

ANALYSEN UND BERICHTE

The Australian Law Reform Commission's Reference on the Recognition of Aboriginal Customary Law

By *James Crawford**

1. The Australian Law Reform Commission and the Terms of Reference on Aboriginal Customary Law

(a) The Role of the Australian Law Reform Commission

Over the past decade (and in some cases for much longer), Law Reform Commissions have become an accepted part of the system of reforming and revising the law in Commonwealth countries. However, they are comparatively unknown outside the Commonwealth of Nations, and it may be helpful, therefore, to outline the general functions of the Australian Law Reform Commission (ALRC) before discussing its work on the Aboriginal Customary Law Reference in particular.

The ALRC began operations in 1975, having been established by an Act of the Commonwealth Parliament.¹ The ALRC is the only statutory agency of the Commonwealth with general functions as a law reform body, although there are some other specific agencies with law reform functions in particular fields.² The Commission consists of a Chairman, a number of full-time Commissioners (presently four) and a number of part-time Commissioners drawn from the ranks of the judiciary, the legal profession and the Universities. There is no specific requirement that Commissioners be legally trained, although in practice those so far appointed have all been lawyers. Essentially, the Commission's function is to prepare Reports for the Commonwealth Government and Parliament on reform of the law in matters falling within Common-

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1 Law Reform Commission Act 1973 (Cwth).

2 E.g. the Administrative Review Council, the Family Law Council, the Human Rights Commission.

wealth legislative responsibility.³ The ALRC is not, however, free to decide for itself the subject matters which it will investigate and report on. Before substantial work can be done in any area, the ALRC must receive a Reference from the Commonwealth Attorney-General requiring it to investigate and report upon a particular matter. In its eight years of operation the Commission has received twenty separate references from the Attorney-General, covering an enormous range of subjects, and has issued fourteen substantive Reports. The Commission is presently working on ten references, including such matters as Access to the Courts (Standing and Class Actions), Evidence in Federal Courts, Contempt of Court, Matrimonial Property and Admiralty Jurisdiction. On each reference the function of the Commission is to consult widely with interested persons and organisations, to take expert advice from a range of honorary consultants, and eventually to report to the Attorney-General and the Parliament as to what if any legislative or administrative changes are necessary or desirable in the particular area. Where legislative changes are recommended, in matters of Commonwealth legislative responsibility, the Commission's report is accompanied by draft legislation prepared by its draftsman.

b) The Terms of Reference on Recognition of Aboriginal Customary Law

Although the range of work which has been done by the Commission since 1975 has been enormous, it has had no more difficult or wide ranging inquiry than that into the recognition of Aboriginal customary law in Australia. Indeed, as far as I know, no Law Reform Commission or equivalent body has been asked to inquire into the legal problems of indigenous minorities in any Commonwealth country. The Papua New Guinea Law Reform Commission has not merely a role, but a constitutionally guaranteed role in relation to the integration of customary law (referred to simply as custom) in the Papua New Guinea legal system, and it has published a Report and a number of papers in this area.⁴ But, although it has its own logistic and other difficulties, the Papua New Guinea Law Reform Commission is in a rather different position from the Australian Law Reform Commission in dealing with indigenous law. The indigenous people of Papua New Guinea form the overwhelming majority of its population, and a significant majority adhere to more traditional ways of life. In this respect the Papua

3 Apart from extensive areas of federal legislative power under s. 51 of the Commonwealth of Australia Constitution 1900, the Commonwealth Parliament has legislative power with respect to federal territories (Constitution, S. 122). From the point of view of the Aboriginal Customary Law Reference the important territory is the Northern Territory, where many more traditional Aborigines live and where many of the Aboriginal initiatives, and many of the legislative and administrative developments relating to recognition of Aboriginal customary law, have so far occurred. However since the Northern Territory was granted a form of self-government (Northern Territory [Self-Government] Act 1978), politically it has tended to be treated rather like the States, from the point of view of federal inquiry and legislative action.

4 See Constitution of the Independent State of Papua New Guinea (1975), Sch. 2.1 (recognition of custom as part of underlying law), 2.3–5 (development of underlying law), 2.14 (special functions of PNGLRC). For the PNGLRC's work see Report No. 7, *The Role of Customary Law in the Legal System* (1977; R. Scaglion, ed., *Homicide Compensation in Papua New Guinea. Problems and Prospects* (PNGLRC Monograph).

New Guinea Law Reform Commission is indeed an organ or agent of the people of Papua New Guinea in making recommendations in this field, and it makes recommendations to a parliament which is, in theory at least, fully representative of the indigenous people. The position of the ALRC is very different. It is, in common with all other agencies of government in Australia, substantially selected from the majority population, overwhelmingly of European, especially British, descent, and totally unrepresentative of the Aboriginal people who are the people most affected by any inquiry into Aboriginal customary law. This has imposed enormous strains upon the Commission's consultative machinery, a matter to which I will refer later.

On 9 February 1977, the then Attorney-General of the Commonwealth referred to the Commission the question of recognition of Aboriginal Customary Law. In referring this matter to the Commission, the Attorney-General set out a number of relevant matters, including:

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

In the light of this formidable, and potentially contradictory, list of principles, the Attorney-General asked the Commission *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.⁶

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*.⁶

It will be noted that the Terms of Reference are in some respects extraordinarily wide, but in others apparently rather narrow and restrictive. As an example of their breadth it would be possible for the Commission to recommend the total exclusion of the general Australian law and the total application of a system of *Aboriginal customary law* to all Aborigines in Australia, although no one would seriously consider making such a suggestion. On the other hand the second specific question in the Terms of Reference, which appears to refer to the general area of *community justice mechanisms* – which

has been perhaps the most fruitful area of experiment and development in jurisdictions such as Papua New Guinea – in fact refers only 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 'justice mechanisms' have involved increasing Aboriginal input in various ways in the application of the *general* law to Aborigines, rather than in the specific application of 'customary law and practices'. The Terms of Reference might also be subject to several more general criticisms. First, they appear to emphasise the use of customary law in criminal proceedings, at the expense of possibilities of civil recognition in areas such as marriage, children and compensation. Secondly, they might appear to assume that solutions to the problems referred to in the Terms of Reference, especially in the criminal law field, are in fact to be found through the recognition of customary law, rather than in other ways such as the reform of police procedures or of the functioning of the ordinary courts. Thirdly, the Terms of Reference are surrounded, almost hemmed in, by injunctions about equality, human rights, and cruel or inhumane treatment, which might be thought to prejudice the very issues the Commission is asked to investigate. The impression is given that the so called 'right of Aborigines to retain their racial identity and traditional lifestyle or where they so desire, to adopt partially or wholly a European lifestyle' (one wonders which European lifestyle? Italian, Greek, Scandinavian?) is to be exercised very strictly on the conditions laid down by the majority culture and legal system.

In fact in each of these respects the impression given by the Terms of Reference, on closer analysis, to some extent proves to be a false or misleading one. The essential question the Commission is asked is the extent to which Aborigines should be free to apply, or to have applied, Aboriginal customary law, in their relationships and transactions. This basic question is a very general one, and the question is asked in an open-ended way. Secondly the Commission is given power to inquire into 'any other related matter', a power which in this broad context is itself a broad power. Thirdly, although strong reference is made to values such as equality and humane treatment, these are values which Aborigines themselves, I believe, have always strongly adhered to, and which they have sought to see applied in practice by the general legal system in its dealings with them. The problems does not lie in the values, but in possible ethnocentric or Eurocentric interpretations of them. I will return to this point later.

c) **The Commission's Work on the Reference**

Such anecdotal evidence as is available suggests that a number of different factors lay behind the decision to refer the question of recognition of Aboriginal customary law to the ALRC. These included:

- requests from, in particular, the people of Yirrkala to be allowed to set up a form of local justice mechanism in their community, applying at least to minor law and order matters;⁵

5 See ALRC DP 17, *Aboriginal Customary Law – Recognition?* (November 1980), 58–9, 69–71.

- the controversy aroused by the decision of Wells J. in the South Australian Supreme Court in the case of *R. v. Sydney Williams*, where the Judge placed the defendant, convicted of the manslaughter of an Aboriginal woman, on a two year good behaviour bond on condition that he returned to the Yalata community and obeyed the lawful orders of his tribal elders. The decision, which was construed (or rather misconstrued) as a form of licensing of traditional punishment (i. e. spearing in the thigh), aroused considerable controversy;⁶
- the general perception amongst informed Australians of the failure of the general legal system to come to terms with Aboriginal ways of belief and action, and the appalling statistics relating to Aboriginal incarceration which were seen as a symptom of that failure;
- perceptions, in certain quarters at least, of a resurgence in traditionality, associated with or accompanied by the conferral of land rights on the basis of Aboriginal tradition in the Northern Territory, and the movement away from larger settlements to smaller outstations⁷.

The breadth and complexity of these considerations, which had already been emphasised in a number of official reports calling for further study of the issues,⁷ made it inevitable that the Commission would be involved in a long and complex study. This was made more difficult by the Commission's location, by its position as a relatively small federal law reform agency engaged in a considerable number of substantial projects, and by its habit of recruiting lawyers as Commissioners for fixed periods of two or three years. It was practically inevitable that the inquiry would last longer than this, and there was consequently a considerable risk of discontinuity. Moreover there are only a handful of Australian lawyers with expertise in legal anthropology, none of whom were in fact appointed to the Commission.⁸ Both the empirical work and the nature of the consultation process were bound to vary markedly from the Commission's normal procedures and approaches. Although this was realised from the beginning, it took quite some time for the full implications to sink in, and it cannot be said that the Commission has ever really mastered either difficulty.

The Commission's work on the reference has taken the form of extensive formal and informal consultations throughout Australia, a number of rather longer field trips to particular areas, and the preparation of a series of consultative papers which have been circulated widely for comment. Formal public hearings have been held in 38 centres around Australia, leading to over 3,000 pages of transcript. Less formal meetings have

6 For details see A CL RP 6, J. Crawford and C. J. Kirkbright, 'Aboriginal Customary Law and the Substantive Criminal Law' (1983), 37-41.

7 E.g. Commission of Inquiry into Poverty, Second Main Report, Law and Poverty in Australia (Cth. Parl. Paper No. 294 (1975), Commissioner R. Sackville), 281.

8 The Reference has had three Commissioners in charge since 1977: the Chairman (the Hon. Mr. Justice M. D. Kirby) on an interim basis until a Commissioner with particular responsibilities for the Reference could be appointed; Mr. B. M. DeBelle (now Q. C. of the Adelaide Bar, 1978-1981), and the present writer (1982-). None of the three possess any formal qualifications in anthropology; none had, before their involvement in the Reference, studied legal anthropology in any detail.

been held in at least as many other places, including some return visits. Attempts were made, in relation to both of the Commission's Discussion Papers, to produce simplified English versions and translations into some major Aboriginal languages. These simplified versions were distributed in print, and read onto cassette tapes for distribution. Many of the formal public hearings, and some of the informal meetings, have been conducted in the form of separate men's and women's meetings, in an attempt to obtain input from Aboriginal women, who are reluctant to speak about many of the matters in the presence of the men. Women researchers from the Commission, and in one case a female Commissioner (Professor Alice E-S. Tay of the University of Sydney Law School), together with consultants such as Dr Diane Bell, have assisted in this process. The consultative papers prepared by the Commission have taken three main forms. Discussion Papers (of which there have so far been two) are formal statements of the Commission's tentative views on the subjects they cover, and are very widely distributed through legal and other periodicals and in other ways. Research Papers are produced by the Commission's research staff and do not represent the Commission's views. They are an attempt at a first draft of the relevant aspects of the Reference, making tentative suggestions and intended to provoke comment and response. So far twelve of a projected sixteen Research Papers have been produced; the remaining four will be available by the end of 1983. Finally in respect of each of the major field trips the Commission has produced a Field Trip Report outlining the impressions gained by the participants, and a good deal of basic information. Seven of these are available. Appendix I sets out a list of the Commission's consultative papers on this Reference.

In addition the Commission has received a large number of submissions (in excess of four hundred) from a wide variety of individuals and organisations, Aboriginal and non-Aboriginal. These vary from single page comments to quite extensive papers. In addition to such written comments, the Commission receives feedback from a wide range of people, including approximately thirty people appointed by the Attorney-General at the recommendation of the Commission as honorary consultants. Meetings with such consultants (again both Aboriginal and non-Aboriginal) have been held in most of the capital cities.

In surveying the Commission's consultative efforts, it is difficult to avoid the impression of an official body doing its best to come to grips in writing with an oral culture. Although specific mistakes have been made (e. g. in not engaging in practical experiment in certain areas such as community justice mechanisms, in failing to implement at an earlier stage better systems of consultation with Aboriginal women), when these have been pointed out attempts have been made to correct them. But at a more basic level the consultative problem is, I think, simply intractable, given the vast areas involved, the logistic and resource difficulties, and the technical complexity of many of the proposals (a complexity which, in many cases, I think, is simply inevitable if the proposals are to have much chance of success). In these circumstances a considerable onus has been cast on Aboriginal organisations, which possess a greater fund of expertise in these areas and can be expected to have some perception of Aboriginal needs and demands. For example

some of the Aboriginal Legal Aid organisations have become increasingly closely involved. It is hoped that the same process will occur with the National Aboriginal Conference, while of course respecting their necessary freedom of action, and the fact that in due course the Government will need to consult with them directly on the acceptability of the Commission's proposals.

2. The Recognition of Aboriginal Customary Law in Australia: History and Development

Against this general background, I want to survey the situation of Aboriginal people and their traditions and customary law in Australia, and the political and constitutional framework within which any proposals for recognition must be made. I will then go on to outline some of the general issues underlying the debate over recognition, and some of the specific areas in which proposals for recognition have been or can be made.⁹

(a) The Aboriginal People of Australia and Their Societies

The traditional world of the Aborigines, in all but a few instances, received a deathblow when it came into contact with outsiders. In the southern and south-eastern areas where Aboriginal settlement expanded rapidly, it meant the complete destruction of the Aboriginal way of life and, in a number of cases, of the people themselves as well. That is an inescapable fact of Australian history.¹⁰

The legacy of white settlements is at best mixed, at worst shameful. In 200 years Aborigines have seen dispossession, disintegration of much of their religion and culture, and damage to or destruction of much of their environment. They have come to know poverty, inequality and demoralisation. This is apparently so well accepted as to have reached the stage of judicial notice in the High Court of Australia. Thus Murphy J. has commented:

›The history of the Aboriginal people of Australia since European settlement, is that they have been the subject of unprovoked aggression, conquest, pillage, rape, brutalisation, attempted genocide and systematic and unsystematic destruction of their culture.‹¹¹

In the same case Brennan J. stated that the 1967 amendment to the Constitution, giving the Commonwealth special power to legislate for Aboriginal people ›was an affirmation of the will of the Australian people that the odious policies of oppression and neglect of Aboriginal citizens were to be at an end, and that the primary object of the power is beneficial.‹¹²

9 In doing so this Paper will draw heavily on the consultative papers listed in Appendix I, in particular the Research Papers.

10 R. M. Berndt & C. H. Berndt, *The World of the First Australians* 1981, 520.

11 *Commonwealth v. Tasmania*, (1983) 45 ALR 625, 737 (Murphy J.).

12 *Id.*, 791. Similarly, Deane J. described the Constitutional amendment as intended to allow ›acceptable laws . . . to mitigate the effects of past barbarism: id., 816.

Aborigines are believed to have occupied Australia for at least 40 thousand years prior to white settlement. It has been estimated that at the time of the arrival of the first fleet in 1788, there were as many as 500 tribes in Australia.¹³ The Australian continent (including Tasmania) was divided into hundreds of tribal areas, representing different language units. There were possibly as many as six hundred distinct dialects of languages.¹⁴ Conflicts between settlers and Aborigines, and the devastation of introduced diseases and alcohol, reduced the Aboriginal population during the first hundred years of settlement from an estimated 300,000 to 60,000.¹⁵ At the same time, many who survived had their traditional way of life destroyed or at least suppressed. In Tasmania the effects of white settlement were particularly devastating.

According to recent studies at the time of the first European settlement in Tasmania in 1803, there were approximately four thousand Aborigines (all Parlevars) in Tasmania. They were divided into 60 or more bands of nomadic hunter/gatherers who ranged over a fifty mile radius inside about 10 major tribal areas. In 1829, 250 Aborigines, believed to be possibly the last of their race, were transported to various Islands in the Furneau Croup. However, the Tasmanian Aboriginal peoples did not become extinct, even though some of the tribes may be. The Report of the Aboriginal Affairs Study Group of Tasmania (No. 94 of 1978) states:

›Any claim that »no Aborigines in the Tasmania« is false . . . the prevalence of such claims in Tasmania is regrettable . . . there are, according to the 1976 census 1,564 males and 1,378 females who, by reason of mixed descent justifiably have the right to be proud to defend their Aboriginality.¹⁶

The Commonwealth Department of Aboriginal Affairs has estimated that there are approximately 167,600 Aborigines in Australia today. (The Department based its figures on projections for 1983 using the 1981 National Population and Housing Census.) This represents 1.1 % of the total population of Australia. In contrast with the non-Aboriginal population, the heaviest concentrations of the Aboriginal population live outside metropolitan areas. Figures published by the Department in 1981 show that there were some 128,000 Aborigines or 80 % of the total number of Aborigines living in non-metropolitan communities.

It is a matter for serious concern that the standard of living of Aboriginal Australians is well below that of the rest of the Australian community. ›The majority of Aborigines are caught up in a self-perpetuating cycle of poverty.¹⁷ It is fair to say that Aborigines have the highest growth rate, the highest death rate, the worst health and housing, and the lowest educational, occupational, economic, social and legal status of any identi-

13 Berndt & Berndt, 28.

14 Blainey, *A Land Half Won*, 1980, 63.

15 Department of Aboriginal Affairs, *Aborigines in Australia Today*, 1981, 4.

16 Murphy J., loc. cit. (above n. 11).

17 Report of the House of Representatives Standing Committee on Aboriginal Affairs, *Aboriginal Legal Aid* (July 1980), para. 20.

fiable section of the Australian population.¹⁸ It is difficult to determine precisely the extent of poverty among wide-spread and culturally diverse Aboriginal populations. Statistics illustrating Aboriginal disadvantage are inadequate and there has sometimes (for whatever reason) been a reluctance to collect or keep adequate statistics identifying Aborigines as a specific group. However those figures that are available indicate that Aborigines have a lower per capita income than non-Aborigines but that the cost of basic items such as food and petrol is (because of transport costs and other factors) considerably higher than average. The Henderson Report found that some 55 % of Aboriginal households in Brisbane and Adelaide had an income of below or near the poverty line.¹⁹

A sample of the statistics that are available reveal, for example, that:

- 1981 census figures show that approximately 11 % of all Aborigines of 15 and over have never attended school. This compares with 1 % for the non-Aboriginal population.²⁰
- Aboriginal unemployment is running at almost three times the rate of unemployment for non-Aborigines. Some 21,000 Aborigines of 1 in 8 of all Aborigines were unemployed as at July 1983.²¹ These statistics also reveal that 30 % of all unemployed Aborigines were under 21.
- 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 and New South Wales was approximately 49 years for males (some 23 years less than for non-Aborigines) and 56 years for females (some 16 years less than for non-Aborigines).²²
- The prevalence of trachoma is 15 times greater for Aborigines than for non-Aborigines. In some areas of the Northern Territory and Western Australia up to 77 % of Aborigines were affected.²³
- Statistics show that the number of children in substitute care arrangements is also alarmingly high. In New South Wales, 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.²⁴ This represents 5 % of all Aboriginal children in substitute care compared to 0.4 % of all

18 The First Report of the National Population Inquiry; Population and Australia: A Demographic Analysis, 1975, 1, 455.

19 Professor R. F. Henderson, First Main Report of the Australian Commission of Inquiry into Poverty, Poverty in Australia (1975) 260-261.

20 1981 National Population and Housing Census.

21 1983 Commonwealth Employment Service figures.

22 N.S.W. Department of Health, Aboriginal Mortality in NSW Country Regions 1980/81 (Unpublished).

23 Report of The National Trachoma and Eye Health Programme 1980.

24 Cited in Aboriginal Children's Research Project (N.S.W.), Principal Report 1982, 75. Cf. the Project's Discussion Paper No. 3 'Assimilation and Aboriginal Child Welfare - the N.S.W. Community Welfare Bill', 8 which points to the high rates of breakdown of foster care and adoption placements when Aboriginal children are placed with non-Aboriginal families.

non-Aboriginal children.²⁵ 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.²⁶

- Aborigines are grossly over-represented in Australian criminal statistics, both in terms of conviction rate and the rate of imprisonment.

Whilst it has long been known that Aboriginals, as 1 % of the Australian population, provided nearly 30 % of the prison population, the details have not been easy to obtain because of the move to non-discriminatory recording leading to an abandonment of separate categorization for Aboriginals. Thanks to the Western Australian Government's willingness to look critically at its own high rate of imprisonment we now know more . . . As at 30 June 1980, Western Australia had 920 non-Aboriginals sentenced and in prison – as against 439 Aboriginals. That is to say that 32.3 % were Aboriginals. During 1979/80 Western Australia imprisoned Aboriginals at a rate of 1300 per 100,000 as against 81 per 100,000 for other races. Corresponding data for the same date in other States is not easy to find but it may be taken that the Northern Territory would show similar high proportions of Aboriginal prisoners, whilst other States would be lower. In March 1981 New South Wales had 217 of its 3670 prisoners Aboriginal, i. e. just under 6 %. If the A.C.T. and N.S.W. populations be combined, the Aboriginal imprisonment rate was 600, compared with 72 for non-Aboriginals. In South Australia, in November 1980, 14.3 % of all prisoners were Aboriginals (122 out of 852). The Aboriginal imprisonment rate was about 1000 and the non-Aboriginal rate was 60. 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 minorities in the world or that there is something inherently wrong with a system which uses imprisonment so liberally.²⁷

This reality of disadvantage, dislocation and depressed socio-economic circumstances provides the context in which an examination of Aboriginal customary law must take place.

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 20 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

25 Ibid., 74.

26 Information provided through WELSTST, Department of Social Security, Canberra. Figures as at 30 June 1981.

27 W. Clifford, 'An Approach to Aboriginal Criminology' (1982) 15 ANZJ Crim 3–21, 8–9. For earlier data on W.A. see M.A. Martin, *Aborigines and the Criminal Justice System: A Review of the Literature* (W.A. Department of Corrections, 1973), 5.

an extraordinary impact on the Aboriginal people's consciousness. This has helped separate Aboriginals as a group within Australian society.²⁸

In common with many other indigenous people Aboriginals share a problem of being an indigenous minority in a non-indigenous society.

However there is among Aboriginal people an enormous variation in experiences and circumstances. To some extent this variation must always have existed, but it also reflects in part the extent to which they have been subjected to European contact and the very different responses different groups have adopted to European contact. It may therefore be necessary, for certain purposes at least, to distinguish Aborigines living in remote and relatively inaccessible 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 behaviour patterns and social organisations to a greater or lesser extent to reflect their changed circumstances and the new pressures upon them. Three broad groups are commonly identified: traditionally-oriented Aborigines, 'detribalised' or 'fringe-dwelling' Aborigines and urbanised 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. Nor can it be assumed that there is any inevitable or regular movement away from a more traditional to a less traditional lifestyle. The situation varies markedly in different areas, and is influenced by such developments as land rights (especially in the Northern Territory and South Australia), the outstation movement, and the internal dynamics of particular communities. Many social, economic and legal difficulties are common to all Aboriginal people regardless of their lifestyle or where they live. The distinction is useful in that it emphasises the need to be aware of the varying legal 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.

(b) Aboriginal Tradition and Customary Law: Continuity and Chance.

There is of course no doubt that Aboriginal societies at the time they made first contact with Europeans is the period from the late eighteenth to the early twentieth century, were governed by an elaborate body of rules, precepts and traditions which in every sense of the term constituted a system of customary law. Equally undeniable is the fact that these systems have been markedly affected by that process of contact and subsequent dispossession. Despite this, the system of Aboriginal tradition and law have in many areas shown a remarkable degree of persistence and resilience. For example in *Milirrpum v. Nabalco Pty Ltd.* (the Gove Land Rights case) in 1971 Woodward J. had no hesitation in treating the system of land-holding and kinship rules of the North-East Arnhem Land people disclosed by the evidence as a system of law.²⁹

²⁸ Report of the House of Representatives Standing Committee on Aboriginal Affairs, Aboriginal Legal Aid, July 1980, para. 25.

²⁹ (1971) 17 FLR 141, 268.

Obviously a basic premise behind any argument for the legal recognition of Aboriginal customary law is the assertion that it exists as a real force influencing or controlling the acts and lives of those Aborigines to whom it applies, and for whom it is 'part of the substance of daily life'.³⁰

The strength of this influence, in the case of traditionally-oriented Aborigines, was for example attested by a Baptist Minister who discussed the Commission's proposals with older Warlpiri and Alyawarra men at Warrabri.

Firstly I must say that 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. Mystical participation is the basis and tenor of their thinking. 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 and the individual must follow from birth to death, and from it there 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.³¹

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 mechanism 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.³²

The same applies in other areas.

However it is sometimes argued that, although in at least some Aboriginal communities something that can properly be termed 'Aboriginal customary law' continues to exist, the scope of that law, compared with the range of new problems arising for those communities, is slight and diminishing. In addition, it is argued, the increasing impact of white Australian culture and language is such that in a relatively few years, Aboriginal customary law 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.³³

30 Submission No. 23, Ambassador B. Dexter, 28. Sept. 1977, 3.

31 Submission No. 191, Rev. J. Whitbourn, 5 May 1981.

32 D. Bell and P. Ditton, *Law: The Old and the New, Aboriginal Women in Central Australia Speak Out* (Canberra, 1980), 114; cf. 21–2, 40, 42.

33 Submission Nr. 251, G. Tambling M.H.R., 11 Oct. 1982, 8.

It may be – though in view of its survival through up to 200 years of contact this is very doubtful – that in 25 years time Aboriginal customary law and tradition will no longer exist in recognisable form. There are, undoubtedly, factors which tend in that direction, such as the availability of alcohol,³⁴ and the influence of the mass media. But there are also countervailing factors, such as the outstation movement,³⁵ the revival of Aboriginal ceremonies and tradition,³⁶ and the conferral of land rights, in certain areas of Australia, on the basis of traditional claims.³⁷ Few of these factors could have been, or were, foreseen a generation ago. The evidence does not support the view that Aboriginal customary law and tradition are transitory. What the position will be in 25 years time is difficult, and unnecessary, to predict. What can be said is that there are good arguments for action to be taken now to recognise aspects of Aboriginal customary law and tradition which do now exist, and which are likely to continue to exist in much the same form for the foreseeable future.

Moreover, it does not follow from the fact that some aspects of Aboriginal customary law have ceased to be practiced in a particular area that other aspects of it may not still apply. This point was made in a number of submissions to the ALRC. 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 an 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.³⁸

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 make 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

34 House of Representatives, Standing Committee on Aboriginal Affairs, *Alcohol Problems of Aborigines* (AGPS, 1978); L. Sackett, 'Liquor and the Law: Wiluna, Western Australia', in R. M. Berndt, ed., *Aborigines and Change. Australia in the '70s* (Canberra, 1977), 90–99; M. Brady & R. Morice, *A Study of Drinking in a Remote Aboriginal Community* (Flinders University of South Australia, Western Desert Project, 1982).

35 Cf. House of Representatives, Standing Committee on Aboriginal Affairs, *Report on Strategies to Help to Overcome the Problem of Aboriginal Town Camps* (October 1982), paras. 434–6.

36 A number of submissions to the ALRC have drawn attention to this phenomenon in particular areas. Cf. also K. Akerman, *The Renaissance of Aboriginal Law in the Kimberley's*, in R. M. and C. M. Berndt, eds., *Aborigines of the West* 2nd rev. edn., Perth, 1980, 234–242.

37 See below, text to nn. 81–91.

38 Submission No. 146 B, The Hon. J. Kennet M. P., Minister responsible for Aboriginal Affairs in Victoria, 19 March 1981, 1.

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.³⁹ Obviously enough the situation varies markedly from place to place, but the degree to which traditions and customary law have been retained seems to be considerably greater than in comparable overseas jurisdictions such as the United States and Canada.

(c) The Non-Recognition of Aboriginal Customary Law

Confronted with this situation the response of the imported system of English law (in quite marked contrast to its response in Africa and North America) was from the first one of stark, blank non-recognition. No treaties were made with Aboriginal groups. Aborigines were, so far as their subjection to British law was concerned, treated as subjects. Thus in 1837, the Colonial Office in London directed the Governor of N.S.W., to ensure to that all Aborigines within his jurisdiction were to be treated as British Subjects.⁴⁰ Thus Aborigines and non-Aborigines were to be governed by one law. I would submit . . . 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.

So long as this is not the case, the older natives have at their disposal the means of effectually preventing the civilization of any individuals of their own tribes, and those among them, who may be inclined to adapt themselves to the European habits and mode of life, will be deterred from so doing by their fear of the consequences that the displeasure of others may draw down upon them.⁴¹

This non-recognition applied as much in civil and criminal matters: it involved the compellability as witnesses of tribal spouses⁴² just as much as the refusal to recognize Aboriginal customary law as a defence to crimes as defined by British law.⁴³

The clear injustice of this policy was noted at the time. In 1837 the British House of Commons Select Committee on Aborigines stated that to require from Aborigines 'the

39 Submission No. 204, Victorian Aboriginal Legal Service, 20 May 1981, 1. Cf. however Submission No. 110, Tasmanian Police, 16. July 1980; Submission No. 156, NSW Police, 2. April 1981, stating that Aboriginal customary law has ceased to exist to all intents and purposes in the relevant States.

40 Glenelg to Bourke, 25. June 1837, H.R.A. Series 1, Vol IX, 47.

41 Report by Grey on the Method for Promoting the civilization of Aborigines. Enclosure, Lord John Russel to Sir George Gipps, 8 October 1840, H.R.A. Series 1, Vol XXI, 35.

42 R. v. Neddy Monkey (1961) 1 W & W (CL) 40; R. v. Colby (1883) 4 LR (NSW) 355, 356.

43 R. v. Jack Congo Murrell (1836) 1 Legge 72. See Bridges, 'The Extension of English Law to the Aborigines for Offences Committed Inter Se, 1829-1842' (1973) 59 JRAHS 264.

observation of our laws would be absurd and to punish their non-observance of them by severe penalties would be palpably unjust.⁴⁴ These were strong sentiments, but ones which were not reflected in the actual recommendations of the Select Committee, or in any other action taken at the time or later. So much so that it has become an axiom of Australian law that Aborigines, whatever their actual lack of contact with or awareness of Australian law, are subject to it in exactly the same way as all other Australians.⁴⁵

(d) Developments Towards Recognition

From the establishment of the colony until quite recent years, it was therefore considered untenable that any specific recognition should be given to customary rules and practices. But various factors have tended, in recent years, to lead to a reappraisal of this position. These have included:

- the failure of the general legal system to deal effectively and appropriately with inter-Aboriginal disputes
- its disproportionate and often discriminatory treatment of Aborigines (especially in criminal cases)
- the movement away from policies of 'assimilation' and 'integration' towards policies based on self-management, at least at federal level but to some extent also at State and Territory level
- the perceived injustice of denying all recognition to distinctive and long-established Aboriginal ways of belief and action.

In the present context this involved the proposition, made explicit in the Commission's Terms of Reference, that Aborigines had (within certain limits) the 'right' to retain their racial identity and traditional lifestyle. To facilitate the exercise of this 'right' tentative steps began to be taken by Australian legislatures to recognize 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 affiliation with land, and to that extent recognizing traditional rights to use land⁴⁶
- a degree of protection of Aboriginal sacred sites and other aspects of the Aboriginal heritage
- the recognition of traditional Aboriginal marriage for certain (more or less limited) purposes
- some provision for traditional distribution of property on death.

Similarly the courts, confronted with the reality of Aboriginal adherence to different or conflicting rules or values, have attempted to refine or mitigate the general law's basic non-recognition of such rules or values, in ways such as:

44 British House of Commons P.P. No. 425, 1837.

45 Cf. *Tuckiar v. R.* (1934) 52 CLR 335; *Milirrpum v. Nabalco Pty Ltd* (1971) 17 FLR 141, 261-2; *R. v. Wedge* [1976] 1 NSWLR 581.

46 See below for more details.

- the exercise of sentencing discretions to take Aboriginal customary law into account;⁴⁷
- taking Aboriginal customary law into account in applying established defences such as provocation, duress and claim of right;⁴⁸
- (in one case) the recognition of traditional marriage for the purposes of an adoption ordinance;⁴⁹
- the recognition that loss of traditional status and privileges is a compensable injury in road accident cases.⁵⁰

It is true that both legislative and judicial examples of recognition tend to be particular rather than general, that they are often confined to particular jurisdictions, and that they often depend upon the exercise of discretions rather than existing as of right. They represent a very piecemeal approach to the problems. Nonetheless they do represent a genuine, usually reasoned, response on the part of the general legal system, and thus they constitute a very important aspect of the background to the ALRC Reference.

(e) The Political and Constitutional Background to the Reference

At the same time it is essential to be aware of a number of more general matters which make up the political and constitutional background to the Aboriginal customary law reference. A characteristic feature – almost a determinant – of the law relating to indigenous peoples in most if not all legal systems in the relationship between that law and the general political and constitutional structure. This is certainly true of Australia, although some important elements in that structure are of relatively recent origin. I shall refer to four of the more important aspects.

(i) Federal Constitutional Power with Respect to Aborigines

The Commonwealth of Australia Constitution, as first enacted in 1900, went out of its way to exclude Aborigines from special federal attention. Most importantly, section 51 (xxvi) conferred on the Commonwealth Parliament the power to legislate with respect to the people of any race for whom it was deemed necessary to make special laws (a power which was inserted with the Kanakas or Pacific Islanders and Chinese immigrants in mind, and was intended more as a source of restrictive or repressive legislation than of beneficial legislation). At the same time 'the Aboriginal race in any State' was specifically excluded from section 51 (xxvi). However this specific exclusion was repealed by a Constitutional amendment in 1967, passed by an overwhelming majority of electors in

47 This has been a very common phenomenon. For a compilation of nearly 50 cases; in the past decade, in three jurisdictions, see A CL RP6A, J. R. Crawford & P. K. Hennessy, 'Cases on Traditional Punishments and Sentencing'. Reported cases include R. v. Moses Mamarika (1982) 42 ALR 94; Jadurin v. R. (1982) 44 ALR 424. Almost all of the cases however are unreported.

48 For details see A CL RP6, above n. 6, 78–81, 84–88, 92, 95–98.

49 See A CL RP3, J. R. Crawford, The Recognition of Aboriginal Tribal Marriage – Areas of Functional Recognition, 31.

50 Napaluma v. Baker, SA Supreme Court, 5 March 1982, (1982) 4 Aboriginal Law Bulletin 9; Dixon v. Davies, NT Supreme Court, 17 November 1982, (1983) 7 Aboriginal Law Bulletin 9.

all States. In consequence the Commonwealth Parliament now possesses the power to legislate for the people of the Aboriginal race for whom it is deemed necessary to make special laws. What has been uncertain until very recently is how wide this particular power is. However two recent decisions of the High Court lend strong support to the view that the power is a very extensive one, no less in scope than the equivalent constitutional powers with respect to Indians in the United States or Canadian Constitutions. In *Koowarta v. Bjelke-Petersen*⁵¹ the High Court held that the Racial Discrimination Act 1975 (Cwlth) could not be justified under section 51 (xxvi), on the ground that it was general rather than special legislation, and was not passed specifically for Aboriginal people but for people of any racial or ethnic group whatsoever. However there was no suggestion in the judgments that the 'races' power would be given any narrow interpretation, provided that the law in question qualified as a 'special law'. This view was powerfully reinforced in the more recent case of *Commonwealth v. Tasmania*.⁵² In that case the Tasmanian government sought to build a large dam to generate hydro-electric power on the Gordon-below-Franklin River, in a wilderness area which had previously been registered by the Commonwealth as a world heritage area under the Convention for the Protection of the World Cultural and Natural Heritage of 1972. The area threatened by inundation as a result of the construction of the dam included several caves and an open site containing important archaeological material left by the early Tasmanian Aborigines. After a federal election campaign fought partly on the issue of the dam, the new Commonwealth Government enacted legislation prohibiting the construction of the dam, relying, amongst other powers, on the races power (section 51 (xxvi)) in respect of the three Aboriginal sites. This was an unprecedented use of Commonwealth power to prohibit outright the exploitation by an Australian State of natural resources situated on State land. It was also an unprecedented use of the 'races' power in passing ostensibly general legislation. Nonetheless the High Court (by a majority of four votes to three) in substance upheld the validity of the Commonwealth legislation, amongst other grounds on the basis of the 'races' power. In doing so the majority adopted an extremely broad interpretation of that power. For example Deane J. stated that:

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' 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 heritage.⁵³

Thus the legislation was valid, notwithstanding that its effect was not restricted to Aboriginal people generally or to Tasmanian Aborigines, because all or some Abori-

51 (1982) 39 ALR 417.

52 (1983) 46 ALR 625.

53 *Id.*, 819–20. Similarly *id.*, 719 (Mason J.), 737–8 (Murphy J.), 792–4 (Brennan J.).

gines (on the assumption made by the Court)⁵⁴ had a special interest in the sites over and above that of all other Australians, and people generally, in the heritage area. Although three members of the Court dissented on the ground that the legislation in question was not a 'special law', it is likely that they would accept legislation deemed by Parliament to be necessary, and conferring rights or imposing duties on members of the Aboriginal race, or on other persons in relation to their dealing with members of the Aboriginal race.⁵⁵ Even on the narrower minority view, it seems clear that any recommendations the Commission might wish to make within its Terms of Reference would be within the Commonwealth's constitutional power under section 51 (xxvi), apart of course from any question of constitutional prohibitions or guarantees.

(ii) Definition of 'Aborigines'

A second and related issue, which has been a source of considerable difficulty in the North American context, is the definition of 'aborigine', i.e. the criteria for membership of the indigenous minority, the subject of constitutional power. This is one area where the fact that Australia has come late to the field may be an advantage, in that there has been no build up of restrictive, technical or bureaucratic definitions of what constitutes such a member, e.g. by reference to membership in a 'tribe' or 'band'. Although in earlier Australian practice there are examples of legislation defining Aboriginity by reference to degrees of blood (octoroons, quadroons, half-castes etc), the accepted Commonwealth definition, which is also adopted widely in the States and Territories, is that to be an Aborigine a person has only to be of Aboriginal descent, and to regard himself and be accepted by other Aboriginal people as an Aborigine. Obviously the framers of this definition preferred flexibility and breadth to any certain or exclusive definition. What was unclear until very recently was whether this broad definition corresponded with the constitutional definition of the 'Aboriginal race' for the purposes of section 51 (xxvi) of the Constitution.⁵⁶ Here again the implications of *Commonwealth v. Tasmania* are very extensive. The relevant provisions of the legislation there had to be upheld as legislation for the people of the Aboriginal race, including the remaining Tasmanian Aborigines. However there was no disposition on the part of the Court to regard Tasmanian Aborigines as other than Aborigines in the legal sense. Thus Gibbs C.J. referred to 'some thousands of people of Aboriginal descent (but of mixed blood) who have been identified

54 The validity of the relevant provisions of the legislation was upheld subject to it being proved that the sites are 'of particular significance to people of the Aboriginal race'. But dicta in the majority judgments make it reasonably clear that this requirement would not have been particularly hard to satisfy. Cf. *Onus v. Alcoa of Australia Ltd* (1981) 36 ALR 425 (held, asserted custodial rights and duties of Aboriginal plaintiffs over a site under Aboriginal customary law sufficient to give them standing to challenge proposed industrial development on that site).

55 E.g. (1983) 46 NALR 625, 677-8 (Gibbs C. J.), 757 (Wilson J.), 857 (Dawson J.).

56 It is true that since 1967 the term 'Aboriginal' does not appear in the Constitution. But the question is the extent to which its repeal in 1967 increased Commonwealth power, and it therefore remains relevant to the constructions of the term 'race'.

as the Aboriginal population of Tasmania'.⁵⁷ The point was made most explicitly by Deane J., who stated: 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 an Aboriginal.⁵⁸

It remains to be seen whether the rest of the Court will go quite so far, but it is likely that the constitutional definition approximates very closely to the administrative one so far adopted by the Commonwealth, with the agreement of Aboriginal people themselves.

(iii) Administrative and Political Constraints Imposed by the Federal System

Questions of constitutional power therefore are unlikely to prove an obstacle to federal legislation in this field.⁵⁹ Much more significant are the administrative and political constraints imposed by the federal system, a matter on which again the Australian situation has much in common with that in Canada and the United States. At present almost all legislative and administrative involvement with Aborigines (apart from funding and employment schemes through the Commonwealth Departments of Aboriginal Affairs and Social Security) are with State or Territory agencies. This is especially true of the criminal justice system; the police, the ordinary criminal courts, the prisons, probation and parole systems are all established under and run by the States and Territories. The same is true of the child welfare and juvenile justice systems. Very many of the problems with the present Reference lie within the areas of responsibility of these various State and Territory agencies. It will come as no surprise to students of federal systems to learn that the States (and in this context also the Northern Territory) are extremely sensitive about possible Commonwealth involvement in their existing fields of legal and administrative activity.

This has both advantages and disadvantages. An advantage is that one form of influencing States or Territories to adopt desirable changes at their own level is to recommend or suggest that such changes be enacted by the Commonwealth. I would not suggest that it is the whole story, but the provisions in the Draft Community Welfare Bill 1983 (N.T.) relating to Aboriginal child welfare may well have been influenced by the ALRC's tentative recommendations in that area for federal legislation. Child welfare is a field in which the States are very jealous of their control, but uneasy about their record in dealing with Aboriginal children.⁶⁰

⁵⁷ (1983) 46 ALR 625, 639. Cf. *id.*, 791–3 (Brennan J.), 855 (Dawson J.).

⁵⁸ *Id.*, 817.

⁵⁹ As noted already there are certain Constitutional prohibitions or guarantees which may be relevant. For present purposes the most important are the restrictions imposed by the separation of judicial power and associated guarantees: these would in practice prevent most direct Commonwealth involvement in Aboriginal justice mechanisms (other than those of a conciliation or mediation kind). They would not however prevent equivalent State involvement or Commonwealth funding thereof. The only other relevant guarantee is s. 116 (freedom of religion), which has been restrictively interpreted and in practice is unlikely to present any problems.

⁶⁰ See Community Welfare Bill 1983 (NT), cl. 70.

On the other hand it can be expected that there will be substantial State opposition to the enactment by the Commonwealth of legislation which, in their view, would intrude into traditional areas of State administrative and legislative responsibility, notwithstanding that such legislation may be valid as special legislation under section 51 (xxvi). Indeed there are recent examples of vehement opposition from State agencies to federal legislation setting new standards, even though restricted to the federal sphere. The Criminal Investigation Bill 1982 (Cwlth) established new standards for criminal investigation in relation to federal offences, and only very peripherally affected State police forces (in relation to their handling of federal offences: most federal offences are dealt with by the Australian Federal Police). Included in the Bill, which followed to a considerable extent an earlier ALRC Report,⁶¹ was provision for special safeguards in the police interrogation of many Aborigines and Torres Strait Islanders, a necessary protection in view of the long history of linguistic and other disadvantages of such groups in interrogation. Yet members of State police forces vehemently opposed the Bill as a whole, ostensibly on the ground that it was undesirable that the Commonwealth should set new and discrepant standards in isolation from the general protections applying to all police forces in Australia. It is not difficult to imagine the reaction of such groups when confronted with federal legislation applying in a much more direct and substantive way to them.

The Australian Labor Party government elected in March 1983 will, if previous experience is any guide, prove to be less susceptible to the States rights argument than the predecessor Liberal/Country Party coalition usually was. In particular the present Minister for Aboriginal Affairs has so far taken a vigorous view of Commonwealth legislative responsibility with respect to Aborigines, in areas such as land rights and child welfare. The extent to which this view will be translated into legislative reality remains to be seen.

The federal/State contest is not merely a debate about legal standards or political power (though it is of course about both); it is also a debate about the most effective methods 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 necessarily the best one, although there will inevitably be substantial Commonwealth financial involvement. One of the key problems with legislation in this field is the need for flexibility. In many areas what are really needed are structured guidelines or discretions, but the only constitutional way for the Commonwealth to impose these upon State administrative agencies is through legislation. Generally such legislation tends to be of a rather novel kind (as for example the Indian Child Welfare Act 1978 (U.S.A.) was), and this makes it easier for defenders of the status quo to criticise and oppose such recommendations. Australia is just entering upon this debate in a serious way, and it will be interesting to see what emerges.

61 ALR C 2, Criminal Investigation (1975). On the Aboriginal interrogation provisions see further A CL RP13, P. Hennessy, 'Aboriginal Customary Law: Problems of Evidence and Procedure' (1983), 2-39.

(iv) Aboriginal Representation and Opinion

Finally, there are significant difficulties, especially for a reference such as this, in obtaining in appropriate ways detailed views from Aboriginal bodies. Expression of opinion from Aboriginal Councils, for example, may or may not represent the views of the whole community or a particular group of them. Many of the more articulate Aboriginal representatives come from urban or semi-urban areas, and their views are not necessarily representative of rural or traditionally oriented people. In this respect the National Aboriginal Conference carries a heavy burden of responsibility in advising the Government.

3. Some General Issues Underlying the Recognition Debate

Against this general background it is possible to discuss some of the major issues of principle which underlie the Australian debate about recognition of Aboriginal customary law. Unfortunately, in a paper of this sort, it is not possible to deal comprehensively with the issues, and what follows is very much an outline.⁶²

(a) Equality, Discrimination and Pluralism

A common argument against legislative, and even sometimes administrative recognition of indigenous minority rules and traditions is that such recognition would be in some way discriminatory or unequal or would violate the principle that all persons in a democratic society should be subject to 'one law'. These are, of course, powerful arguments, and so far as basic standards of discrimination and equality are concerned, I believe that they reflect fundamental values. However these standards are much more difficult to apply than is commonly realised. Crass versions of the notion of equality were an important factor underlying previous policies of integration and assimilation, both in Australia and elsewhere. Such views continue to appeal to officials and lawyers brought up in a common law tradition, perhaps because the common law at its height embodied in quite fundamental ways a laissez-faire form of egalitarianism. The difficulties many common law judges have with the concepts of equality before the law and discrimination are shown by the struggle of the Canadian Supreme Court, in a series of cases from *R. v. Drybones* onwards,⁶³ to make sense of the principle in the light of established Canadian government policy towards Indians. The indications are that Australian courts may have similar problems.

62 These issues are canvassed in greater detail in three Research Papers: A CL RP8, J. Crawford, 'Aboriginal Customary Law: A General Regime for Recognition' (1982); ALR RP9, J. Crawford, 'Separate Institutions and Rules for Aboriginal People: Pluralism, Equality and Discrimination' (1982); AL C RP10, J. Crawford, 'Separate Institutions and Rules for Aboriginal Peoples – International Prescriptions and Proscriptions' (1982).

63 See *R. v. Drybones* [1970] S CR 282; *Attorney-General of Canada v. Canard* (1975) 52 DLR (3d) 548. See A CL RP9, above n. 62, 16–26.

The most obvious example is a recent decision of a single judge in the South Australian Supreme Court, holding that certain provisions of the Pitjantjatjara Land Rights Act 1981 were invalid because inconsistent with the Racial Discrimination Act 1975 (Cwlth), implementing the International Convention on the Elimination of all Forms of Racial Discrimination of 1966.⁶⁴ Section 19 of the South Australian Act provided that any person other than a Pitjantjatjara could not enter upon Pitjantjatjara land except with the permission of the corporate body representing the Pitjantjatjara people. The defendant, an Aboriginal but not a Pitjantjatjara, entered upon the land without such permission, and was prosecuted under the Act. Millhouse J. 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 inevitably 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 was rejected out of hand. Millhouse J. said: [Counsel] argued vigorously that [the definition of »Pitjantjatjara«] was a definition based on traditional ownership and not on race. I simply cannot accept that: it is based on both . . . race . . . and traditional ownership . . . [T]hat the definition is at least partly a racial one is enough . . . every person but a Pitjantjatjara is discriminated against and an essential ingredient in the discrimination is race, viz. » . . . part of the definition of »Pitjantjatjara«.⁶⁵

As the learned Judge hinted, this reasoning would invalidate not merely the access provisions of the Pitjantjatjara Land Rights Act, but possibly even the initial grant of land itself.

Courts with more experience in this area have come to realise that the concept of discrimination cannot be applied in such a simplistic and undiscriminating way. Indeed, careful attention to the terms of the Racial Discrimination Convention itself should have made this clear.⁶⁶

One can readily accept that Australia's international obligations, both under the Racial Discrimination Convention and the International Covenant on Civil and Political Rights, require that Australian legislation should not discriminate on grounds of »race, colour, descent, or national or ethnic origin«. But »discrimination« is carefully defined. It does not include reasonable, as distinct from arbitrary, measures distinguishing particular groups and recognising and responding to their special characteristics, provided that an appropriate definition of the group is adopted, and that basic rights and freedoms are assured to members of such groups.⁶⁷ A similar position has been arrived at in Canada.

64 Gerhardy v. Brown, Millhouse J., SA Supreme Court, unreported, 21 June 1983.

65 Transcript, 11.

66 Millhouse J. did refer to Art. 1 (4) of the Convention (the »affirmative action« provision), but held it inapplicable because the grant of land rights was not temporary but ostensibly permanent: *id.*, 12. It was irrelevant, but not for that reason.

67 Cf. A CL RP9, above n. 62, 2–8.

There, legislative distinctions, even if partly based on race, 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 are consistent with special treatment of Canadian Indians, for whom there is a specific constitutional responsibility. In exercising its power with respect to Indians and Indian lands, parliament can use distinctions based on a 'legitimate legislative purpose in the light . . . to long and uninterrupted history',⁶⁸ or on 'Indian customs and values',⁶⁹ provided that such distinctions do not exclude Indians from the enjoyment of basic rights and freedoms.

With some exceptions, 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. But legislation which infringes basic rights (e.g. 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. Perhaps the most important difference between the United States and that under the Racial Discrimination Convention is in the tolerance of 'special measures' of reverse discrimination. These are not exempt from review under the 'equal protection' guarantee, although the standard of review that will be adopted remains unclear. 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, of course, 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 fulfillment of Congress's unique obligation towards the Indians'.⁷⁰

Applying the standards of non-discrimination and equality in the light of the travaux préparatoires of the Racial Discrimination Convention and of other international and comparative experience in the field, it is possible therefore to suggest that special measures for the recognition of Aboriginal customary law will not be racially discriminatory, or involve a denial of equality before the law or of equal protection, if these measures

- are reasonable responses to the special needs of those Aboriginal people affected by them
- are generally accepted by those people
- do not deprive individual Aborigines of basic human rights or of access to the general legal system and its institutions.

Applying such standards it can be seen that the argument that provisions such as section 19 of the South Australian Act are discriminatory is simply based on confusion and

68 Attorney-General of Canada v. Lavell (1973) 38 DLR (3d) 481, 575 (Beetz J.).

69 Ibid.

70 Morton v. Mancari 417 US 535, 555 (1974), See A CL RP9, above n. 62, 10-16.

misunderstanding. On these criteria, it was not discrimination to recognise the long established links of the Pitjantjatjara people to their land, or to set aside that land for use by them under Australian law. Once that had been done, it was clearly reasonable and proportionate to give the Pitjantjatjara people control over access to the land. Indeed it would be a strange form of recognition of land rights that did not do so. The fact that the defendant in *Gerhardy v. Brown* was an Aboriginal demonstrates, not the discriminatory nature of the legislation but its non-discriminatory nature. The legislation recognised what it was to be Pitjantjatjara. (It may be that in some of the details regulating access to the land the legislation was unworkable or unduly restrictive, and this might be capable of raising issues of equal protection or non-discrimination. However Millhouse J. did not base his judgment on these possibilities.)

Unfortunately, it may not be possible to dismiss such decisions as isolated aberrations. A number of members of the High Court seem to have committed themselves to the view that any legislation under section 51 (xxvi) is inherently discriminatory (even if advantageously discriminatory).⁷¹ This may be true if by 'discrimination' is meant the inevitable effect of all legislation, in singling out particular acts or situations or persons on which it will operate. It may also be true in the sense of discrimination which involves judgment between things or circumstances of different quality or character; that is, in the sense that I am an extremely discriminating judge of wine, or books, or persons. But it is not necessarily, or even usually true of a power to legislate for Aboriginal people, that it will involve discrimination in the pejorative sense. Indeed, there is something bizarre in saying that the Commonwealth legislation which protected Aboriginal sites in the world heritage area in Tasmania, and preserved them for future generation of Australians, was somehow discriminatory.

Apart from basic arguments about discrimination and equality, the ALRC has frequently been met by arguments of a more general character about the undesirability of legal pluralism, the dangers of divisiveness and so on. Once basic issues of equality are sorted out, these further arguments tend to become rather elusive. Almost invariably they are an indirect reference to other evils which might be thought to flow from the proposed action, whether through the inefficiency of the new legal structures, the problems of demarcation, the aggravation of public opinion and so on. Obviously in particular contexts such arguments may be convincing, but they do not have the peremptory character of arguments about basic equality. In particular, legal pluralism, in the sense of the recognition of multiple laws or obligations, is a description of a variety of legal techniques which can be used to accommodate cultural pluralism. It is not, as such, desirable or undesirable. Where different legal or cultural systems co-exist in fact, it will often be desirable for the dominant system to take steps to recognise, adjust to or allow for that co-existence. But exactly what steps should be taken must depend on the specific context. It follows that the desirability or otherwise of 'recognition' or 'adjustment'

71 E.g. *Koowarta v. Bjelke-Petersen* (1982) 39 ALR 417, 475 (Wilson J.), 489 (Brennan J.).

cannot be determined categorically or in the abstract. But this is precisely what many of the arguments about legal pluralism or divisiveness seek to do.

Alternatively it is sometimes argued that the recognition of Aboriginal customary law would create a form of backlash in terms of public opinion, thus causing more problems than it resolves. Again this is essentially one argument among many to be weighed, and it is particularly difficult for a law reform commission, which is not a representative body, to assess or represent this form of public opinion. In any event the ALRC has not been made aware of any upsurge of public opinion against the general idea of recognising Aboriginal customary law, although it is fair to say that many members of the majority community have reservations about it. So much depends on the details of recognition, however, that it is fruitless to discuss these issues in the abstract.

(b) The Specification and Protection of Basic Human Rights

As the Commission's Terms of Reference make clear, certain aspects of the recognition of Aboriginal customary law raise problems of the application and interpretation of basic human rights standards. It might be thought a sufficient reply to this to say that Aborigines themselves can determine and maintain adequate standards of human rights. However, what is proposed is Australian legislation, and the Commonwealth Parliament cannot abrogate its responsibility for ensuring the maintenance of the human rights of all Australians including Aboriginal Australians.

However this does not dispose of the proposition that Aborigines themselves can and should assume responsibilities for the maintenance of human rights in their own communities. There are obviously tensions between the values of self-determination or self-management and other human rights standards, and their detailed resolution is not a simple or straightforward matter. It is not possible to discuss it in any detail here, but some general comments may be in order.⁷²

There is a tendency in the literature relating to indigenous peoples and human rights for quite polarized views to emerge: on the one hand, it is said that basic minimum standards of human rights in effect preclude all or almost all forms of recognition of minority practices and traditions, on the ground that the physical sanctions are cruel or inhumane, the marriages are coerced and involve the marriage of children, the community justice mechanisms are not independent or impartial, and so on. On the other hand it is argued that many of these so called universal human rights standards are western cultural artifacts, lacking validity for peoples of distinct cultures and traditions: »[I]t is clear that human 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

72 See further A CL RP10, above n. 62, and the works cited in the Bibliography, id., 50–52.

standard upon which all nations ought to agree, recognising, however, that this is only our particular value system.⁷³

The argument confuses the historical origins of human rights law with their modern status. All the basic human rights treaties have been concluded, within the United Nations and elsewhere, in forums in which ›Western‹ states have been in the 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. For example in December 1981, there were 69 parties to the Civil and Political Rights Covenant, 42 of them ›third-world‹ countries. Nor is the content of the Covenants merely an uncritical reflection of ›Western‹ values. For example, in important respects, non-Western countries influenced the terms of the Civil and Political Rights Covenant, in ways with which Western countries disagreed. Much more evidence is available to similar effect.

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. It is not to be assumed that its provisions are 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. To summarise, the human rights standards enunciated in the Civil and Political Rights Covenant, the Economic, Social and Cultural Rights Covenant, and the Racial Discrimination Convention are not merely Western artifacts. They represent an important expression of international standards. But it follows that such instruments have to be interpreted against the background of a wide variety of cultures and beliefs. They are not to be interpreted in the light of just one of these cultures.

Some particular problems which arise for the Reference may be briefly considered in the light of this conclusion.

- Traditional Punishments. Traditional killing, which evidently existed in traditional Aboriginal society but seem now to have died out, is excluded from recognition not only by Article 7 of the ICCPR but by the explicit terms of Article 6, which is directly applicable to such cases. A more significant issue for the ALRC has been the question of traditional sanctions such as thigh spearing. In its first Discussion Paper the Commission suggested that judicially-ordered or legally-imposed spearing would constitute ›cruel, inhuman or degrading treatment or punishment‹ under Article 7.⁷⁴ This is, however, not the context in which the problem actually arises. No Australian court now has authority to impose corporal punishments of any kind, let alone traditional punishments such as spearing. But problems of taking traditional punishments into account continue to arise. Nothing in the ICCPR prevents a court from taking such punishments into account, for example in sentencing.

It might be said that the Covenant requires a State party not merely to refrain from

73 A. Pollis and P. Schwab, ›Human Rights: A Western Construct of Limited Applicability‹, in A. Pollis and P. Schwab, eds., *Human Rights: Cultural and Ideological Perspectives* (New York, 1980), 1–18, 4.

74 ALR C DP17, above n. 5, 51–6.

imposing cruel punishments itself, but to ensure by effective policing that no cruel treatment is inflicted on persons by other private individuals or groups. Certainly the Covenant requires remedies to be provided for individuals whose protected rights have been violated. But adequate remedies do now exist in Australian law.

The question, then, is whether the Covenant requires States parties actively to suppress all treatment considered 'cruel' or 'degrading', even where that treatment occurs with the consent of the parties concerned, and as an aspect of the traditions and customs of the ethnic group within which it occurs, and no matter what other consequences such suppression, with its associated policing, would involve for the group in question. Quite apart from the question whether such punishment is properly classified as 'cruel' or 'degrading', the answer must be that it does not. Nothing in the Covenant prevents the law enforcement authorities from adopting a policy of intervening in indigenous communities only upon complaint, in cases not involving threats to life or suppression of complaints.

- Community Justice Mechanisms. Article 14 of the ICCPR requires 'a fair and public hearing by a competent, independent and impartial tribunal established by law'. So far as independent community justice mechanisms are concerned, this may create difficulties in smaller Aboriginal communities, although these difficulties may not be insuperable. On the other hand, dependent community justice mechanisms, attached to or operating in conjunction with the general courts, pose far fewer problems. Article 14 leaves the State substantial freedom in the methods of organization of its judicial system, and, of course, a very wide variety of forms and methods of organization exists throughout the world. Another possibility is the development or adaptation of forms of mediation or conciliation (such as community justice centres), or other informal methods of diversion or settlement. There is much room for experiment.
- Traditional Marriage. The ICCPR presents no particular problems for the Commission's tentative proposals for recognition of traditional marriage. But Art. 6(2) of the Women's Discrimination Convention of 1980 states that 'no legal effect' shall be given to the marriage of a child, and that 'registration of marriages as an official register' should be compulsory.

In Discussion Paper 18 the Commission tentatively proposed a form of functional recognition of traditional Aboriginal marriages. Such marriages are informal, non-ceremonial unions, and in some parts of Australia (by no means everywhere) potentially polygamous or may commence at a lower age than the marriageable age (presently 16 for girls).⁷⁵ However no proposal has been made that this functional protection of traditional marriage should be conditional upon registration (although registration should be available). It has not been decided whether to impose a

⁷⁵ ALR C DP18, 'Aboriginal Customary Law – Marriage, Children and the Distribution of iProperty' (1982), 5–8.

minimum age for recognition. It is suggested that Article 16(2) is not concerned with ›legal effects‹ attributed to a relationship by way of functional protection (as with existing laws on de facto relationship and traditional marriage, and the Commission's proposals for further recognition of traditional marriage). It is concerned only with marriage as a status. Since the broader interpretation would actually involve withdrawing protection from under age partners, it is suggested that the narrower view should be preferred. The issues of registration and marriageable age remain, therefore, to be determined on their merits.⁷⁶

(c) Aboriginal Autonomy and Self-Management: The Role of the ALRC

A key issue underlying the Reference – what may almost be called its ›hidden agenda‹ – is the issue of Aboriginal autonomy or self-management. In one sense it is not hidden but open, since the Terms of Reference expressly refer to ›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‹. This may well be regarded as the governing principle in the context of the Reference, since it is capable of determining both its direction and its overall approach.

But the difficulty remains that the ALRC is a non-Aboriginal body, an advisory arm of the general legal system with no special authority to speak for Aborigines. We have become acutely aware that it could be considered offensive for a body such as the Commission to determine matters which may properly be considered to be the domain of Australia's indigenous people. The National Aboriginal Conference raised this dilemma as part of its submissions to the World Council of Indigenous People in 1981. In its ›Position Paper on Indigenous Ideology and Philosophy‹, it proposed the following resolution:

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. We demand Aboriginal involvement and proper consultation of all the appropriate groups and at all levels. Fundamental to this is recognition of Aboriginal customary rights in land and Aboriginal equity transactions, as well as post colonial Aboriginal land tenure, including historical occupation, rights and residence and land rights on the basis of need and compensation. We demand the right of Aboriginal Australians to decide their customary law and we refuse to accept definitions arrived at by white legal commissions of inquiry or any other white legal institution in Australia.⁷⁷

Undoubtedly by the N.A.C. Position Paper raises legitimate concerns. However, the Commission has not sought to infringe on the right of Aboriginal Australians to define

⁷⁶ See generally A CL RP10, above n. 62, 41–9.

⁷⁷ N.A.C., The Australian Aboriginal Position Paper on Indigenous Ideology and Philosophy (presented to the World Council of Indigenous Peoples Third General Assembly 1981, Australia), 46, 47.

their own customary laws. Wherever possible the Commission has left the definition of Aboriginal customary law and practices in the hand of Aboriginal people themselves. The process of arriving at recommendations, the tentative recommendations themselves and the details of their implementation all reflect this objective. The question for the Commission is the extent to which the general legal system should recognise Aboriginal customary law – and not the task of defining customary laws as such. The former is properly a question on which the Commission can advise the Government – the latter is directly a matter for the Aboriginal people concerned.

An example is the Commission's tentative proposals for recognition of traditional marriage. What these proposals would involve is the definition of the circumstances in which traditional marriage would be equated to marriage under the general law, from the point of view of consequences (in terms of accident compensation, spousal compellability, eligibility for social security payments etc). But it does not involve an attempt to specify, much less codify, exactly when Aborigines are regarded as married under their customary law and tradition (or for that matter when they are regarded as no longer married). It involves the recognition and protection of persons who regard themselves and are regarded by their community as married in accordance with Aboriginal tradition. This is not a denial of Aboriginal self-management or control, but a desirable extension of the facilities for its exercise. Other examples could be given in areas such as traditional distribution of property, evidence and procedure, and the criminal law.⁷⁸

This is however not a complete response. Undeniably, the fact that the general legal system recognises or does not recognise Aboriginal customary law in some area or context is likely to have effects upon that law, and these effects may be no less real for being, in theory, indirect. The Commission in making recommendations as to changes in the general law therefore inevitably does effect the extent to which Aborigines will be free to adopt a traditional 'lifestyle'. Awareness of this requires the Commission to proceed with great caution, particularly in stating views on a society and culture with which inevitably it is not fully familiar. However, like it or not, the general legal and political system in Australia will inevitably make judgments about the recognition of Aboriginal customary law: the Commission's function is to advise the competent organs of that system. Thus the Commission simply has not the option, short of declining to proceed with the reference, of abandoning efforts at finding workable solutions:

The more sophisticated cultural relativist, indeed, goes further and in the name of tolerance rejects the concept of judgment all together – often in epistemology as much as in morals. It is not a path open to those who take either law or human capacity seriously.⁷⁹

This inescapable fact is, however, to be qualified in a number of important ways. First of

78 E.g. the tentative recommendation in A CL RO14, J. Crawford, 'The Proof of Aboriginal Customary Law' (1983), 33–41 that Aborigines themselves should be competent to give evidence about their customary law notwithstanding that they may not qualify as 'expert witnesses'.

79 A. E-S. Tay, 'Law and Legal Culture', IIVR World Congress, Helsinki, August 1983, 3.

all, the Commission cannot and will not present its recommendations as anything else than advice from one Australian government instrumentality to the Government and Parliament of Australia. That advice in no way commits either Aboriginal people generally or the National Aboriginal Conference in particular. Moreover the Commission must be extremely cautious in making assertions about Aboriginal opinion, although inevitably it must do so in the course of arriving at conclusions. Once the Commission has reported, it becomes a matter for the government to determine which agencies or organisations should speak for the Aboriginal people in this context. Undoubtedly the National Aboriginal Conference will have a major role in this respect; indeed this is a matter to which specific recommendations will be addressed in the Commission's final Report.⁸⁰

Secondly, all the Report can do is to recommend what the Commission believes to be appropriate and workable proposals for the particular time. The Report cannot be presented as the final or authoritative word on recognition of Aboriginal customary law, given the dynamic and rapidly changing situation. It is overwhelmingly likely that in some years time some further examination of the question will be required (not necessarily by a body such as the ALRC). Moreover individual issues will continue to arise, and will need to be dealt with on their merits. Given appropriate consultation and access to information, this is not necessarily a bad thing. Indeed it is, I think, not merely the inevitable but the right approach to the wide range of problems Aboriginal people face with the legal system. I think it is an illusion to believe that these problems can be resolved through any single programme of legislative or administrative reform. To this extent the whole of the Commission's work on the reference amounts to a programme for functional recognition of different aspects of Aboriginal tradition and customary law, or for functional adjustment to take into account the distinctive problems Aborigines have with the legal system as a result of their adherence to traditional lifestyles and beliefs. This basic, and rather pragmatic approach becomes obvious from a survey of the different areas in which the legal system does now or may in the future recognise Aboriginal customary law.

4. Some Specific Areas of Recognition

Finally, therefore, it is proposed to outline rather briefly some of the areas in which recognition of Aboriginal customary law is being considered. The first of these, the question of Aboriginal land rights and associated issues of protection of sacred or significant sites, has been treated as outside the Commission's Terms of Reference, principally because it is being intensively dealt with in other ways and through other

80 On the role of the N.A.C. in these contexts cf. Australia, 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* (Canberra, 1983), 134–47.

agencies. However it is of course a key issue, and one on which much of the practical working out of recognition of Aboriginal customary law will depend.

(a) Land Rights, Sacred Sites and Access to Land

As far as we can know, land has always been of primary importance to Aborigines and the overriding source of authority in Aboriginal society.⁸¹ In the words of one authority: For tens of thousands of years prior to the establishment by the British of a penal colony at Botany Bay in 1788, the Australian Aborigines based their life and law on their complex relationships to land. They looked to the Dreamtime, a creative era, when their mythical ancestors wandered across the land, named important sites and features, explained social institutions, and performed rituals. Today their living descendants must perform these rituals and celebrate the activities of the ancestral heroes in order to maintain and reaffirm the strength and relevance of the law as an ever present and all guiding force in people's lives . . . The loss of land over which to hunt has been more than an economic loss, for it was from the land that Aboriginal people gained not only their economic livelihood but also their sense of being.⁸²

Despite the indisputable importance that the land carried, no account was taken of any prior Aboriginal title to the Australian continent or any part of it on settlement. The land holdings of Aboriginal clans and tribes were ignored by the first Europeans. Their special relationship with the land was denied. Under the principles of English common law applying to the Australian colonies it was assumed that all land was vested in the British Crown.⁸³ This was judicially confirmed in 1825. No title to land could be recognised by the law unless it had been acquired through an express, formal grant from the Crown.⁸⁴ In 1889 the Privy Council reaffirmed this position in *Cooper v. Stuart*: There was no land law or tenure existing in the colony at the time of its annexation to the Crown; and in that condition of matters, the conclusion appears to their Lordships to be inevitable that, as soon as colonial land became a subject of settlement and commerce, all transactions in relation to it were governed by English law, and in so far as that law could be justly and conveniently applied to them.⁸⁵

More recent claims to land by Aborigines based on customary law or common law rights of prior occupation or long user have also failed.⁸⁶

Of all cases of non-recognition of Aboriginal customary laws and institutions, the non-recognition of land rights was the most fundamental and far reaching in its effects.

81 C. H. Berndt and R. M. Berndt, *Pioneers and Settlers* (Pitman, 1978), 19; Kenneth Maddock, *The Australian Aborigines* (Penguin, 2nd edn., 1982), Ch. 2.

82 D. Bell, 'Women's Business is Hard Work: Central Australian Aboriginal Women's Love Rituals' (1981) 7 *Journal of Women in Culture and Society* 314-337, 315-6.

83 A. C. Castles, *An Australian Legal History* (Law Book, 1982), 20-31.

84 *The King v. Cooper* Sydney Gazette, 17 February 1825 (No. 1109), 2.

85 (1889) 14 App. Cas. 286, 292.

86 *Milirrpum and Ors v. Nabalco Pty Ltd and the Commonwealth* (1971) 17 FLR 141; *Coe v. The Commonwealth* (1979) 24 ALR 118.

Indeed, so far reaching and devastating have the effects been, that it is no longer sufficient to resolve the problems of Aboriginal alienation and powerlessness by anything so straight-forward as recognition of customary law rights to land. In many cases whole tribes have disappeared; in others, resettlement (forced or voluntary) has led to non-traditional groupings in large settlements on alien land. The social problems of such settlements are well documented.

It was not until the late 1960's and 1970's that legislative steps were taken in Australia to give Aboriginal persons and organisations some control over land that was previously reserved for their use. Since then, however, there have been substantial developments and the issue is now high on the political agenda.

In 1966, South Australia became the first State to give Aboriginals title to reserves. Briefly, developments since then have included the following.

- The Aboriginal Land Rights (Northern Territory) Act 1976 (Cwlth) was the first major piece of land rights legislation. It not only provided for title to existing reserves to be transferred, but also 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 according to the wishes of the traditional owners. Section 3 of the Act defines the term 'traditional Aboriginal owners' to mean: a local descent group of Aboriginals who –

- (a) have common spiritual affiliations to a site on the land, being affiliations that place the group under a primary spiritual responsibility for that site and for the land;

- (b) are entitled by Aboriginal tradition to forage as of right over the land.

Aboriginal customary law rules are also specifically incorporated into section 71(1) of the Act which 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 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, whether or not those rights are qualified as to place, time, circumstances, purpose, permission or any other factor.⁸⁷

- Claims have been lodged over virtually all the vacant Crown land in the Northern Territory. So far more than 15 have been successful.
- In all, Aboriginal freehold title now accounts for 28.8 % of the Northern Territory (or some 388,796 square kilometres). Aboriginals represent 25 % of the population of the Northern Territory.

⁸⁷ See also the Pitjantjatjara Land Rights Act 1981 (S.A.) s.4 for the customary law definition of traditional owner, & ss.18 and 19 relating to access to land.

- South Australia was the first State to provide inalienable Aboriginal freehold title over 100,000 square kilometres in the north-west of that State.⁸⁸
- In the other States, by comparison, the grant of land to Aboriginal people has been of a relatively minor nature.⁸⁹
- However Australia wide total Aboriginal land at present amounts to some 752,367 square kilometres or 9.79 % of the total land area of Australia.

In addition to these existing provisions a number of further inquiries into land rights issues are underway. The Federal Minister for Aboriginal Affairs has established a review both of rights to land, and the protection of sacred sites, throughout Australia, with a view to passing federal legislation where necessary. Related to this inquiry, is a report being prepared by Mr. Justice Toohey, the former Aboriginal Land Commissioner. His review covers the operation of the Northern Territory Aboriginal Land Rights Act 1976. In Western Australia, the government has appointed Mr. Paul Seiman Q.C., to undertake a review of Aboriginal claims to land in that State.

As well as legislation specifically conferring land rights (whether on a basis of traditional affiliations, need, or some other basis), there is legislation in all States and in the Northern Territory for the protection of sacred and significant sites.⁹⁰ Many thousands of sites are now recorded by State and Territory authorities, by the Australian Institute for Aboriginal Studies and by the Heritage Commission. This represents a considerable improvement on the situation of 10 years ago, although registration of a site by no means guarantees its security from development or interference.

(b) Recognition of Traditional Marriage

Reference has already been made in this Paper to the imported law's failure to recognise traditional Aboriginal marriage in any way, and to more recent cases of legislative or judicial recognition of traditional marriage for particular purposes.⁹¹ Despite the long-standing failure to recognise them, patterns of traditional marriage have continued to exist, and remain remarkably strong not only in the Northern Territory but also in parts of Western Australia, South Australia and Western Queensland. Indeed there has been a tendency to revert to patterns of traditional marriage even in communities which had previously been subject to heavy mission influence, as the Commission has observed in Central Australia.

88 Pitjantjatjara Land Rights Act 1981 (S.A.). The Maralinga Tjurutja Land Rights Bill 1983 (S.A.) contains similar provisions to the 1981 Act. Under this Bill Aboriginals will receive inalienable freehold title to some 50 000 square kilometres. In addition the Department of Defence has agreed to hand over some 20 000 square kilometres to Aboriginal people in South Australia. This represents the former Woomera land.

89 See *Aborigines Act 1971*, ss.17-24 (Qld); *Aboriginal Land Act 1970* (Vic); *Aboriginal Land Rights Act 1983* (N.S.W.).

90 See *Aboriginal Relics Preservation Act 1967* (Qld); *Aboriginal Heritage Act 1979* (SA); *Aboriginal Sacred Sites Act* (NT); *Coburg Peninsular Aboriginal Land and Sanctuary Act* (NT); *Aboriginal Relics Act 1975* (Tas); *Archaeological and Aboriginal Relics Preservation Act 1972* (Vic.); *Aboriginal Heritage Act 1972* (W.A.).

91 See above n.42.

Responding to this situation is, however, another question. Traditional Aboriginal marriages are informal, non-ceremonial relationships, which can be entered into in a variety of ways, which are not infrequently polygenous (i. e. involving plural wives), and which do not conform to the Marriage Act model in various other ways. Consequently, it is sometimes suggested that the best way to deal with traditional marriages of this kind is to recognise them merely as *de facto* relationships, since the latter also lack formal or documentary criteria for their commencement and conclusion, but are still recognised for certain limited purposes under the laws of some of the States and Territories.⁹² However this is very much a second class form of recognition, since the distinguishing feature of a *de facto* relationship in the wider society is that it is not a marriage. By contrast, Aborigines do regard stable unions entered into within the appropriate kinship categories as marriages, rather than as *de facto* relationships.

On the other hand it is not necessarily appropriate to recognise such marriages as having all of the legal consequences of marriage under the Marriage Act. Most obviously, marriage under general Australian law is necessarily monogamous, requires a formal judicial termination and carries obligations of continuing maintenance which do not seem to have any direct analogue in Aboriginal tradition and which may well cut across other methods of providing for spouses. Under these circumstances, what the Commission has tentatively recommended is the functional recognition of such marriages, that is their equation with Marriage Act marriage for certain specified purposes rather than generally. The aim is to avoid foisting on the parties to what is in most cases a rather informal relationship a set of rules and structures developed in a different culture and involving different assumptions about the status and consequences of marriage, while at the same time offering appropriate forms of protection to traditional spouses consistent with Aboriginal marriage traditions.

An advantage of the tentative proposal is that it is a continuation and extension in a coherent way of existing rules and policies of recognition in the Commonwealth sphere and in at least one other jurisdiction (the Northern Territory). Existing forms of recognition include:

- The Compensation (Commonwealth Government Employees) Act 1971, which includes in its definition of 'spouse' an Aborigine 'recognised as the husband or wife of [another Aborigine] by the custom prevailing in the tribal group . . . to which [he or she] belonged'.
- The Status of Children Act (N.T.) which makes the children of a traditional marriage legitimate children.
- The Family Provision Act (N.T.) which allows traditionally married persons to apply for family provision (testator's family maintenance) in case of need, in the same way as other married persons.

92 For the law in *de facto* relationship in Australia see N.S.W. Law Reform Commission, Report on De Facto Relationship (LRC 37, 1983).

- The Administration and Probate Act (N.T.) which recognise traditional spouses as married for the purposes of distributing the property of a deceased partner who did not make a will.

Similarly the Commonwealth Department of Social Security informally recognises first traditional marriages as marriages rather than as de facto relationships for the purposes of the Social Security Act 1947. But Aborigines have no entitlement in this respect, as the policy is an extra-statutory concession. Moreover it involves drawing invidious distinctions between wives, distinctions which have no basis in Aboriginal tradition, and which may well involve depriving women of all social security benefits. Ironically the present position is that the Department recognises a second wife only to her disadvantage; that is, she is recognised as living with the man as his wife for the purposes of disqualifying her from a widow's or supporting parent's benefit, but is not recognised as living with him as his wife for the purposes of qualifying her for a wife's pension (if otherwise applicable). These defects would be cured by an adequate provision for legislative recognition.

Thus it has been recommended that parties to a traditional Aboriginal marriage, defined in essentially the same way as in the Compensation (Commonwealth Government Employees) Act 1971, should be regarded as married persons for the purposes of Australian law relating to such questions as:

- legitimacy of children
- accident compensation in its various forms
- eligibility for family provision or testators family maintenance and for the distribution of an estate upon intestacy
- eligibility to adopt children (and related issues of consent to adoption)
- eligibility as a spouse under the Social Security Act 1947
- non-compellability to give evidence as a spouse (where that rule still applies to other married persons)
- exclusion of liability for prosecution for carnal knowledge in respect of traditional spouses above the age of 14.

On the other hand it is more doubtful whether it is desirable to extend recognition to areas of maintenance or property distribution during a marriage or on its termination, although the recommendation with respect to property distribution has been vigorously challenged.

It will be obvious that the recommendations, though an acknowledgement of a situation existing as a matter of Aboriginal customary law or tradition, only constitute recognition of Aboriginal customary law in a rather special way. What the proposals would involve would be attaching consequences under the general law to a state of affairs which, under wholly traditional circumstances, would not attract many of the consequences simply because they would be irrelevant to the society. Elsewhere we have described this as a form of 'recognition by translation'; in a situation where contact between the indigenous minority and the general system is constant, it is a common, indeed inevitable form of recognition, if any recognition at all is to be given.

Conversely, the proposal does not involve the enforcement of any distinctively Aboriginal marriage rules. To make these enforceable under the general legal system would be completely to change their character, and certainly would tend to deprive Aboriginal communities of control over this aspect of their law. This is one context in which 'recognition as translation' is to be preferred to 'recognition as incorporation', that is the simple enactment of the indigenous rule as part of the general system.⁹³

(c) Problems of Aboriginal Child Custody

In its Discussion Paper 18 the ALRC tentatively recommended the enactment of an Aboriginal child welfare principle along lines similar to that contained in the Indian Child Welfare Act 1978 (U.S.A.).⁹⁴ As pointed out already this is an area of State administrative and (up to now) legislative responsibility and the tentative recommendation is, partly for this reason, implicated in two related debates about the child welfare system in general. The first, which is substantially a federal issue, is the question who should take responsibility for delivery of child welfare services, and to what extent the Commonwealth's involvement in certain areas of funding (e.g. in funding Aboriginal Child Care Agencies) should give it some say in the determination of policy. The second is of a more general character, that is, the debate between proponents of formal legislative models in the child welfare area, emphasising considerations such as due process, and on the other hand those who support more flexible discretionary models. In the juvenile justice area the balance of opinion now strongly supports the former approach, and much of the Australian child welfare legislation has either already been or is in the course of being changed to reflect this approach in respect of juvenile offenders.⁹⁵ On the other hand in the context of child care and custody, opinion seems to be much more evenly balanced, and a compromise position often arrived at is to insert apparently regulatory principles in the child welfare legislation, but in a form which gives child welfare agencies a good deal of discretion in practice. Obviously enough, an Aboriginal child welfare principle raises central questions about this debate, as about the role of the State in relation to Aboriginal families. My impression is that, with few exceptions, the child welfare administrators in the various States and Territories are, in child welfare as distinct from juvenile justice contexts, strong proponents of the flexible and discretionary view of legislation, so that quite apart from any federal considerations they are likely to be unsympathetic to any form of enforceable Aboriginal child welfare principle. A further difficulty, which can be used to support either side of the argument in somewhat different ways, is the close relationship between child care and juvenile

93 For the distinctions between the various forms of recognition see A CL RP8, above n.62, 33–34. For a more detailed examination of the recognition of marriage proposals see A CL RP3, J. Crawford and P. Hennessy, 'The Recognition of Aboriginal Tribal Marriage: Areas for Functional Recognition' (1982).

94 ALRC DP18, above n.75, 11–14. For further detailed discussion see A CL RP4, 'Aboriginal Customary Law: Child Custody, Fostering and Adoption'.

95 For discussion see e.g. ALR C 18, Child Welfare (1981).

justice system in practice, as methods of intervention in Aboriginal families. If for some reason a State department thought it desirable to intervene in an Aboriginal family situation, but was impeded in doing so by some form of placement principle, it would be rare indeed if the alternative avenue of criminal juvenile proceedings was not available (with respect to children above the relevant age of 9 or 10). The only satisfactory resolution of this dilemma may well be the increased involvement of Aboriginal people and communities in both aspects of the 'child placement' system, so that the development of appropriate Aboriginal Child Care Agencies with local responsibilities is of great importance. Aboriginal Child Care Agencies now exist in most States and Territories, and are starting to develop better relations with Child Welfare Departments in at least some cases.

On this issue at least, Aboriginal opinion is not hard to gauge. It would be difficult to find an Aboriginal person above the age of thirty who had not had some fairly direct experience of State intervention in Aboriginal families. This makes the issue an extremely sensitive and important one for many Aboriginal people, and one of the stronger arguments for legislation is that it may provide a degree of security where security and confidence in the system up to now have been almost completely lacking.⁹⁶

(d) Traditional Distribution of Property⁹⁷

The idea of 'property' in Aboriginal tradition is very different to that of the wider Australian community and its law. This is so for both goods and land, but especially for land. Aboriginal society was not materialistic and placed little importance on a person's wealth or possessions. Much more important was the development, management and transfer of knowledge and skills. Of course, Aboriginal customary law is not static and has made significant changes to accommodate to the wider Australian system. It has, in general, accepted the cash economy and its rules. But sometimes conflicts arise between Aboriginal ways of doing things and legal rules for transferring property.

Problems seem to arise, most obviously at least, in the area of the distribution of property upon death. There is certainly the potential for conflict between the general rules for property distribution and claims upon death, based as they are substantially on an assumption of nuclear families, and Aboriginal family structures and kinship obligations. So far this has tended to be more theoretical than real, but a number of more traditional Aborigines are starting to acquire assets in various forms through mining royalties, etc. So the problem may well arise in future. As we have seen the ALRC has proposed that traditional marriage be recognised as marriage for the purpose of distribution of property upon death, including family provision. It may also be desirable

96 In this context the provisions of the Community Welfare Bill 1983 (N.T.) are of considerable interest: see above n.60.

97 See also ALRC DP18, above n.75, 14–17 (from which this discussion is substantially drawn, and A CL RP5, P. Hennessy, 'Aboriginal Customary Law; Traditional and Modern Distributions of Property' (1982).

to expand the categories of persons who may apply for family provision to reflect more closely obligations and ties arising from the Aboriginal family structure.

But even when traditional marriages have been recognised, there are other problems of recognising Aboriginal customs of dealing with the property of someone who has died. An interesting idea for dealing with this is contained in a Northern Territory law.⁹⁸ This allows a court to approve a special plan for dividing the property of the dead person, which follows 'the customs and traditions of the community or group to which the . . . Aboriginal belonged'. This could allow a man's obligations to his kin or extended family to be honoured.

An important limitation of the Northern Territory provision is that it applies only if the deceased had not entered into a Marriage Act marriage. The reasoning seems to have been that marriage under the Marriage Act indicated an intention to reject Aboriginal customary law. But this is not necessarily so. For example, traditionally married Aborigines may decide to marry under the Marriage Act to avoid the consequences of non-recognition of their marriage. Marriage Act marriage might be a relevant factor in deciding whether to order a traditional distribution, but it should not preclude it. This provision is a good example of the general tendency to assume that acceptance by a traditionally-oriented Aborigine of some particular institution or facility of the general legal or economic system (whether Toyotas, televisions or marriage) indicates the abandonment more generally of Aboriginal tradition and belief.

Interesting problems arise of the relationship between traditional distribution, family provisions (testator's family maintenance) and wills. Few traditional Aborigines make a will, but, when they do, the will reflects or expresses their beliefs about what should happen to their property. This is an expression of their right to retain a traditional lifestyle, or to adopt some mixture of traditional and non-traditional elements. Such a will should, therefore, not be set aside by a 'traditional distribution'. But it can be set aside under existing law by an application for family provision in case of need. Recognising traditional marriage and other family ties for the purpose of family provision would therefore take some account of traditional elements.

There may also be a conflict between traditional distribution and adequate provision for the immediate family. Family provision is limited to cases of need, and in such cases it may therefore be right to allow a claim for family provision to override a traditional distribution.

The Commission's tentative proposals in this area, therefore, can be summarised as follows:

- traditional marriage should be recognised for the purposes of distribution of property upon death (including family provision)

98 Administration and Probate Act (NT), s.71B. A more limited W.A. provision (Aboriginal Affairs Planning Authority Regulations 1972, reg. 9) sets out the persons who are entitled to a share of the dead person's property, taking into account any traditional marriage.

- the categories of persons who may apply for family provision should be expanded to reflect more closely family ties under Aboriginal customary law
- a court should have power, upon application, to order a traditional distribution of property, in line with the customs and traditions of the community to which the deceased belonged.
- a traditional distribution should be subject to family provision, but only in clear cases of need
- traditional distribution should not prevail over the clear terms of a will
- ambiguities in a will should be interpreted in the light of relevant customary law and tradition
- time limits for applications should be flexible to take into account periods of mourning following death.

In fact, under the Northern Territory law (passed in 1979) traditional distribution has not yet been used. This does not mean that it will not be used in the future. But it may be that there is no need for the Commonwealth to pass a law for traditional distribution. Action by the Commonwealth in passing 'special laws' under s.51 (xxvi) should perhaps be reserved to clear cases of need, although there is, as always, the competing demand for a uniform defensible general principle underlying the law.

(e) Criminal Law and Sentencing of Aboriginal Offenders⁹⁹

As we have seen, the application of the general criminal law to Aborigines has long been established. This raises the possibility of conflict between that law and Aboriginal customary law rules still adhered to by traditionally-oriented Aborigines. But it would be wrong to assume that cases of direct conflict, at least such cases that come to court, are particularly common. While it is well-established that, for various reasons, Aborigines are grossly over-represented in the criminal justice system, the relationship between particular offences and Aboriginal customary law may not be direct. Examination of the limited evidence available suggests that:

- 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 much more common, even for traditionally-oriented Aborigines, that the act that resulted in the charge was a violation of both Aboriginal customary law and the general law, or was not specifically allowed or justified by Aboriginal customary law, than that it was so justified.
- The explanation for very high offence and imprisonment rates of Aborigines is not, in any way, the product of non-recognition of Aboriginal customary law by the substantive criminal law.

⁹⁹ The arguments in this section are a brief summary of those set out in A CL RP6, above n.6. The best published study is still E. Eggleston, *Fear, Favours and Affection. Aborigines and the Criminal Law in Victoria, South Australia and Western Australia* (Canberra 1976), 15.

- It seems to follow that the problems reflected by those exorbitant rates are not likely to be solved by the recognition of Aboriginal customary law within the rules of the substantive criminal law. Indeed, if the characteristics of traditionally-oriented Aboriginal offenders do not differ markedly from it may be that solutions will not be found directly through any form of recognition of Aboriginal customary law.

Nonetheless, particular conflicts do occur, and so too (more often) do problems of the interaction of the two systems (i. e. 'double jeopardy'). In arriving at a general position on these issues, only limited assistance can be obtained from overseas comparisons: recognition of indigenous customary law in the criminal law is very limited or non-existent in many jurisdictions; in other (e. g. United States, Papua New Guinea) recognition is qualified and erratic.

However considerable assistance is to be gained from an examination of the extensive (mostly unreported) Australian case law, especially in dealing with cases of past or prospective 'traditional punishments' of various kinds.¹⁰⁰ An examination of the case-law discloses seven basic propositions for which there is a good deal of support.

1. A defendant should not be sentenced to a longer term of imprisonment than would otherwise apply, merely to 'protect' him from traditional punishment (even if that punishment would or may be unlawful under the general law).
 2. The attitude of the defendant's local community to him and to the offence is of particular relevance in sentencing, especially where the offence was committed within that community and where the victim was from that community.
 3. That the defendant has been subjected to traditional punishment under Aboriginal customary law is relevant in sentencing him, especially where the local community is thereby reconciled.
 4. However, the fact that the defendant's community is satisfied, by; the infliction of traditional punishment or otherwise, though relevant does not preclude further punishment by the court. The general Australian community has an interest in the maintenance of law and order in Aboriginal communities.
 5. The fact that D may be subject to traditional punishment in the future is also relevant in sentencing.
 6. A court cannot order or impose traditional punishment not lawful under the general law, and should not give the impression of having done so, thereby condoning (or even possibly producing) illegality.
 7. A court should not prevent a defendant from returning to his own community (with the likelihood or inevitability that the defendant will face some form of traditional punishment) if he wishes to do so, and if the other conditions for his release are met.
- These propositions are not directed at the legality of traditional punishments (in most cases they will be unlawful of D's consent), and they do not entail legalizing or legitimizing traditional punishments. The point is that it is 'necessary to recognize certain facts which exist only by the reason of [the] offender's membership of a

100 See e.g. A CL RP6A, above n.47.

particular group, as Brennan J. stated in one case.¹⁰¹ There would be no point in acknowledging the right of traditionally-oriented Aborigines [to retain their racial identity and traditional lifestyle] if no allowance was 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. The law's continuing disapproval of some traditional punishments does not mean that these cannot be taken account of. 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
- sentencing
- procedural decisions such as on bail applications.

Whether legislative guidance is needed to reinforce the propositions derived from the case-law is another question. Whatever view is taken on this issue, they are a good starting point from which to discuss the specific issues.

(i) Criminal Liability and Aboriginal Customary Law

Three main topics arise here.

- Substantive Criminal Liability: Intent and Criminal Defences. Aboriginal customary law may be relevant in ascertaining or explaining D's state of mind, i. e. as an aspect of the mental element of an offence or in assessing the 'reasonableness' of D's conduct, where this is necessary as an aspect of a particular defence (e. g. provocation, duress, self-defence, etc.). The better view is that there is already scope for taking into account Aboriginal customary law through the application of existing defences. It would, generally speaking, be undesirable to amend such defences specifically to take account of the difficulties experienced by traditionally-oriented Aborigines with the general criminal law. Those difficulties may help to demonstrate the need for the introduction or reform of a defence in general terms (as with diminished responsibility), but that is a matter outside the Commission's Terms of Reference. However it is appropriate that Aboriginal customary law and tradition be taken into account in assessing criminal responsibility, through notions such as 'reasonableness'. The criminal law attempts to reflect measures of subjective guilt or criminality in its assessment of criminal responsibility. To a considerable extent it is now able to do this in cases with customary law elements (except perhaps in cases of direct opposition or conflict of rules). But two specific issues arise:
- Aboriginal Customary Law and 'Reasonableness'. Is some reinforcement of the present law desirable to allow Aboriginal customary law to be taken into account in assessing the 'reasonableness' of conduct? Since the law of provocation seems to be well-settled and there is no clear indication that other defences will follow a different course it may be that no recommendation for legislation is necessary.¹⁰²

101 Neal v. R. (1982) 42 ALR 609, 626, cited by the Federal Court in Jadurin v. R. (1982) 44 ALR 424, 429.

102 See further A CL RP6, above No. 6, 76-88.

- Evidence of Traditional Norms and Responses. If Aboriginal customary law is to be taken into account in assessing the reasonableness of acts or excuses, it will be necessary to allow evidence of it to be adduced, so that traditional concepts of reasonableness may be explained and understood by the jury. It seems that such evidence would now be admissible, although the matter is not clear. To clarify this may perhaps be desirable.

Finally, a partial or complete customary law defence is examined. Although such a defence may be helpful in particular cases, my own tentative view would be against a general defence of this kind, for several reasons. Briefly, these include:

- the availability of procedural alternatives
- the uncertainty of scope or effect of such a defence
- the inapplicability of the notion of a complete defence in this context
- the need to protect victims.

The case for a partial defence may be stronger, in particular since it would attract a sentencing discretion that might not otherwise be available. But it is arguable that the law should set its face, at the level of responsibility, against all homicide and life-endangering assaults, and that a sentencing discretion will exist anyway in all other cases.

- Procedural Alternatives. However there are various procedural alternatives, existing and suggested: these are examined in some detail in Research Paper 6.¹⁰³ They include:

- discretions not to prosecute
- consent to prosecution
- exclusion of cases through a judicial or administrative hearing
- refusal to proceed to a conviction, or discharge without penalty.

Compared with the problems of substantive criminal liability and of sentencing, these procedural methods of dealing with conflicts between Aboriginal customary law have not been discussed in much detail in submissions or evidence to the Commission. Questions which remain to be clarified include:

- whether procedural methods of resolving conflict or avoiding criminal proceedings in appropriate cases are adequate
- whether reinforcement or formalisation is necessary (e. g. through prosecution guidelines or requirements of consent to prosecution)
- whether some mechanism of exclusion or diversion of cases from the criminal justice system would be appropriate
- if so, whether this should take the form of administrative or judicial decision.
- Customary Law as a Ground of Criminal Liability. Finally suggestions have quite frequently been made for incorporating Aboriginal customary law as a ground of criminal liability. This may be appropriate in particular cases (e. g. protection of sacred sites or ceremonies). But it is suggested that it is not desirable as a general rule, especially in relation to offences within a particular group or community, since

103 Above n.6, 113–120.

it may result in depriving that community of control over its own law. Certain problems, especially with local public order, may be assisted by prosecution under existing offences, in appropriate cases. Alternatively, by-law powers associated with local community justice mechanisms may be a way of dealing with the problems.

(f) Community Justice Mechanisms and Other Issues

The range of proposals canvassed in this Paper represent some of the more interesting of those so far dealt with, but they are not exhaustive. Other issues discussed in the Commission's consultative papers have included:

- protection of Aboriginal designs and art-work¹⁰⁴
- various modifications in the rules of evidence and procedure¹⁰⁵
- better provision for proof of Aboriginal customary law.¹⁰⁶

More importantly, a major issue in the Reference is the desirability and feasibility of establishing or supporting Aboriginal communities. This complex and difficult issue – or rather, range of issues – will be the subject of further Research Papers presently being prepared.

5. The Future?

The ALRC's work on this Reference, though by no means completed, is now in its final stage. It is hoped that a Report will be ready for the Government in the first half of 1984. As we have seen, in some areas it is likely that the Report will recommend federal legislation, and the terms of that legislation would be set out in draft legislation appended to the Report, in accordance with the ALRC's usual practice. In other areas what may be necessary is administrative or financial assistance along certain lines, and this will also be indicated. However the Commonwealth can only give directions to the States in the form of legislation, so that much of the work in this area will need to occur by agreement through inter-governmental discussions etc.

The point was made at the beginning of this paper that one of the difficulties of the ALRC on this Reference is that it is not in a position to speak for Aboriginal people, either generally or in particular contexts. The Report will therefore recommend, I believe, that the Government take steps to satisfy itself that any recommendations are at least consistent with the views of, and preferably strongly supported by, the Aboriginal people who will be particularly affected by them. Of course there may be other more general policy considerations which the Government would take into account before making any decision. In engaging in this further process of consultation, which is in the nature of things not one that can be undertaken by the ALRC itself, the Government will

104 See ALR C DP18, above n.75, 17–18.

105 See A CL RP13, above n.61.

106 See A CL RP14, above n.78.

presumably need to have discussions with the NAC and with other Aboriginal organisations with functional responsibilities in this area.

Clearly enough, the step-by-step approach advocated in this Paper as the appropriate one for the Reference necessarily involves the proposition that any ALRC Report will not be a complete or final statement of the position. Again the Report will need to make recommendations for review. It may indeed be desirable that there be a form of continuing involvement and review in the process of recognition of Aboriginal customary law. It is interesting that in Papua New Guinea there is both a Village Courts Secretariat and a Law Reform Commission with continuing responsibilities for oversight of the 'underlying law' including custom. In contrast, the ALRC has no power to engage in an ongoing review on its own initiative in any particular area. Having completed a particular report, the Commission moves on to new, if not greener, pastures. It may well be that some formal body is necessary in this area, although again the contradiction between bureaucracy and customary law presents itself. But if so, I very much doubt that it could, or should, be the ALRC.

It would be wrong, however, to end on a negative note. The Aboriginal customary law reference has been and continues to be a fascinating and challenging one. It is an important part (though still a subsidiary part) of a more general process of discussion on the part of Australians generally, and between non-Aboriginal and Aboriginal Australians, on the terms of their future association.