare: The Issues of Power Relationships in Services for Aborigines*, Sydney, 1982.
NSW LAW REFORM COMMISSION, Report No 36, *De Facto Relationships*, Sydney, 1983.
READ, P, *The Stolen Generations: The Removal of Aboriginal Children in NSW*, 1883 to 1969, Aboriginal Children's Research Project, Sydney, 1981.

***South Australia***
CRIMINAL LAW AND PENAL METHODS REFORM COMMITTEE, *Third Report* (Chairman: Justice RF Mitchell) Adelaide, 1975.
CRIMINAL LAW AND PENAL METHODS REFORM COMMITTEE, *Special Report: Rape and Other Sexual Offences* (Chairman: Justice RF Mitchell) Adelaide, 1976.

***Tasmania***
LAW REFORM COMMISSION OF TASMANIA, *Report on Obligations Arising from De Facto Relationships*, LRC No 12, Hobart, 1977.

***Western Australia***
LAW REFORM COMMISSION OF WESTERN AUSTRALIA, Report No 66, *Fatal Accidents*, Perth, 1978.
DEPARTMENT OF COMMUNITY WELFARE, Backlog Procedures Committee, *Report: A System of Review and Planning for Children in Limbo*, Perth, September 1982.

***Canada — Federal***
HEPWORTH, HP, *Foster Care and Adoption in Canada*, Canadian Council on Social Development, Ottawa, 1980.

***Canada — British Columbia***
ROYAL COMMISSION ON FAMILY AND CHILDREN'S LAW, *Fifth Report*, Vancouver, 1975.

***Canada — Manitoba***
MANITOBA REVIEW COMMITTEE ON INDIAN AND METIS ADOPTIONS AND PLACEMENTS (Associate Chief Judge EC Kimelman), *Interim Report*, Manitoba, May 1983.
MANITOBA REVIEW COMMITTEE ON INDIAN AND METIS ADOPTIONS AND PLACEMENTS (Associate Chief Judge EC Kimelman), *File Review Report*, Manitoba, April 1984.

***Canada — Ontario***
MINISTRY OF COMMUNITY AND SOCIAL SERVICES, *The Children's Act. A Consultation Paper, Ontario*, October 1982.

***United Kingdom***
UK LAW COMMISSION No 42, *Report on Polygamous Marriages*, London, 1971.

***United States of America***

HOUSE OF REPRESENTATIVES, 95th Congress, 2nd Session, *Report together with Dissenting Views to Accompany HR 12533*, Washington, 1978.

US SENATE, 96th Congress, 2nd Session, *Hearings before the Select Committee on Indian Affairs on Oversight of the Indian Child Welfare Act, 30 June 1980*, Washington, 1978.

***Other***

INTERNATIONAL YEAR OF THE CHILD, National Committee of Non-Governmental Organisations, Subcommittee on Aboriginal Children, *Aboriginal Children in Crisis*, unpublished, Sydney, 1979.

SECRETARIAT FOR NATIONAL ABORIGINAL ISLANDER CHILD CARE, *First Interim Report on the Aboriginal Fostering and Adoption Principles and its Implementation in the States of Australia*, Fitzroy, Victoria, 1985.

THIRD AUSTRALIAN CONFERENCE ON ADOPTION, Recommendations and Statements, *Changing Families, Adelaide*, May 1982.

## Part IV: The Criminal Law and Sentencing

### Books and Articles

ASHWORTH, AJ, 'Excusable Mistake of Law' [1974] *Criminal Law Review* 652.

ASHWORTH, AJ, 'The Doctrine of Provocation' (1976) 35 *Cambridge Law Journal* 292.

ASHWORTH, AJ, 'Prosecution and Procedure in Criminal Justice' [1979] *Criminal Law Journal* 482.

ASHWORTH, AJ, *Sentencing and Penal Policy*, Weidenfeld & Nicholson, London, 1983.

ASHWORTH, AJ, 'Criminal Justice, Rights and Sentencing: A Review of Sentencing Policy and Problems'. Paper presented to seminar on Sentencing, Australian Institute of Criminology, March 1986.

BAILEY, R, 'A Comparison of Appearance By Aboriginal and Non-Aboriginal Children Before the Children's Court and Children's Aid Panels in South Australia' in B Swanton (ed) *Aborigines and Criminal Justice*, Australian Institute of Criminology, Canberra, 1984, 43.

BATES, AP, BUDDIN, TL & MEURE, DJ, *The System of Criminal Law Cases and Materials New South Wales, Victoria and South Australia*, Butterworths, Sydney, 1979.

BAYNE, P, 'Prosecutorial Discretion and Administrative Law' in IL Potas (ed) *Prosecutorial Discretion*, Australian Institute of Criminology, Canberra, 1984, 69.

BEDJAOUI, M, Special Rapportcur, 'Eleventh Report on Succession of States in respect of matters other than Treaties' in United Nations, *International Law Commission Yearbook 1979* Vol 11 Pt 1,67.

BELL, R, 'Protection of Aboriginal Folklore' (1985) 17 *Aboriginal Law Bulletin* 6.

BELL, S, 'Diminished Responsibility Reconsidered' [1982] *Criminal Law Review* 809.

BERNDT, RM & BERNDT, CH, *The World of the First Australians*, 4th rev edn, Rigby, Adelaide, 1985.

BILES, D, *Groote Eylandt Prisoners. A Research Report*, Australian Institute of Criminology, Canberra, 1983.

BRADY, M, *Children without Ears. Petrol Sniffing in Australia*, Drug & Alcohol Services Council, Adelaide, 1985.

BRADY, M & MORICE, R, *Aboriginal Adolescent Offending Behaviour. A Study of a Remote Community*, Flinders University of SA, Western Desert Project, 1982.

BRADY, M & PALMER, K, *Alcohol in the Outback: Two Studies of Drinking*, Australian National University, North Australia Research Unit, Darwin, 1984.

BRETT, P, 'Mistake of Law as a Criminal Defence' (1966) 5 *Melbourne University Law Review* 179.

BROWN, M, 'The Te Atatu Maori Tribunal: Community Participation and Support of the Formal Court System, New Zealand' in K Hazlehurst (ed) Justice *Programs for Aboriginal and other Indigenous Communities*, Australian Institute of Criminology, Canberra, 1985, 87.

CAMPBELL, IG, 'The Role of the Crown Prosecutor on Sentence' (1985) 9 *Criminal Law Journal* 202.

CANAGARAYAR, JK, 'Diversion' A New Perspective in Criminal Justice' (1980) 22 *Canadian Journal of Criminology* 168.

CAWTE, J, *Medicine is the Law*, University Press of Hawaii, Honolulu, 1974.

CLIFFORD, W, 'An Approach to Aboriginal Criminology' (1982) 15 *Australian and New Zealand Journal of Criminology* 3.

CLINTON, RN, 'Criminal Jurisdiction over Indian Lands: A Journey Through the Maze' (1976) 18 A*rizona Law Review* 531.

COHEN, FS, *Handbook of Federal Indian Law*, Michie, Bobbs — Merrill, Virginia, rev edn, 1982.

CORRECTIONAL SERVICES DIVISION (NT), 'Aboriginals and the Supervision Process' in B Swanton (ed) *Aborigines and Criminal Justice*, Australian Institute of Criminology, Canberra, 1984, 308.
COWLEY, D, 'The Retreat from Morgan' [1982] *Crim LR* 198.
CRAWFORD, J, *Australian Courts of Law*, Oxford University Press, Melbourne, 1982.
CROW, I & COVE, J, 'Ethnic Minorities and the Courts' [1984] *Criminal Law Review* 413.
DAUNTON-FEAR, MW & FREIBERG A, '"Gum-tree" Justice: Aborigines and the Courts' in D Chappell & P Wilson (ed) *The Australian Criminal Justice System*, 2nd edn, Law Book Co, Sydney, 1977.
DELL, S, 'Diminished Responsibility Reconsidered' [1982] *Criminal Law Review* 809.
DUCKWORTH, AME, FOLEY-JONES, CR, LOWE, P & MALLER M, 'Imprisonment of Aborigines in North Western Australia' (1982) 15 *Australian and New Zealand Journal of Criminology* 26.
EDITORIAL, 'Sentencing the Aborigine Offender' (1977) 10 *Australian & New Zealand Journal of Criminology* 65.
EDITORIAL NOTE, 'The Sydney Williams Case' (1976) 50 *Australian Law Journal* 386.
EDWARDS, J LI J, 'The Integrity of Criminal Prosecutions — Watergate Echoes beyond the Shores of the United States' in PR Glazebrook (ed) *Reshaping the Criminal Law*, Stevens, London, 1978, 364.
EGGLESTON, E, *Fear, Favour or Affection. Aborigines and the Criminal Law in Victoria, South Australia and Western Australia*, Australian National University Press, Canberra, 1976.
FAIRALL, P, 'Provocation, Attempted Murder and Wounding with Intent to Murder' (1983) 7 *Criminal Law Review* 44.
FAIRALL, P, 'The Objective Test in Provocation' (1983) 7 *Criminal Law Review* 142.
FAIRALL, PA, 'Majewski Banished' (1980) 4 *Criminal Law Review* 264.
FINKLER, HW, *Inuit and the Administration of Justice in the Northwest Territories: The case of Frobisher Bay*, North of 60 Series (NRD 76-3), Department of Indian and Northern Affairs, Ottawa, 1976.
FLETCHER, GP, *Rethinking Criminal Law*, Little, Brown, Boston, 1978.
FOX, RG & FREIBERG, A, *Sentencing. State and Federal Law in Victoria*, Oxford University Press, Melbourne, 1985.
FROST, S, 'The Use of Customary Law in the Criminal Justice System' in *The Use of Customary Law in the Criminal Justice System*, Australian Institute of Criminology, Training Project No 23, Canberra, 1976, 11.
FUA, C & LUMSDEN, L, 'Aboriginal Alcohol Abuse and Crime in Queensland' in B Swanton (ed) *Aborigines and Criminal Justice*, Australian Institute of Criminology, Canberra, 1984, 6.
FULTON, C, 'Tassie' (1985) 16 *Aboriginal Law Bulletin* 5.
GALE, F & WUNDERSITZ, J, 'Variations in the Over-representation of Aboriginal Young Offenders at Each Level of the Criminal Justice System' (1985) 20 *Australian Journal of Social Issues* 209.
GANNAGE, M, 'The Defence of Diminished Responsibility in Canadian Criminal Law' (1981) 19 *Osgoode Hall Law Journal* 301.
GOODE, M, 'Some Thoughts on the Present State of the "Defence" of Intoxication' (1984) 8 *Criminal Law Review* 104.
GORTA, A & HUNTER, R, 'Aborigines 'in NSW Prisons' (1985) 18 *Australian and New Zealand Journal of Criminology* 25.
HALL, G, *An Introduction to Criminal Jurisdiction in Indian Country*, American Indian Lawyer Training Program Inc, 1981.
HAVEMANN P, COUSE K, FOSTER L, MATONOVICH R, *Law and Order for Canada's Indigenous Peoples*, 1984-7, Solicitor General of Canada, Ottawa, 1984.
HAYTER, K, 'Female Circumcision — Is There a Legal Solution?' [1984] *Journal of Social Welfare Law* 323.
HAZLEHURST, K, 'Community Care/Community Responsibility: Community Participation in Criminal Justice Administration in New Zealand' in K Hazlehurst (ed) *Justice Programs for Aboriginal and other Indigenous Communities*, Australian Institute of Criminology, Canberra, 1985, 95.
HELLON, CP, 'Legal and Psychiatric Implications of Erosion of Canadian Aboriginal Culture' (1969) 19 *University of Toronto Law Journal* 76.
HELMER, W, 'Judicial Control of Prosecutorial Discretion in Pre trial Diversion Programs' (1982) 31 *Buffalo Law Review* 909.
HIATT, LR, *Kinship and Conflict*, Australian National University Press, Canberra, 1965.
HOOKEY, JF, 'The "Clapham Omnibus" in Papua and New Guinea' in BJ Brown (ed) *Fashion of Law in New Guinea*, Butterworths, Sydney, 1969, 117.
HOWARD, C, *Criminal Law*. 4th edn, Law Book Co, Sydney, 1982.

JONES, IH, 'Stereotyped aggression in a group of Australian Western Desert Aborigines' (1971) 44 *British Journal of Medical Psychology* 259.
JONES, IH & HORNE, DJ, 'Psychiatric Disorders among Aborigines of the Australian Western Desert' (1973) 7 *Social Science and Medicine* 219.
JONES, S, 'Deferment of Sentence' (1983) 23 *British Journal of Criminology* 381.
KNOWLES, M, 'A New Prosecution Policy' [1982] *New Zealand Law Journal* 133.
LANGTON, M, *'Medicine Square': For the Recognition of Aboriginal Swearing and Fighting as Customary Law*, BA Honours thesis, Australian National University, Canberra, 1983.
KRIEWALDT, MC, 'The Application of the Criminal Law to the Aborigines of the Northern Territory of Australia' (1960) 5 *University of Western Australia Law Review* 1.
LEACH, E, *Social Anthropology*, Fontana, London, 1982.
LEMAIRE, JE, *The Application of Some Aspects of European Law to Aboriginal Natives of Central Australia*, LLM thesis, University of Sydney, Sydney, 1971.
LIGERTWOOD, A, 'The Trial of Sydney Williams' (1976) 2 *Legal Services Bulletin* 136.
LIGERTWOOD, A, 'Aborigines in the Criminal Courts' in P Hanks & B Keon-Cohen (ed) *Aborigines and the Law*, George Allen & Unwin, Sydney, 1984, 191.
LOWE, P, 'Misfits: Aboriginal Culture and Prison' in B Swanton (ed) *Aborigines and Criminal Justice*, Australian Institute of Criminology, Canberra, 1984, 327.
LYNCH, ACE, 'The Scope of Intoxication' [1982] *Criminal Law Review* 139.
McCASKILL, D, 'Native People and the Justice System' in IAL Getty & AS Lussier (ed) *As Long as the Sun Shines and Water Flows*, University of British Columbia Press, Vancouver, 1983, 288.
McCONVILLE, M & BALDWIN, J, 'The Influence of Race on Sentencing in Birmingham' [1982] *Criminal Law Review* 652.
McCORQUODALE, J, 'Alcohol and Anomie: The Nature of Aboriginal Crime' in B Swanton (ed) *Aborigines and Criminal Justice*, Australian Institute of Criminology, Canberra, 1984, 17.
McCORQUODALE, J, 'The Voice of the People' Aborigines, Judicial Determinism and the Criminal Justice System in Australia' in B Swanton (ed) *Aborigines and Criminal Justice*, Australian Institute of Criminology, Canberra, 1984, 272.
McDONALD, C, 'Australia's Most Jailed Citizens' (1984) 3 *Australian Society* 6.
MACKAY, RD, 'The Conundrum of Consensual Combat' (1982) 98 *Law Quarterly Review* 356.
MACKAY, RD, 'Is Female Circumcision Unlawful?' [1983] *Criminal Law Review* 717.
MANSELL, M, 'The Bodysnatchers' (1985) 17 *Aboriginal Law Bulletin* 10.
MARTIN, MA, *Aborigines and the Criminal Justice System: A Review of the Literature* Western Australia Department of Corrections, Perth, 1973.
MARTIN, M & NEWBY, L, 'Aborigines in Summary Courts in Western Australia, A Regional Study: Preliminary Report on Selected Findings' in B Swanton (ed) *Aborigines and Criminal Justice*, Australian Institute of Criminology, Canberra, 1984, 305.
MILLIKIN, EP, 'Social Structures and the Problems of Northern Territory Aborigines' in RM Berndt (ed) *A Question of Choice*, University of Western Australia Press, Perth, 1974, 44.
MILNE, T, 'Aborigines and the Criminal Justice System' in M Findlay, SJ Egger & J Sutton (ed) *Issues in Criminal Justice Administration*, George Allen & Unwin, Sydney, 1983, 184.
MOODY, SR & TOOMBS, J, *Prosecution in the Public Interest*, Scottish Academic Press, Edinburgh, 1982.
MORRIS, N & HOWARD, C, *Studies in Criminal Law*, Oxford, Clarendon Press, 1964.
MORROW, WG, 'A Survey of Jury Verdicts in the Northwest Territories' (1970) 8 Alberta Law Review 50.
MORROW, WG, 'Law and the Thin Veneer of Civilisation' (1972) 10 Alberta Law Review 38.
MORROW, WG, 'Riding Circuit in the Arctic' (1974) 58 *Judicature* 236.
MORROW, WG, 'Women on Juries' (1974) 12 *Alberta Law Review* 321.
MORSE, B, 'Lessons from Canada?' (1983) 7 *Aboriginal Law Bulletin* 4.
MUGFORD, S & GRONFORS, M, 'Racial and Class Factors in the Sentencing of First Offenders' (1978) 14 *Australian & New Zealand Journal of Sociology* 58.
NAROKOBI, BM, 'Adaption of Western Law in Papua New Guinea' (1977) 5 *Melanesian Law Journal* 52.
NATIONAL ASSOCIATION FOR THE CARE AND RESETTLEMENT OF OFFENDERS, *Diversion from Criminal Justice in an English Context*, Barry Ross, London, 1975.
NATIVE COUNSELLING SERVICES OF ALBERTA, 'Creating a Monster — Issues in Community Program Control', Paper presented at the Canadian Association for the Prevention of Crime, Winnipeg, July 1981.

NEWTON, JE, 'Aborigines and the Criminal Justice System' in D Biles (ed) *Crime and Justice in Australia*, Australian Institute of Criminology, Canberra, 1977, 134.
O'REGAN, RS, 'Provocation and Homicide in Papua and New Guinea' (1971) 10 *University of Western Australia Law Review* 1.
O'REGAN, RS, 'Ordinary Men and Provocation in Papua and New Guinea' (1972) 21 *International and Comparative Law Quarterly* 551.
O'REGAN, RS, 'Sorcery and Homicide in Papua New Guinea' (1974) 48 *Australian Law Journal* 76.
O'REGAN, RS, 'Intoxication and Criminal Responsibility under the Queensland Code' (1977) 10 *University of Queensland Law Journal* 70.
OKONKWO, CO, 'The Defence of Bona Fide Claim of Right in Nigeria' (1973) 17 *Journal of African Law* 271.
PROTT, LV & O'KEEFE, PJ, *Law and the Cultural Heritage*, vol I *Discovery and Excavation*. Professional Books, Abingdon, 1984.
REID, J, *Sorcerers and Healing Spirits. Continuity and Change in an Aboriginal Medical System*, ANU Press, Canberra, 1983.
ROBINSON, PH, 'Criminal Law Defenses: A Systematic Analysis' (1982) 82 *Columbia Law Review* 199.
RONALDS, C, CHAPMAN, M & KITCHENER, K, 'Policing Aborigines' in M Findlay, SG Egger & J Sutton (ed) *Issues in Criminal Justice Administration*, George Allen & Unwin, Sydney, 1983, 168.
ROSE, DB, *Dingo Makes us Human: Being and Purpose in Australian Aboriginal Culture*, PhD thesis, Bryn Mawr College, Bryn Mawr, 1984.
SAMUELS, A, 'Excusable Loss of Self-Control in Homicide' (1971) 34 *Modern Law Review* 163.
SCHMEISER, DA, *The Native Offender and the Law*, Canada Law Reform Commission, Background Paper, Ottawa, 1974.
SEIDMAN, RB, 'Witch Murder and Mens Rea .' A Problem of Society under Radical Social Change' (1965) 28 *Modern Law Review* 46.
SEIDMAN, RB, 'Mens Rea and the Reasonable African: The Pre-Scientific World-View and Mistake of Fact' (1966) 15 *International and Comparative Law Quarterly* 1135.
SILAS, FA, 'Service, not Trial' (1984) 70 *American Bar Association Journal* 34.
SMITH, ATH, 'Defences of General Application: The Law Commission's Report No 83(1) — Duress' [1978] *Criminal Law Review* 128.
SOBELL, LC & SOBELL, MB, 'Drunkenness, A "Special Circumstance" in Crimes of Violence: Sometimes' (1975) 10 *International Journal of the Addictions* 869.
SORNARAJAH, M, 'Duress and Murder in Commonwealth Criminal Law' (1981) 30 *International and Comparative Law Quarterly* 660.
SPENCER, B & GILLEN, FJ, *The Native Tribes of Central Australia*, McMillan, London, 1899.
SUTTON, A, 'Crime Statistics Relating to Aboriginal People In South Australia' in B Swanton (ed) *Aborigines and Criminal Justice*, Australian Institute of Criminology, Canberra, 1984, 363.
SYDDALL, T, 'Pre-trial Diversion: A Magistrate's Perspective' in IL Potas (ed) *Prosecutorial Discretion*, Australian Institute of Criminology, Canberra, 1984, 203.
THOMAS, DA, *Principles of Sentencing*, 2nd edn, Heinemann, London, 1979.
VINING, 'Reforming Canadian Sentencing Practices: Problems, Prospects and Lessons' (1979) 17 *Osgoode Hall Law Journal* 355.
VORENBERG, J, 'Decent Restraint of Prosecutorial Power' (1981) 94 *Harvard Law Review* 1521.
WARD, A, 'The Wholesome Precedent of Sydney Williams' (1976) 2 *Legal Services Bulletin* 141.
WARNER, K, 'Bail Conditions and Civil Liberties' (1983) 8 *Legal Services Bulletin* 124.
WARNER, WL, *A Black Civilisation*, Harper & Bros, London, 1937.
WASIK, M, 'Duress and Criminal Responsibility' [1977] *Criminal Law Review* 453.
WASIK, M, 'Cumulative Provocation and Domestic Killing' [1982] *Criminal Law Review* 29.
WEISBROT, D, 'Law Reform Commission Working Paper No 6 — Criminal Responsibility' (1977) 5 *Melanesian Law Journal* 164.
WEISBROT, D, 'Homicide Law Reform in New South Wales' (1982) 6 *Criminal Law Journal* 248.
WEISBROT, D, 'Integration of Laws in Papua New Guinea: Custom and the Criminal Law in Conflict' in D Weisbrot, A Paliwala & A Sawyerr (ed) *Law and Social Change in Papua New Guinea*. Butterworths, Sydney, 1982, 59.
WEISBROT, D, 'The Disorder of Law in Papua New Guinea' (1985) 10 *Legal Services Bulletin* 170.
WEISBROT, D, 'The Papua New Guinea Minimum Penalties Legislation' (1985) 18 *Australian & New Zealand Journal of Criminology* 164.

WILCOX, AF, *The Decision to Prosecute*, London, Butterworths, 1972.
WILCOX, AF, 'The Proposed Prosecution Process' [1981] *Crim Law Review* 482.
WILLIAMS, CR (ed) *Brett and Waller's Criminal Law*, Butterworths, Sydney, 1983.
WILLIAMS, G, 'Consent and Public Policy' [1962] *Criminal Law Review* 74.
WILLIAMS, G, *Textbook of Criminal Law*, London, Stevens, 1978.
WILLIAMS, G, 'Intention and Recklessness Again' (1982) 2 *Legal Studies* 189.
WILLIS, J, 'Reflections on Nolles' in IL Potas (ed) *Prosecutorial Discretion*, Australian Institute of Criminology, Canberra, 1984, 173.
WILSON, K, 'Provocation in Papua New Guinea' ( 1981) 5 *Criminal Law Journal* 128.
WILSON, PR, *Black Death White Hands*, George Allen & Unwin, Sydney, 1982.
WILSON, PR, 'Black Death White Hands Revisited: The Case of Palm Island' (1985) 18 *Australian and New Zealand Journal of Criminology* 49.
WOODS, GD, 'The Sanctity of Murder: Reforming the Homicide Penalty in New South Wales' (1983) 57 *Australian Law Journal* 161.
WORRALL, J, 'European Courts and Tribal Aborigines — A Statistical Collection of Dispositions from the North-West Reserve of South Australia' (1982) 15 *Australian and New Zealand Journal of Criminology* 47.
WUNDERSITZ, J & GALE, F, *Aboriginal and Non-Aboriginal Appearances before Children's Courts and Children's Aid Panels in South Australia (1 July 1979 — 30 June 1983): The First Four Years of Operation of the Children's Protection and Young Offenders Act 1979*, unpublished report submitted to Department for Community Welfare (SA), Adelaide, 1984.
ZAMBROWSKY, J & DAVIES, DT (ed) *Victim's Rights and the Judicial Process. Proceedings of The First National Seminar, Canadian Criminal Justice Association, Toronto, 1985*.
ZELLICK, G, 'The Role of Prosecuting Counsel in Sentencing' [1979] *Criminal Law Review* 493.

## Official Papers and Reports

***Australia — Federal***

AUSTRALIAN LAW REFORM COMMISSION, Report No 15 (Interim), *Sentencing of Federal Offenders*, AGPS, Sydney, 1980.
AUSTRALIAN LAW REFORM COMMISSION, Report No 29, *Standing in Public Interest Litigation*, AGPS, Canberra, 1985.
AUSTRALIAN LAW REFORM COMMISSION, Aboriginal Customary Law Reference, Research Paper 6A (J Crawford & P Hennessy) *Cases on Traditional Punishments and Sentencing* ALRC, Sydney, 1982.
AUSTRALIAN LAW REFORM COMMISSION, Sentencing Working Paper (K Boehringer & J Chan) *Towards Rational Sentencing* ALRC, Sydney, 1985.
DEPARTMENT OF HOME AFFAIRS AND ENVIRONMENT, Working Party on the Protection of Aboriginal Folklore, *Report*, unpublished, Canberra, 4 December, 1981.
COMMONWEALTH OF AUSTRALIA, *Prosecution Policy of the Commonwealth*, AGPS, Canberra, 1982.
HOUSE OF REPRESENTATIVES STANDING COMMITTEE ON ABORIGINAL AFFAIRS, *Alcohol Problems of Aboriginals*, AGPS, Canberra, 1977.
HOUSE OF REPRESENTATIVES STANDING COMMITTEE ON ABORIGINAL AFFAIRS, *Aboriginal Legal Aid*, AGPS, Canberra, 1980.
INQUIRY INTO ABORIGINAL LEGAL AID (JP Harkins), Report vol 1, *General Issues*, AGPS, Canberra, 1985.
LEMAIRE, J, *Legal Education, Legal Aid and Confessional Evidence in Respect of Aborigines of the Northern Territory*, A Special Report to the Council of the Office of Aboriginal Affairs (unpublished), Department of Aboriginal Affairs, Canberra, July 1972.
SENATE STANDING COMMITTEE ON CONSTITUTIONAL AND LEGAL AFFAIRS, *Two Hundred Years Later ... Report on the Feasibility of a Compact or 'Makarrata' between the Commonwealth and Aboriginal People*, AGPS, Canberra, 1983.
WALKER, J & BILES, D, *Australian Prisoners 1984*, Australian Institute of Criminology, Canberra, 1985.

***New South Wales***

ANTI-DISCRIMINATION BOARD, *Study of Street Offences by Aborigines*, Sydney, 1982.

***South Australia***

ABORIGINAL CUSTOMARY LAW COMMITTEE (Chairman: Judge JM Lewis) *Preliminary Report*, Adelaide, 1979.

ABORIGINAL CUSTOMARY LAW COMMITTEE (Chairman: Judge JM Lewis) *Children and Authority in the North West*, Adelaide, 1984.

ABORIGINAL LEGAL RIGHTS MOVEMENT, *Annual Report 1982-3*, Adelaide, 1983.

CRIMINAL LAW AND PENAL METHODS REFORM COMMITTEE (Chairman: Justice RF Mitchell) *Fourth Report. The Substantive Criminal Law*, Adelaide, 1977.

OFFICE OF CRIME STATISTICS (SA), *Courts of Summary Jurisdiction 1 January — 30 June 1983*, Attorney-General's Department, Adelaide, 1985.

OFFICE OF CRIME STATISTICS (SA), *Crime and Justice in South Australia*, Attorney-General's Department, Adelaide, 1985.

***Victoria***

LAW REFORM COMMISSION OF VICTORIA, Report No 1, *The Law of Homicide in Victoria: The Sentence for Murder*, Melbourne, 1985.

LAW REFORM COMMISSIONER, Report No 12, *Provocation and Diminished Responsibility as Defences to Murder*, Melbourne, 1982.

LAW REFORM COMMISSIONER, Working Paper 8, *Murder: Mental Element and Punishment*, Melbourne, 1984.

***Western Australia***

LAVERTON ROYAL COMMISSION (Royal Commissioners GD Clarkson, CF Bridge, EF Johnston) *Report*, Perth, 1976.

***Canada — Federal***

CANADIAN LAW REFORM COMMISSION, *Studies on Diversion*, Ottawa, 1975.

CANADIAN LAW REFORM COMMISSION, Working Paper No 7, *Diversion*, Ottawa, 1975.

CANADIAN LAW REFORM COMMISSION, *A Report on Disposition and Sentences in the Criminal Process*, Ottawa, 1976.

MINISTER FOR INDIAN AFFAIRS AND NORTHERN DEVELOPMENT, *James Bay and Northern Quebec Agreement Implementation Review*, Ottawa, February 1982.

***Canada — Alberta***

ALBERTA BOARD OF REVIEW, Provincial Courts, Report No 4, *Native People in the Administration of Justice in the Provisional Courts of Alberta*, 1978.

***Canada — Other***

NATIVE COUNSELLING SERVICES OF ALBERTA, *Evaluation Report of the High Level Diversion Program*, Winnipeg, 1981.

NATIVE COUNSELLING SERVICES OF ALBERTA, *Final Report on the Demonstration Phase of the High Level Diversion Project 1977-81*, Winnipeg, 1981.

***New Zealand***

PENAL POLICY REVIEW COMMITTEE (Chairman: Justice ME Casey), *Report*, Government Printer, Wellington, 1982.

***Papua New Guinea***

PAPUA NEW GUINEA LAW REFORM COMMISSION., Report No 3, *Punishment for Wilful Murder*, Waigani, 1975.

PAPUA NEW GUINEA LAW REFORM COMMISSION, Report No 7, *The Role of Customary Law in the Legal System*, Waigani, 1977.

SCAGLION, R (ed) *Homicide Compensation in Papua New Guinea. Problems and Prospects*, Papua New Guinea Law Reform Commission, Monograph No 1, Waigani, 1981.

***United Kingdom***

ROYAL COMMISSION ON CRIMINAL PROCEDURE, *The Investigation and Prosecution of Criminal Offences in England Wales: The Law and Procedure*, HMSO, London, 1981.
ROYAL COMMISSION ON CRIMINAL PROCEDURE, *Report*, HMSO, London, 1981.

***Other***

GROOTE EYLANDT ABORIGINAL TASK FORCE, *Report*, Angurugu, 1985.
SECRETARIAT FOR NATIONAL ABORIGINAL ISLANDER CHILD CARE, *First Interim Report on the Aboriginal Fostering and Adoption Principles and its Implementation in the States of Australia*, Fitzroy, Victoria, 1985.

## Part V: Evidence and Procedure

### Books and Articles

AGUDA, TA, *Law and Practice Relating to Evidence in Nigeria*, London, Sweet & Maxwell, 1980.
ALL INDIA REPORTS MANUAL, 3rd edn, ed DV Chitaley & SA Rao, Nagpur, 1971, vol 10.
ALLOTT, A, 'The Judicial Ascertainment of Customary Law in British Africa' (1957) 20 *Modern Law Review* 244.
ALLOTT, A, *New Essays in African Law*. Butterworths, London, 1970.
ALLOTT, A, EPSTEIN, AL & GLUCKMAN, L, 'Introduction' in M Gluckman (ed) *Ideas and Procedures in African Customary Law*, Oxford, Clarendon Press, 1969, 31.
AMERICAN ANTHROPOLOGICAL ASSOCIATION, *Professional Ethics: Statements and Procedures of the American Anthropological Association*, Washington, 1973.
ARONSON, M, REABURN, MN & WEINBERG, M, *Litigation: Evidence and Procedure*, Butterworths, Sydney, 1982.
BARTHOLOMEW, AA, MILTE, KL & CANNING, WC, 'Unfitness to Plead and the Admissibility of Confessions' (1980) 13 *Australian & New Zealand Journal of Criminology* 37.
BASTEN, J, 'The Court Expert in Civil Trials — A Comparative Appraisal' (1977) 40 *Modern Law Review* 174.
BATES, F, 'Interrogation of Australian Aborigines' (1984) 8 *Criminal Law Journal* 373.
BELL, D, 'Aboriginal Women and Land: Learning from the Northern Territory Experience' (1985) 3 *Anthropological Forum* 353.
BENNETT, TW & VERMUELEN, T, 'Codification of Customary Law' (1980) 24 *Journal of African Law* 206.
BERNDT, RM & BERNDT, CH, *The World of the First Australians*, 4th rev edn, Rigby, Adelaide, 1985.
BRAZIL, P, 'A Matter of Theology' (1960) 34 A*ustralian Law Journal* 195.
BURT, RA & MORRIS, N, 'A Proposal for the Abolition of the Incompetency Plea' (1972) 40 *University of Chicago Law Review* 66.
BUZZARD, JH, MAY, R, HOWARD, MN (ed) *Phipson on Evidence*, 13th edn, Sweet and Maxwell, London, 1982.
CHADBOURN, JM, *Wigmore on Evidence*, 3rd rev ed, Little Brown, Boston, 1974.
CHALMERS, DRC, 'A History of the Role of Traditional Dispute Settlement Procedures in the Courts of Papua New Guinea' in D Weisbrot, A Paliwala, A Sawyerr (ed) *Law and Social Change in Papua New Guinea*, Butterworths, Sydney, 1982, 169.
CHANG, WBC & ARAUJO, MU, 'Interpreters for the Defence: Due Process for the Non-English Speaking Defendant' (1975) 63 *California Law Review* 801.
COHEN, M, 'The Unsworn Statement from the Dock' [1981] *Criminal Law Review* 224.
COLDREY, J & VINCENT, F, 'Tales from the frontier: White laws — black people' (1980) 5 *Legal Services Bulletin* 221.
CRAWFORD, J, *Australian Courts of Law*, Oxford University Press, Melbourne, 1982.
CRONHEIM, AJ & SCHWARTZ, AH, 'Non-English Speaking Persons in the Criminal Justice System: Current State of the Law' (1976) 61 *Cornell Law Review* 289.
DASHWOOD, A, 'Juries in a Multi-Racial Society' [1972] *Criminal Law Review* 85.
DAVIES, LL, 'The Yupupu Case' (1976) 2 *Legal Services Bulletin* 133.
DICEY, AV & MORRIS, JHC, *The Conflict of Law*s, 10th edn, Stevens, London, 1980, vol 2.
DICKEY, A, 'The Province and Function of Assessors in English Courts' (1970) 33 *Modern Law Review* 494.

DICKEY, AF, 'The Jury and Trial by One's Peers' (1974) 11 *University of Western Australia Law Review* 205.
DIXON, RM, HOGAN, WA and WIERZBICKA, A, 'Interpreters: Some Basic Problems' (1980) 5 *Legal Services Bulletin* 162.
EADES, D, 'English as an Aboriginal Language in South-east Queensland', PhD Thesis, University of Queensland, 1983.
EGGLESTON, E, *Fear Favour and Affection*, Australian National University Press, Canberra 1976.
ELKIN, AP, 'Aboriginal Evidence and Justice in North Australia' (1947) 17 *Oceania* 173.
ELKIN, AP, *The Australian Aborigines*, rev edn, Angus and Robertson, Sydney, 1979.
FEDERATION OF ETHNIC COMMUNITIES COUNCILS OF AUSTRALIA, *National Language Policy Conference Report*, October 1982. FESL, E, Bala Bala, AGPS, Canberra, 1982.
FINLAY, HA, *Family Law in Australia*, 3rd edn, Butterworths, 1983.
FISHER, M, 'Secrecy, Proof and Confidentiality of Aboriginal Customary Laws in the Legal System' (1985) 17 *Aboriginal Law Bulletin* 12.
FOLEY, M, 'Aborigines and the police', in P Hanks and B Keon-Cohen (ed) *Aborigines and the Law*, George Allen and Unwin, Sydney, 1984, 160.
FORGIE, S, 'Challenge to the Array' (1975) 49 *Australian Law Journal* 528.
FRECKELTON, I, 'Witnesses and the Privilege Against Self-Incrimination' (1985) 59 *Australian Law Journal* 204.
FRECKELTON, I, 'Court Experts, Assessors and the Public Interest' (1985) 8 *International Journal and Law of Psychiatry* 29.
FRIEBERG, A, 'Out of Mind, Out of Sight' (1976) 3 *Monash Law Review* 134.
FROHLICH, EF, 'Committal Procedures in England and Australia' (1975) 49 *Australian Law Journal* 561.
GOBBO, JA, BYRNE, D & HEYDON, JD (ed) *Cross on Evidence*, 2nd Australian edn, Butterworths, Sydney, 1979.
GORTA, A & HUNTER, R, 'Aborigines in, NSW Prisons' (1985) 18 *Australian & New Zealand Journal of Criminology* 25.
GRAY, I, 'Breakdown' (1982) 6 *Aboriginal Law Bulletin* 3.
GRAY, J, 'Opinions of Assessors in Criminal Trials in East Africa as to Native Custom' (1958) 2 *Journal of African Law* 5.
HANNIGAN, A St J, 'Native custom, its Similarity to English Conventional Custom and its Mode of Proof' (1958) 2 *Journal of African Law* 101.
HART, HLA, *The Concept of Law*, Oxford, Clarendon Press, 1961.
HAYES, R & HAYES, S, *Mental Retardation, Law Policy and Administration*, Law. Book Co, Sydney, 1982.
HINSWORTH, CMG, 'The Botswana Customary Law Act 1969' (1972) 16 *Journal of African Law* 4.
JACOB, HI, 'The Inherent Jurisdiction of the Court' (1970) 23 *Current Legal Problems* 22.
JAIN, MP, 'Custom as a Source of Law in India' (1963) 3 *Jaipur Law Journal* 96.
KERR, AJ, 'The Application of Native Law in the Supreme Court' (1957) 74 *South African Law Journal* 131.
KIRBY, MD & ODGERS, SJ, 'The Dilemma of Unlawfully Obtained Evidence' in *Proceedings of the Institute of Criminology*, University of Sydney, No 62, 1984, 11.
KRIEWALDT, MC, 'The Application of the Criminal Law to the Aborigines of the Northern Territory of Australia' (1960) 5 *University of Western Australia Law Review* 1.
LESTER, Y, *Aborigines and the Courts and Interpreting in the Court*, Institute for Aboriginal Development, Alice Springs, 1974.
LEWIN, J, 'The Recognition of Native Law and Custom in British Africa' (1938) 20 *Journal of Comparative Legislation and International Law* 16.
LIBERMAN, K, 'Ambiguity and Concurrence in Inter-cultural Communication' (1980) 3 *Human Studies* 65.
LIBERMAN, K, 'Understanding Aborigines in Australian Courts of Law' (1981) 40 *Human Organisation* 247.
LOWE, P, 'Misfits: Aboriginal Culture and Prison' in B Swanton (ed) *Aborigines and Criminal Justice*, Australian Institute of Criminology, Canberra, 1984, 327.
LOORHAM, C, 'Kumajay's Case' (1982) 3 *Aboriginal Law Bulletin* 3.
LYNCH, CJ, 'A Description of Aspects of Political and Constitutional Development and Allied Topics' in BJ Brown (ed) *Fashion of Law in New Guinea*, Butterworths, Sydney, 1969, 39.
McCONVILLE, M & BALDWIN J, 'Questioning Police Interrogation' (1982) 132 *New Law Journal* 673.

McKIMM, KJ, *Criminal Procedure and Practice in New South Wales*, Butterworths, Sydney, 1972.
McLEOD, I, 'Law and Social Welfare' *Seminar Paper*, Service Delivery to Remote Communities Seminar, Darwin, 1-3 December 1981.
MADDOCK, K, '"Owners", "Managers" and the Choice of Statutory Traditional Owners by Anthropologists and Lawyers' in N Peterson and M Langton (ed) *Aborigines, Land and Land Rights*, Australian Institute of Aboriginal Studies, Canberra, 1983, 211.
MADDOCK, K, 'Aboriginal Customary Law' in P Hanks & B Keon-Cohen (ed) *Aborigines and the Law*, George Allen & Unwin, Sydney, 1984, 212.
MANSELL, M, 'Police/Aboriginal Relations: A Tasmanian Perspective' in B Swanton (ed) *Aborigines and Criminal Justice*, Australian Institute of Criminology, Canberra, 1984, 112.
MARTIN, M & NEWBY, L, 'Aborigines in Summary Courts in Western Australia', in Swanton (ed) *Aborigines and Criminal Justice*, Australian Institute of Criminology, Canberra, 1984, 295.
MORRIS, HF, *Evidence in East Africa*, Sweet & Maxwell, London, 1968.
MORRIS, HF, 'English Law in East Africa: A Hardy Plant in Alien Soil' in HF Morris & JS Read, *Indirect Rule and the Search for Justice Essays in East African Legal History*, Clarendon Press, Oxford, 1972, 73.
MORROW, WG, 'A Survey of Jury Verdicts in the Northwest Territories' (1970) 8 *Alberta Law Review* 50.
MORROW, WG, 'Women on Juries' (1974) 12 *Alberta Law Review* 321.
NAROKOBI, B, 'History and Movement in Law Reform in Papua New Guinea' in D Weisbrot, A Paliwala & A Sawyerr (ed) *Law and Social Change in Papua New Guinea*, Butterworths, Sydney, 1982, 13.
NASH, D, 'Foreigners in their Own Land: Aborigines in Court' (1979) 4 *Legal Services Bulletin* 105.
NEATE, G, *Dying Declarations and Customary Marriages of Australian Aborigines and Rules of Criminal Evidence*, LLB Honours Thesis, Australian National University, Canberra, 1979.
NEATE G, 'Legal Language Across Cultures: Finding the Traditional Aboriginal Owners of Land' (1981) 12 *Federal Law Review* 187.
NEATE, G, 'Keeping secrets secret' (1982) 5 *Aboriginal Law Bulletin* 1, 17.
NETTHEIM, G (ed) *Aborigines, Human Rights and the Law*, ANZ Book Co, Sydney, 1970.
NEWTON, JE, 'Aborigines and the Criminal Justice System' in D Biles (ed) *Crime and Justice in Australia*, Australian Institute of Criminology, Canberra, 1977, 135.
O'REGAN, RS, 'Aborigines, Melanesians and Dying Declarations' (1972) 21 *International and Comparative Law Quarterly* 176.
O'REGAN, RS, *Pruning the English Oak*, Public Lecture, University of Papua New Guinea, 1972.
ODGERS, SJ, 'Police Interrogation and the Right to Silence' (1985) 59 *Australian Law Journal* 78.
OLLENNUS, NA, 'The Structure of African Judicial Authority and Problems of Evidence and Proof in Traditional Courts' in M Gluckman (ed) *Ideas and Procedures in African Customary Law*. Oxford, Clarendon Press, 1969, 110.
PALIWALA, A, 'Law and Order in the Village: The Village Courts' in D Weisbrot, A Paliwala & A Sawyerr (ed) *Law and Social Change in Papua New Guinea*. Butterworths, Sydney, 1982, 191.
PATTENDEN, R, 'Expert Evidence based on Hearsay' [1982] *Criminal Law Review* 85.
POTAS, I, *Just Deserts for the Mad*. Australian Institute of Criminology, Canberra, 1982.
PROTT, LV & O'KEEFE, PJ, *Law and the Cultural Heritage* Vol I. *Discovery and Excavation*, Professional Books, Oxford, 1984.
READ, JS, 'Customary Law under Colonial Rule' in HF Morris & JS Read, *Indirect Rule and the Search for Justice. Essays in East African Legal History*, Clarendon Press, Oxford, 1972, 167.
REES, N, 'Police Interrogation of Aborigines' in J Basten, M Richardson, C Ronalds, G Zdenkowski (ed) *The Criminal Injustice System*, Australian Legal Workers Group, Clayton, 1982, 36.
REES, N, 'The Criminal Investigation Bill and Aboriginal Suspects: Fewer Safeguards' (1982) 3 *Aboriginal Law Bulletin* 1, 6.
REES, N, 'The Rules Governing Police Interrogation of Children' in J Basten, M Richardson, C Ronalds & G Zdenkowski (ed) *The Criminal Injustice System*, Australian Legal Workers Group, Clayton, 1982, 68.
ROSEN, L, 'The Anthropologist as Expert Witness' (1977) 79 *American Anthropologist* 555.
ROWELL, M, 'Women and Land Claims in the Northern Territory' in N Peterson & M Langton (ed) *Aborigines Land and Land Rights*, Australian Institute of Aboriginal Studies, Canberra, 1983, 256.
SANSOM, B, *The Camp at Wallaby Cross*, Australian Institute of Aboriginal Studies, Canberra, 1980.
SARKAR, PC, *Sarkar's Law of Evidence*, SC Sarkar & Sons Private Ltd, Bombay, 1980.
SEYMOUR, J, *Committal for Trial*, Australian Institute of Criminology, Canberra, 1978.
SHEPPARD, J, 'Court Witnesses — A Desirable or Undesirable Encroachment on the Adversary System?' (1982) 56 *Australian Law Journal* 234.

SPRING, BC, 'The Judicial System of Western Samoa including its Relationship to the Executive and the System of Legal Education' in *Record of the Fourth Asian Judicial Conference Canberra April 1970*, AGPS, Canberra, 1971,204.
STEPHEN, JF, *A Digest of the Law of Evidence*, MacMillan, London, 1876.
STREHLOW, TGH, 'Notes on Native Evidence and its Value' (1936) 6 *Oceania* 323.
SUTTON, P, 'Aboriginal Customary Marriage' (1985) 12 *Aboriginal Law Bulletin* 13.
TATZ, C, 'Aborigines: Legal Aid and Law Reform' (1980) 5 *Legal Services Bulletin* 91.
TOOHEY, Justice JF, 'Land Claims' (1982) 3 *Aboriginal Law Bulletin* 4.
VON STURMER, J, *Talking with Aborigines*, Australian Institute of Aboriginal Studies, Canberra, 1981.
WEISBROT, D, 'Interpretation of Laws in Papua New Guinea: Custom and the Criminal Law in Conflict' in D Weisbrot, A Paliwala & A Sawyer (ed) *Law and Social Change in Papua New Guinea*, Butterworths, Sydney, 1982, 59.
WHITMORE, H, *Principles of Australian Administrative Law*, 5th ed, Law Book Company, Sydney, 1980.
WHITMORE, H & ARONSON, M, *Review of Administrative Action*. Law Book Company, Sydney, 1978.
WILSON, P, *Black Death, White Hands*, George Allen & Unwin, Sydney, 1982.
YEO, MH, 'The Discretion to Exclude Illegally and Improperly Obtained Evidence: A Choice of Approaches' ( 1981 ) 13 *Melbourne University Law Review* 31.

## Official Papers and Reports

***Australia — Federal***

ABORIGINAL LAND COMMISSIONER, *Borroloola Land Claim*, AGPS, Canberra, 1978.
ABORIGINAL LAND COMMISSIONER, *Alyawarra & Kaititja Land Claim*, AGPS, Canberra, 1979.
ABORIGINAL LAND COMMISSIONER, *Annual Report 1978-1979*, AGPS, Canberra, 1980.
ABORIGINAL LAND COMMISSIONER, *Anmatijirra & Alyawarra Land Claim to Utopia Pastoral Lease*, AGPS, Canberra, 1980.
ABORIGINAL LAND COMMISSIONER, *Yingawunarri (Old Top Springs) Mudbura Land Claim*, AGPS, Canberra, 1980.
ABORIGINAL LAND COMMISSIONER, *Finniss River Land Claim*, AGPS, Canberra, 1981.
ABORIGINAL LAND COMMISSIONER, *Limmen Bight Land Claim*, AGPS, Canberra, 1981.
ABORIGINAL LAND COMMISSIONER, *Daly River (Malak Malak) Land Claim*, AGPS, Canberra, 1982.
ABORIGINAL LAND COMMISSIONER, *Nicholson River (Waanyi/Garawa) Land Claim*, AGPS, Canberra, 1985.
ABORIGINAL LAND COMMISSIONER, *Practice Directions*, Darwin, 22 May 1985.
AUSTRALIAN INSTITUTE OF MULTICULTURAL AFFAIRS, *Evaluation of Post Arrival Programs and Services*, Australian Institute of Multicultural Affairs, Melbourne, 1982.
AUSTRALIAN LAW REFORM COMMISSION, Report No 2, *Criminal Investigation* AGPS, Canberra, 1975.
AUSTRALIAN LAW REFORM COMMISSION, Report 26 (Interim), *Evidence*, AGPS, Canberra, 1985.
BRENNAN, G, *The Need for Interpreting and Translation Services for Australian Aboriginals, with Special Reference to the Northern Territory — A Research Report*, Department of Aboriginal Affairs, Canberra, 1979.
COMMISSION OF INQUIRY INTO POVERTY, Second Main Report, *Law and Poverty in Australia* (Commissioner: R Sackville) AGPS, Canberra, 1975.
HOUSE OF REPRESENTATIVES, STANDING COMMITTEE ON ABORIGINAL AFFAIRS, *Aboriginal Legal Aid*. AGPS, Canberra, 1980.
HOUSE OF REPRESENTATIVES, STANDING COMMITTEE ON ABORIGINAL AFFAIRS, *Aboriginal Health*, AGPS, Canberra, 1979.
INQUIRY INTO ABORIGINAL LEGAL AID (JP Harkins) *Report*, vol I *General Issues*, AGPS, Canberra, 1985.
SENATE, SELECT COMMITTEE ON ABORIGINES AND TORRES STRAIT ISLANDERS, *The Environmental Conditions of Aborigines and Torres Strait Islanders and the Preservation of their Sacred Sites*, AGPS, Canberra, 1976.

***New South Wales***

ANTI-DISCRIMINATION BOARD, *A Study of Street Offences by Aborigines*, Sydney, June 1982.

NEW SOUTH WALES LAW REFORM COMMISSION, Working Paper, *Course of the Trial*, Sydney, 1978.
NEW SOUTH WALES LAW REFORM COMMISSION, *Report on the Rule Against Hearsay*, LRC 29, Sydney, 1978.
NEW SOUTH WALES LAW REFORM COMMISSION, *Unsworn Statements of Accused Persons*, LRC45, Sydney, 1980.

***Queensland***
COMMITTEE OF INQUIRY INTO THE ENFORCEMENT OF CRIMINAL LAW IN QUEENSLAND (Chairman: G Lucas), *Report*, Government Printer, Brisbane, 1977.
QUEENSLAND POLICE EMPLOYEES UNION, *Report of Sub-Committee's Examination of Report of Inquiry into the Enforcement of Criminal Law in Queensland*, Brisbane, 1982.

***South Australia***
CRIMINAL LAW AND PENAL METHODS REFORM COMMITTEE, *Third Report — Court Procedure and Evidence* (Chairman: Justice RF Mitchell) Government Printer, Adelaide, 1975.
SELECT COMMITTEE OF THE LEGISLATIVE COUNCIL, *Final Report, Unsworn Statements and Related Matters*, Adelaide, September 1981.
SOUTH AUSTRALIAN ABORIGINAL CUSTOMARY LAW COMMITTEE, *Preliminary Report* (Chairman: Judge JM Lewis) Adelaide, September 1979.

***Tasmania***
TASMANIAN LAW REFORM COMMITTEE, *Recommendations for Revision of the Criminal Code*, Government Printer, Hobart, 1972.
TASMANIAN LAW REFORM COMMITTEE, *The Hearsay Rule*, Government Printer, Hobart, 1972.

***Victoria***
BOARD OF INQUIRY INTO ALLEGATIONS AGAINST MEMBERS OF THE VICTORIA POLICE FORCE, *Report* (Chairman: B Beach) Government Printer, Melbourne, 1976.
VICTORIAN LAW REFORM COMMISSION, Report No 2, *Unsworn Statements in Criminal Trials*, Government Printer, Melbourne, 1985.
VICTORIAN LAW REFORM COMMISSIONER, Report No 11, *Unsworn Statements in Criminal Trials*, Government Printer, Melbourne, 1981.

***Canada — Federal***
CANADIAN LAW REFORM COMMISSION, Working Paper No 4, *Criminal Procedure — Discovery*, Ottawa, 1974.
CANADIAN LAW REFORM COMMISSION, Report, *Evidence*, Ottawa, 1975.

***Papua New Guinea***
PAPUA NEW GUINEA LAW REFORM COMMISSION, Report No 7, *The Role of Customary Law in the Legal System*, Waigani, 1977.
PAPUA NEW GUINEA LAW REFORM COMMISSION, Report No 10, *Committal Proceedings*, Waigani, 1980.

***United Kingdom***
CRIMINAL LAW REVISION COMMITTEE OF ENGLAND, 11th Report, *Evidence (General)*, Cmnd 4991, HMSO, London 1972.
ROYAL COMMISSION ON CRIMINAL PROCEDURE, *Report*, Cmnd 8092, HMSO, London, 1981.

## PART VI: Justice Mechanisms in Aboriginal Communities

### Books and Articles

ABEL, RL, *The Politics of Informal Justice*, Academic Press, New York, 1982.
AMERICAN INDIAN LAWYER TRAINING PROGRAM, *Indian Self-Determination and the Role of Tribal Courts*, Oakland, 1977.
AMERICAN INDIAN LAWYER TRAINING PROGRAM, *Justice in Indian Country*, Oakland 1980.

AMERICAN INDIAN LAWYER TRAINING PROGRAM, *An Introduction to Criminal Jurisdiction in Indian Country*, Oakland, 1981.

ASCHE, A & MARSHALL, J, 'The Interaction of Judges, Lawyers and Counsellors in the Family Court of Australia' (1980) 1 *Australian Journal Sex, Marriage & Family* 27.

BANNER, JD & WILT, GM, 'Black Policemen: A Study of Self Images' (1973) 1 *Journal of Police Science and Administration* 21.

BARTLETT, BH, 'The Indian Act of Canada' (1978) 27 *Buffalo Law Review* 581.

BAYNE, P, 'Village Courts in Papua New Guinea' in KM Hazlehurst (ed) *Justice Programs for Aboriginal and other Indigenous Communities*, Australian Institute of Criminology, Canberra, 1985, 75.

BELL, D, 'Re Charlie Jakamarra Limbiari. Report to the Court', unpublished report tendered in *R v Charlie Limbiari Jagamara*, unreported, Northern Territory Supreme Court, 28 May 1984.

BENNETT, TW, 'The Application of Common Law and Customary Law in Commissioners Courts' (1979) 96 *South African Law Journal* 399.

BEVAN, O, 'Aborigines and Police — Hostility, Harmony or Hopelessness' in B Swanton (ed) *Aborigines and Criminal Justice*, Australian Institute of Criminology, Canberra, 1984, 108.

BISKUP, P, *Not Slaves, Not Citizens. The Aboriginal Problem in Western Australia 1898-1954*, University of Queensland Press, St Lucia, 1973.

BRAKEL, SJ, 'American Indian Tribal Courts: Separate? Yes, Equal? Probably Not' (1976) 62 *American Bar Association Journal* 1002.

BRAKEL, SJ, *American Indian Tribal Courts: The Costs of Separate Justice*, American Bar Foundation, Chicago, 1978.

BRENNAN, F, 'Underlying Issues in the Recognition of Customary Law' in Australian Law Reform Commission — Australian Institute of Aboriginal Studies, *Report of a Working Seminar on the Aboriginal Customary Law Reference* Sydney, 1983, 18.

BROWN, M, 'The Te Atatu Maori Tribunal' in KM Hazlehurst (ed) *Justice Programs for Aboriginal and other Indigenous Criminology Communities*, Australian Institute of Criminology, Canberra, 1985.

BUSH, RA, 'A Pluralistic Understanding of Access to Justice: Developments in Systems of Justice in African Nations' in M Cappelletti & B Garth (ed) *Access to Justice*, vol III *Emerging Issues and Perspectives*, Sijthoff and Noordhoff, Milan, 1979, 260.

CAPPELLETTI, M & WEISNER J (ed) *Access to Justice*, vol II *Promising Institutions*, Sijthoff and Noordhoof, Milan, 1978.

CAPPELLETTI M, & GARTH, B, 'Access to Justice: The Worldwide Movement to Make Rights Effective' in M Cappelletti & B Garth (ed) *Access to Justice*, vol I *A World Survey*, Sijthoff and Noordhoff, Milan, 1978, 3.

CHALMERS, DRC, 'A History of the Role of Traditional Dispute Settlement Procedures in the Courts of Papua New Guinea' in D Weisbrot, A Paliwala & A Sawyerr (ed) *Law and Social Change in Papua New Guinea*, Butterworths, Sydney, 1982, 169.

COHEN, FS, *Handbook of Federal Indian Law*, 2nd edn, Michie, Bobbs-Merrill, Charlottesville, 1982.

COHEN, F, CHAPPELL D & WILSON, P, 'Aboriginal and American Indian relations with police' in D Chappell & P Wilson (ed) *The Australian Criminal Justice System*, 2nd edn, Butterworths, Sydney, 1977, 152.

COLLINS, RB, JOHNSON, RW & PERKINS, KI, 'American Indian Courts and Tribal Self Government' (1977) 63 *American Bar Association Journal* 808.

COOMBS, HC, 'The Yirrkala Proposals for the Control of Law and Order' in K Hazlehurst (ed) *Justice Programs for Aboriginal and Other Indigenous Communities*, Australian Institute of Criminology, Canberra, 1985, 201.

COOMBS, HC, BRANDL, MM, SNOWDON, WE, *A Certain Heritage*, Centre for Resource and Environmental Studies, Canberra, 1983, 197.

COWEN, Z & ZINES, L, *Federal Jurisdiction in Australia*, Oxford University Press, Melbourne, 2nd edn, 1978.

CRAIG, D, 'The Social Impact of the State on an Aboriginal Reserve in Queensland, Australia', PhD Thesis, *University of California*, Berkeley, 1979.

CRAWFORD, J, *Australian Courts of Law*, Oxford University Press, Melbourne, 1982.

DAUNTON-FEAR, MW & FREIBERG, A, "'Gum-tree" justice: Aborigines and the Courts' in D Chappell & PR Wilson (ed) *The Australian Criminal Justice System*, 2nd edn, Law Book Co, Sydney, 1977, 45.

DAVIS, S, 'Aboriginal Communities Justice Project: Northern Territory' in KM Hazlehurst (ed) *Justice Programs for Aboriginal and other Indigenous Communities*, Australian Institute of Criminology, Canberra, 1985, 187.

EASTON, BW, 'Future Planning Needs' in KM Hazlehurst (ed) *Justice Programs for Aboriginal and other Indigenous Communities*, Australian Institute of Criminology, Canberra, 1985, 221.

EGGLESTON, E, *Fear, Favour or Affection. Aborigines and the Criminal Law in Victoria, South Australia and Western Australia*, Australian National University Press, Canberra, 1976.

ELKIN, AP, 'Aboriginal Evidence and Justice in North Australia' (1947) 17 *Oceania* 173.

FAULKES, W, 'Community Justice Centres in New South Wales' in KM Hazlehurst (ed) *Justice Programs for Aboriginal and other Indigenous Communities*, Australian Institute of Criminology, Canberra, 1985, 143.

FORRESTER, G, 'US Indian Legal Services' (1982) 7 *Legal Services Bulletin* 112.

GALANTER, M, 'Justice in Many Rooms: Courts, Private Ordering and Indigenous Law' (1981) 19 *Journal of Legal Pluralism* 1.

GALVIN, WT, 'Bridging the Gap: Practical Application and Obstacles to Change and Cooperation, New South Wales' in KM Hazlehurst (ed) *Programs for Aboriginal and other Indigenous Communities*, Australian Institute of Criminology, Canberra, 1985, 47.

GRANT, PR, 'Role of Traditional Law in Contemporary Cases' (1983) 5 *Canadian Legal Aid Bulletin* 107.

GYANRAJ, S, 'Autonomy for Aboriginal Communities' (1979) 4 *Legal Services Bulletin* 234.

HASLUCK, P, *Black Australians*, Melbourne University Press, Melbourne, 1942.

HAZLEHURST, KM, *Aboriginal Policing: Principles and Practices*, Australian Institute of Criminology, Canberra, 1985.

HODDINOTT, A, *That's "Gardia" Business. An Evaluation of the Aboriginal Justice of the Peace Scheme in Western Australia*, Perth, 1985.

HODDINOTT, A, 'Aboriginal Justices of the Peace and "Public Law'" in KM Hazlehurst (ed) *Justice Programs for Aboriginal and other Indigenous Communities* Australian Institute of Criminology, Canberra, 1985, 173.

HOOKER, LB, *Legal Pluralism*, Clarendon Press, Oxford, 1978.

HOPE, D, 'Contemporary Issues in the Management of Law and Order in South Australia Pitjantjatjara Community' in B Swanton (ed) *Aborigines and Criminal Justice*, Australian Institute of Criminology, Canberra, 1984, 359.

HOPE, D, 'Aboriginal Policing in South Australia. The Problem and the Potential', Paper delivered at ANZAAS Conference, Melbourne, August, 1985.

HOWARD, J, 'Aboriginal Communities Act 1979', Address to the Australian Law Librarians Conference, Perth, September 1983,

HUMPHREY, MNT, 'Disputes and Law. A Study of Lebanese Muslim Immigrant Communities in Sydney', PhD Thesis, Macquarie University, 1982.

JAMES, M (ed) *Community Policing*, Australian Institute of Criminology, Seminar Proceedings No 4, Canberra, 1984.

JAYEWARDENE, CHS, 'Policing the Indian' (1979-80) 7/8 *Crime and Justice* 42.

KEON-COHEN, BA, 'Native Justice in Australia, Canada and the USA: A Comparative Analysis' (1981) 7 *Monash University Law Review* 250.

KEON-COHEN, BA, 'Native Justice in Australia, Canada and the USA: A Comparative Analysis' (1982) 5 *Canadian Legal Aid Bulletin* 187.

KOEPPING, K-P, 'Cultural Patterns on an Aboriginal Settlement in Queensland' in RM Berndt (ed) *Aborigines and Change*, Australian Institute of Aboriginal Studies, Canberra, 1977, 159.

KRIEWALDT, MC, 'The Application of the Criminal Law to the Aborigines of the Northern Territory of Australia' (1960) 5 *University of Western Australia Law Revie*w 1.

LYON, N, 'Constitutional Issues in Native Law' in BW Morse (ed) A*boriginal Peoples and the Law: Indian, Metis and Inuit Rights in Canada*, Carleton University Press, Ottawa, 1985, 408.

LYONS, G, 'Aboriginal Perceptions of Courts and Police: a Victorian Study' (1983) 2 *Australian Aboriginal Studies* 45.

LYONS, G, 'Aboriginal Legal Services' in P Hanks and B Keon-Cohen (ed) *Aborigines and the Law*, George Allen and Unwin, Sydney, 1984, 137.

MacDONALD, J, 'The Police and the Reserve Aborigine in Queensland' (1978) 32 *Australian Police Journal* 21.

MacDONALD, JA, 'Community Service Projects on Aboriginal Communities in .Queensland' in KM Hazlehurst (ed) *Justice Programs for Aboriginal and other Indigenous Communities*, Australian Institute of Criminology, Canberra, 1985, 153.
McCABE, N, *A Short Guide to the Courts of the Navajo Nation*, unpublished, 1982.
McHUGH, PG, *The Fragmentation of Maori Land*, Legal Research Foundation, Publication No 18, Auckland, 1980.
McHUGH, PG, 'The Constitutional Role of the Treaty of Waitangi' [1985] *New Zealand Law Journal* 224.
McLEOD, DW, *How the West was Lost. The Native Question in the Development of Western Australia*, DW McLeod, Pt Hedland, 1984.
MANSELL, M, 'Police/Aboriginal Relations: A Tasmanian Perspective' in B Swanton (ed) *Aborigines and Criminal Justice*, Australian Institute of Criminology, Canberra, 1984, 112.
MISNER, RL, 'Administration of Criminal Justice on Aboriginal Settlements' (1974) 7 *Sydney Law Review* 257.
MITCHELL, B, 'Family Law in Village Courts: The Woman's Position', unpublished paper presented to Waigani Seminar, 1982.
MORRIS, HF & READ, JS, *Indirect Rule and the Search for Justice*, Clarendon Press, Oxford, 1972.
MORROW, WG, 'A Survey of Jury Verdicts in the Northwest Territories' (1970) 8 *Alberta Law Review* 50.
MORROW, WG, 'Law and the Thin Veneer of Civilisation' (1972) 10 *Alberta Law Review* 38.
MORROW, WG, 'Riding Circuit in the Arctic' (1974) 58 *Judicature* 236.
MORSE, BW, 'Indian & Inuit Family Law and the Canadian Legal System' (1980) 8 *American Indian Law Review* 199.
MORSE, BW, 'Indian Tribal Courts in the United States' A Model for Canada?' *Saskatoon Native Law Centre*, University of Saskatchewan, 1980.
MORSE, BW, 'A Unique Court: s 107 Indian Act Justices of the Peace' (1982) 5 *Canadian Legal Aid Bulletin* 131.
MORSE, BW, 'Lessons from Canada?' (1983) 7 *Aboriginal Law Bulletin* 4.
MOSS, W, 'The Implementation of the James Bay and Northern Quebec Agreement' in BW Morse (ed) *Aboriginal Peoples and the Law: Indian, Metis and Inuit Rights in Canada*, Carleton University Press, Ottawa, 1985.
NEAL, D, 'A "national" movement' (1983) 8 *Legal Services Bulletin*, 178.
NETTHEIM, G, *Victims of the Law. Black Queenslanders Today*, George Allen & Unwin, Sydney, 1981.
NORTH AMERICAN INDIAN JUDGES ASSOCIATION, *Indian Courts and the Future*, US Government Printing Office, Washington, 1978.
NWOGUGU, EI, 'Abolition of Customary Courts — The Nigerian Experiment' (1976) 20 *Journal of African Law* 1.
O'NEILL, N, 'The Papua New Guinea Legal System', Paper presented to 8th International Association of Law Librarians Course on Law Librarianship, 13 May 1981.
ORAM, ND, 'Grass Roots Justice: Village Courts in Papua New Guinea' in W Clifford (ed) *Innovations in Criminal Justice in Asia and the Pacific*, Australian Institute of Criminology, Canberra, 1979, 49.
PALIWALA, A, 'Law and Order in the Village: The Village Courts' in D Weisbrot, A Paliwala and A Sawyerr (ed) *Law and Social Change in Papua New Guinea*, Butterworths, Sydney, 1982, 191.
PARKER, D, *The Criminality of Aborigines in Western Australia*, unpublished Report for the Department of Native Welfare in Western Australia, Perth, 1970-2.
PATHE, M, 'Police/Aboriginal Relations in South Australia' in KM Hazlehurst (ed) *Justice Programs for Aboriginal and Other Indigenous Communities*, Australian Institute of Criminology, Canberra, 1985, 41.
ROBERTS, L, 'Current Developments in Aboriginal/Police Relations in Western Australia in KM Hazlehurst (ed) *Justice Programs for Aboriginal and other Indigenous Communities*, Australian Institute of Criminology, Canberra, 1985, 53.
ROBERTS, S, 'Mediation in Family Disputes' (1983) 46 *Modern Law Review* 537.
SCHWARTZKOFF, J & MORGAN, J, *Community Justice Centres. A Report on the New South Wales Pilot Project, 1979-81*, Law Foundation of New South Wales, Sydney, 1982.
SMALL, C, *Justice in Indian Country*, American Lawyer Training Program, Oakland, 1980.
SNYDER, FG, 'Anthropology, Dispute Processes and Law' (1981) 8 *British Journal of Law and Society* 141.
SOMARE, M, 'Law and the Needs of Papua New Guinea's People' in J Zorn & P Bayne (ed) *Lo Bilong Ol Manmeri*, University of Papua New Guinea, Port Moresby, 1975, 14.

SUTTNER, RS, 'Legal Pluralism in South Africa: A Reappraisal of Policy' (1970) 19 *International and Comparative Law Quarterly* 134.
SUTTON, JD, 'The Treaty of Waitangi Today' (1981) 11 *Victoria University of Wellington Law Review* 17.
SYDDALL, T, 'Aborigines and the Courts I' in B Swanton (ed) *Aborigines and Criminal Justice*, Australian Institute of Criminology, Canberra, 1984, 133.
SYDDALL, T, 'Aborigines and the Courts II', in B Swanton (ed) *Aborigines and Criminal Justice*, Australian Institute of Criminology, Canberra, 1984, 144.
SYKES, RB, 'Self Determination: Implications for Criminal Justice Policy Makers' in KM Hazlehurst (ed) *Justice Programs for Aboriginal and Other Indigenous Communities*, Australian Institute of Criminology, Canberra, 1985, 21.
TATZ, CM, 'South Africa The Recognition of Native Law' in Australian Law Reform Commission Australian Institute of Aboriginal Studies, *Report of a Working Seminar on the Aboriginal Customary Law Reference*, Sydney, 1983, 47.
TAYLOR, M, 'Field Report: Consequences of Oliphant for Reservation Law Enforcement', unpublished paper, University of Puget Sound, 1983.
TOMASIC, R & FEELING M, *Neighbourhood Justice: Assessment of an Emerging Idea*, Longman, New York, 1982.
UNIVERSITY OF SYDNEY, Institute of Criminology, *Proceedings No 51*, Community Justice Centres, Sydney, 1982.
VYVER, JD van der, 'Human Rights Aspects of the Dual System Applying to Blacks in South Africa' (1982) 15 *Comparative and International Law Journal of Southern Africa* 306.
WARREN, N, 'The Introduction of a Village Court', IASER Discussion Paper 2, Institute of Applied Social and Economic Research, July 1976.
WEARNE, H, *A Clash of Cultures*, Uniting Church in Australia, Brisbane, 1980.
WEISBROT, D, 'Integration of Laws in Papua New Guinea: Custom and the Criminal Law in Conflict' in D Weisbrot, A Paliwala & A Sawyerr (ed) L*aw and Social Change in Papua New Guinea*, Butterworths, Sydney, 1982, 59.
WEISBROT, D, 'The Recognition of Custom in Papua New Guinea and the Pacific' in Australian Law Reform Commission — Australian Institute of Aboriginal Studies AIAS, *Report of a Working Seminar on the Aboriginal Customary Law Reference*. Sydney, 1983, 51.
WESTERMARK, G, 'The Village Courts in Question: The Nature of Court Procedure' (1978) 6 *Melanesian Law Journa*l 79.
WILLIAMS, NM, 'Comments on the Yirrkala Proposal and Similar Developments' in Australian Law Reform Commission — Australian Institute of Aboriginal Studies, *Report of a Working Seminar on the Aboriginal Customary Law Reference*, Sydney, 1983, 77.
WILLIAMS, NM, 'Two Laws: Managing Disputes in a Contemporary Aboriginal Community', Canberra, June 1983.
ZION, JW, 'The Navajo Peacemaker Court: Deference to the Old and Accommodation to the New' (1984-85) 11 *American Indian Law Review* 89.
ZION, JW & McCABE, NJ, *Navajo Peacemaker Court Manual*, Window Rock, 1982.

**Official Papers and Reports**

***Australia — Federal***

AUSTRALIAN LAW REFORM COMMISSION, Report No 2, *Criminal Investigation*, AGPS, Sydney, (1976).
AUSTRALIAN LAW REFORM COMMISSION, Report No 15 (Interim), *Sentencing of Federal Offenders*, AGPS, Canberra 1980.
AUSTRALIAN LAW REFORM COMMISSION, Report No 18, *Child Welfare*, AGPS, Canberra, 1981.
COMMISSIONER FOR COMMUNITY RELATIONS, *Second Annual Report, 1976-77*, AGPS, Canberra, 1977.
COUNCIL FOR ABORIGINAL AFFAIRS (HC Coombs, WEH Stanner, BG Dexter) *Report on Arnhem Land*, Canberra, 1975.
FAMILY LAW COUNCIL, *Report to the Attorney-General in respect of Family Law Centres*, November 1983.
HAWKINS, GJ & MISNER, RL, *Restructuring the Criminal Justice System in the Northern Territory*, Canberra, AGPS, 1973.

HAWKINS, GJ & MISNER, RL, *Framework for Change: Second Report on the Criminal Justice System in the Northern Territory* (tabled in the Parliament, August 1974, not printed).
HAWKINS, GJ & MISNER, RL, *Some Specific Proposals: Third Report on the Criminal Justice System in the Northern Territory* (tabled in the Parliament, August 1974, not printed).
HOUSE OF REPRESENTATIVES, STANDING COMMITTEE ON ABORIGINAL AFFAIRS, *Report on Aboriginal Legal Aid*, AGPS, Canberra, 1980.
HUMAN RIGHTS COMMISSION, *Aboriginal Reserves, By-laws and Human Rights*, Occasional Paper No 5, AGPS, Canberra, 1983.
HUMAN RIGHTS COMMISSION, Report No 9, *Community Services (Aborigines) Act 1984*, AGPS, Canberra, 1985.
TOOHEY, Justice J, *Seven Years On. Report to the Minister for Aboriginal Affairs on the Aboriginal Land Rights (Northern Territory) Act 1976 and Related Matters*, AGPS, Canberra, 1984.

***New South Wales***
ANTI-DISCRIMINATION BOARD, *Study of Street Offences by Aborigines*, Sydney, 1982.

***Northern Territory***
DAVIS, S, Aboriginal Communities Justice Project, *Final Report*, Darwin, 1985.

***Queensland***
COMMITTEE OF INQUIRY INTO THE ENFORCEMENT OF THE CRIMINAL LAW IN QUEENSLAND, (Chairman: Justice GA Lucas) *Report* Government Printer, Brisbane, 1977.

***South Australia***
ABORIGINAL CUSTOMARY LAW COMMITTEE (Chairman: Judge JM Lewis) *Preliminary Report*, Adelaide, September 1979.
ABORIGINAL CUSTOMARY LAW COMMITTEE (Chairman: Judge JM Lewis) *Children and Authority in the North-West*, Adelaide, August 1984.
McCARRON, R, *Report on the Norwood Community Mediation Service*, Adelaide, 1984.
POLICE DEPARTMENT, *Police/Aboriginal Relations in South Australia*, Special Projects Section, Adelaide, 1985.

***Victoria***
DISPUTE RESOLUTION PROJECT COMMITTEE, *Report*, Neighbourhood Mediation Service, Melbourne, February 1985.

***Western Australia***
LAVERTON ROYAL COMMISSION 1975-6, *Report*, WA Government Printer, Perth, 1976.

***Canada — Federal***
DEPARTMENT OF INDIAN AND NORTHERN AFFAIRS, *Indian Conditions: A Survey*. Ottawa, 1980.
GILLARD, HE, *Native Policing. A New Era*, Research Paper, RCMP, October 1979.
HOUSE OF COMMONS, Special Committee on Indian Self-Government, *Report* (Chairman: K Penner) Ottawa, 1983.
HAVEMANN, P, COUSE K, FOSTER L, MATONOVICH R, *Law and Order for Canada's Indigenous People 1984-7*, Solicitor-General of Canada, Ottawa, 1984.
MINISTER FOR INDIAN AFFAIRS AND NORTHERN DEVELOPMENT, *James Bay and Northern Quebec Agreement Implementation Review*, Ottawa, February 1982.

***Canada — Ontario***
ONTARIO NATIVE COUNCIL ON JUSTICE, *The Native Justice of the Peace: An Underemployed Natural Resource for the Criminal Justice System*, Ottawa, 1982.

***Papua New Guinea***
CLIFFORD, W, MORAUTA, L & STUART, B, *Law and Order in Papua New Guinea*, vol I Report and Recommendations, Waigani, 1984.
VILLAGE COURTS SECRETARIAT, *Annual Report*, 1980.

***Other***

GROOTE EYLANDT ABORIGINAL TASK FORCE, *Report*, Angurugu, 1985.
NATIONAL ABORIGINAL CONFERENCE, Queensland State Branch, *Policy Directions*, Brisbane, 1985.

## PART VII: Aboriginal Hunting, Fishing and Gathering Rights

### Books and Articles

AKERMAN, K, 'The Double Raft or Kalwa of the West Kimberley' (1975) 10 *Mankind* 20.
ALTMAN, JC, 'Hunting Buffalo in North Central Arnhem Land: A Case of Rapid Adaptation among Aborigines' (1982) 52 *Oceania* 274.
ALTMAN, JC, 'Maningrida Outstations', *Small Rural Communities, the Aboriginal Component in the Australian Economy*, Development Studies Centre, Australian National University, 1982.
ALTMAN, JC, *Hunter-Gatherers and the State: The Economic Anthropology of the Gunwinggu of North Australia*, PhD Thesis, Australian National University 1982.
ALTMAN, JC, 'Hunter-Gatherer Subsistence Production in Arnhem Land: The Original Affluence Hypothesis Re-examined' (1984) 14(3) *Mankind* 179.
ALTMAN, JC, 'The Dietary Utilisation of Flora and Fauna by Contemporary Hunter Gatherers at Momega Outstation, North Central Arnhem Land' (1984) 1 *Australian Aboriginal Studies* 35.
ALTMAN, JC & NIEUWENHUYSON, J, *The Economic Status of the Australian Aborigines*, Cambridge University Press, Cambridge, 1979.
BARTLET, RH, 'Survey of Canadian Law, Indian Law, and Native Law' (1983) 15 *Ottawa Law Review* 433.
BELL, D, *Daughters of the Dreaming*, McPhee Gribble/George Allen and Unwin, Sydney, 1983.
BELL, D & DITTON, P, *Law: The Old and The New. Aboriginal Women in Central Australia Speak Out*, 2nd edn, Aboriginal History, Canberra, 1984.
BENNETT, DH, 'Some Aspects of Aboriginal and Non-Aboriginal Notions of Responsibility to Non-Human Animals' (1983) 2 *Australian Aboriginal Studies* 19.
BERNDT, RM & CH, *The World of the First Australians*, 4th rev edn, Rigby, Adelaide, 1985.
BRADY, M, 'Sea Rights. The Northern Territory Sea Closure: A Weakened Law' (1985) 15 *Aboriginal Law Bulletin* 8.
BRAND, JC & CHERIKOFF, V, 'The Nutritional Composition of Australian Aboriginal Plants of the Desert Regions' in GE Wickens, JR Goodin, DV Field (ed) *Plants for Arid Lands*, George Allen and Unwin, London, 1985, 53.
BRAND, JC, RAE, C, McDONNELL, J, LEE, A, CHERIKOFF, V & TRUSWELL, AS, 'The Nutritional Composition of Australian Aboriginal Bush Foods' (1983) 35 *Food Technology in Australia* 293.
BROKENSHA, P, *The Pitjantjatjara and the Crafts*, Aboriginal Arts Board, Sydney, 1975.
BROWN, D, 'Indian Hunting Rights and Provincial Law; Some Recent Developments' (1981) 39 *University of Toronto Faculty of Law Review* 121.
BUTLIN, NG, *Our Original Aggression: Aboriginal Populations of Southeastern Australia 1788-1850*. George Allen & Unwin, Sydney, 1983.
CHASE, A, 'Dugongs and Australian Indigenous Cultural Systems. Some Introductory Remarks' in H Marsh (ed) *The Dugong. Proceedings of a Seminar/Workshop held at James Cook University of North Queensland (8-12 May 1979)*, James Cook University, Townsville, 1981, 115.
CHASE, A & SUTTON, P, 'Hunter-Gatherers in a Rich Environment: Aboriginal Coastal Exploration in Cape York Peninsula' in A Keast (ed) *Ecological Biography of Australia*, Junkby Publishers, The Hague, 1981, 1819.
COHEN, FS, *Handbook of Federal Indian Law*, rev edn, Michie, Bobbs Merrill, Charlottesville, 1982.
COOK, GF, 'Wildlife and Fishery Allocation 1982; Allocation for Subsistence, Commercial and Recreational Users' in R Sabol (ed) *Transactions of the Fifty-Seventh North American Wildlife and Natural Resources Conference*, Wildlife Management Institute, Washington, 1982, 613.
CREAMER, H, 'Information Relevant to the Inclusion of Hunting, Fishing and Gathering Rights in the Proposed New South Wales Aboriginal Land Rights Legislation', Paper prepared at the request of the Permanent Head, Ministry of Aboriginal Affairs, Sydney, September 1982.
DAVIS, SL, 'Research Proposal: Aboriginal Subsistence Fishing and Tenure of the Sea', unpublished, Northern Territory Industry Research and Development Trust Fund, May 1983.

DAVIS, SL, 'Aboriginal Land Claims to Coastal Waters in North Eastern Arnhem Land, Northern Australia' in K Ruddle & T Akimichi (ed) *Maritime Institutions in the Western Pacific*, 17 Senri Ethnological Studies, Osaka, Japan, 1984, 231.

DAVIS, SL, 'Aboriginal Sea Rights in Northern Australia' (1985) 21 *Maritime Studies* 12.

DAVIS, SL, 'Aboriginal Tenure of the Sea in Northern Arnhem Land', in L Zann (ed) *Proceedings of the Workshop on Traditional knowledge of the Marine Environment in Northern Australia*, Great Barrier Reef Marine Park Authority, Townsville, 1986 (in press).

DREYFUS, M & DHULUMBURRK, M, 'Submission to the Aboriginal Land Commissioner regarding Control of Entry onto Seas Adjoining the Aboriginal Land in the Milingimbi, Crocodile Islands and Glyde River Area', 30 May 1980.

ELLIOTT, DW, ' Baker Lake and the Concept of Aboriginal Title' (1980) *Osgoode Hall Law Journal* 653.

GOTT,.B, 'Murnong-Microseris Scapigera: A Study of a Staple Food of Victorian Aborigines' (1983) 2 *Australian Aboriginal Studies* 2.

GOULD, RA, 'Subsistence Behaviour among the Western Desert Aborigines of Australia' (1969) 39 *Oceania* 253.

HARRIS, SG, 'Milingimbi Economic System' in S Turnbull (ed) *Economic Development of Aboriginal Communities in the Northern Territory*, AGPS, Canberra 1980, Appendix VIII.

HIATT, B, 'Woman the Gatherer' in F Gale (ed) *Women's Role in Aboriginal Society*, 3rd edn, Australian Institute of Aboriginal Studies Canberra, 1978, 4.

HIATT, LR, *Kinship and Conflict. A Study of an Aboriginal Community in Northern Arnhem Land*, Australian National University Press, Canberra, 1965.

HIATT, LR, 'Traditional Attitudes to Land Resources' in RM Berndt (ed) *Aboriginal Sites, Rights and Resource Development*, University of Western Australia Press, Perth, 1982, 13.

HOWKINS, A, 'Economic Crime and Class Law: Poaching and the Game Laws 1840-1880' in SR Burman and BE Harrell-Bond (ed) *The Imposition of Law*, New York, Academic Press, 1979, 273.

HUDSON, BET, 'The Dugong Conservation, Management and Public Education Program in Papua New Guinea' in H Marsh (ed) *The Dugong: Proceedings of a Seminar workshop held at James Cook University of North Queensland (8-12 May 1979)*, James Cook University, Townsville, 1981, 123.

HURLEY, J, 'The Crown's Fiduciary Duty and Indian Title: *Guerin v The Queen* (1985) 30 *McGill Law Journal* 559.

JOHANNES, RE, 'Traditional Marine Conservation Areas in Oceania and Their Demise' (1979) 9 *Annual Review of Ecological Systems* 349.

JOHANNES, RE, 'Traditional Conservation Methods and Protected Marine Areas in Oceania' (1982) 11 *Ambio* 258.

JOHANNES, RE, 'Research on Traditional Tropical Fisheries: Some Implications for Torres Strait Islands and Australian Aboriginal Fisheries' in L Zann (ed) *Proceedings of the Workshop on Traditional Knowledge of the Marine Environment in Northern Australia*, Great Barrier Reef Marine Park Authority, Townsville, 1986 (in press).

JOHANNES, RE & MACFARLANE, JW, 'Traditional Sea Rights in the Torres Strait Islands with Emphasis on Murray Islands' in K Ruddle & T Akimichi (ed) *Maritime Institutions in the Western Pacific*, 17 Senri Ethnologogical Studies, Osaka, Japan, 1984, 253.

JOHANNES, RE & MACFARLANE, JW, 'Traditional Fishing Rights in the Torres Strait Islands' in AK Haines, GC Williams & D Coates (ed) *Proceedings of the Torres Strait Fisheries Seminar*, Port Moresby, 11-14 February 1985, AGPS, Canberra, 1986 (in press).

KELSO, DD, 'Subsistence Use of Fish and Game Resources in Alaska: Considerations in Formulating Effective Management Policies in R Sabol (ed) T*ransactions of the Fifty-Seventh North American Wildlife and Natural Resources Conference*, Wildlife Management Institute, Washington, 1982, 630.

KENCHINGTON, R, 'Dugong Hunting In the Great Barrier Reef Marine Park' (1985) 16 *International Union for Conservation of Native and Natural Resources* 89.

KIMBER, RG, 'Resource Use and Management in Central Australia' (1984) 2 *Australian Aboriginal Studies* 12.

LAWSON, B, *Aboriginal Fishing and Ownership of the Sea*, Department of Primary Industry, Canberra, 1984.

LEE, KB & DEVORE, *I, Man the Hunter*, Aldine Press, Chicago, 1968.

LEVITT, D, *Plants and People: Aboriginal Uses of Plants on Groote Eylandt*, Australian Institute of Aboriginal Studies, Canberra, 1981.

LOORHAM, C, 'The Warlpiri and the Rufous Hare-Wallaby. Aboriginal Land Rights and Wildlife Conservation in the Tanami Desert' *Habitat* (August 1985) 8.
LYSYK, K, 'The Rights and Freedoms of Aboriginal People in Canada' in WS Tarnopolosky & GA Beaudoin (ed) *Canadian Charter of Rights and Freedoms*, Carswell, Toronto, 1982, 467.
MABO, E, 'Land Rights in the Torres Strait' in F Olbrei (ed) *Black Australians: The Prospects for Change*, James Cook University, Townsville, 1982, 143.
McCONNEL, VH, 'Native Arts and Industries on the Archer Kendall and Holroyd Rivers, Cape York Peninsula North Queensland' (1953) 16 *Records of the South Australian Museum* 1.
McHUGH, PG, 'Aboriginal Title in New Zealand Courts' (1984) 2 *Canterbury Law Review* 235.
McHUGH, PG, 'The Legal Status of Maori Fishing Rights in Tidal Waters' (1984) 14 *Victoria University of Wellington Law Review* 247.
MADDOCK, K, T*he Australian Aborigines A Portrait of Their Society*, Penguin, Ringwood, 1982.
MARSH, H, 'Summary of Available Information on Dugong Distribution, Abundance and Mortality in Queensland Waters', James Cook University, Townsville, 1984.
MARSH, H, BARKER HUDSON, B, HEINSOHN, G & KINBAG, F, 'Status of the Dugong in The Torres Strait Area: Results of an Aerial Survey in the Perspective of Information on Dugong Life History and Current Catch Levels', James Cook University, Townsville, April 1984,
MARSH, H, GARDNER, BR & HEINSOHN, GE, 'Present Day Hunting and Distribution of Dugongs in the Wellesley Islands (Queensland): Implications for Conservation' (1980-81) 19 *Biological Conservation* 258.
MARSH, H, HEINSOHN, G, HUDSON, BET, 'Zoning the Far North Section of the Great Barrier Reef Marine Park for the Conservation and Management of Dugongs (Dugong Dugon)', James Cook University, Townsville, 1984.
MARSH, H, SMITH, A, KELLY, G, 'Dugong Hunting by Members of the Hope Vale Aboriginal Community and the Initial Reaction to the Great Barrier Reef Marine Park and the Dugong Permit System', James Cook University, Townsville, February 1984.
MEEHAN, B, *Shell Bed to Shell Midden*, Australian Institute of Aboriginal Studies, Canberra, 1982.
MEGGITT, MJ, 'Notes on Vegetable Foods of the Walbiri of Central Australia' (1957) 28 *Oceania* 143.
MEGGITT, MJ, *Desert People. A Study of the Walbiri Aborigines of Central Australia* Angus and Robertson, Sydney, 1962.
NIETSCHMANN, B, 'Torres Strait Islander Sea Resource Management and Sea Rights' in K Ruddle & RE Johannes (ed) *The Traditional Knowledge and Management of Coastal Systems in Asia and the Pacific*, UNESCO Regional Office for Science and Technology in Southeast Asia, Jakarta Pusat, 1984, 129.
PETERSON, N, 'Aboriginal Involvement in the European Economy of the Central Reserve during the Winter of 1970s' in RM Berndt (ed) *Aborigines and Change in the 1970s*, Australian Institute of Aboriginal Studies, Canberra, 1977, 136.
PIBUS, CJ, 'The Fisheries Act and Native Fishing Rights in Canada: 1970-1980' (1981) 39 *University of Toronto Faculty of Law Review* 43.
POWER, G, 'Problems of Fisheries Management in Northern Quebec' (1979) 10 *Fisheries Management* 108.
REICHER, H, 'Access by Australian Aboriginals to the Fruits of' Deep Seabed Mining' (1983) 14 *University of Western Australia Law Review* 187.
REYNOLDS, H, *The Other Side of the Frontier*, Penguin, Ringwood, 1982.
SACKETT, L, 'The Pursuit of Prominence: Hunting in an Australian Aboriginal Community' (1979) 21 *Anthropologica* 197.
SANDERS, D, 'Indian Hunting and Fishing Rights' (1974) 38 *Saskatchewan Law Review* 45.
STANNER, WEH, 'Aboriginal Territorial Organisation, Estate, Range, Domain and Region' (1965) 36 *Oceania* 1.
STREHLOW, TGH, 'Culture, Social Structure and Environment in Aboriginal Central Australia' in RM Berndt and CH Berndt (ed) *Aboriginal Man in Australia*, Angus and Robertson, Sydney, 1965, 121.
TATZ, C, *Aborigines and Uranium*, Heinemann, Sydney, 1982.
TAYLOR, J, 'Diet Health and Economy' in RM Berndt (ed) A*borigines and Change. Australia in the 1970s*, Australian Institute of Aboriginal Studies, Canberra, 1977, 153.
THOMPSON, DF, 'The Dugong Hunters of Cape York' (1934) 64 *Royal Anthropological Institute Journal* 237.
TURNBULL, S, *Economic Development of Aboriginal Communities in the Northern Territory*, AGPS, Canberra, 1980.

VON STURMER, JR, 'The Wik: Economy, Territoriality and Totemism in Western Cape York Peninsula North Queensland', PhD Thesis, University of Queensland, 1978.
WEAVER, SM, 'Progress Report: The Role of Aboriginals in the Management of Cobourg and Kakadu National Parks, Northern Territory, Australia', North Australia Research Unit, Seminar, July 30 1984, Darwin.
WILKIN, A, 'Property and Inheritance' in AC Haddon (ed) *Reports of the Cambridge Anthropological Exhibition to the Torres Straits*, Cambridge University Press, Cambridge, 1908, vol 6, 167.
YOUNG, E, *Tribal Communities in Remote Areas*, Development Studies Centre, Australian National University, Canberra, 1981.
YOUNG, E, *Outback Stores: Retail Services in North Australian Aboriginal Communities*, Australian National University, North Australian Research Unit, Darwin, 1984.
ZLOTKIN, NK, 'Post-Confederation Treaties' in BW Morse (ed) *Aboriginal Peoples and the Law: Indian, Metis and Inuit Rights in Canada*, Carleton University Press, Ottawa, 1985, 272.

## Official Papers and Reports

***Australia — Federal***

ABORIGINAL LAND RIGHTS COMMISSION (Commissioner: Justice EA Woodward), *Second Report*, AGPS, Canberra, 1974.
ABORIGINAL LAND COMMISSIONER, *Alyawarra and Kaititja Land Claim*, AGPS, Canberra, 1979.
ABORIGINAL LAND COMMISSIONER, *Uluru (Ayers Rock) National Park and Lake Amadeus/Lutritja Claim*, AGPS, Canberra, 1980.
ABORIGINAL LAND COMMISSIONER, *Warlmanpa, Warlpiri, Mudbura and Warumungu Land Claim*, AGPS, Canberra, 1982.
ABORIGINAL LAND COMMISSIONER, *Yutpundji-Djindiwirritj (Roper Bar) Land Claim*, AGPS, Canberra, 1982.
AUSTRALIAN NATIONAL PARKS AND WILDLIFE SERVICES, *Kakadu National Park Plan of Management*, Canberra, 1980.
AUSTRALIAN NATIONAL PARKS AND WILDLIFE SERVICE, *Uluru (Ayers Rock — Mount Olga) National Park Plan of Management*, Canberra, 1982.
COMMITTEE OF REVIEW (Chairman: Professor CA Gibb) *The Situation of Aborigines on Pastoral Properties in the Northern Territory*, AGPS Canberra, 1973.
COUNCIL FOR ABORIGINAL AFFAIRS, (HC Coombs, WEH Stanner, B Dexter) *Visit to Yuendemu and Hooker Creek*, AGPS, Canberra, 1974.
GREAT BARRIER REEF MARINE PARK AUTHORITY, *Annual Report*, Townsville, 1983.
HOUSE OF REPRESENTATIVES, STANDING COMMITTEE ON ENVIRONMENT AND CONSERVATION, *Second Report on the Adequacy of Legislative and Administrative Arrangements for Environmental Protection*, AGPS, Canberra, 1981.
SENATE, STANDING COMMITTEE ON CONSTITUTIONAL AND LEGAL AFFAIRS, *Two Hundred Years Later*, AGPS, Canberra, 1983.
TOOHEY, Justice JF, *Seven Years On. Report to the Minister for Aboriginal Affairs on the Aboriginal Land Rights (Northern Territory) Act 1976 and Related Matters*, AGPS, Canberra, 1984.

***New South Wales***

NATIONAL PARKS AND WILDLIFE SERVICE (Director: DA Johnstone) *Public Statement, Representations by Hon FJ Walker MP, Minister for Aboriginal Affairs*, Sydney, 29 August 1983.
SELECT COMMITTEE OF THE LEGISLATIVE ASSEMBLY UPON ABORIGINES (Chairman: M Keane MP) *Report: Aboriginal Land Rights and Sacred and Significant Sites*, NSW Parl Paper 2, 1980.

***Northern Territory***

ABORIGINAL LAND COMMISSIONER, *Report to the Administrator of the Northern Territory, Closure of the Seas: Milingimbi, Crocodile Islands and Glyde River Area*, NT Govt Printer, Darwin, 1983.

***Queensland***

PREMIERS DEPARTMENT, *Capricornia Section: Investigation of Tidal Lands and Tidal Waters of Queensland for the Declaration of a Marine Park, Vol 2, Draft Zoning Plans*, Environment Science and Services, Spring Hill, August 1984.

***South Australia***

ARID LANDS REVIEW STEERING COMMITTEE, *A Proposal for Future Establishment, Management and Regulation of Public Rights of Access and Way Over Outback Lands*, Department of Lands, Adelaide, 1984.

DEPARTMENT OF ENVIRONMENT AND PLANNING, *Report of the Interdepartmental Working Party on Aboriginal Hunting* (Chairman: D Barrington) unpublished, Adelaide, 23 April 1985.

DEPARTMENT OF ENVIRONMENT (SA), Discussion Paper, *Taking of Protected Wildlife by Aborigines* (DE 1018/72) 1983.

SELECT COMMITTEE OF THE HOUSE OF ASSEMBLY (SA) ON THE MARALINGA TJARUTJA LAND RIGHTS BILL, *Report*, SA Parl Paper 155, 1983.

***Western Australia***

ABORIGINAL LAND INQUIRY (Commissioner: P Seaman QC) *Discussion Paper*, Perth, January, 1984.

ABORIGINAL LAND INQUIRY (Commissioner: P Seaman QC) *Report*, Perth, September 1984.

***Canada — Federal***

JAMES BAY AND NORTHERN QUEBEC AGREEMENT, Editeur Officiel du Quebec, Montreal, 1976.

MUNRO, Hon JC, Minister for Indian Affairs and Northern Development, *Report on the Implementation of the Provisions of the James Bay and Northern Quebec Claims Settlement Act 1977 for the period of ending March 31, 1980*, Ottawa, 1980.

PEARSE, PH, Commission on Pacific Fisheries Policy, *Final Report, Turning the Tide, 'A New Policy for Canada's Pacific Fisheries*, Vancouver, September 1982.

WESTERN ARCTIC CLAIM, *The Inuvialuit Final Agreement Entitlement (COPE)*, Editeur Officiel du Quebec, Montreal, 1984.

***Other***

LIBRARY COMMITTEE OF THE COMMONWEALTH PARLIAMENT, *Historical Records of Australia*, Series 1, repr, AGPS, Canberra, 1971.

## Part VIII: Summary of Recommendations and their Implementation

### Books and Articles

BAIRD, L, 'Aborigines and Alcohol' (1985) 9 *Aboriginal Health Worker* 27.

BARBER, L & O'CONNOR, CM, 'The 1984 UN Sub-Commission on Prevention of Discrimination and Protection of Minorities' (1985) 79 *American Journal of International Law*, 168.

BARSH, R, 'Indigenous Policy in Australia and North America', unpublished paper, December 1983.

BELL, D, 'Questions of Implementation and Review' in Australian Law Reform Commission Australian Institute of Aboriginal Studies, *Report of Working Seminar in the Aboriginal Customary Law Reference*, Sydney, 1983, 89.

BRADY, M, *Children Without Ears. Petrol Sniffing in Australia*, Drug and Alcohol Services Council, Parkside, 1985.

CUMMINGS, P, 'Canada's North and Native Rights' in BW Morse (ed) *Aboriginal Peoples and the Law: Metis and Inuit Rights in Canada*, Carleton University Press, Ottawa, 1985, 695.

FUA, C & LUMSDEN, L, 'Aboriginal Alcohol Abuse and Crime in Queensland' in B Swanton (ed) *Aborigines and Criminal Justice*, Australian Institute of Criminology, Canberra, 1984, 6.

GIBBS, Sir H, 'The Constitutional Protection of Human Rights' (1982) 9 *Monash Law Review* 1.

HEALEY, B, TURPIN, T & HAMILTON M, 'Aboriginal Drinking: A Case Study in Inequality and Disadvantage' (1985) 20 *Australian Journal of Social Issues* 191.

JACKSON, DF, 'Federalism in the Future: The Impact of Recent Developments' (1984) 58 *Australian Law Journal* 438.

LANE, PH, *A Manual of Australian Constitutional Law*, 3rd edn, Law Book Co, Sydney, 1984.

LINDELL, GH, 'The Corporations and Races Power' (1984) 14 *Federal Law Review* 219.

LUMB, RD & RYAN KW, *The Constitution of the Commonwealth of Australia Annotated*, 3rd edn, Butterworths, Sydney, 1981.

McCORQUODALE, J, 'Alcohol and Anomie: The Nature of Aboriginal Crime' in B Swanton (ed) *Aborigines and Criminal Justice*, Australian Institute of Criminology, Canberra, 1984, 17.

MORSE, BW, 'Canadian Developments' (1985) 12 *Aboriginal Law Bulletin* 8.
MORSE, BW, 'The Resolution of Land Claims' in BW Morse (ed), *Aboriginal Peoples and the Law: Indian Metis and Inuit Rights in Canada*, Carleton University Press, Ottawa, 1985, 617.
NICHOLS, T, 'Petrol Sniffing — now on TV' (1985) 9 *Aboriginal Health Worker* 44.
NICHOLSON, GR 'The Constitutional Status of the Self-Governing Northern Territory' (1985) 59 *Australian Law Journal* 698.
NOSWORTHY, JR, 'Changes in Law and Procedure on the Corporate Scene' (1981) 55 *Australian Law Journal* 533.
NUNAVUT CONSTITUTIONAL FORUM, *Building Nunavut*, Inuvik, 1983.
O'CONNOR, R, 'Alcohol and Contingent Drunkenness in Central Australia' (1984) 19 *Australian Journal of Social Issues*, 173.
ROSE, DB, *Dingo Makes Us Human: Being in Purpose in Australian Aboriginal Culture* PHD Thesis, Bryn Mawr College, Bryn Mawr, 1984.
ROSE, DJ, 'Comment on the Corporations Power and the Races Power' (1984) 14 *Federal Law Review* 253.
SADLER, RJ, 'The Federal Parliament's Power to Make Laws "With Respect to ... the People of any Race ..."' (1985) 10 *Sydney Law Review* 591.
SAWER, G, 'The Australian Constitution and the Australian Aborigine' (1966-7) 2 *Federal Law Review* 17.
SIMPSON, T, 'UN Action on Aboriginal Rights' (1985) 16 *Aboriginal Law Bulletin* 11.
STANNER, WEH, 'Religion, Totemism and Symbolism' (1962) in WEH Stanner, *White Man Got No Dreaming*, Australian National University Press, Canberra, 1979, 106.
STANNER, WEH, 'Continuity and Change' (1958) in WEH Stanner, *White Man got No Dreaming*, Australian National University Press, Canberra, 1979, 41.
TERRY, J, 'Damned Wilderness and Special Laws' (1983) 8 *Aboriginal Law Bulletin* 2.
WADE, JH, 'Void and De Facto Marriages' (1981) 9 *Sydney Law Review* 356.
WEBSTER, B, 'Petrol Sniffing and Pregnancy' (1985) 9 *Aboriginal Health Worker* 6.

## Official Papers and Reports

***Australia — Federal***

AUSTRALIAN INSTITUTE OF ABORIGINAL STUDIES, *Aborigines and Uranium, Consolidated Report to the Minister for Aboriginal Affairs on the Social Impact of Uranium Mining on the Aborigines of the Northern Territory*, AGPS, Canberra, 1984.
AUSTRALIAN INSTITUTE OF CRIMINOLOGY, *Seminar on Criminal Investigation Bill (Cth)*, Australian Institute of Criminology Canberra, 1982.
AUSTRALIAN LAW REFORM COMMISSION, Aboriginal Customary Law Reference, Research Paper 15 (M Fisher) *Aboriginal Customary Law: The Recognition of Traditional Hunting Fishing and Gathering Rights*, ALRC, Sydney, May 1984.
AUSTRALIAN LAW REFORM COMMISSION REPORT No 11, *Unfair Publication: Defamation and Privacy*, AGPS, Canberra, 1979.
DEPARTMENT OF SOCIAL SECURITY, *Aboriginal Access to Departmental Programs and Services*, unpublished, Canberra, 1983.
HOUSE OF REPRESENTATIVES STANDING COMMITTEE ON ABORIGINAL AFFAIRS, Aboriginal Legal Aid, AGPS, Canberra, 1980.
INQUIRY INTO ABORIGINAL LEGAL AID (JP Harkins) *Report* vol 1, *General Issues*, AGPS, Canberra, 1985.
SENATE STANDING COMMITTEE ON CONSTITUTIONAL AND LEGAL AFFAIRS, *Report on Aboriginals and Torres Strait Islanders on Queensland Reserves*, AGPS, Canberra, 1978, 3.
SENATE STANDING COMMITTEE ON CONSTITUTIONAL AND LEGAL AFFAIRS, *Two Hundred Years Later ...*, AGPS, Canberra, 1983.
STANDING COMMITTEE OF SOCIAL WELFARE ADMINISTRATORS, Working Party Report, *Aboriginal Fostering and Adoption, Review of State and Territory Principles, Policies and Practices*, Sydney, October 1983.

***Canada***

HOUSE OF COMMONS, SPECIAL COMMITTEE ON INDIAN SELF-GOVERNMENT (Chairman: K Penner) *Report*, Ottawa, 1983.

***South Australia***

ABORIGINAL CUSTOMARY LAW COMMITTEE (Chairman: Judge JM Lewis) *Children and Authority in the North West*, Adelaide, 1984.

***Other***

O'DONOGHUE, L, *Proposal for an Aboriginal and Islander Consultative Organisation*, Commonwealth Government Printer, Canberra, 1985.

SECRETARIAT FOR NATIONAL ABORIGINAL AND ISLANDER CHILD CARE, *First Interim Report on the Aboriginal Fostering and Adoption Principles and its Implementation in the States of Australia*, Fitzroy, Victoria, 1985.