BACKGROUND PAPER 1

ABORIGINAL COMMUNITIES AND ABORIGINAL LAW IN THE NORTHERN TERRITORY

This paper provides the factual basis for the Committee of Inquiry talking about Aboriginal customary law in the Northern Territory.

Background Paper 1: Aboriginal communities and Aboriginal law in the Northern Territory (Darwin: NTLRC 2003)
prepared for Committee of Inquiry into Aboriginal customary law
by the Northern Territory Law Reform Committee

Northern Territory Law Reform Committee
GPO Box 1535 Darwin NT 0801
Tel: 08 8999 6243 Fax: 08 8999 7095

COMMITTEE ON ABORIGINAL CUSTOMARY LAW

Members of the Northern Territory Law Reform Committee

Co-Chair: Honourable Austin Asche AC QC

Members:

Peter Boyce
Richard Bruxner
Stephen Gray
Alison Hanley
Max Horton
John Hughes
Anna McGill
Alison Worsnop

Other Northern Territory Law Reform Committee members that assisted with the Inquiry:

Hugh Bradley, Chief Magistrate
Barbara Bradshaw
Dr Philip Jamieson

Aboriginal members appointed by the Attorney-General

Co-Chair: Yananymul Mununggurr

Members:

Gwen Brown
Marjorie Limbiari
Roy Hammer
Robert Hoosan
Agnes Palmer
Warren Williams
Mary Yarmirr
Galarrwuy Yunupingu AM

Support provided by Department of Justice:

Principal Legal Consultant: Stephen Herne (from February 2003)
Consultant: Ken Brown (until February 2003)
Executive Officer: Faith Woodford
Administrative Support: Julie Caswell and Lynn Finlay

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1 GENERAL BACKGROUND

(a) Encounter, conflict and separation

Initial government policy in Australia with respect to Aboriginal people was developed in response to situations of encounter and conflict, where European settlements and pastoralists, miners and others were competing for land occupied by various Aboriginal communities. This lead to a policy by which many Aboriginal people were displaced from their traditional lands and encouraged or forced to move to lands set aside for them.[1]

(b) Assimilation

In the belief that European culture was superior, it was the general approach of Australian and other western governments from the 1880's on to adopt policies that were specifically meant to replace Aboriginal culture: to encourage or coerce Aboriginal people to adopt western sensibilities. This policy was manifested in Australia,[2] Canada[3] and the USA[4] in all spheres of government and non-government activity.

The policy of "assimilation" was formally officially adopted in 1937, following a conference of State and Federal ministers. Although the word "assimilation" only became common in the 1930s, the philosophy of assimilation pervaded the work of the various Aboriginal Protection Boards established in the 1880s.[5]

(c) Recognition and respect

From the late 1960's on, the general approach of Australian governments was to recognise and respect the traditional culture of Aboriginal people. The 1967 constitutional referendum to allow the Commonwealth to legislate with respect to Aboriginal people (passed May 1967) is often said to mark the beginning of this change in policy, together with the beginning of the land rights movement at Wave Hill in 1966 where Aboriginal stockmen and women walked off the job in protest at their working conditions and wages, and sought the return of some of their traditional land. However, this change in policy was part of a more general recognition that colonial notions were no longer appropriate.

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[1] See generally Rowley CD, The Destruction of Aboriginal Society (Ringwood: Penguin Books 1972).
[2] Human Rights and Equal Opportunity Commission, Bringing Them Home: Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from their Families (Sydney: HREOC, 1997). The Report noted that, in the period from 1910 to 1970, between 10 and 30 per cent of indigenous children were removed from their families.
[3] Royal Commission on Aboriginal Peoples, Gathering Strength: Final Report (Ottawa: Canadian Royal Commission on Aboriginal Peoples, 1996) 5 Volumes, esp Volume 1.
[4] Frederick Hoxie, A Final Promise: The Campaign to assimilate the Indians, 1880-1920 (University of Nebraska Press, 1984; 2nd edition 2001).
[5] R Chisholm, "Black Children: White Welfare? Aboriginal Child Welfare Law and Policy in New South Wales" (Social Welfare Research Centre, University of NSW, Reports and Proceedings No 52, 1985) at 20.This view is reflected in Hasluck P Shades of Darkness: Aboriginal Affairs 1925-1965 (Melbourne: Melbourne University Press, 1988) p 131.

This is the policy today.[6] Within this context, Australian governments have explored the extent to which traditional law is a significant influence on Aboriginal life, and the extent to which government policy and Australian law should recognise Aboriginal customary law.

[6] Prime Minister John Howard, "Perspectives on Aboriginal and Torres Strait Islander Issues" [Menzies Lecture 13 December 2000].

2 ABORIGINAL COMMUNITIES

The Australian indigenous population is as follows:[7]

	Number	Percentage
New South Wales	135,300	2.0
Victoria	27,900	0.6
Queensland	126,000	3.5
Western Australia	25,600	1.7
South Australia	66,100	3.5
Tasmania	17,400	3.7
Northern Territory	57,600	28.8
ACT	3,900	1.2
Total	460,100	2.4

(a) Demographic Profile

The majority of indigenous Australians live in capital cities and regional centres. The indigenous population is increasingly urbanised: from 44% of indigenous people in 1971 to 72.6% by 1996.[8] However, Aboriginal people comprise a minority of the total Northern Territory population inside urban areas and a majority outside urban areas. Two-thirds of all Aboriginal people in the Northern Territory live outside urban areas in small communities on Aboriginal land or special purpose leases or on pastoral leases.[9] In the Northern Territory, 70 % of indigenous people speak a language other than English at home.[10]

The history of Aboriginal settlement in the Northern Territory follows a standard Australian pattern: Aboriginal communities operating as essentially autonomous and self sustaining entities before European contact, followed by dispersal and dispossession in urban and some pastoral areas, then the establishment of mission settlements, town camps and outstations. This pattern of settlement and interaction established patterns of economic power between the Aboriginal and non-Aboriginal populations. Additionally, some cultural models of belief or behaviour were impressed, particularly in mission settlements, on Aboriginal children and adolescents, that did not reflect traditional law or Aboriginal culture generally. [11]

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[7] Population Distribution Aboriginal and Torres Strait Islanders, 2001 (Canberra: Australian Bureau of Statistics, 2002) p 24.

[8] This increase can be accounted for by natural population growth, migration from rural areas, changes in statistical classification of some smaller urban centres and greater representation of mixed origin families: Population: Special Article – Aboriginal and Torres Strait Islander Australians: A Statistical Profile from the 1996 Census in Year Book Australia, 1999.

[9] See generally Population Distribution Aboriginal and Torres Strait Islanders, 2001 op cit. Paul Memmott and Mark Moran, Indigenous Settlements of Australia [Australia: State of the Environment Second Technical Paper Series (Human Settlements), Series 2] (Canberra: Department of the Environment and Heritage, 2001) provides the most comprehensive discussion of this topic.

[10] Information from NT Aboriginal Interpreter Service. As of June 2003, the Service had 250 active interpreters providing on-site and telephone services throughout the Territory in 104 Aboriginal languages.

[11] For example: pastoralism and European settlement in central Australia dislodged the Western Arrernte from the 1870s. A Lutheran mission, Hermannsburg (now Ntaria), was established in 1877 and remained

The ability of Aboriginal people to practice the rights and responsibilities required under traditional law depends substantially on them having access to their traditional land. Accordingly, Aboriginal people not living on their own land, as is the case with respect to some towns and town camps, community living areas on pastoral leases and even a few Aboriginal communities on Aboriginal Land Trust land, are specially disadvantaged in this regard.

Northern Territory Population:

Aboriginal	56,900
Torres Strait Islander	600
Non-indigenous	142,500
Total	200,000

Aboriginal population[12]

Location	Number	% of total
Northern		
Darwin	9691	9.6
Galiwinku	1377	93.2
Marthakal Homelands	165	98.2
Gapuwiyak (Lake Evella) & os.	743	91.5
Numbulwar & os.	665	92.2
Ramingining & os.	754	93.7
Milingimbi & os.	1030	93.6
Yirrkala	491	77.4
Nhulunbuy (T)/Laynha Homelands	1179	25.5
Groote Eylandt	1521	63.2
Tiwi Islands	2045	91.9
Wadeye & os.	1396	92.3
Nauiya Nambiyu	308	83.9
Douglas/Daly/Pine Creek	886	57.3
Kakadu/Marrakai	449	24.6
Maningrida	1382	84.8
Maningrida os.	477	99.4
Kunbarlianjnja-Oenpelli	753	88.4
Wurrawi & os.	369	97.1
Minjilang & os.	249	84.1
Kunbarlianjnja os.	269	96.8
Lower Northern		
Katherine (T): town camps	399	96.1
Katherine (T): excl. town camps	1432	18.5
Katherine hinterland/Binjari	504	42.0
Barunga/Mamuallaluk	400	94.6

until 1982. See Austin-Broos D, " 'Right Way' 'Til I Die': Christianity and Kin on Country at Hermannsburg" in Olson (ed) Religious Change, Conversion and Culture (Sydney: Sydney Association for Studies in Society and Culture 1996) pp 226-253.

[12] Population Distribution Aboriginal and Torres Strait Islanders, 2001 (Canberra: Australian Bureau of Statistics, 2002) Table 11.

Lajamanu & os.	721	88.2
Walangeri Ngumpinku & os.	297	59.8
Kalkarinji/Dagaragu & os.	589	82.0
Bulman (Gulin Gulin) & os.	316	92.9
Yugul Mangi	1277	91.6
Borroloola/Robinson River	1095	66.2
Ngarliwurru-Wuli & Wardaman os./Timber Creek	438	62.3
Beswick (Wugularr)	323	90.5
Upper Central		
Tennant Creek (T): town camps	600	100.0
Tennant Creek (T): excl. town camps	490	22.7
Elliot & os.	369	70.4
Julalikari Buramana os./Canteen Creek/Tara	909	70.2
Alpurrurulam	346	94.8
Ali Curung	472	94.6
Central		
Alice Springs (T): town camps	964	98.9
Alice Springs (T): excl. town camps	3043	12.8
Alice Springs outskirts	666	81.1
Petermann	1168	42.4
Tanami	2639	84.7
Sandover	590	70.0
Hermannsburg (Ntaria) & os.	909	92.9
Anmatjere (Ti Tree)/Wilora	788	87.3
Willowra	315	93.5
Urapuntja os.	691	94.9
Ampilatwatja & os.	393	92.7
Santa Teresa (Ltentye Apurte)	482	89.6
		?

(i) Urban Areas[13]

The Aboriginal population of urban areas covers Aboriginal people living within towns and Aboriginal people living in town camps. For example, in Alice Springs, about 3,500 Aborigines live in the town and about 1,500 people live in town camps or the town outskirts. About another 6,000 Aboriginal people, living in nearby communities, regularly visit Alice Springs for social reasons, and to access urban services, such as business or medical services.

[13] See the House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs, Report "We can do it - The needs of urban dwelling Aboriginal and Torres Strait Islander peoples" (Canberra, 2001). The focus of the inquiry was on housing and employment issues generally, access to and appropriateness of mainstream services, involvement in decision-making and maintenance of culture. The Commonwealth government (Government Response, September 2002) supported the general direction of the Report on capacity building, supporting local decision-making and responsibility, improving cross-portfolio and cross-jurisdictional coordination and some other matters.

(ii) Town Camps[14]

Town camps comprise groups of people with and without strong clan affiliations, as well as groups of people with varying levels of participation in the daily life of the urban community near the camp. Generally these areas have now become permanent Aboriginal residential areas with basic infrastructure, though still referred to as "town camps". However, a percentage of the population will be people from other Aboriginal communities visiting the camp, for the purpose of accessing the urban services, or for social or other reasons. Camps exist on the fringes of Darwin (5 camps[15]), Alice Springs (18-20 camps[16]), Katherine (3 camps[17]), Tennant Creek and Elliott. Additionally, there are other temporary "camps" that are not permanent or lawful.[18]

Aboriginal town camp organisations in effect provide local government services.[19] Generally ATSIC provides the majority of funding. Tangentyere Council is responsible for service and infrastructure delivery to town camps around Alice Springs,[20] Julalikari in Tennant Creek,[21] Kalano in Katherine[22] and Gurungu in Elliott.[23] Present living standards in many town camps are regarded as inadequate for a satisfactory life.[24]

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[14] Specific town camp studies are: Alice Springs (Drakakis-Smith D, "Alice through the looking glass: marginalisation in the Aboriginal town camps of Alice Springs", (1980) 12 Environment and Planning 427; Memmott P, "An Aboriginal Culture in Suburbia" in Ferber Healy & McAuliffe (eds) Beasts of Suburbia: Re-interpreting Cultures in Australian Suburbs (Melbourne: Melbourne University Press, 1994) pp 53-75); Darwin (Sansom B, The Camp at Wallaby Cross, Aboriginal Fringe Dwellers in Darwin (Canberra: Australian Institute of Aboriginal Studies, 1980); Katherine and Tennant Creek (Lea J, "South of the Berrimah line: government and the Aboriginal community in Katherine and Tennant Creek after World War Two", in Loveday and Webb (eds) Small Towns in Northern Australia (Darwin: NARU 1989) pp 189-204.

[15] Knuckey's Lagoon, Railway Dam, 15 Mile, Bagot Aboriginal Community and Kulaluk Community are held under Crown leases and are serviced by the Aboriginal Development Foundation (ADF).

[16] The names are listed in the Annual Reports of the Tangentyere Council.

[17] Myilli Brumby (Kalano), Rockhole and Gorge Camp/Walpiri.

[18] The Aboriginal and non-Aboriginal occupants of these camps are referred to as fringe dwellers, itinerants or long grassers. See also Fantin S and Memmott P, The 'Long Grassers': A Strategic Report on Indigenous 'Itinerants' in the Darwin and Palmerston Area (Darwin: Territory Housing/ATSIC, 2001).

[19] Bern J, "The politics of a small Northern Territory town: a history of managing dependency" in Loveday and Webb op cit pp 165-176.

[20] Tangentyere Council services approximately 1000 Aboriginal people who reside in 18 Special Purpose Leases within the boundaries of the Town of Alice Springs. Each "camp" is separately incorporated under the Associations Incorporation Act (NT) or the Aboriginal Councils and Associations Act 1976 (Cwth). There are some 200 houses in the camps.

[21] Julalikari Council Aboriginal Corporation, incorporated under the Aboriginal Councils and Associations Act, is an elected body representing the whole Aboriginal community of Tennant Creek. Julalikari is the largest employer in the Barkly region, offering CDEP to 190 people in Tennant Creek, and 90 in outlying communities, and employs about 60 permanent staff.

[22] Kalano Community Association Inc provides housing and related services to Aboriginal residents of four communities and within the urban population of Katherine.

[23] Gurungu Council Aboriginal Corporation services the township and outstations.

[24] It is not possible to generalise. There are "quiet camps" which are usually small and consist of one mob, and larger and overcrowded camps: " C … is really crowded - Pintubi, Pitjantjatjarra, Arrente, Luritja are squashed in that place" quoted Bolger A, Aboriginal Women and Violence (Darwin: ANU NARU, 1991).

By way of illustration, the population of the three town camps in Katherine is as follows:[25]

	INDIGENOUS			NON-INDIGENOUS			TOTAL		
	Male	Female	Total	Male	Female	Total	Male	Female	Total
Total persons	215	200	415	8	3	11	223	206	429
0-4 years	23	17	40	0	0	0	23	17	40
5-14 years	37	49	86	3	0	3	40	49	89
15-24 years	42	39	81	3	0	3	45	42	87
25-44 years	77	68	145	0	0	0	77	68	145
45-64 years	26	24	50	3	0	3	29	24	53
65 years and over	10	3	13	0	0	0	10	3	13
Speaks Aboriginal language	148	146	294	0	0	0	148	146	294
English only	48	44	92	7	3	10	55	47	102
Traditional Religion	12	5	17	0	0	0	12	5	17
Attending educational institution:									
Aged 5-14 years	16	19	35	3	0	3	19	19	38
Aged 15-19 years	4	3	7	0	0	0	4	3	7
Highest level of schooling completed:									
Year 10 or below	103	85	188	6	3	9	109	88	197
Year 11 to 12	15	19	34	0	3	3	15	22	37
Still at school	7	5	12	0	0	0	7	5	12
Never attended school	15	14	29	0	0	0	15	14	29
Private dwellings:									
Separate house	197	186	383	7	3	10	204	189	393
Improvised home, sleeps out, tent	6	8	14	0	0	0	6	8	14
Other	12	6	18	3	0	3	18	9	27
Total	215	200	415	10	3	13	228	206	434
Non-private	0	0	0	0	0	0	0	0	0

(iii) Aboriginal communities

The average population of Aboriginal communities in the Northern Territory is around 300-600. Communities are separated from each other by considerable distances and are mostly a day's drive or more from the nearest towns. Roads are generally poor. Communities generally have schools, health clinics and essential services. Police and substantial medical services are usually a significant distance away.

[25] 2001 Census: Indigenous Profile Katherine (T): town camps (IARE32001) (Australian Bureau of Statistics, Canberra 2002). These figures released in November 2002 are revised from the Census data cited earlier, showing an indigenous population of 399 for Town Camps.

Most Aboriginal communities have a restricted economic base and service providers there are usually the main source of employment. [26] Work is also done under the Community Development Employment Scheme (CDEP). It has been estimated that, discounting CDEP employment, the unemployment level in Aboriginal communities in the Northern Territory is 85%.[27]

Community government structures[28]

After self-government in 1978, the Northern Territory enacted legislation which provided for community government councils, now provided for by the *Local Government Act*. This, together with the *Associations Incorporations Act* (NT) and *Aboriginal Councils and Associations Act* 1976 (Cwth) provides forms of incorporation for Aboriginal community organisations. About half the 62 local councils in non urban areas are community government councils incorporated under the *Local Government Act*.[29] The others are incorporated councils or associations.

Part 5 of the *Local Government Act* provides for the establishment of a community government scheme, the constitution of community government areas and the election of community government councils to perform certain functions in relation to those areas. Section 97(2) sets out the community government council functions for which a community government scheme may provide.[30] Before a community government

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[26] Taylor J and Roach L, The relative economic status of indigenous people in the Northern Territory, 1991-96 Discussion Paper 156 (Canberra: Centre for Aboriginal Economic Policy Research ANU, 1998) analysed the 1991-1996 census data on Aboriginal employment. Employment was heavily dependent on CDEP programs. Indigenous income derived from employment was 55.5 %, well below the non-indigenous level of 92 %. However, it is also clear that land rights have lead to increased economic opportunity: "[E]conomic activity has been stimulated by land rights but in ways that are not amenable to measurement by mainstream social indicators. Examples of this abound in the literature and include subsistence activities (hunting, fishing and gathering) activities, art and craft manufacture, land management and ceremonial duties.": J Taylor, The social, cultural and economic costs and benefits of land rights: an assessment of the Reeves analysis (CAEPR, ANU 1999) being a submission to the House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs Review of "Building on Land Rights for the Next Generation: The Review of the Aboriginal Land Rights (Northern Territory) Act 1976" by John Reeves.

[27] Senate Standing Committee on Community Affairs Inquiry into Poverty and Financial Hardship – see transcript 29 July 2003 Darwin. See Morphy and Sanders (eds) The Indigenous Welfare Economy and the CDEP Scheme (Canberra: Centre for Aboriginal Policy Research 2001).

[28] Mowbray M, "Contemporary colonial administration: the Northern Territory's community government schemes and Aboriginal development", in Loveday and Webb op cit pp 144-155; Westbury N and Sanders W, Governance and service delivery for remote Aboriginal communities in the Northern Territory: challenges and opportunities (CAEPR Working Paper No. 6/2000).

[29] Alpurrurulam CGC, Angurugu CGC, Anmatjere CGC, Arltarlpilta CGC, Barunga Manyallaluk CGC, Belyuen CGC, Binjari CGC, Borroloola CGC, Coomalie CGC, Cox Peninsula CGC, Daguragu CGC, Elliott District CGC, Jilkminggan CGC, Kunbarllanjnja CGC, Lajamanu CGC, Ltyentye Apurte CGC, Marngarr CGC, Mataranka CGC, Nauiyu Nambiyu CGC, Numbulwar Numburindi CGC, Pine Creek CGC, Tapatjatjaka CGC, Tiwi Island Local Government, Timber Creek CGC, Walangeri Ngumpinku CGC, Wallace Rockhole CGC, Watiyawanu CGC, Wugularr CGC, Yuendumu CGC, Yugul Mangi CGC.

[30] (2) Subject to this Part, a scheme may contain a provision for or in relation to the performance of a function by a community government council relating to –

(a) animal control;

(b) animal impounding;

(c) commercial development;

(d) communications;

(e) community amenities;

scheme can be set up in relation to a particular area, there must be an application to the Minister for Local Government by at least 10 residents of the area. The Minister then requests the Administrator to establish a community government council (s.100). A community government scheme must be prepared in consultation with the residents of the area to which the scheme relates and may not be approved by the Minister unless the Minister is satisfied that a "substantial majority" of the residents are in favour of the matters contained therein (s.105).

Community Government Councils, particularly those on Aboriginal land, can take on a wide range of functions that may include Centrelink Agency, CDEP, housing construction, maintenance and rental, health clinic, essential services, community policing and community corrections.

Unlike the situation with incorporated associations, Community Government by-laws apply to <u>all</u> residents and visitors to a Community Government area, and are enforceable by Northern Territory Police.

Community Government does not impose a uniform structure on each community, as with municipal councils. The scheme was designed so that Aboriginal communities could develop their own form of local government. Schemes are able to embody traditional concepts and principles and reflect individual communities wishes. Communities wishing to use a traditional selection of elders as the basis for selecting council members, rather than using a voting system involving a ballot, are able to do so. Community government has equal status with municipal councils for the purpose of government funding eligibility.

Most land over which community government exists is land vested in an Aboriginal Land Trust.[31] On Aboriginal land, Councils do not charge rates but many have introduced service charges which go towards the provision of local government services.

Despite the legislative aspiration, community government structures may not accord with the ways of traditional decision making in Aboriginal culture, and such structures may represent a parallel system of decision making in the one community.[32] A model of

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(f) education or training;
(g) electricity supply;
(h) garbage collection and disposal;
(j) health;
(k) housing;
(m) community employment;
(n) roads and associated works;
(p) sewerage;
(q) water supply;
(r) welfare;
(s) raising of revenue in accordance with this Part; or
(t) such other matters as are approved by the Minister.

[31] See the discussion of the Aboriginal Land Rights (Northern Territory) Act in Background Paper 3: Legal Recognition of Aboriginal customary law.

[32] "[M]any of the local governments now in place in the Territory are seen as lacking legitimacy by their Aboriginal constituents often apparently because the 'right' people are not making decisions": Coles D, "The Marriage of Traditional Aboriginal and Western Structures in Local Government in the Northern

"dispersed governance" for Aboriginal communities, which may be a fact of life for many Aboriginal communities, may be more appropriate.[33]

(b) Significant issues affecting Aboriginal communities

From now on, references to Aboriginal communities will include town camps. The recognition of traditional law is relevant to only some of the significant issues facing Aboriginal communities.

There is presently little accurate information of the effectiveness of the delivery of government services to Aboriginal people or Aboriginal communities.[34] The Royal Commission into Aboriginal Deaths in Custody examined some of the underlying issues that lead to conflict between some Aboriginal people and the Australian criminal justice system.[35] The Northern Territory has reported on its programs to deal with the causes of Aboriginal deaths in custody.[36]

(i) Health

The problem of Aboriginal health is a complex issue. In Australia, the western health system has been imposed on top of traditional systems of health management. However, these traditional systems have survived to a large extent in the Northern Territory.[37] The life expectancy of persons of indigenous origin compared to the life expectancy of the total Australian population is about 20 years less.[38] The high Aboriginal adult mortality

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Territory" paper delivered to Institute of Public Administration Australia Conference, 8–10 September 1999 Darwin at 6.

[33] This is argued by Rowse T, Remote Possibilities: The Aboriginal Domain and the Administrative Imagination (Darwin: NARU, 1992) p 89. Also note Westbury and Sanders op cit: "Many Northern Territory remote Aboriginal communities already have a form of multi-cameralism or pluralism in their governance structures. This may include, for example, having Land Trusts of traditional owners supported by the land councils; royalty associations servicing traditional owners and other Aboriginal residents; and local councils representing residents working on a range of other matters in relation to numerous Commonwealth and Territory agencies (not to mention a range of other incorporated associations which deliver government type services)."

[34] Westbury and Sanders op cit. The exceptions are information in the annual reviews of Commonwealth-State service provision by the Productivity Commission.

[35] Report of the Royal Commission into Aboriginal Deaths in Custody, 5 Volumes (Canberra: AGPS, 1992); Langton M, Ah Matt L, Moss B, Schaber E, Mackinolty C, Thomas M, Tilton E and Spencer L, 'Too Much Sorry Business—The Report of the Aboriginal Issues Unit of the Northern Territory' in Vol 5 Appendix D (I) pp 275–512 [Langton].

[36] See Background Paper 3: Legal Recognition of Aboriginal customary law.

[37] Devanesen D, Traditional Aboriginal Medicine and Bicultural Approach to Health Care in Australia's Northern Territory, Proceedings of the 2nd National Drug Institute, Alcohol and Drug Foundation, Canberra 1985; Devanesen D, Traditional Aboriginal Medicine Practice in The Northern Territory, Paper International Symposium on Traditional Medicine Better Science, Policy and Services For Health Development 11-13 September 2000 Japan.

[38] The life expectancy of persons of indigenous origin born in the 1991-96 period was 57 years for males and 62 years for females. This compared to the life expectancy of total Australian males and females of 75 years and 81 years respectively: Experimental Estimates of the Aboriginal and Torres Strait Islander Population, 30 June 1991 - 30 June 1996 [3230.0] (Canberra: Australian Bureau of Statistics, 1997). By the next survey, indigenous male life expectancy had fallen further. The median age at death for indigenous people in 2001 was 54 years, around 24 years less than the median age for all deaths (79 years). Indigenous life expectancy at birth was 56 years for males compared to 77 years for all Australian males and 63 years for females compared to 82 years for all Australian females. The life expectancy of indigenous people in both New Zealand and the United States of America is higher than for indigenous

rates through heart disease, respiratory disease and injury and other causes are well known and government has developed specific strategies to deliver health services to Aboriginal people and Aboriginal communities in the Northern Territory.[39]

Community health is the outcome of total service delivery: adequate essential service infrastructure,[40] adequate housing,[41] adequate education, and adequate economic and social opportunity. Health is the most accurate measure of the success or failure of the delivery of government services, including law and justice services, to Aboriginal people. The Committee of Inquiry has generally recommended that government take into account the effect of traditional law issues on the ability of government to delivery these services.[42]

(ii) Education

The Collins Report,[43] an evaluation of Aboriginal education in the Northern Territory, identified failures in the delivery of education services to Aboriginal children in 1999. Government has developed specific strategies to deliver education services to

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Australians, and the difference to the total population is not as great as in Australia. In 1995-1997 the Maori life expectancy at birth was 67 years for males and 72 years for females, respectively 7 and 8 years respectively lower than the total population. In 1996-1998 Native Americans had a life expectancy at birth of 67 years for males and 74 years for females, respectively 6 and 5 years lower than the total population: Deaths, Australia [3302.0] (Canberra: Australian Bureau of Statistics, 2001).

[39] See the National Aboriginal Health Strategy, the Northern Territory Aboriginal Health Policy (DHCS 1996), The Northern Territory Food and Nutrition Policy 1995-2000, The Aboriginal Public Health Strategy and Implementation Guide 1997-2002 (THS Darwin 1998); Devanesen D and Briscoe J, The Health Worker Training Program in Central Australia [The Lambie-Dew Oration], Sydney University Medical Society 1980. The Katherine West Health Board commenced in July 1998. The Board manages eight health clinics: Lajamanu, Kalkaringi, Daguragu, Yarralin, Bulla, Timber Creek, Pigeon Hole and Mialuni serving a population of 3,000 people and is funded through the Primary Health Care Access Program. Clinics are staffed by nurses and Aboriginal health workers, and doctors visit once a week. Doctors are living at Lajamanu, Kalkaringi and Timber Creek. Management structure is made up of 18 community representatives from the region. NT HealthConnect (a trial program extended to June 2005) enables the change of information between health clinics across 300,000 square kilometres.

[40] The Territory has the funding responsibility for water, electricity and sewerage services for 72 communities (with another seven communities partially funded through being connected to the electricity or water grid of an adjacent larger community), with the Commonwealth providing funding for all other communities. As a service provider to the Department of Community Development Sport and Cultural Affairs, the Power and Water Corporation delivers water, electricity and sewerage services for Territory funded communities and the Department of Infrastructure, Planning and Environment delivers construction and maintenance services for airstrips and barge landings.

[41] The Indigenous Housing Authority of the Northern Territory (IHANT) is a jointly funded partnership between the Northern Territory and the Commonwealth (represented by ATSIC and the Department of Family and Community Services). The functions of IHANT are to develop and review annually a five year strategic plan for the delivery of housing and related infrastructure to Aboriginal communities.

[42] See the Report of the Committee of Inquiry, Recommendation 3. By way of example, Section 8 of the Mental Health and Related Service Act provides that the assessment and treatment of Aboriginal persons with mental health problems is "appropriate to, and consistent with, the person's cultural beliefs, practices and mores" and the views of the persons family and community are to be taken into account.

[43] "Learning lessons: An independent review of Indigenous education in the Northern Territory" (NT Department of Education, 1999) (the Collin's Report). The Report made 151 recommendations toward better education outcomes, with Aboriginal health identified as an area for special attention. The percentage of Year 5 NT students achieving national reading in English benchmarks in 1998 were as follows: All students urban 71%; Non-Indigenous students urban 78%; Indigenous students urban 36%; Indigenous students non-urban 4%.

Aboriginal people and Aboriginal communities in the Northern Territory.[44] The Committee of Inquiry has generally recommended that government take into account the effect of traditional law issues on the ability of government to delivery these services.[45]

(iii) Protection of Aboriginal culture

Aboriginal culture has been influenced by western cultures through the presence of television, the consumer life style of townships, the education system and the delivery of government services. A view of Aboriginal people put to the Committee of Inquiry has not been to reject or ignore Australian law and culture, but to seek means for "two laws working together"[46] to enable, not just an accommodating response to the impact of Australian society, but a means to preserve Aboriginal culture.

The development of community knowledge projects[47] is a means to preserve relevant traditional law. This process assists not just the protection of specific traditional law and culture – where traditional knowledge holders in a community become valued by young people for the knowledge they can impart – but, by the incorporation of such knowledge into other areas, such as education, it can assist those outcomes.

(iv) Law and justice issues

Government has a general policy of assisting Aboriginal and non-Aboriginal communities to develop crime prevention strategies.[48] The extent to which it may be appropriate to recognise traditional law for the purpose of responding to law and justice issues in Aboriginal communities is the subject of Background Paper 3: Legal Recognition of Aboriginal customary law and the Report of the Committee of Inquiry. The general recommendation of the Committee of Inquiry is that Aboriginal communities should be assisted to develop their own strategies to deal with these issues.[49] Such strategies may involve the use of the general Australian law, the use of both the general law and traditional law, or the use solely of traditional law.

Additionally, people in Aboriginal communities are often required to comply with two sets of law: traditional law and Australian legal obligations: see Appendix B. This obligation extends across the whole range of Australian law. However, it is at its most

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[44] The Indigenous Education Strategic Plan 2000-2004 (Northern Territory Department of Education Employment and Training 2000). See also Partners in a Learning Culture - A blueprint for implementing the National Strategy for Aboriginal and Torres Strait Islander People in vocational education and training (ANTA, Brisbane 2000), developed to support Partners in a Learning Culture - Australia's National Aboriginal and Torres Strait Islander Strategy for vocational education and training 2000-2005. (ANTA, Brisbane, 2000), both by the Aboriginal and Torres Strait Islander Peoples Training Advisory Council.
[45] See the Report of the Committee of Inquiry, Recommendation 3.
[46] See the Report of the Committee of Inquiry, Chapter 5.
[47] Discussions with Richard Gandhuwuy (March 2003) and others concerning the Galiwinku Knowledge Centre, a digital database to store songs, dances, words, photographs, and other items of cultural significance. See also Rothwell N, "Ancient traditions preserved" The Australian, 10 June 2003.
[48] NT Crime Prevention provides support and services and assists the Regional Crime Prevention Councils. There is also the NT Crime Prevention Grant Scheme.
[49] See the Report of the Committee of Inquiry, Recommendation 4.

significant with respect to matters covered by conflicting requirements of Australian criminal law and traditional law.

The two main issues of concern that were put to the Committee of Inquiry with respect to the maintenance of law and order in Aboriginal communities were alcohol abuse and family violence. In general, these were not regarded as issues where traditional law necessarily had an exclusive role to play. These problems were often regarded as effects of the absence of traditional law (and Australian law), rather than the effect of the inherent inability of traditional law to grapple with them.

Alcohol abuse

It was put to the Committee by many Aboriginal and non-Aboriginal people that alcohol abuse was the "number 1" underlying problem preventing both the proper implementation of traditional law and the adequate protection of human rights in Aboriginal communities. Allied to this is the issue of general substance abuse.

The alcohol economy in the Northern Territory and the efficacy of controls over the purchase of alcohol (with the additional problem of grog-running to Aboriginal communities) has been noted in various reports.[50] There are a number of well known issues relating to the misuse of alcohol that are of great concern to all Australian communities: poor health and education outcomes, high levels of policing; high levels of admissions to hospital because of accident or injury and violence, vandalism and property crime.

The economic and social costs to a community of substance abuse are considerable. For example, for the entire population of Alice Springs (approximately 25,400), during the year 1998-1999:

> 2,999 people were arrested for alcohol related offences; 4,400 people were placed in protective custody; the Alice Springs Hospital Accident and Emergency Section dealt with 1,341 admissions that were alcohol-related, where, of these, 442 involved assault. At the same time, the Drug and Alcohol Services Association dealt with 6,918 admissions to the Sobering Up Shelter, the Tangentyere Night Patrol undertook 4,380 alcohol-related incidents and at a bare minimum, Congress dealt with 8,000 alcohol-related medical consultations.[51]

The possibility that Aboriginal Community Justice Plans may be able to be used as a mechanism to prevent alcohol related violence is noted in the Committee's Report.[52] Violence is intensified by alcohol abuse, so that it is a constant problem in communities where alcohol use is not adequately controlled.

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[50] P d'Abbs, Alcohol use in the Northern Territory: a statistical summary (Darwin: NT Department of Health and Community Services, 1991), Denis Gray, Comment on Dollars Made from Broken Spirits, (National Drug Research Institute Curtin University of Technology, 2000): "In Alice Springs excessive consumption is a problem for both the Aboriginal and non-Aboriginal populations of the region and should be dealt with as such."

[51] Hauritz, McIlwain, Finnsson, Dollars Made From Broken Spirit: Determining its Well-Being and Responsible Alcohol Management as Part of Everyday Life (Alice Alcohol Representative Committee, 2000). The figures cited include double counting for repeat clients/offenders.

[52] See the Report of the Committee of Inquiry, Chapter 6.

It has been argued that alcohol abuse is not a cause but a symptom of further underlying problems, such as dispossession, poverty due to lack of genuine economic opportunity, lack of education in English (and thus ability to access the benefits of Australian society in general). This is true in the sense that there is no single cause. However alcohol abuse plays a primary role in Aboriginal people coming within the criminal justice system.

Government and many Aboriginal communities, jointly or separately, have developed strategies to combat alcohol abuse.[53] The Northern Territory has had a long history of night patrols. The recent consultations for the project to develop common night patrol protocols brought together some 78 communities and over 350 key night patrol/Community warden scheme workers, as well as other stakeholders, to develop community managed solutions in a series of regional workshops.[54]

Violence[55]

Violence may occur in the home or on the street or in drinking areas. One must therefore distinguish between "public" and the "private" violence. However, all such violence may be intensified by alcohol or substance abuse.

Public violence, which victims may therefore be able to anticipate and avoid, will usually stem from alcohol or substance abuse at drinking sessions or social gatherings, particularly if there are unresolved issues of conflict between the parties. Additionally, elements of feud arising from long standing and unresolved traditional law issues may be a cause of violence. It has been pointed out that such "long simmering" disputes, by the sheer number of people involved directly or indirectly, can exacerbate both public and private violence.[56]

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[53] For example, the Julalikari Night Patrol is a community policing program aimed at breaking the cycle of violence associated with alcohol abuse. Following a night patrol, a community meeting is held to attempt to mediate any related dispute and admonish perpetrators in a culturally appropriate way: Peter Grabosky and Marianne James (eds) The Promise of Crime Prevention: Leading Crime Prevention Programs (Canberra: Australian Institute of Criminology, 1995).

[54] See Scott Mitchell, "Night Patrols" in Report of NPY Lands Tri-Jurisdictional Justice Initiatives Roundtable (10 & 11 June 2003 Alice Springs).

[55] See generally Bolger, op cit (dealing specifically with the Northern Territory) at 4: "When discussing violence against Aboriginal women, it should be noted that while it is important to distinguish between traditional and non-traditional violence, in practice it is often difficult to do so. Strictly speaking traditional violence refers to clearly defined and controlled punishments which were applied in cases where Aboriginal Law was broken, many of which are still in use in communities where traditional Law is followed. However, it may sometimes be used to describe violence which is not prescribed by Aboriginal Law but which is condoned as a response to socially disapproved behaviour" and at 50: "One result of this [Aboriginal women's changed role today] is that they are now subject to violence from their own men of a kind which would not have been countenanced in traditional society. As one woman remarked; 'There are now three kinds of violence in Aboriginal society—alcoholic violence, traditional violence, and bullshit traditional violence'. Women are the victims of all three. By 'bullshit traditional violence' is meant the sort of assault on women which takes place today for illegitimate reasons, often by drunken men, which they then attempt to justify as a traditional right"; Memmott, Stacy, Chambers and Keys, Violence in Indigenous communities (Canberra: Attorney-General's Department, 2001).

[56] Blagg H, Aboriginal family and Youth Violence (Crawley, WA: UWA, Crime Research Centre 2001).

Family violence

Violence within the family is hidden and shameful, being contrary to all cultural values and Australian law and traditional law. The causes for such violence lie in various socio-economic pressures: insecure relationships, the pressures of debt, unemployment, bereavement, homelessness and so on.[57]

Family violence is a major concern for indigenous people, eclipsing issues such as property crime.[58] The issue of violence in indigenous communities has received considerable attention over recent years.[59] The end result of existing research is that:[60]

- rates of violence in Aboriginal communities are significantly higher than in non-Aboriginal communities
- improving the situation for indigenous victims requires a whole of community approach
- programs need to be delivered within a *cultural* framework as only indigenous people can challenge the myth of Aboriginal male entitlement to violence
- strategies must include recognising Aboriginal law as fundamental to the long term health of indigenous communities
- Aboriginal youth are the most vulnerable group in society to becoming the direct or indirect witnesses of violence.

When they do access facilities such as refuges, Aboriginal women tend to use them as places of safety and respite, rather than as exit points from the relationship. Choosing to leave the family "with all its complexly embedded ties of mutual responsibility and obligation, and connection with country and culture - is not an option."[61]

> Once the considerable limitations placed on Indigenous women's capacity to abrogate responsibilities to family are accepted as the starting point – rather than the problem – in victim support, it follows that community based strategies of diversion into restorative programs are most likely to satisfy the demands of Indigenous women and their communities.[62]

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[57] Blagg H, Crisis intervention in Aboriginal family violence: summary report (Canberra: Office of the Status of Women, 2000); Memmott et al op cit.
[58] Hommel, Lincoln and Herd, "Risk and resilience: crime and violence prevention in Aboriginal communities" (1999) 32 ANZ J of Criminology 2 at 192.
[59] Aboriginal and Torres Strait Islander Women's Task Force on Violence Report (Department of Aboriginal and Torres Strait Islander Policy and Development Qld, 2000); Call for louder voice on Indigenous family violence Aboriginal communities Radio, Thursday, 24 July 2003 (transcript): The Aboriginal and Torres Strait Islander Commission's (ATSIC) central zone commissioner says Indigenous community leaders must be encouraged to speak out about family violence.
[60] See generally Blagg, Aboriginal family and Youth Violence, op cit where these and other points are made.
[61] Blagg, Aboriginal family and Youth Violence, op cit.
[62] Blagg ibid.

3 ABORIGINAL LAW

> Customary law is an integral and inseparable part of Aboriginal culture. As such, it is as important to Aboriginal people as are traditional lands and heritage. … Not only is the recognition of Aboriginal customary law an issue of Aboriginal pride, heritage and custom. It can also be, to some communities, an issue of survival.[63]

Customary law derives its authenticity from "actual social practice and owes nothing to the reasoning or advocacy of lawyers, the art of legal drafters, or the rulings of formal courts."[64]

From its visits to Aboriginal communities and its consultations with people who work in Aboriginal communities, the Committee of Inquiry has concluded that Aboriginal customary law is being widely practised in the Northern Territory. The fact of life for many Aboriginal people in the Northern Territory, and for all Aboriginal people in Aboriginal communities, is that traditional law is the governing force of their daily lives.[65]

(a) Background

There has been an enormous amount of literature on Aboriginal societies, usually written by non-lawyers, placing Aboriginal laws and legal systems within the context of the social system.[66] The first descriptions of Aboriginal laws or legal systems in colonised lands usually appear soon after the arrival of the colonisers; for example in the American Colonies (Canada in 1610[67]), Australia in 1789[68] and New Zealand in 1845.[69] As Reynolds has pointed out, in Australia, "The problem appeared to be that there was too much law rather then too little."[70]

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[63] O'Donoghue L, "Customary Law as a Vehicle for Community Empowerment" Indigenous Customary Law Forum, Parliament House, Canberra, 18 October 1995 Canberra: AGPS) at p 58.
[64] Ken Brown, Paper Promises? The constitutional prescription of customary law (1994) 24(5) Alternative Law Journal 221.
[65] See for examp le, Appendix B - Address to AIJA Conference 2002: William Tilmouth.
[66] See generally the Bibliography in Appendix A.
[67] Jesuit missionaries compiled reports (called the Jesuit Relations) between 1632 and 1672 and have become a primary written source of the history of Aboriginal peoples in Canada at that time: Reuben Gold Thwaites (ed), Travels and Explorations of the Jesuit Missionaries in New France, 1610-1791: The Jesuit Relations and Allied Documents (Cleveland: The Burrows Brothers Company, 1896-1901) in 73 volumes with index, original text and English translation.
[68] For example, D Collins, An Account of the English Colony in New South Wales (London: T Cadell Jnr & W Davies, 1789) Vol 1 at 497: "strange as it may appear, they [ie the Aborigines] also have their real estates". On 14 March 1841, James Stephen, head of the Colonial Office, noted on a despatch received from South Australia: "It is an important and unexpected fact that these Tribes had proprietary rights in the Soil - that is, in particular sections of it which were clearly defined or well understood before the occupation of their country": Colonial Office Records, Australian Joint Copying Project, File No.13/16, Folio 57.
[69] New Zealand Law Commission, Study Paper 9, Mäori Custom and Values in New Zealand Law (2001).
[70] Henry Reynolds, After Mabo, What About Aboriginal Sovereignty? 1996 Australian Humanities Review http://www.lib.latrobe.edu.au/AHR/archive/Issue-April-1996/Reynolds.html.

For present purposes, the traditional law may be defined as the whole series of social rights and responsibilities that define who a person is, and his or her relationship to everyone else in the world.[71]

Traditional law has often been described as being a religious[72] or spiritual[73] affair. These descriptions are apt to mislead. Traditional laws are rules of behaviour, that bind the members of Aboriginal communities. They are rules of social control and, because of the smallness of the Aboriginal community, where everyone is known to everyone else, and everyone is in a defined relationship to everyone else, the end of social harmony is achieved through the primary means of attaching responsibilities to those relationships.[74]

(b) General principles of Aboriginal law

It is useful here to provide an overview of general or core concepts of Aboriginal law in the Northern Territory.

Generally, traditional law is in the land (or the universe), exists and has always existed. Aboriginal people can obey and carry out the law but they cannot make it or change it.[75]

The underlying value of Aboriginal law is often said to be the attainment of "peace" or "harmony" in the Aboriginal community.[76] Phrases such as "restorative justice" are

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[71] AP Elkin, Australian Aborigines (Sydney: Angus and Robertson, 1976) Chapter 6.
[72] RM & CH Berndt, op cit xi-xii. RM Berndt, "The Concept of 'The Tribe' in the Western Desert of Australia" (1959) 30 Oceania, 81-107.
[73] For example: Report on Lake Amadeus Land Claim (No. 28) by the Aboriginal Land Commissioner (Justice Maurice) 1989; Western Australia v Ward [2002] HCA 28 at para 14 per Gleeson CJ, Gaudron, Gummow and Hayne JJ.
[74] Sutton P, "Kinship, Descent and Aboriginal Land Tenure and Families of Polity: Post-Classical Aboriginal Society and Native Title" in Native Title and the Descent of Rights (Perth: National Native Title Tribunal 1998); Laurent Dousset, Introduction into kinship (http://www.ausanthrop.net/research/kinship/index.php, 2001). However, kinship is not the sole basis for ascribing rights and responsibilities under traditional law.
[75] Rennard Strickland, Fire and the Spirits, Cherokee Law from Clan to Court (Norman: University of Oklahoma Press, 1975) 10-11: "The ongoing social process could not, in the Cherokee way, be manipulated by law to achieve policy goals. There was no question of man being able to create law because to the Cherokee the norms of behavior were a sovereign command from the Spirit World. Man might apply the divinely ordained rules, but no earthly authority was empowered to formulate rules of tribal conduct."
[76] Discussions with Richard Gandhuwuy; Tonkinson R, "One Community, Two Laws: aspects on conflict and convergence in a Western Australian Aboriginal settlement." in Morse & Woodman, Morse & Woodman Indigenous Law and the State Foris Publications Holland (1987) at 399-401.

used to describe a similar process.[77] This is an underlying legal value of some other non-western systems of justice.[78]

It is said that western law tends to focus more on the protection of *rights* (that is, *individual* rights) rather than how those rights might form part of a larger scheme which assists in the achievement of social harmony (*collective* rights).[79]

The way that traditional law achieves the goal of harmony is to use *relationships* as the fundamental legal touchstone.[80] Under traditional law, a person's kinship relationship to another person, determines that person's rights and responsibilities with respect to that other person. This relationship could be determined by marriage, shared membership of a group or clan, shared dreamings or remoter connections.

Kinships and relationships extend beyond the western concepts of the blood/marriage relatives or nuclear or extended families. Persons may be considered as being part of the same family, that is, kin, if there is something in common. Living in the same community for a long period may be enough so that people consider themselves as being part of the same family. Aboriginal kinship systems are called "classificatory and universal".

Thus a man from Darwin could determine his relationship to a man from Alice Springs or a man from Port Augusta, by discussion of shared dreamings or their relationships to a common ancestor or living persons. Additionally, clans often stood in a particular kinship relationship to each other. True "strangers" were slotted into the appropriate kinship relationship if any.[81]

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[77] Law Commission of Canada, From Restorative Justice to Transformative Justice: Discussion Paper (Ottawa: Law Commission of Canada, 1999): "For those harmed, restoration means repairing the actual damage caused by wrongdoing and restoring their sense of control over their lives. For wrongdoers, restoration involves accepting responsibility for their actions by repairing any harm that they caused and dealing with the issues that contributed to the wrongdoing. For the community, restoration means denouncing wrongdoers' behaviour and assisting victims and offenders in their process of restoration. The restorative justice approach responds to the immediate conflict and encourages the development of respectful relationships among those who are wrongdoers, those who have suffered harm and members of the community."

[78] Rennard Strickland, op cit 10-11: "Public consensus and harmony rather than confrontation and dispute, as essential elements of the Cherokee world view, were reflected in the ancient concepts of the law." Similarly Aboriginal Justice Implementation Commission, Report of the Aboriginal Justice Inquiry of Manitoba (1999) "The purpose of a justice system in an Aboriginal society is to restore the peace and equilibrium within the community … It is a difference that significantly challenges the appropriateness of the present legal and justice system for Aboriginal people in the resolution of conflict, the reconciliation and the maintenance of community harmony and good order" citing Dumont J, "Justice and Aboriginal People," research paper prepared for the Aboriginal Justice Inquiry, (Sudbury, September 1990) p 32. Murray Sinclair, Aboriginal Peoples, Justice and the Law, in (Gosse et al eds) Continuing Poundmaker's and Riel's Quest (1994) at 178 "t]he primary meaning of 'justice' in an Aboriginal society would be that of restoring peace and equilibrium to the community through reconciling the accused with his or her own conscience and with the individual or family that is wronged".

[79] Hartney M, "Some Confusions Concerning Collective Rights" in Kymlicka W (ed) The Rights of Minority Cultures (Oxford: Oxford UP, 1995).

[80] Elkin AP, Australian Aborigines, Chapter 6.

[81] Bird R, Dingo Makes Us Human Life and land in an Aboriginal Australian culture (Melbourne Cambridge University Press 1992) discussing the Yarralin people of the Northern Territory notes that it is a fundamental features of Aboriginal culture to ensure a proper distribution of people through space and time and there is therefore a negotiability about who belongs with whom, and where, and who is responsible for major aspects of community life.

A person's nominal or actual relationship to another person, such as aunt or uncle, determine the rights and responsibilities to respect or care for that person. There are matters which are wrong under traditional law, such as neglect of kinship obligations, but are not civil wrongs under Australian law.

A relationship based system must also have rules relating to seniority to avoid conflict, and such rules exist in Aboriginal societies.[82]

Traditional law requires the performance of ceremony to preserve the land and the people in it.[83]

(c) The law

For the sake of consistency of exposition, traditional laws will usually be described from now on by reference to the traditional law of Arrernte people of Central Australia.[84]

The Arrernte concept *altyerre* can be translated as "the Dreaming, Dreamtime: the creation of the world and the things in it, and its external existence".[85] It embodies the source and content of *all* law.

> Customary law is what I am, the essence of an Aboriginal person is customary law. It controls you completely and wholly, not in an imprisoned way but in the way that it cares for you completely and that means holistically.[86]

All Arrernte people belong to one of the eight "social categories"[87] (subsections or skin groups): *kemarre, purrurle, penangke, pengarte, angale, ampetyane, kngwarraye* and *peltharre*. The system of skin allocation is socio-centric. This means that skin names are allocated to people like personal names and that they can largely (though not exclusively) be used from any point of reference. This is the common system throughout the Northern Territory, except for the western desert people. For example, below are listed the 8 Arrernte skin names, with the 16 Walpiri equivalent.

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[82] Williams N, Two Laws: Managing Disputes in a Contemporary Aboriginal Community (Canberra: Australian Institute of Aboriginal Studies, 1987) Chapter 2.
[83] Bell D, Daughters of the Dreaming (Sydney: Allen & Unwin 1983) describes Aboriginal women's ritual life (including love, health and the fecundity of the land) among the different groups of Aboriginal people at Ali Curung in 1970s.
[84] The six groups of Arrernte (also spelt as Arrente, Aranda, Aranta, Arunda, Arunta, Arranda and many other forms) occupy approximately 122,200 sq km around Alice Springs: Andado; Arltunga; Blood Creek; Charlotte Waters; Connor Well; Deep Well; Finke River; Gillen Creek; Hale River; Henbury; Horseshoe Bend; Hugh River; Idracowra; Intea; James Range; MacDonnell Range; Macumba River; Maryvale and Mount Dare: see NB Tindale Aboriginal Tribes of Australia (1974). Unless otherwise stated, the Arrernte material referred to can be found in the judgment of the Federal Court in the Alice Springs native title claim: Hayes v Northern Territory (1999) 97 FCR 32; and with respect to the neighbouring Walpiri, in Meggitt, MJ Desert People: a Study of the Walbiri Aborigines of Central Australia (Sydney: Angus and Robertson 1962).
[85] Myra Hayes op cit.
[86] Rosalie Kunoth-Monks in discussion with the Committee of Inquiry on 15 May 2003.
[87] Berndt CH and Berndt RM, The World of the First Australians (2 ed, Sydney: Ure Smith, 1977) at 98.

Arrernte	Walpiri	
	Women	Men
Angale	Nangala	Jangala
Ampetyane	Nampijinpa	Jampijinpa
Purrurle	Napurrula	Japurrula
Kemarre	Nakamarra	Jakamarra
Kngwarraye	Nungarrayi	Jungarrayi
Peltharre	Napaljarri	Japaljarri
Penangke	Napanangka	Japanangka
Pengarte	Napangardi	Japangarci

(d) Personal law

Personal law is generally defined as the law relating to who a person "is" and thus covers laws of birth, adoption, children, marriage, divorce, death, burial, inheritance and succession. Many legal systems recognise a separate system of personal law for people of different ethnic/cultural groups.[88]

The Arrernte system of skin names meshes with the relationship terminology. For example, if one is a *kemarre* man, one's father should be *perrurle*; one's mothers should be *penangke*; one's wife or potential wives should all be *peltharre*; one's sons and daughters should all be *perrurle* and one's sister's children should all be *kngwarraye*.

The skin terms also cover a wide range of relatives who are regarded as equivalent; eg mother's sister is called by the same term (*meye*) as one uses for mother.

(i) Birth and adoption

The concept of descent is conventionally understood to include genetic connection or something comparable, such as adoption. Adoption is part of Arrernte kinship practice and is critical in understanding the position of many children of mixed cultural parentage who have been incorporated in Arrernte society: "any man who lived with a woman was looked on as her properly married husband; and he was expected to regard and treat every one of his wife's children, irrespective of their actual parentage".[89]

There is also the important process known as "conception". In this context, conception refers to the moment of entry of an ancestral spirit into a women to animate the child with which she is already pregnant. This occurs some months into the pregnancy. Conception links a person not only with a Dreaming and its track, but also with a place on the track where a particular ancestral event took place. Conception, then, can be a

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[88] Seymour SM, Bantu Law in South Africa (Cape Town: Juta & Co. Ltd, 1970); Bilimoria P, Tradition, rights and communalism in India [Society and Culture in Asia Monograph] (Deakin University, 1998); Jain, MJ (ed) Outline of Indian Legal History 4th ed (Bombay: Tripathi 1978); Poh-Ling Tan, Asian Legal Systems (Butterworths, Sydney, 1997.

[89] Strehlow TGH, Journey to Horseshoe Bend (Sydney: Angus & Robertson 1969) at 109.

very significant feature of rights and interests in land, since it is possible to make a strong claim on land associated with one's conception site.

(ii) Children

Aboriginal laws and customs with respect to children are different from European conceptions. The sharpest illustration is the common Australia wide custom, that the mother’s brother has primary responsibility for the discipline and education of male children. By allocating rights and responsibilities with respect to children solely to parents, the Australian family law system conflicts with Aboriginal child-rearing values where child-rearing rights and responsibilities are shared:

> [In Arnhem Land] it was the responsibility for an Aunt or Uncle to grow up the child of their sister or brother. It is a belief amongst Aboriginal people living in these areas that because an Aunty or an Uncle are not too emotionally involved with the child that they are able to make the best decisions for his education needs and the future role of the child in becoming a responsible member of the Aboriginal family group.[90]

A girl or boy is physically capable of fulfilling many of the traditional adult roles when she or he reaches puberty.

At the time she reaches puberty, a girl will be initiated into womanhood. After a relatively short time of seclusion from the group, during which she may be instructed in women’s business, appropriate initiation ceremonies are conducted for her.[91]

Similarly, a boy approaching puberty is introduced to manhood through initiation ceremonies. Uncles have responsibilities with respect to the initiation process. The boy is physically removed from his family, for an extended period, and taught the rights and responsibilities of male adulthood, and the first of the secrets of traditional law. Male initiation rites include tests of worthiness or courage, and may include circumcision, nose piercing and ceremonial markings on the skin. Appropriate initiation ceremonies are conducted for him. Thereafter a boy gains in status by participating in further ceremonies and, as a man becomes entrusted with more knowledge of traditional law and traditional ceremonies, his social power and influence grows.

(iii) Marriage and divorce

Under traditional law there are strict rules about whom a person can marry. The parties have to be in the right skin relationship. As indicated, if one is a *kemarre* man, one's potential wives must be *peltharre*.

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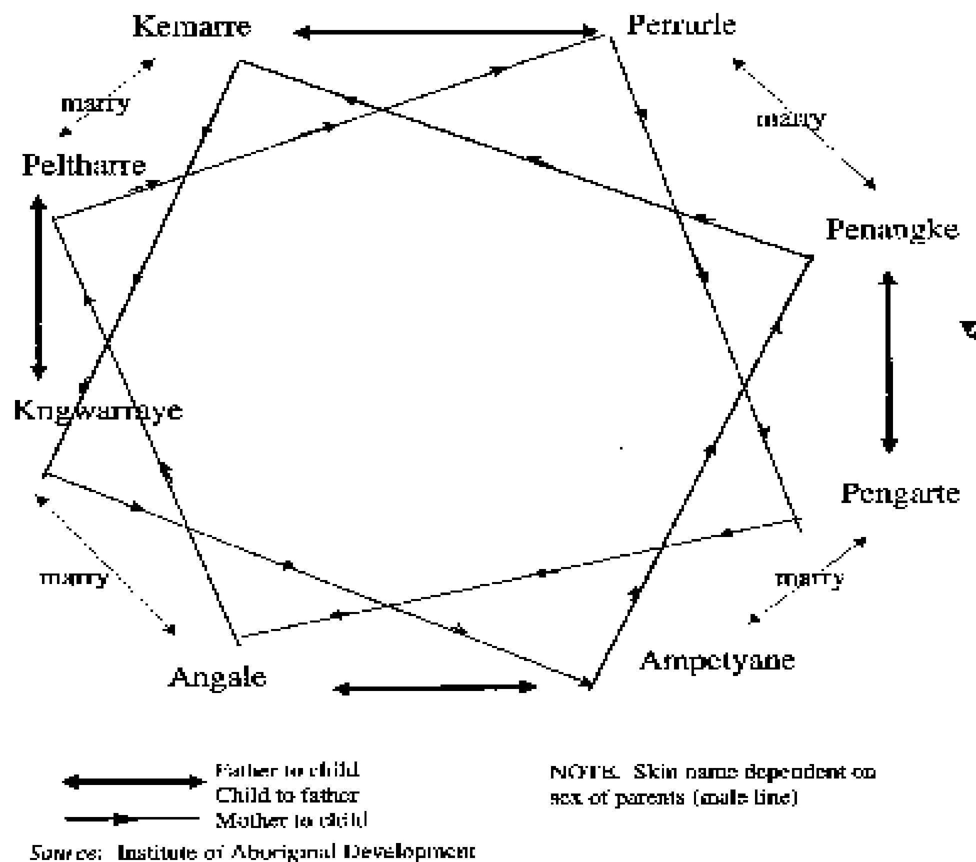
[90] Randall L, Aboriginal Placements in Oxenberry R (ed) Proceedings of Third Australian Conference on Adoption (Adelaide: Dept Continuing Education, University of Adelaide, 1982) p 342.
[91] Berndt RM and Berndt CH, op cit pp 180-181.



Not all marriages conform precisely with these rules and when, as sometimes happens, couples do not marry in accordance with them, their marriage may be called "two way" or "wrong way" and their offspring may be known by two skin names, one derived by association with the father, the other from the mother.

It has become difficult to maintain the requirements of the skin system for various contemporary reasons, such as increasing urbanisation. Earlier policies with respect to the separation of Aboriginal children from their families have also contributed to the pressure. However, even in such settings, Aboriginal families remain primarily extended and skin taboos are known. When a person lives in an urban setting, contact with family on the community is usually maintained.

Some Aboriginal communities have high levels of exogamy (marriage outside the community), mostly in the smaller communities and those with Western Desert populations. This results in a number of people moving to take up residence in the community of their spouse some distance away.[92]

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[92] Amunturrngu, for example, is 'primarily exogamous', with the exception of nearby outstations whose members may intermarry (but not in-marry). The radius for Amunturrngu out-marriages is about 900km:

Traditional law permits multiple male marriages. A marriage may be signalled by a couple living together and being accepted as married by their kin.[93]

When spouses marry under *both* traditional law and general law rites, to allow both forms of marriage equal effect might create legal confusion. Under Australian law, the consequences of such a union would be determined by the *Marriage Act*, rather than the parties situation (as indicated by their lifestyles or other relevant factors).

Divorce is also recognised, as a matter of fact. Generally there is no confusion on whether a married couple have divorced.

Promised marriages

The practice of arranged marriages, in which (usually) an infant girl is promised to an adult male, is also recognised under traditional law. It should be noted that such arrangements are not universal in Aboriginal communities, and many communities no longer practice such marriages.[94]

In traditional law, marriages may be agreed between the prospective husband and the persons responsible for a young girl.[95] This is a contract to which the child is not a party. The contract imposes material obligations on the prospective husband with respect to the child and her family; and obligations on the parents and child with respect to the prospective husband.

Generally speaking, the child is expected to understand the nature of the contract when she reaches puberty (say 12 or 13). There is then a process by which the child and her family affirm the contract and the girl goes to live with the family of the husband, but not usually with the husband at first. Sometime thereafter the girl goes to live with the husband as his wife. The girl can choose not to comply with the marriage agreement at any time prior to living with the husband. However it should be noted that the social expectations of all the families involved are that the marriage would normally proceed. Love marriages are recognised as a fact of life for the girl, her family and the

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Holcombe S, Amunturrngu: An Emergent Community in Central Australia. (PhD thesis, University of Newcastle (NSW) 1998) 109-110.

[93] Meggitt op cit p 269.

[94] Burbank VK, Aboriginal Adolescence: Maidenhood in an Australian community (New Brunswick, NJ: Rutgers University Press 1988) noted that in an Arnhemland community, girls now expect to make their own choice even if it goes against traditional rules. Australian culture (school, movies and television) has brought new norms. Girls therefore marry later than in traditional times, and boys, who used to wait to be fully initiated (in their thirties), marry earlier. School, organised sports and social gatherings enable same-age boys and girls to meet and to get to know each other. The change has created a conflict between their behaviour and the expectations of their parents under traditional law. These fears are based on social disruption through marriages that do not fit the rules of skin marriage (p120). See now Burbank VK, Gender hierarchy and adolescent sexuality: The control of female reproduction in an Australian Aboriginal community (1995) 23 Ethos 33.

[95] A Glass, Into Another World: A Glimpse of the Culture of the Ngaanyatjarra People (Alice Springs: Institute for Aboriginal Development, 1990). Hamilton A, "The Role of Women in Aboriginal Marriage Arrangements" in Gale F (ed) Woman's Role in Aboriginal Society 2nd ed (Canberra, Australian Institute of Aboriginal Studies, 1974) noted that in Maningrida in the 1970s, the identity of the bestower was usually said to be the father of the girl, or the mother's mother, but never the mother or mother's brother.

community and thus the process for the girl and her family repaying benefits received in anticipation of marriage is also dealt with under traditional law.

(iv) Kinship rights and responsibilities

All law revolves around the kinship system.[96] In traditional communities, kinship rights and responsibilities oblige people to behave in certain ways. Thus it is said that property crimes are rare, since most objects may be borrowed pursuant to kinship rights.[97] A number of offences related to neglect of kinship responsibilities exist, such as the physical neglect of certain relatives and the refusal to make gifts to certain relatives in appropriate circumstances.[98] Similarly kinship obligations may require a person take sides in a dispute, regardless of the particular rights or wrongs of the dispute.[99]

(v) Death and burial

Dealing with death, "sorry business", is a central part of Aboriginal culture.

Traditional law will require formal acts of mourning, the singing of songs and the carrying out of funeral and other ceremonies. Funerals often involve the whole community. All ceremonies must be carried out properly, as failure to do so means the deceased's spirit will be trapped between life and the spirit world. The "sorry time" takes precedence over all other matters.

The community refrains from using the name of the deceased, but refers to him or her by the term "no-name", or by a reference, such as "A's father/brother" or other general term, such as "that old man". People with the same name as the deceased are often referred to as "no name", or adopt a new name. Grieving relatives usually live in a separate area, the sorry camp, for a period of time.

Death, at one level, might be attributed to a spirit, but a person will eventually be identified under traditional law as responsible for the spirit or means involved in the death. Meetings are held to ascertain the circumstances of death, and decisions are made as to who is considered to have breached traditional law duties and contributed to the death.[100] An inquest into the circumstances of death, part of the sorry business process, establishes the social cause of death.

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[96] Berndt RM, "Law and Order in Aboriginal Australia" in Berndt & Berndt (eds) Aboriginal Man in Australia (Sydney, Angus & Robinson 1965) at 169.
[97] Williams op cit at 100.
[98] Meggitt, op cit p 257; The Australian Law Reform Commission, The Recognition of Aboriginal Customary Laws, Report No. 31 (3 volumes) (Canberra: AGPS, 1986) [ALRC Report] vol 1 p 360.
[99] See the example cited by the South Australian Aboriginal Customary Law Committee, Children and Authority in the North-West (Adelaide, 1984) at 44, where the kin of a person injured in the process of mediating a dispute between others were expected to retaliate to cancel the wrong done to her. There are various European descriptions of ongoing "feuds" or "blood vengeance", for example: Thomson DF, Report on Expedition to Arnhem Land, 1936-37 (Canberra: Minister for the Interior, 1939). This is also the subject of anecdotal references to the Committee of Inquiry.
[100] Langton op cit sets out the information cited which refers to traditional law in the Alice Springs region.

In the case of death by "natural causes", this person will often be the person responsible for "not looking after kin properly".[101] This is a breach of traditional law and punishment (shaming or corporal punishment) is required. Corporal punishment may be executed at the funeral against those persons. Additionally, persons more remotely involved with the death may have some responsibility under traditional law.[102]

In the case of death by assault, the person accountable will usually be the person who assaulted the deceased, but people responsible under traditional law for that person might also be blamed for not having looked after the deceased properly, in failing to ward off the attacker or otherwise protect the deceased from the causal events, and therefore share some responsibility for the death under traditional law.

If the Aboriginal coronial method takes place before the arrest or removal of the person responsible:

- the proper paybacks are executed and the anger and grief are controlled, and injuries from further paybacks avoided, because kinfolk have undertaken the necessary inquiry, and executed the necessary punishments, under traditional law
- the matter will be settled and not raised again in the Aboriginal domain.

It is said that "[m]ayhem follows if the necessary payback ritual is not carried out."[103]

Burial practices also vary: the deceased's body may be left exposed in a cave, tree or platform, cleansed with smoke, or cremated or buried in a coffin. Traditional burial places are regarded as dangerous places where spirits may gather and these places can only be later approached in the proper way.[104] After the funeral, the family may move away from the area for a period and may have to observe food and other taboos.

(vi) Inheritance and succession

There are special rules governing the transmission of 'sacred objects' after death.[105] These rules are generally unaffected by Australian law. The objects concerned do not "belong" to the deceased and so, technically, no issue of succession arises.

Rules with respect to the inheritance of property exist under traditional law. Of course, these rules must now apply to a far greater range of property interests than existed under traditional law. By way of example:

> [the] dead man's goods are later given to the senior mother's brother of the matriline to share with the older mother's brothers of that kin and, sometimes, of

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[101] Ibid cites a specific example (wife responsible for husband's death). A similar example was given the Committee, occurring in the Darwin region (wife responsible for husband's death by reason of him failing to take prescribed medicine).
[102] Ibid cites the following example from Yuendemu: "Yapa Law, we know we all respect our Law … if there is an accident, when bloke passed away, the people, all the people in the accident got punished. It's still hard now. … even people who bring someone to hospital… they didn't have anything to do with the actual 'accident' rather they came along and took people where they died. So they were only trying to 'help' but became involved."
[103] ibid.
[104] Meggitt op cit p 317.
[105] ALRC Report vol 1 para 331.

> his community. When a woman dies, her daughters and sisters hand her possessions to her senior mother's brother to distribute to the women of the matriline.[106]

Aboriginal conceptions of inheritance also envisage a man or woman succeeding to his/her older brother's/sister's rights and responsibilities.[107] Such process may extend to distant classificatory brothers or sisters.

(e) Land law

The nature of land rights under traditional law has been discussed in a number of native title cases[108] and in the reports of the Aboriginal Land Commissioners.[109] It varies from community to community.

Arrernte land tenure

Arrernte land tenure involves identification between tracts of country and particular groups of people. There are different ways by which people may claim rights in land. One is through patrifiliation and patrilineal descent. (Patrifiliation refers to being associated with one's father; patrilineal descent to inheritance through the male line).

Kinship terms are used to describe the land itself. This usage is extensive. Land is related to those who own it. An Arrernte estate may be known as *peltharre/kngwarraye* country and so on. For example, the town of Alice Springs contains parts of three estates: Mparntwe, which is *peltharre/kngwarraye*; Antulye, which is *penangke/pengarte*; and Irlpme, which is *angale/ampetyane.* In general terms, people might say, for example, that *peltharre/kngwarraye* country does not extend beyond this creek or that hill at which point responsibility for the Dreaming is handed over to another group.

The word *apmereke-artweye* is derived from the words *apmere* meaning place, and *artweye*, covering concepts of ownership, belonging and relationship. *Apmereke-artweye* are holders of an estate and have particular responsibilities for looking after it and authorising what goes on there. The status of *apmereke-artweye* is associated with patrilineal descent. *Apmereke-artweye* are often designated as owners of an estate. They take care of it in partnership with others known as *kwertengerle.* Terms used to convey the sense of *kwertengerle* are "manager", "policeman" or "spokesman".[110]

Apmereke-artweye have descent ties to the estate of their *arrenge* (father's father). *Kwertengerle* responsibilities are acquired through their *atyemeye* (mother's fathers) *aperle* (father's mothers) and *ipmenhe* (mother's mothers).

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[106] This example concerns the Walpiri: Meggitt op cit p 321.
[107] Williams op cit at p 43. For Yolgnu this includes responsibility for the widows of older brothers.
[108] See generally RH Bartlett, Native title in Australia (Sydney: Butterworths, 2000).
[109] See the Annual Reports of the Aboriginal Land Commissioners.
[110] See generally Maddock K, "Owners, Managers and the Choice of Statutory Traditional Owners by Anthropologists and Lawyers" in Peterson and Langton (eds) Aborigines, land and land rights (Canberra: Australian Institute of Aboriginal Studies, 1983).

While a person's rights in all four estates are held simultaneously, those connections tend to be more or less ranked in people's minds. One belongs first to the estate of one's father's father; second to the estate of one's mother's father; third to the estate of one's father's mother; and fourth to the estate of one's mother's mother. However, there may be exceptions to this ranking system based on factors such as knowledge, seniority and long term residence.

(f) Religion and ceremony

Ceremonial business for the handing on of songs and stories is a dominant part of cultural life. It is surrounded by very strict taboos. For instance an individual learning about the ceremonial business of the opposite gender can be punished. Under traditional law, the appropriate punishment for an (unauthorised) individual travelling through areas where initiations are taking place is generally death. When issues of ceremonial business come up, a taboo prohibiting discussion of all related matters will usually come into play. If male business is to be discussed, then females and children should not be present, and vice versa for female business.

(g) Wrongs

Generally, traditional law does not distinguish between civil law and criminal law in the western way. One can use phrases like serious wrongdoing, or “big trouble/little trouble” to distinguish degrees of wrongdoing.

The breaking of marriage arrangements was often a source of dispute in Aboriginal communities, and the remedies were temporary exile or some form of restitution.[111] Additionally, wrongs such as failure to ask permission to hunt on someone’s country, breaches of taboo or failure to comply with previously imposed punishment required a similar imposition of sanctions.

Other matters considered to amount to significant breaches of traditional law (that is, breaches threatening the well being of the community as a whole) include:

- improper conduct with respect to ceremonial rights and responsibilities,
- publicly insulting a person with respect to whom rights and responsibilities are owed,
- breach of various taboos (such as invoking the name of a dead person),
- adultery with certain kin (an extended definition prohibits sexual relations with classificatory relatives).

A meaningful distinction can be made between “private” matters and “public” matters. Thus a private matter can be elevated to a public matter, in which the whole community becomes interested. This is expanded on the discussion below on dispute resolution.

Punishment is a public response to a socially wrongful act, authorised by some form of *collective* decision, and is regulated by rules. The sanctions authorised by traditional law include:[112]

[111] For example: Williams op cit Chapter 5.
[112] Sanctions are noted in Williams op cit Chapter 5.

- public acknowledgement of wrongdoing (this may amount to “shaming” in a specific context);
- restitution/fine;[113]
- corporal punishment;
- spearing or wounding;
- temporary or permanent exile;
- death.[114]

It is generally felt that the presence of Australian law has meant that physical sanctions nowadays are applied either less generally or less severely, or applied in ways to avoid contact with the Australian legal system.[115]

The viewing of sacred objects, places, or ceremonies by those not entitled to view them is a serious offence even if done by mistake. The penalty for breach of ceremonial business is usually death.[116]

The extent to which sanctions can be modified to adapt to modern conditions is a matter of debate.[117]

<u>Payback</u>

The term “payback” is often used in general discussion either to describe all punishments for all offences under traditional law, or to imply that spearing is the appropriate punishment for all offences under traditional law. In its Report, the Committee of Inquiry limits the use of the word “payback” to the penalty for causing the death of someone. The punishment of spearing in the thigh for this offence is widespread in the Northern Territory:

> Only thing, according by the Law, Aboriginal Law is … payback, that's the only thing that will give the family satisfaction, and everyone will be satisfied. Making payback in front of the family at the [name of community deleted] oval, so everyone would know that the trouble has been finished and won't he carried on when they leave the oval. That shows other families recording with their own eyes telling them that is a tribal way that the Law is being finished and there will he no more troubles what-so-ever with other families … it's been disgrace by the Law Department by not releasing the accused … in the first place. If it was organised

[113] “When I was involved in family dispute, I had to pay $50 fine -- that's Yolngu Law to keep the peace so that I didn't go on blacklist” cited Langton op cit.
[114] “You know for example if somebody takes somebody's wife, well black fella way is kill him” cited Langton op cit.
[115] Langton op cit states: “This illegality of aspects of Aboriginal Law does not mean that these practices have ceased nor that elders agree with Australian law. On the contrary, we can only report that they are adamant that this is "blackfella's business" and nobody else's.” This view was put to the Committee of Inquiry by a number of Aboriginal communities with respect to matters involving breaches of traditional law.
[116] Meggitt, op cit p 256-253.
[117] Meggitt op cit. Hiatt considers that while “Aboriginal conceptions of correct behaviour have a basis in … the Dreaming… [in] the existence of a supernaturally-sanctioned moral code …Aboriginal religious beliefs are not so explicit and unequivocal, nor sanctions so unerring, as to constitute a set of instructions which people follow automatically” Hiatt L, Aboriginal political life (Wentworth lecture 1984) (Canberra: Australian Institute of Aboriginal Studies, 1986).

> by the Law Department and by the court saying, release the man who has been stand trial in the eyes of the court … He still have to face responsibility through Aboriginal Law. People in the Centre have their strong Laws -- Laws how to deal if any Aboriginal people do the wrong thing in the eyes of the ancestors because all Aboriginal people know they have been looked down, watching over, every move what a man, a woman, a boy, a girl does on this earth. It was told by the great, great, great grandfathers that doing the wrong thing have to be sort out by the tribal ways so that the great ancestors will be happy and be free that the Law is still going, generation by generation, … doesn't matter if it is a Warlpiri, Pintubi, Luritja, Pitjantjatjarra, Arrente, Kaytetye, Warumungu, even on the top end tribes, they was born with it. These other things, the Court and the Law Department have to understand. This is a message I'm giving it to help not only Aboriginal people, European as well to understand what they mean about their culture … I wanted to share this to help our people in peace, white and black.[118]

For the offence of murder, the appropriate penalty under traditional law almost always includes spearing in the thigh. However there may exist mitigating circumstances whereby spearing is not imposed. The spearing protocol is agreed to by the families of the offender and victim, or failing agreement, by the community at large, and often negotiated by a relevant lawman. The process is carried out in public, by authorised persons, pursuant to the agreed protocol, and overseen by agreed adjudicators, whose function it is to moderate the process, to make sure the protocol is observed, and intervene if necessary. This process, of course, leads to wounds that may result in permanent physical injury. It should *not* lead to death, because it is not a death penalty under traditional law. If a person dies because of payback, those who carried out payback are guilty of murder or manslaughter under traditional law, and they must, accordingly, undergo payback as a penalty for their wrongdoing. Under traditional law, payback settles the matter.[119]

While the death penalty has been recognised as the appropriate punishment for some offences under traditional law, and while such penalties have been carried out in the Northern Territory within living memory, submissions to the Committee and general knowledge indicates that the death penalty is no longer imposed under traditional law, primarily because Aboriginal communities recognise it is unlawful under Australian law, and the policy of Australian law is that persons authorised under traditional law to carry out the death penalty are charged under Australian law, and, if convicted, imprisoned as a result.

It should be noted that some Aboriginal communities do not impose payback or do not impose it for all classes of murder. For example, in Amadjarra, the Committee of

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[118] Langton op cit.

[119] See also the sentencing remarks of Bailey J in SCC No 20214130 R v Webb (unreported): “The deceased’s sister, AB, signed a victim impact statement, exhibit P6, on behalf of the deceased’s family. Ms B refers to the anger, sorrow felt by family members at the deceased’s senseless death at the hands of the prisoner. She also refers to the prisoner and his family visiting Nyirrpi and the prisoner receiving payback. Ms B expresses the family’s contentment with the payback and states that, insofar as the deceased’s family is concerned, the matter is now settled … Mr M gave evidence that the prisoner withstood his punishment like a man. The deceased’s family does not consider that the prisoner should serve further time in imprisonment. ….I acknowledge the deceased’s family considers that the matter has been settled and that the prisoner need not spend further time in prison. However, I would be failing in my duty if I were not to require the prisoner to spend a considerable period behind bars.”

Inquiry was told it is not imposed where there is no Aboriginal eyewitness to the murder.

Additionally under traditional law, if the offender is not able to undergo payback members of his family would be expected to undergo the process, or there would be an expectation that when the offender is released on bail he would undergo payback. [120] A substantial term of imprisonment, leading to an inability to carry out payback, has sometimes resulted in disruption or other social tensions within a community.[121]

(h) Dispute resolution[122]

Inter-personal disagreements or disputes are generally seen as a normal consequence of community life and must be distinguished from situations where traditional law has broken down.

Disputes will consist of public matters, or private matters elevated to the status of public matters, by a recognisable process.[123] As such disputes disrupt communal harmony, traditional law always seeks a resolution to them. Generally, once a dispute is settled, it is settled for ever, so that "bringing up old trouble" is an offence itself.[124]

As disputes within Aboriginal communities are not generally perceived as matters restricted to individuals, the negotiation and mediation process may involve everyone in the community. In particular, where the conflict involves an offence perpetrated by one member against another, members of both the offender's and victim's families become involved.

Different procedures may be followed in an attempt to resolve a dispute.[125] Elders may attempt to negotiate a satisfactory outcome or informal discussions, in which everyone participates, may take place.[126]

The way in which a dispute is stated means, under traditional law, an anticipated range of outcomes/punishments will exist for settlement. These outcomes may not be available under Australian law.

Generally facts are determined by mutual agreement, rather than choosing between conflicting witness statements. Recounting of events may be subject to some restraint and, as a general rule, one does not give a "blow-by-blow" description of an event, but

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[120] See transcript Court of Summary Jurisdiction 20214130 (Police and Webb) bail application before Magistrate Ward SM, 3 October 2002. The case was also referred to by Mr Bamber in discussions of 15 May; and in discussions with the Tangentyere Council on 9 June. See also SCC No 20214130 sentencing remarks: "Mr Bamber emphasised that at the time he was bailed the prisoner was facing a murder charge and a potential mandatory life sentence. Nevertheless, the prisoner felt obliged to undergo traditional punishment, regardless of his personal situation, in order to avoid continuing trouble between his own family and that of the deceased."

[121] Submission of Mr Ward SM, Gottlieb Tom Svikart and David Bamber.

[122] Williams op cit dealing with the Yolgnu and Sansom B op cit (Darwin) involve studies specifically dealing with dispute resolution in Aboriginal communities. A marked similarity can be noticed.

[123] Williams op cit pp 74-76 gives examples of announcing a dispute to the community.

[124] Williams op cit p 12.

[125] Williams op cit 49 to 66 describes a Yolgnu procedure; similarly Chapter 4.

[126] See generally ALRC, 'Traditional Aboriginal Society and Its Law'.

rather a "communal verdict" on the outcome.[127] Additionally, asking questions is often regarded as impolite and may not lead to clarification.

The process by which a wrong is dealt with under traditional law must therefore be contrasted with the general approach of Australian law to a civil or criminal trial.

Under Australian criminal law, the maintaining of public order usually involves a unilateral approach, in that police investigate and charge an offender (based on a subjective and objective assessment of the seriousness of the wrongdoing in which the views of the victim are relevant but not decisive), and bring the offender before a court for trial or sentencing.

Under traditional law, the offending parties must initiate the process, that is, make it a public matter. While a community as a whole need not be directly involved in the investigative process, the stage will be reached where an offender publicly acknowledges "guilt" for the wrong, and thereby assume responsibility for it.[128] The community acknowledges this, and the appropriate punishment is then negotiated and acquiesces in its carrying out.

While the overarching concern of traditional law is social harmony, the outcome to the dispute must be acceptable to the injured party. Failure of the outcome to satisfy the injured party will lead to ongoing social disharmony.[129]

The ALRC, in its Discussion Paper *Aboriginal Customary Law - The Criminal Law, Evidence and Procedure* cautioned against assuming that the general approach to sanctions applies in every case:

> [i]t should not be assumed that "traditional punishments" are only a response to "wrongful" acts, that they are closely regulated by rules, or that they are activated by some more or less collective decision, i.e. by a person or body authorised to act in the name of the community. Aboriginal "punishment" may be one of a range of possible outcomes of a dynamic process of dispute-settlement, with little or no resemblance to the impartial, impersonal application of defined sanctions in accordance with general rules which it is assumed by Anglo-Australian law. It does not follow that Aboriginal customary punishments (and dispute-resolving machinery generally) are not the product of something properly called "law", or that they should be ignored because they do not reflect a particular conception of the administration of justice. But it does follow that the "recognition" of such punishments is likely to be a difficult matter, given the different assumptions behind the "two laws".[130]

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[127] Burbank VK, Fighting Women: Anger and Aggression in Aboriginal Australia (Berkeley: University of California Press, 1994) at 9; Sansom op cit at 84.

[128] Until recently, this was often referred to as "trial by spears", eg ALRC Report Vol 1 at para 625; C Scollay, "Arnhem Land Aboriginals Cling to Dreamtime" (1980) 158 National Geographic 568 at 660; instead of the more obvious "punishment" by spears.

[129] The Race Discrimination Commissioner noted in *Alcohol Report* (Canberra, AGPS, 1995) p 27: "The claim that collective rights jeopardise traditional individual rights misunderstands the interdependent relationship between group and individual rights. The apparent tension between individual and collective rights is partially resolved once it is recognised that certain individual rights cannot be exercised in isolation from the community. This is particularly the case in indigenous communities."

[130] ALRC Discussion Paper 20 (1984) at 10-11.

In accordance with their obligations under Australian law, Police or community service agencies may sometimes intervene in matters involving a breach of traditional law, so that the course of dispute resolution under traditional law, or the punishment or settling of the matter through (say) public corporal punishment or admonishment, cannot occur.

APPENDIX A – SELECT BIBLIOGRAPHY

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APPENDIX B - ADDRESS TO AIJA CONFERENCE 2002: WILLIAM TILMOUTH

Address to AIJA Conference 2002:
William Tilmouth, General Manager, Tangentyere Council, Alice Springs:

Good Morning. I would like to acknowledge the Australian Institute of Judicial Administration for their efforts to implement recommendation 96 of the Royal Commission into Aboriginal Deaths in Custody. So many of the recommendations in this report have been ignored - that I applaud the effort.

In the short time I have I want to give an Aboriginal perspective on some of the main law and justice issues we face in Central Australia. The right to self-determine with regard to law and justice along with all other rights that flow from sovereignty was never relinquished by Indigenous people. I want to make it clear, this is not just a political statement - it is the lived reality for the majority of Aboriginal people in the Northern Territory.

We live under two laws - a cause for both celebration and grief.

Celebration because our law - Aboriginal law has not only survived 200 odd years of oppression but is actually getting stronger.

Grief because the western legal system is still used to oppress our law and culture. While this system of "two laws" continues, without the full acknowledgment of Aboriginal customary law, our rights are denied. Customary law refers to a much broader system than the restrictive interpretation of law and order in western culture. From our point of view customary law provides the blueprint for all social, economic and political circumstances in life.

Unfortunately, much of the debate about the formal recognition of customary law is restricted to methods of incorporating it into the legal system. Aboriginal people advocate the broader interpretation - we do this by living it.

Steve Hatton - a former NT Attorney General acknowledged this when he told an Indigenous customary law conference, in, 1995 that "Customary law for many people in the Territory is a fact. Whether we recognise it or not, customary law exists and affects the lives of many Aboriginal people. If we do not recognise it there is the potential for injustice to occur."

Despite this lived reality, the reference to customary law within the Aboriginal Land Rights Act and the untested potential of the Mabo judgement - the recognition of customary law continues to be ad hoc….

Whilst we may applaud these individual judgements, this piecemeal approach means that Indigenous people will continue to face double jeopardy with regard to punishment.

Obviously 'customary law' is considered a hot potato by Australian Governments. The very fact that there has been so much fact finding, so many recommendations and so little shift in this area indicates that there continue to be significant barriers - one is of course the choice disciplinary method.

But consider the sheer barbarity of locking people into institutions where they are subjected to an array of abuses. I am quite well versed on the abuses that occur in the disciplinary institutions of the western legal system. I travelled the route from mission home to juvenile detention and beyond and there is little to distinguish between them. This is because these institutions operate in privacy - the key ingredient for abuse. Western notions of law and justice are based on secrecy - particularly the surveillance and disciplinary arms ie prisons and police.

From our perspective the Western justice system is covert, secret and the process prolonged. In contrast Aboriginal law is open and transparent - a public ritual, thought out by the Elders in accordance with the law. People are then able to move on with their lives - all parties are satisfied.

Not only do Aboriginal people face the double jeopardy but they are also discriminated against within the western legal system. On average 75% of the prisoners in Territory jails are Aboriginal and many arrests continue to be for public order offences. The daily average cost of keeping an adult prisoner in jail is about $200 per day - a level of funding that Aboriginal organisations and communities can only dream about.

Over-policing in urban areas is the reason there are so many Aboriginal people in Territory jails. Our lives are scrutinised by a host of government agencies and our behaviour is publicly debated in the media.

The application of justice is also unfair. If you are non-Indigenous you can rip-off an entire community and walk away scot-free and the communities reward for alerting officials is to see their corporation collapse, leaving a pile of debt and human misery. I am not talking about isolated incidents here - but a pattern that has been occurring in remote Aboriginal communities, across northern Australia for years.

Consider also the injustice implicit in the lack of interpreting services. It is an indictment that it took the suicide of a young man detained under Mandatory Sentencing for the Government to fund such a service.

Little wonder that Aboriginal people question the value of western law or tablecloth law as Mr Dixon calls it; Aboriginal law is the table, the solid structure underneath. Whitefella law is like the tablecloth that covers the table, so you can't see it, but the table is still there.

I argue we need to deal with the reality and recognise Aboriginal customary law in its entirety.

Thank you