

BACKGROUND PAPER 3

LEGAL RECOGNITION OF ABORIGINAL CUSTOMARY LAW

While Australian common law does not recognise traditional law as “law”, it permits traditional law to be taken into account in certain situations. Some Aboriginal customary law is also specifically recognised by Australian legislation. This paper deals with these issues.

Background Paper 3: The legal recognition of Aboriginal customary law (Darwin: NTLRC 2003)

prepared for Committee of Inquiry into Aboriginal customary law
by the Northern Territory Law Reform Committee

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1 BACKGROUND

Prior to 1986 there were several inquiries into the issue of Aboriginal customary law.¹ However modern analysis of the issue can be said to begin with the Report of the Australian Law Reform Commission in 1986.

(a) ALRC: The Recognition of Aboriginal Customary Laws (1986).

In 1986 the Australian Law Reform Commission (ALRC) issued a report entitled “The Recognition of Aboriginal Customary Laws”.² The ALRC Report contained recommendations on ways in which customary laws could be recognised within the framework of the general law in Australia, and called on the Commonwealth, State and territory governments to implement recommendations dealing with matters within their areas of responsibility. The ALRC noted that although Aboriginal customary laws and traditions have been recognised in some cases and for some purposes by courts and in legislation, this recognition has, on the whole, been exceptional, uncoordinated and incomplete.

The ALRC’s recommendations were based on the following underlying principles:

- Aboriginal customary law should be recognised, in appropriate ways, by the Australian legal system
- such recognition must occur within the framework of the general law
- the creation of new and separate legal structures should be avoided unless the need for those is clearly demonstrated
- in most instances codification or direct enforcement are not appropriate forms of recognition nor is the exclusion of the general law desirable.

Specific recommendations for recognition of aspects of customary law were made in respect of:

- marriage and family matters, child custody, fostering and adoption
- distribution of property on death
- the criminal law (including policing, interrogation, evidence and sentencing)
- hunting, fishing and gathering rights
- local justice mechanisms for Aboriginal communities.

The Northern Territory Law Reform Committee does not propose to duplicate the ALRC research. This Background Paper prepared by the Northern Territory Law Reform Committee confine themselves to examining the position of traditional law in Aboriginal communities in the Northern Territory today.

¹ JW Bleakley, *The Aborigines and Half Castes of Central Australia and North Australia: Report to the Parliament of Australia* (Parliamentary Paper 21, Government Printer, Melbourne, 1928); *Western Australia, Report of the Royal Commissioner Appointed to Investigate, Report and Advise Upon Matters in Relation to the Condition and Treatment of Aborigines* (HD Mosely, Royal Commissioner, Parliamentary Paper 2, Government Printer, Perth, 1935); *South Australian Aboriginal Customary Law Committee, Children and Authority in the North-West* (Adelaide, 1984).

² The Australian Law Reform Commission, *The Recognition of Aboriginal Customary Laws*, Report No. 31 (3 volumes) (Canberra: AGPS, 1986) [ALRC Report].

(i) Arguments for and against the recognition of Aboriginal customary law

The ALRC noted a number of arguments in favour of greater recognition of Aboriginal customary law:

- recognition would advance the process of reconciliation between Aboriginal and non-Aboriginal Territory residents
- non-recognition can lead to injustice in specific situations where traditional law governs a person's conduct
- the present legal system has failed to deal effectively with many Aboriginal disputes and there are disproportionately high levels of Aboriginal contact with the justice system
- traditional authority may be more efficient in maintaining order with Aboriginal communities, and thus be more cost-effective³
- courts are recognising Aboriginal customary law within their discretionary powers, and more formal recognition would clarify the law
- non-recognition is consistent with principles of 'assimilation' and 'integration', whereas principles of 'self-management' or 'self-determination' are more appropriate
- Australia's international standing and reputation would benefit from its giving recognition to the laws and traditions of its indigenous peoples.

The ALRC Report identified a number of arguments against recognition:

- customary law may incorporate rules and punishments that are unacceptable to the wider Australian society
- some aspects of customary law are secret, and disclosure on a confidential basis is inconsistent with the judicial function within our legal system
- Aboriginal people may lose control over customary law if it were incorporated within the general legal system
- customary law may not adequately protect Aboriginal women
- recognition of customary law might create "two laws" within society
- Aboriginal customary law may no longer be relevant to some Aboriginal people, and some may prefer the present legal system
- recognition should be restricted to those Aborigines living in a strictly traditional manner.

(ii) Options for Recognition

If Aboriginal customary law were to be more formally recognised, a number of options were identified by which this might be achieved:

- recognition by incorporation of customary law into the general law, either generally or by specific reference. This might be done by statutory codification or by reference to customary laws without setting out their detail, in a manner similar to the legislative provisions for the protection of sacred sites

³ Of course the issue is complicated. 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] points out "However, there is no simple correlation between allegiance to Aboriginal customs and Laws in a traditional community and lower crime rates".

- recognition by exclusion of customary law from general law, allowing customary law to be regulated independently, such as through a separate tribal court system
- recognition by the translation of customary law concepts into concepts known to general criminal law
- recognition by adjustment or accommodation of the general criminal law to take into account customary law in appropriate ways, such as in sentencing.

The general approach of the ALRC was not the general recognition of Aboriginal customary law for all purposes of Australian law, but recognition by reference to topics of Australian law where a failure to recognise traditional law would work injustice – functional recognition. This is the approach adopted by the Committee of Inquiry in its Report.

The ALRC felt that greater recognition of Aboriginal customary law may avoid being considered to be racially discriminatory if the measures are reasonable responses to the special needs of the Aboriginal people affected, are generally accepted by them, and do not deprive individual Aborigines of basic human and legal rights.

The recommendations of the ALRC have been adopted in Australian jurisdictions to varying degrees. A progress report on implementation of the ALRC's recommendations was incorporated into the 1993-94 Annual Report on Implementation of Commonwealth Government Responses to the Recommendations of the Royal Commission.⁴

(b) Royal Commission into Aboriginal Deaths in Custody (1992)

Since the tabling of the ALRC's report, there have been significant developments in areas of law and policy concerning the position of Aboriginal and Torres Strait Islander peoples in Australia. The Royal Commission into Aboriginal Deaths in Custody (RCIADIC) was established in 1987 and reported in 1992.⁵ It made a number of relevant comments:

That in the case of discrete or remote communities sentencing authorities consult with Aboriginal communities and organisations as to the general range of sentences which the community considers appropriate for offences committed within the communities by members of those communities and, further, that subject to preserving the civil and legal rights of offenders and victims such consultation should in appropriate circumstances relate to sentences in individual cases. (Recommendation 104)

That Governments negotiate with appropriate Aboriginal organisations and communities to determine guidelines as to the procedures and processes which should be followed to ensure that the self determination principle is applied in the design and implementation of any policy or program or the substantial

⁴ See generally Aboriginal customary laws, Report on Commonwealth implementation of the Recommendations the Australian Law Reform Commission (Office of Indigenous Affairs, DPMC 1994); Indigenous Deaths in Custody 1986-1996 (ATSIC 1997); Office of Aboriginal Development, Northern Territory Government Implementation Report on the Recommendations of the Royal Commission into Aboriginal Deaths in Custody, Office of Aboriginal Development, Darwin. Reports issued: 1992-93, 1993-94, 1994-95, 1996-97.

⁵ Royal Commission into Aboriginal Deaths in Custody, National Report (Five Volumes) (AGPS, Canberra, 1991-92).

modification of any policy or program which will particularly affect Aboriginal people (Recommendation 188)

[t]he Australian Law Reform Commission's Report on the Recognition of Aboriginal Customary Law was a significant, well-researched study. The Royal Commission received requests from Aboriginal people through the Aboriginal Issues Units regarding the progress in implementation of the recommendations made by the Australian Law Reform Commission and in some cases from communities which had made proposals to the Law Reform Commission. (Recommendation 219)

(c) NT Sessional Committee on Constitutional Development (1992 – 1996)

The incorporation of customary law has been being considered in the development of proposals for a Northern Territory Constitution.

The Sessional Committee of the Northern Territory Legislative Assembly on Constitutional Development, made recommendations on a new Constitution for the Northern Territory, to replace the *Northern Territory (Self-Government) Act 1978*, including as a possible new State Constitution. It engaged in widespread community consultations in the Northern Territory.

Committee members were apprised during their community visits of the great strength of feeling in traditional Territory Aboriginal communities for some form of recognition of customary law. It was frequently said that the two laws, Aboriginal and non-Aboriginal, should go hand-in-hand.⁶

Subsequent to its community visits, the Committee released its Discussion Paper No. 4 on Recognition of Aboriginal Customary Law.⁷

In that Discussion Paper, the Committee canvassed the following issues:

- Should Aboriginal customary law be legally recognised in the Northern Territory?
- Should any such recognition be given constitutional force in a new Northern Territory constitution?
- If recognised as an enforceable source of law, should there be an exclusion of customary law that is inconsistent with fundamental human rights?
- Should any recognition be limited geographically to areas under the jurisdiction or control of appropriate Aboriginal institutions?
- Should any recognition be subject to any overriding Territory statute law? If so, should it be subject to appropriate constitutional guarantees of customary rights?
- If customary law is recognised, how should it be applied and enforced? By the existing general courts, by a new system of Aboriginal courts or by some other flexible scheme designed in consultation with each Aboriginal community? Alternatively should it be left to traditional methods of enforcement?
- Whether or not customary law generally is recognised, should there be some ongoing study to consider further legislative incorporation of selected aspects of

⁶ Graham Nicholson, Customary and Common Law, Sessional Committee on Constitutional Development, Discussion Paper No. 3, August 1992.

⁷ "Recognition of Aboriginal Customary Law", Sessional Committee on Constitutional Development Discussion Paper No. 4, August 1992.

customary law by reference, or the adjustment of the general law to take into account selected aspects of customary law?

The Committee received a number of submissions in reply, none strongly opposed to any form of recognition of customary law.

In a later Discussion Paper No. 6, in considering issues of Aboriginal self-determination, the Committee raised for consideration the possibility of Aboriginal community control of matters such as the exercise of customary rights and practices.⁸

In 1996 the Committee reported to the Legislative Assembly on a Final Draft Constitution for the Northern Territory.⁹ It recommended an express recognition of Aboriginal customary law as a source in the Northern Territory law under the new Constitution. However the Committee offered two options for this recognition:

- one expressly providing that customary law be implemented and enforced where a person considered that he or she was bound by that law, and
- one that did not provide for the specific form of implementation of this recommendation.

In the Commentary on the Final Draft, the Committee stated:

3. Aboriginal Customary Law

The Committee was faced, in its hearings and consultations in numerous centres throughout the Northern Territory, and in submissions made to it, with overwhelming support from Aboriginal Territorians for some form of constitutional recognition of Aboriginal customary law. It is quite clear to the Committee that in the Northern Territory, Aboriginal customary law is a living system of law for many Territorians, one that is central to their existence and daily lives. There were frequent concerns expressed about the erosion of customary law in Aboriginal communities and the damage that this was causing to Aboriginal society and to the maintenance of order in that society....

The Committee's discussion paper on the constitutional recognition of Aboriginal customary law, that raised a number of options for the recognition of customary law, has been well received. There has been no significant opposition to some form of recognition. There are concerns as to particular aspects of customary laws which might, on some standards, be seen as objectionable. But in the Committee's view this does not necessitate a view that is opposed to any form of recognition. There is also no constitutional impediment to any such recognition.

The draft Constitution contains a proposal to recognise Aboriginal customary law as a source of Northern Territory law on a par with the common law. Both would be subject to any legislation. ...The Committee's proposal, expressed in the form of two options, is that the common law and customary law should run in tandem, not as two completely separate systems of law in a discriminatory manner, but in

⁸ "Aboriginal Rights and Issues - Options for Entrenchment", Sessional Committee on Constitutional Development Discussion Paper No. 6, July 1993, pages 32-37.

⁹ "Foundations for a Common Future", The Report on Paragraph 1 (a) of the Sessional Committee on Constitutional Development's Terms of Reference on a Final Draft Constitution for the Northern Territory, Volume 1, November 1996.

a complementary manner as part of the one system of laws for the whole Northern Territory. However, to prevent unfair or undesirable consequences, it is proposed that Aboriginal customary law will not be able to be implemented and enforced through the institutions and officers of government except insofar as the courts are prepared to do so or as Territory legislation so provides. For example, this would prevent the use of practices which may be harsh or unjust on international principles - compare Part 8 of the final draft Constitution.

In this way, it will be possible to bring the two systems of law into a form of mutuality and reciprocity within a common constitutional framework, a gradual harmonisation of laws, but without any unfair or undesirable side effects. Aboriginal people will be subject to their own traditional laws as part of the laws of the Northern Territory, as well as being subject to non-Indigenous Territory laws, and without being placed in a position of double jeopardy. This should greatly help to strengthen Aboriginal traditional society and meet their demands for recognition of their laws whilst remaining a part of one Territory community. Far from creating two separate systems of law on racial lines, this will legally recognise what already exists, and should facilitate the process of reconciliation and understanding between Indigenous and non-Indigenous people in the Territory.¹⁰

(d) NT Attorney General's Concept Proposal (1996)

At a 1995 Forum on Indigenous Customary Law, the then Attorney General of the Northern Territory, Steve Hatton, stated:

Customary law for many people in the Northern 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. ... [C]ustomary law in the lives of many Aboriginal people in the Northern Territory deals not just with the criminal law and the much talked about "payback" system including physical punishment and death, but with a whole social, political and judicial structure.... Customary law in the broader sense is already being incorporated in the Northern Territory. Our community government schemes, our civil law and parts of our legal system are models for the effective implementation of customary law.¹¹

Subsequently in March 1996, he released a paper entitled "The recognition of Aboriginal customary law: a concept proposal for the Northern Territory". Three principles were proposed:

The principles identified that will guide the recognition of customary law in the Northern Territory are:

1. The process by which customary law can be recognised involves firstly a recognition of the commonality between the two systems. Once that is achieved sensible negotiation about the differences between the two systems can occur to create a synthesis of both legal systems.

¹⁰ "Foundations for a Common Future", pages 5-6 to 5-7.

¹¹ Hatton S, "Customary Law in the Northern Territory" in Indigenous Customary Law Forum, Parliament House, Canberra, 18 October 1995 (Canberra: AGPS 1996) at p 43.

2. The process of recognition of customary law should be driven from the “bottom up” and not the “top down” because of the differences between Aboriginal communities and their customary law. The process should incorporate negotiation and decision making, firstly on a clan level and then on a regional level and finally on a Territory level.
3. Those matters that constitute a breach of an International Human Rights Treaty to which Australia is a signatory cannot be condoned by the mainstream legal system.¹²

(e) NT Standing Committee on Legal and Constitutional Affairs (2002)

On 22 May 2002, the Committee resolved to conduct an inquiry into matters relating to Indigenous governance in the Northern Territory, in particular, the examination of appropriate relationships that should exist between the Indigenous people/communities of the Northern Territory, the Northern Territory Government and the wider Territory community:

- (a) under the present constitutional/legislative arrangements applying in the Northern Territory; and
- (b) whether those arrangements might have influence upon a future grant of Statehood to the Northern Territory; including
- (c) the question whether the Northern Territory Government should enter into a Framework Agreement or agreements with the representatives of those Indigenous people/communities.

In discussing Framework Agreements, the Committee took into account its 1999 Report into Appropriate Means to Facilitate Statehood which included a discussion of the interests of the indigenous people of the Northern Territory as part of any grant of Statehood. The report also discussed the subject of a possible Framework Agreement for the Northern Territory, that is, an agreement between the Northern Territory Government, and the representatives of the Indigenous people of the Northern Territory, concerning a range of issues of vital interest to the two parties, and setting out a framework within which the relationship between the two could or should be developed in the future.

In June 2002 the Committee issued a Discussion Paper with respect to the appropriate relationships that should exist between the Indigenous people/communities of the Northern Territory, the Northern Territory Government and the wider Territory community on matters of Indigenous governance.

(f) Northern Territory Law Reform Committee (2003)

In October 2002 the Attorney General set up “An Inquiry into Aboriginal Customary Law in the Northern Territory”. The Terms of Reference are set out in Appendix A to the Report of the Committee of Inquiry. In giving consideration to the issues concerning the recognition of Aboriginal customary law, the Committee has taken into account all the above reports. The Committee held its first meeting on 6 February 2003 and its final

¹² Steve Hatton, “The recognition of Aboriginal customary law: a concept proposal for the Northern Territory” (1996) at p (i).

meeting on 1 August 2003. The Committee delivered its report to the Attorney on 19 August 2003.

2 GENERAL ISSUES

The Committee has recommended that, as an integral part of its ongoing process of the review of specific legislation or administrative policy or practice, government should examine the need to recognise or take into account Aboriginal customary law.¹³ It is therefore up to government to adopt an appropriate law reform strategy to do this. There are many ways that this can be achieved: as part of the mandatory information going to Cabinet in any Cabinet Submission proposing any change to legislation or administrative policy or practice; as a standing legislative or administrative requirement to be observed by agencies in the review or development of legislation; or as part of the process of consideration of legislation by the Legislative Assembly.

Customary law and customary laws

The localization of traditional law has two aspects: the content of traditional law will vary from community to community, if not in principle, then in detail; and the persons authorized to speak authoritatively about the law will vary. The degree of variety reflects what has been described as the localism of indigenous societies:

Indigenous societies are typically characterized by an intense ‘localism’, in which social, economic and political allegiances are constructed around locally based and small-scale forms and institutions, rather than in larger all-encompassing institutions based on larger socio-political units. Consequently, indigenous authority operates in contexts and domains which rarely extend beyond relatively small-scale groupings. Who has authority, over which matters, and in which contexts, may itself be contested, particularly for those groups with a long history of contact with non-indigenous society.¹⁴

Legislative drafting

The *Legislative Standards Act 1992* (Qld) sets out a list of fundamental legislative principles which should be observed in drafting legislation. The Act requires Queensland Parliamentary Counsel (and thus instructing government agencies) to have regard to Aboriginal tradition and Island custom in carrying out their duties:

4 Meaning of “fundamental legislative principles”

- (1) For the purposes of this Act, “**fundamental legislative principles**” are the principles relating to legislation that underlie a parliamentary democracy based on the rule of law.
- (2) The principles include requiring that legislation has sufficient regard to—
 - (a) rights and liberties of individuals; and
 - (b) the institution of Parliament.

¹³ Recommendation 10 reads: “Law reform strategy: The Committee recommends government adopt a policy of ensuring the application of the general law of the Northern Territory does not work injustice in situations where Aboriginal people are subject to rights and responsibilities under traditional law, and that statute law should on appropriate occasions recognise this”.

¹⁴ Mantziaris C. and Martin D, *Native Title Corporations: a legal and anthropological analysis*, (Sydney, Federation press 2000) p 40.

- (3) Whether legislation has sufficient regard to rights and liberties of individuals depends on whether, for example, the legislation—
- (a) makes rights and liberties, or obligations, dependent on administrative power only if the power is sufficiently defined and subject to appropriate review; and
 - (b) is consistent with principles of natural justice; and
 - (c) allows the delegation of administrative power only in appropriate cases and to appropriate persons; and
 - (d) does not reverse the onus of proof in criminal proceedings without adequate justification; and
 - (e) confers power to enter premises, and search for or seize documents or other property, only with a warrant issued by a judge or other judicial officer; and
 - (f) provides appropriate protection against self-incrimination; and
 - (g) does not adversely affect rights and liberties, or impose obligations, retrospectively; and
 - (h) does not confer immunity from proceeding or prosecution without adequate justification; and
 - (i) provides for the compulsory acquisition of property only with fair compensation; and
 - (j) has sufficient regard to Aboriginal tradition and Island custom; and
 - (k) is unambiguous and drafted in a sufficiently clear and precise way.

The Parliamentary Scrutiny of Legislation Committee examines Bills before the Queensland Parliament, according to section 4 of the *Legislative Standards Act*. The Committee reports to Parliament in its publication *Alert Digest*.

The enactment of a legislative requirement to take account of Aboriginal customary law in the drafting of legislation is identified as an issue for government requiring a policy response.

3 FAMILY LAW

It has been the almost universal practice of the law makers of British colonies, and former British colonies, to provide that, while matters of public law are governed by English law, matters of “personal law” are governed by the Aboriginal law. Personal law embraces family law (marriage, divorce, custody and inheritance).¹⁵ Family law has universally been recognised as the area where the distinction between English law and traditional law has been the most fundamental.

The current family law system presents particular problems for indigenous Australians, not experienced by the wider community. These problems affect their ability to access the family law system. They arise from language and cultural differences in understanding the Australian family law process.¹⁶ The Family Court has developed, and continues to develop, processes to help it take into account Aboriginal customary law where relevant, and legally permissible.¹⁷

(a) Marriage and divorce

Marriage is a matter governed by the *Marriage Act* (Cwth) and divorce is a matter governed by the *Family Law Act* (Cwth).

The ALRC identified four different ways in which recognition of traditional marriages may be made:

- de facto recognition
- underwriting or enforcing traditional marriage rules
- equating traditional marriage to *Marriage Act* marriage for all purposes
- functional recognition (ie for particular purposes).

The ALRC recommended functional recognition by comparing traditional marriages, with *Marriage Act* marriages, to determine in a specific situation whether the consequences of recognition would produce results that were appropriate with Aboriginal perceptions of marriage, and ultimately Australian legal values. This would avoid the enforcement of traditional marriage rules which may be seen to infringe basic human rights, such as underage marriages. The ALRC proposed:

- traditional marriages should be recognised notwithstanding that the relationship is actually or potentially polygamous [para 258-60]
- there should be no minimum age requirements for traditional marriages [para 261]
- the recommendations should apply to marriages between an Aboriginal and a non-Aboriginal persons which are recognised as traditional marriages by the community [para 264]

¹⁵ See discussion in Background Paper 1.

¹⁶ The Pathways Report (Out of the Maze - Pathways to the Future for Families Experiencing Separation, 2001). The Commonwealth Government's Response was released on 13 May 2003.

¹⁷ See the Annual Reports of the Family Court. There is a Family Court Aboriginal and Torres Strait Islander Awareness Committee. The Court also has an indigenous Family Consultant program to enable it to provide culturally relevant services to clients. The program is targeted at indigenous families involved in family conflict and separation and divorce, especially where children are concerned. The consultants work as a two person gender balanced team where possible. Working relationships have been developed with remote communities throughout the Territory.

- registration of traditional marriages should not be required, but communities may operate a register [para 268].

The disadvantages flowing from a legal failure to recognise these relationships is lessened in the Northern Territory where laws recognise some of these relationships generally (de facto legislation) or for particular purposes (status of children). Many Commonwealth, state and territory agencies have endeavoured to incorporate recognition of traditional law marriages into the performance of their service delivery functions. For example, the Commonwealth Department of Social Security has adopted an administrative approach to implementing the ALRC recommendations under which the members of a 'principal' traditional relationship are paid benefits at the married rate, and other partners are paid on the basis that they are single.

(i) De Facto Relationships

Traditional Aboriginal marriages are recognised as de facto relationships under the *De Facto Relationships Act 1991* (NT). Section 3 provides:

"de facto partner" means

- (a) in relation to a man, a woman who is living with, or has lived with, the man as his wife on a bona fide domestic basis although not married to him; and
- (b) in relation to a woman, a man who is living with, or has lived with, the woman as her husband on a bona fide domestic basis although not married to her;

"de facto relationship" means the relationship between de facto partners, namely the relationship of living together as husband and wife on a bona fide domestic basis although not married to each other.

The Act provides for applications to the Supreme Court or Local Court to be made by de facto partners for maintenance or for the adjustment of property rights. Section 18(1) states:

The order which a court may make... is such order adjusting the interests of the partners in the property as the court considers just and equitable having regard to

- (a) the financial and non-financial contributions made directly or indirectly by or on behalf of the partners to the acquisition, conservation or improvement of any of the property or to the financial resources of the partners or either of them; and
- (b) the contributions (including any made in the capacity of homemaker or parent) made by either of the partners to the welfare of the other partner, or to the welfare of the family constituted by the partners and one or more of the following:

- (i) a child of the partners;
- (ii) a child accepted by the partners or either of them into the household of the partners, whether or not the child is a child of either of the partners; or
- (iii) any person dependent on the partners who has been accepted by the partners or either of them into the household of the partners.

To simply treat Aboriginal marriages as de facto relationships is not to recognise the nature of the traditional relationship or the distinction made by Aboriginal people between traditional marriages and other relationships. However, it is clear that the *De Facto Relationships Act* is able to provide a just and equitable resolution to the

problems associated with the breakdown of traditional marriages that are amenable to Australian law – except those about children. However, issues with respect to children, arising from the breakdown of a traditional marriage or de facto relationship are dealt with in the Family Court. Indeed the *Family Law Act* applies even if the parents have never lived together. All parents have the same responsibilities for their children and all children have the same rights.

(ii) Promised brides

Background Paper 1: Aboriginal communities and Aboriginal law in the Northern Territory sets out traditional law with respect to promised marriages. The recommendation of the ALRC was that the general law should not be used as a means of enforcing promises to marry, as this would involve the general law denying the right not to be coerced to marry.¹⁸ The principle that marriage requires the consent of the parties is fundamental, and accordingly a traditional marriage should not be recognised for any purpose unless the parties (at or before the time when the issue of recognition arose) had consented to the relationship.¹⁹

(iii) Marriageable age

Marriages of girls below the age permitted under Australian law still occur in some Aboriginal communities. A majority of the ALRC considered that traditional marriages should be recognised as they exist, without requiring that rules relating to marriageable age under the general law be complied with. Under the approach of functional recognition, it is undesirable to deny the benefits of recognition, merely on the basis of marriageable age. Under this approach (and unlike Marriage Act marriages) what is recognised is the consequences of relationships regarded by Aborigines themselves as marriage.²⁰ The Commonwealth Attorney General's Department is opposed to recognising a marriage involving a party who is too young to marry according to Australian law.²¹

Recognition of traditional marriages in Northern Territory legislation is not affected by minimum age requirements.

(iii) Polygamy

Recognition of traditional marriages carries with it recognition of polygamous marriage. The ALRC recommended that recognition of traditional marriages should allow the recognition of polygamy, where it occurs, as recognition should entail benefits or protection for all spouses, and problems of apportionment could be considered in the context in which they arise.²² Some Northern Territory legislation presently makes express recognition of polygamous traditional marriage.²³ The Commonwealth Attorney General's Department is opposed to marriages which involve polygamy.²⁴

¹⁸ ALRC Report at para 246-53.

¹⁹ ALRC Report at para 262.

²⁰ ALRC Report at para 261.

²¹ Australia's Third Report under the International Covenant on Civil and Political Rights March 1987 - December 1995 (Canberra: AGPS 1998) at para 1379.

²² ALRC Report at para 258-60.

²³ For example, s.67A of the Administration and Probate Act.

²⁴ Australia's Third Report op cit at para 1379.

The review of legislation or administrative policy or procedure to take account of polygamous traditional marriage is identified as an issue for inclusion in the government law reform strategy.

(b) Adoption

Aboriginal laws and customs with respect to children are different from European conceptions. The sharpest illustration is the common, and seemingly Australia wide custom, that the mother's brother has primary responsibility for the discipline and education of the child. That fact has been known for along time.

The recommendation for an Aboriginal child placement principle to be incorporated into legislation affecting the care of indigenous children was proposed by the ALRC in its 1986.²⁵ All Australian jurisdictions now recognise, either in legislation or policy, that when Aboriginal or Torres Strait Islander children are to be placed in substitute care, they should be placed within their own culture and community where possible.

The *Adoption Act* 1994 (NT) requires that in exercising any power under the legislation, the chief executive, an authorised officer and the Court must have regard to:

- the views of the recognised Aboriginal or Torres Strait Islander agency for the child about Aboriginal traditions and Island Custom relating to the child; and
- if it is not practicable to obtain the agency's views-the views of members of the community to whom the child belongs; and
- the general principle that Aboriginal and Torres Strait Islander children should be cared for within their own communities.

The Act also requires that an authorised person must try to conduct consultations, negotiations, family meetings and other proceedings involving an Aboriginal person or Torres Strait Islander (whether a child or not) in a way that is appropriate to Aboriginal tradition or Island custom.

The *Adoption Act* recognises couples who are in traditional Aboriginal marriages. Efforts must be made to find placements within families, kin groups or communities as appropriate (s 8). Where an order for the adoption of an Aboriginal child is to be made, the Court must satisfy itself that every effort has been made, including consultation with the child's parents, with other persons who have responsibility for the welfare of the child according to Aboriginal customary law and with appropriate Aboriginal welfare organisations, to arrange appropriate custody with the child's extended family or with Aboriginal people who have the correct kinship with the child according to Aboriginal customary law. Where this is not possible or not in the best interests of the child, the Court must give preference to a placement with Aboriginal persons, and take into consideration geographical proximity to the relatives of the child and any undertakings by the caregivers to encourage and facilitate contact by the child and its own kin and culture (s 11).

²⁵ ALRC Report at paras 365-371.

(c) Protection of children

It will be the case that in any community, particular children will be at risk of harm, by reason of having no family unit, or having a dysfunction family unit. To deal with such cases, governments have passed child protection laws allowing for government agencies to remove these children, if it would be “in the best interests of the child.”²⁶

The fundamental importance of the ‘best interests of the child’ principle in relation to all decisions and legislation with respect to the care of children is recognised in the *United Nations Convention on the Rights of the Child* Article 3(1):

In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

In the past, it was the policy of government to assume that Aboriginal people were incapable of adequately looking after children where one partner was Aboriginal and the other was non-Aboriginal, and remove the children.²⁷ This policy, which reflected paternal and racist attitudes of the time, was not confined to Australia, but was also the policy of governments in places such as Canada²⁸ and the USA.²⁹

This policy has been rejected by all Australian governments. In its place is the general policy that child protection and welfare issues relate to the circumstances of the individual child. Governments have adopted a child protection policy that, in the case of Aboriginal children, takes account of the Aboriginal cultural concerns. Such a policy is also applied to other distinct cultural groups.

The *Community Welfare Act 1993* provides for the placement of an Aboriginal child who is in need of care with extended family or appropriate Aboriginal caregivers. As well, subject to agreement with the Minister, a community government or an association under the *Associations Incorporation Act* may undertake functions in relation to the welfare of children.

The prosecution of child abuse cases, in Aboriginal communities, raises additional issues to those encountered in wider society. Some governments have developed programs to allow Aboriginal cultural and legal issues to be addressed in the investigation and trial of such offences.

²⁶ The child's best interests should govern all aspects of custody (residency), guardianship and access (contact) to children. However, as the “best interests principle” has no specific content, cultural expectations may be accommodated by the courts. See generally Alston P (ed) *The Best interests of the Child; reconciling culture and human rights* (Oxford: Clarendon Press, 1994).

²⁷ Philip Lynch, "Keeping Them Home: The Best Interests of Indigenous Children and Communities in Canada and Australia" (2001) 23 *Sydney L. Rev.* 501.

²⁸ Marlee Kline, "Child Welfare Law: 'Best Interests of the Child Ideology' and First Nations" (1992) 30 *Osgoode Hall LJ* 375.

²⁹ *Adoption of Baby Boy D*, Matter of 1985 742 P.2d 1059 at 1072: “Continuing separation of Indian children from their heritage is one of the most tragic and destructive aspects of contemporary Indian life. State intrusion into Native American parent-child relationships impedes the ability of the tribe to perpetuate itself, and, ultimately, it unjustifiably results in a coerced assimilation of the First Americans into a larger more homogenous society.”

The review of legislation or administrative policy or procedure with respect to the prosecution of child abuse cases, to take account of the role, if any, traditional law has to play in dealing with this matter is identified as an issue for inclusion in the government law reform strategy.

(d) Family violence

Government has developed specific strategies to prevent family violence in situations involving Aboriginal people and Aboriginal communities in the Northern Territory.³⁰

(e) Inheritance and succession³¹

The ALRC recommended reform of the general law relating to the distribution of property on death as follows:

- Aborigines should be able to apply to have an intestate estate distributed in accordance with the traditions or customary laws of the deceased's community;
- State and Territory Family Provision legislation should allow for applications by persons who could reasonably have expected support from the deceased in accordance with the customary laws of the community;
- Claims for family provision should prevail, in clear cases of need, over claims for traditional distribution on intestacy.³²

Administration and Probate Act 1979/Family Provision Act 1970

Section 6(4) of the *Administration and Probate Act 1979* (NT), and s 7(1A) of the *Family Provision Act 1970* (NT), both provide that for the purposes of the Acts:

an Aboriginal who has entered into a relationship with another Aboriginal that is recognised as a traditional marriage by the community or group to which either Aboriginal belongs is married to the other Aboriginal, and all relationships shall be determined accordingly.

Section 67A of the *Administration and Probate Act* provides that when an Aboriginal person is survived by more than one spouse, the estate passing to the spouse must be divided equally between the spouses.

The Public Trustee, or anyone who claims to be entitled to take an interest in an intestate estate of an Aborigine under the customs and traditions of the community or group to which the Aborigine belonged, may apply for an order to the Supreme Court. The application must be accompanied by a plan of distribution of the estate in accordance with the traditions of the community or group to which the Aborigine

³⁰ Media Release by the Chief Minister of the Northern Territory, 09 January 2003: New plan to address domestic and aboriginal family violence, referring to the Aboriginal Family Violence Strategy.

³¹ See generally ALRC Report; *Aboriginal Customary Law: Traditional and Modern Distribution of Property*, Research Paper 5 (Sydney: ALRC 1982); *The Recognition of Aboriginal Tribal Marriages: Areas for Functional Recognition*, Research Paper 3 (Sydney: ALRC, 1982).

³² ALRC Report Chapter 15.

belonged. The application must be made within a limited time. The court may extend the time limit as it thinks fit, although an application for extension shall be precluded once the estate is lawfully and fully distributed.

When making an order for distribution of an intestate estate, the court shall take into account the plan of distribution prepared under the Act and the traditions of the community or group to which the intestate Aborigine belonged. The court must also be satisfied that the order would in all the circumstances be just. The court has power to make an order even where an administrator has already made a distribution, but it shall not make an order under the Division if that order would affect or disturb “a proper distribution made for the purposes of providing for the maintenance, education or advancement in life of a person who was totally or partially dependent on the intestate Aboriginal immediately before his death”.³³

In oral submissions the Public Trustee noted that the expense of undertaking a Supreme Court action made this option impractical for the many small estates that might be affected by traditional law considerations. His general view was that it would be appropriate to develop a legislative option suitable for small estates.

The review of legislation with respect to the distribution of an intestate estate of a person subject to traditional law is identified as an issue for inclusion in the government law reform strategy.

³³ Administration and Probate Act 1979 (NT), s 71B.

4 CIVIL LAW

(a) Land Rights

There are three aspects to Aboriginal land rights in the Northern Territory:

- The grant of inalienable freehold title to Aboriginal Land Trusts under the *Aboriginal Land Rights (Northern Territory) Act*
- The recognition of specific native title rights under the *Native Title Act* with respect to Crown land or land vested in statutory bodies
- The granting or recognition of specific rights, such as hunting or fishing rights, with respect to Crown land or land vested in statutory bodies.

(i) Aboriginal Land Rights

The ownership of most land by Aboriginal people in the Northern Territory is governed by the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cwth). Aboriginal traditional owners, through Land Trusts established under the Act, own land as inalienable Aboriginal freehold title. An important feature of the land rights system is the veto which traditional owners have in relation to proposed exploration, mining and other developments on their land.

In addition, under the *Aboriginal Land Act 1978* (NT), permits are required to enter Aboriginal land, except for a specified group of people, and the Administrator may restrict entry into seas adjoining Aboriginal land.

Aboriginal interests in land are also recognised by the *Pastoral Land Act 1992*. Under this Act, Aboriginal associations may receive title to areas of land for community residential purposes. The advantages of these 'community living area' titles are:

- protection from compulsory acquisition (except acquisition of easements for essential services) and
- protection against alienation.

(ii) Native Title

Native title rights and interests are recognised and protected by that *Native Title Act* and the *Northern Territory (Native Title) Act*, *Crown Lands Act*, *Pastoral Lands Act Mining Act*, *Lands and Mining Tribunal Act* and associated legislation.

The Aboriginal and Torres Strait Islander Land Fund established by the *Land Fund and Indigenous Land Corporation (ATSIC Amendment) Act 1995*,³⁴ provides a means to benefit indigenous Australians who, through dispossession from their traditional lands, cannot meet the criteria for a native title claim. Such indigenous peoples can access the fund to acquire, manage and maintain land. The Indigenous Land Corporation is responsible for the purchase of lands. The Corporation enables the land acquired to be managed in a sustainable way to produce financial, cultural and social benefits for Aboriginal and Torres Strait Islander peoples and their children.

³⁴ See now inserted into the ATSIC Act 1989.

(iii) Hunting, fishing and gathering rights

The ALRC Report recommended that recognition of Aboriginal hunting, fishing and gathering rights should reflect the variety of legitimate interests in the environment such as conservation, effective management of natural resources, pastoral and other residential and commercial interests and that no overriding recognition of traditional hunting, fishing and gathering practices was appropriate.³⁵

Section 211 of the *Native Title Act 1993* (Cwth) protects native title rights of hunting, gathering or fishing interests:

211 Preservation of certain native title rights and interests

Requirements for removal of prohibition etc. on native title holders

- (1) Subsection (2) applies if:
- (a) the exercise or enjoyment of native title rights and interests in relation to land or waters consists of or includes carrying on a particular class of activity (defined in subsection (3)); and
 - (b) a law of the Commonwealth, a State or a Territory prohibits or restricts persons from carrying on the class of activity other than in accordance with a licence, permit or other instrument granted or issued to them under the law; and
 - (ba) the law does not provide that such a licence, permit or other instrument is only to be granted or issued for research, environmental protection, public health or public safety purposes; and
 - (c) the law is not one that confers rights or interests only on, or for the benefit of, Aboriginal peoples or Torres Strait Islanders.

Removal of prohibition etc. on native title holders

- (2) If this subsection applies, the law does not prohibit or restrict the native title holders from carrying on the class of activity, or from gaining access to the land or waters for the purpose of carrying on the class of activity, where they do so:
- (a) for the purpose of satisfying their personal, domestic or non-commercial communal needs; and
 - (b) in exercise or enjoyment of their native title rights and interests.

Note: In carrying on the class of activity, or gaining the access, the native title holders are subject to laws of general application.

Definition of class of activity

- (3) Each of the following is a separate class of activity:
- (a) hunting;
 - (b) fishing;
 - (c) gathering;
 - (d) a cultural or spiritual activity;
 - (e) any other kind of activity prescribed for the purpose of this paragraph.

Section 53 of the *Fisheries Act* protects the traditional fishing rights of Aboriginal people.

³⁵ ALRC Report Chapters 33 to 36.

- (1) Unless and to the extent to which it is expressed to do so but without derogating from any other law in force in the Territory, nothing in provision of this Act or an instrument of a judicial or administrative character made under it shall limit the right of Aboriginals who have traditionally used the resources of an area of land or water in a traditional manner from continuing to use those resources in that area in that manner.
- (2) Nothing in subsection (1) shall authorise a person to enter any area used for aquaculture, to interfere with or remove fish or aquatic life from fishing gear that is the property of another person, or to engage in a commercial activity.

Section 37 of the *Crown Lands Act* provides that where a lease under the Act contains a reservation in favour of the Aboriginal inhabitants of the Territory, Aboriginals traditionally entitled to use or occupy the land may enter the land, take and use natural water, vegetable matter and wild animals for food or ceremonial purposes.

Section 38 of the *Pastoral Land Act* imposes a reservation on all pastoral leases in favour of the Aboriginal inhabitants of the Territory who ordinarily reside on the leased land, on a living area excised from the leased land, or who are traditionally entitled to use or occupy the land may enter the land, to take and use natural water and take a kill for food or ceremonial purposes wild animals and vegetable matter growing naturally.

Aboriginal people can apply to the Minister for the excision of land from a pastoral lease for a community living area (s.101). The Minister may approve the application or refer it to the Community Living Areas Tribunal, which will consider the matter and make a recommendation to the Minister. The Act also provides for access to Aboriginal land by crossing over pastoral leases where there is no other practical way of gaining access, as determined by agreement or by the Tribunal (s.113). An association of Aboriginals may apply to the Minister to have its interest in land, by lease or estate in fee simple, converted to an Aboriginal community living area held on the same terms as if it were excised from a pastoral lease under the *Pastoral Land Act*.

Under s.76, the Administrator may resume Crown lands subject to a lease other than a lease under the *Mining Act* or *Pastoral Lands Act* for the use and benefit of Aboriginal people.

The *Lands Acquisitions Act* prohibits the Minister from compulsorily acquiring land held by an incorporated association or Aboriginal association as a community living area for Aboriginals, having been excised from a pastoral or Crown lease, except for the purpose of the provision of essential services and facilities or where the land is held subject to the reservation that the Territory can acquire it for the purpose proposed (s.28A).

Section 73 of the *Territory Parks and Wildlife Act* authorises the Parks and Wildlife Commission to enter into agreements with an Aboriginal Land Council relating to schemes for the protection and conservation of wildlife in and the protection of the natural features of Aboriginal land.

(b) Cultural heritage

The term “Aboriginal tradition” is defined in s.3 of *Aboriginal Land Rights (Northern Territory) Act* as:

Aboriginal tradition’ means the body of traditions, observances, customs and beliefs of Aboriginals or of a community or group of Aboriginals, and includes those traditions, observances, customs and beliefs as applied in relation to particular persons, sites, areas of land, things or relationships.

(i) Protection of cultural information

There have been a series of inquiries into the legal protection of indigenous culture.³⁶

The decision in *Foster v Mountford*³⁷ indicates that the law of confidential information may also protect information protected under traditional law. Dr Mountford, an anthropologist, was given information by the Pitjantjatjara people about tribal sites and objects, communal tradition, paintings and totemic geography. He subsequently published the information in a book. The plaintiffs sought an order to prevent the sale of the book. The court held that the publication of the information of deep religious and cultural significance to the Aborigines concerned amounted to a breach of confidence. In particular, the court noted that the revelation of secrets could give rise to serious damage by way of disruption to Aboriginal society: “revelation of the secrets to their women, children and uninitiated men may undermine the social and religious stability of their hard-pressed community”.³⁸

The *Heritage Conservation Act* 1991 (NT) establishes the Heritage Advisory Council to carry out functions such as preparing criteria for the assessment of places or objects of heritage value, carrying out research into and evaluating the heritage value of places and objects and recommending to the Minister places and objects for inclusion on the Register of Heritage Places. Applications for inclusion on the Register can be received from the public.

Once a place or object is declared a heritage place or object, it is an offence to “carry out work of any sort on or damage desecrate or alter a heritage place or object” unless such work is in accordance with a Conservation Management Plan determined by the Heritage Advisory Council (s.33). Pursuant to s.39 of the Act, and the Regulations, any place containing Aboriginal rock paintings or carvings, burial sites evidence of prehistoric occupation etc is deemed a heritage site.

(ii) Sacred sites

The term “sacred site” is defined in s.3 of the *Aboriginal Land Rights (Northern Territory) Act* [ALRA] as follows:

³⁶ Recent reports include Review of the Aboriginal and Torres Strait Islander Heritage Protection Act 1984, Report by Hon Elizabeth Evatt (1996); Attorney - General's Department Issues Paper, Stopping The Rip-Offs - Intellectual Property Protection for Aboriginal and Torres Strait Islanders, (Canberra: AGPS, 1994); see K Puri, "Cultural Ownership and Intellectual Property Rights Post-Mabo: Putting Ideas into Action" (1995) *Intellectual Property Journal* 293.

³⁷ (1976) 29 FLR 233

³⁸ *ibid* at 244.

“sacred site” means a site that is sacred to Aboriginals or is otherwise of significance according to Aboriginal tradition, and includes any land that, under a law of the Northern Territory, is declared to be sacred to Aboriginals or of significance according to Aboriginal tradition

The Legislative Assembly has power pursuant to s.73(1)(a) ALRA to make laws extending to:

the protection of, and the prevention of the desecration of, sacred sites in the Northern Territory, including sacred sites on Aboriginal land, and, in particular, laws regulating or authorizing the entry of persons on those sites, but so that any such laws shall provide for the right of Aboriginals to have access to those sites in accordance with Aboriginal tradition and shall take into account the wishes of Aboriginals relating to the extent to which those sites should be protected

The *Northern Territory Aboriginal Sacred Sites Act 1989* [Sacred Sites Act] has been enacted pursuant to that power. Both Acts bind the Crown in right of the Northern Territory. The definition of "sacred site" in the Sacred Sites Act is the same as that in ALRA. Sacred sites can be in either of two categories:

- (a) a site that is sacred to Aboriginals; or
- (b) a site that is otherwise of significance according to Aboriginal tradition.

The effect of these definitions is that a site can be a sacred site, regardless of whether any person other than the custodians know this to be the case. Sacred sites may exist on any land within the Northern Territory. The Sacred Sites Act provides for registration of sites on application, registration being prima face evidence that the registered area is a sacred site (s.45). But the legal status of the area as a “sacred site” is not dependent on registration.³⁹

It is an offence, pursuant to s.69(1) of ALRA and s.33 of the Sacred Sites Act, for a person to enter or remain upon land which is a sacred site. A further offence of "work on sacred site" is created by s.34(1) of the Sacred Sites Act.

Under the Sacred Sites Act, the Aboriginal Areas Protection Authority [AAPA] examines applications for Authority Certificates. Certificates are required before persons can use or carry out work on sacred sites. The AAPA must issue a Certificate where it is satisfied that the proposed work or use of the land will not constitute a substantive risk of damage to or interference with a sacred site, or where an agreement has been reached between the custodians and the applicants setting out details of the nature and extent of the agreed work or use (s.22).

Aboriginal religion and Aboriginal tradition are not generally regarded as separate and distinguishable, but as one part of a whole. However, the term “sacred site” carries with it religious connotations. The definitions of “Aboriginal tradition” and “traditional Aboriginal owners” in s.3 of ALRA, by references to “common spiritual affiliations to a site” and to “primary spiritual responsibility for that site” and the reference to “desecration” in s.73(1)(a) of ALRA suggest that the concept of a “sacred site” is essentially a religious or spiritual concept.

³⁹ *Aboriginal Sacred Sites Protection Authority v Maurice* (1986) 10 FCR 104 per Toohey J at 121-24.

The Woodward Report noted:

518. Land generally has spiritual significance for Aborigines but, because of the form and content of the myths relating to it, some land is more important than other land. Certain places are particularly important, usually because of their mythological significance, but sometimes because of their use as a burial ground or important meeting place for ceremonies.

519. For this reason it is often better to refer to “sites of special significance”; but this description omits the important fact that the significance is not only social and historical, but also spiritual or religious.

520. I have therefore elected to use the expression “sacred sites” as the simplest and most convenient for my purpose. It must be remembered though, that other places not so designated are still important to Aborigines in a spiritual sense. It is not possible merely to protect sacred sites and treat other land as unimportant.⁴⁰

The features of the site, while not the same as the site itself, may comprise an aspect of Aboriginal traditions and may be relevant in determining whether a “sacred site” exists, particularly if those features are identifiable with stories, songs, dreaming tracks or ceremonies.

(iii) Copyright

Under Australian law indigenous artists have the same rights and protections as other artists under the Commonwealth *Copyright Act*.

In *Bulun Bulun & Milpururru v R & T Textiles Pty Ltd*⁴¹ the Federal Court found that the relationship between the painter, Bulun Bulun, and his community in regard to the creation of a painting was one of mutual trust and confidence, sufficient under Australian law to establish a fiduciary relationship between Bulun Bulun and the community. Therefore, he was not able to use his painting in a manner contrary to customary law, and in the event of infringement of copyright by a third party, he was required to take action to remedy infringement of the copyright. Additionally, it was held that if a copyright owner fails to take action, or cannot be found, the community might take action itself.

However there is an additional issue: the very ability of the *Copyright Act* to protect traditional works. This is a matter presently under consideration by the Commonwealth government.

Under traditional law, some designs and images belong to particular Aboriginal communities, and thus only some members of that community are authorised to paint them. *Yumbulul v Reserve Bank of Australia*⁴² illustrates some aspects of this. This case arose after the Reserve Bank was licensed to reproduce Terry Yumbulul’s design “Morning Star Pole” on a bank note. French J noted that Mr Yumbulul had come “under considerable criticism from within the Aboriginal community for permitting the reproduction of the pole by the bank”. This was so, even though Mr Yumbulul had

⁴⁰ Aboriginal Land Rights Commission (Commissioner, Mr Justice Woodward), Second Report (Canberra: ASGPS 1974) at para 518-520.

⁴¹ (1998) 41 IPR 513.

⁴² (1991) 21 IPR 481.

authority within his own clan to paint certain sacred designs, derived from his father and mother and from having passed through ceremony. This raises the practical problem artists reconciling their responsibilities to communities under traditional law, with their assertion of copyright under Australian law.

Damages for breach of copyright

In the assessment of damages for unlawfully copying another's work, von Doussa J noted in *Milpururru v Indofurn Pty Ltd*:

The statutory remedies do not recognise the infringement of ownership rights of the kind which reside under Aboriginal law in the traditional owners of the dreaming stories and the imagery such as used in the artworks of the present applicants.⁴³

This is because the anger and humiliation of the creators of the work, *and their communities*, cannot be properly taken into account in the assessment of damages. He assessed damages on the basis that damages had to compensate the creators of the work for the *personal* distress they had suffered, and *their* exposure to embarrassment and contempt within their communities.

He accepted anecdotal evidence that Aboriginal law and custom would treat each of the applicants equally, and that "fruits of the action would be shared equally between the named parties". However such a treatment would not be in accordance with the principles under the *Copyright Act*. He left the applicants collectively to distribute the proceeds of the action "to those traditional owners who have legitimate entitlements according to Aboriginal law to share compensation paid by someone who has without permission reproduced the artwork of an Aboriginal artist."

(c) Compensation for loss

Generally Aboriginal people have the same rights as any other person with respect to compensation for loss or injury. However, cultural factors or traditional law rights and responsibilities may be relevant to the assessment of the actual sum of damages appropriate to a particular loss or injury.

(i) Torts

Awards of damages to Aboriginal people in negligence actions have included damages for loss of cultural fulfilment, the victim's subjective suffering resulting from an inability to fully participate in traditional cultural ceremonies and activities.⁴⁴

(ii) Statutory schemes

In the Northern Territory, a traditional spouse is entitled to benefits associated with accident compensation (including workers' compensation), compensation on death, criminal injuries compensation, repatriation benefits and superannuation.

⁴³ (1995) 30 IPR 209.

⁴⁴ *Napaluma v Baker* (1982) 29 SASR 192; *Dixon v Davies* (1982) 17 NTR 31; *Weston v Woodroffe* (1985) 2 MVR 475; 36 NTR 34.

Statutory compensation schemes in the Northern Territory generally recognise traditional Aboriginal marriages in their definition of spouses: *Compensation (Fatal Injuries) Act 1974 (NT)*, s 4(3); *Crimes (Victims Assistance) Act 1982 (NT)*, s 4(2); *Motor Accidents (Compensation) Act 1979 (NT)*, s 4. Section 37 of the *Motor Accidents (Compensation) Act* also provides that where there are multiple spouses, the benefits prescribed must be divided by the number of spouses.

This is also the case with much Commonwealth legislation. For example, the definition of spouse in the *Safety and Rehabilitation and Compensation Act 1988 (Cwth)* includes, in the case of an employee or a deceased employee who is, or was, a member of the Aboriginal race or the descendant of indigenous inhabitants of the Torres Strait Islands, a person who is, or was, recognised as the employee's husband or wife by the custom prevailing in the tribe or group to which the employee belongs or belonged.

The review of legislation or administrative policy or procedure with respect to statutory compensation schemes, to take account of the role, if any, traditional law has to play in dealing with this matter is identified as an issue for inclusion in the government law reform strategy.

(d) Benefit schemes

Aborigines have the same general entitlements under the *Social Security Act 1991 (Cwth)* as any other person. However, traditional law aspects of Aboriginal culture raise practical problems with respect to the application of statutory criteria of entitlement, and the development of individual or community benefit programs.⁴⁵

(e) Evidence

The *Native Title Act 1993* and the *Aboriginal Land Rights (Northern Territory) Act 1976* allow for proof of customary laws. Under both Acts, the relevant body may, on its own initiative or on the application of a party, direct that an inquiry or part thereof be held in private. Other general common law powers may be exercised by common law courts.

While the technical rules of evidence apply to civil proceedings, they tend to play a much greater part with respect to criminal law issues and are considered in that regard.

⁴⁵ Oral Submissions from Centrelink Katherine.

5 CRIMINAL LAW

Australian law provides that a person commits a crime when he or she voluntarily does an act prohibited by the criminal law. In such a case, a person is charged, applies for bail until the trial, stands trial and, if found guilty, is punished.

Traditional law may be relevant in relation to the applications for bail and issues of fitness to stand trial.

The fact that a person may have acted in accordance with Aboriginal customary laws in committing an offence against the general criminal law does not constitute a defence unless it comes within one of the existing criminal law defences. Traditional law may be relevant in relation to defences of provocation, duress and authorisation - did the person knowingly and voluntarily commit the offence?

Finally traditional law may be relevant in relation to the appropriate sentence.

In the ALRC Report, the Commission considered that the appropriateness of general Australian law, including criminal law, to Aborigines, was not really disputed in evidence or submissions to the Commission. The issue was the perceived failure of the general law to allow room for Aboriginal customary law to operate in areas where those laws and traditions are strong.⁴⁶

Recognition of customary laws in the criminal justice system at the Commonwealth, state or territory level has been of a general nature, rather than giving legislative recognition to specific aspects of customary laws.

The ALRC supported and encouraged the local resolution of disputes in Aboriginal communities by unofficial methods, but concluded that there should be no general scheme of Aboriginal courts established in Australia.

The Committee of Inquiry has not recommended either the establishment of Aboriginal courts to administer general Australian law where an Aboriginal person is charged, nor has it recommended the amendment of the Criminal Code to recognise specific aspects of traditional law.

The incorporation of specific aspects of traditional law into specific aspects of Australian will result in the creation of synthetic law that is neither Australian law nor Aboriginal law. It will be a law that is less likely to be understood by non-Aboriginal and Aboriginal people alike.

(a) Decision and discretion to prosecute

In *R v Anunga*⁴⁷ the Supreme Court established guidelines to be observed by police in the interrogation of Aboriginal people. The guidelines require the presence of an interpreter if the suspect is not fluent in English, the presence of a prisoner's friend, care in administering the caution to ensure that it is understood, provision of basic refreshments and substitute clothing if needed, and limits on questioning when the person in custody is not able to deal with them.

⁴⁶ ALRC Report Vol 1 at p 287.

⁴⁷ (1976) 11 ALR 412.

With respect to more serious offences, the discretion of the Director of Public Prosecutions [DPP] allows customary law considerations to be taken into account within its general guidelines.⁴⁸ Guideline 9 states:

Factors which may arise for consideration either alone or in combination in determining whether the public interest requires a prosecution include:

- (a) the seriousness or, conversely, the triviality of the alleged offence or that it is of a *technical* nature only
- (b) any mitigating or aggravating circumstances
- (c) the youth, age, intelligence, physical health, mental health or special infirmity of the alleged offender
- (d) the alleged offender's antecedents and background
- (e) the staleness of the alleged offence
- (f) the degree of culpability of the alleged offender in connection with the offence
- (g) the obsolescence or obscurity of the law
- (h) whether the prosecution would be perceived as counter-productive, for example, by bringing the law into disrepute
- (i) the availability and efficacy of any alternatives to prosecution
- (j) the prevalence of the alleged offence and the need for deterrence, both personal and general
- (k) whether the consequences of any resulting conviction would be unduly harsh and oppressive
- (l) whether the alleged offence is of considerable public concern
- (m) any entitlement of the State or Territory, the victim or other person or body to criminal compensation, reparation or forfeiture if prosecution action is taken
- (n) the attitude of the victim of the alleged offence to a prosecution
- (o) the likely length and expense of a trial
- (p) whether the alleged offender is willing to co-operate in the investigation or prosecution of others, or the extent to which the alleged offender has done so
- (q) the likely outcome in the event of a finding of guilt having regard to the sentencing options available to the court
- (r) whether the alleged offence is triable only on indictment and
- (s) the necessity to maintain public confidence in such basic institutions as the Parliament and the courts.

The discretion of the Police allows customary law considerations to be taken into account. Police are required to take into account the DPP guidelines. Additionally, there is the common law discretion not to prosecute in the public interest.

⁴⁸ Pursuant to s.25 of the Director of Public Prosecutions Act, the DPP has issued guidelines to be followed in the performance of the Director's functions, see Office of Director of Public Prosecutions, The Criteria Governing the Decision to Prosecute. Similarly the common law position is stated thus: "It has never been the rule in this country - I hope it never will be - that suspected criminal offences must automatically be the subject of prosecution. Indeed the very first Regulations under which the Director of Public Prosecutions worked provided that he should ... prosecute whenever it appears that the offence or the circumstances of its commission is or are of such a nature that a prosecution in respect thereof is required in the public interest. That is still the dominant consideration. (Sir Hartley Shawcross QC, Attorney-General, stated to the House of Commons - HC Debates, Vol 483, col.681, 29 January 1951).

Some individual decisions to prosecute may be influenced by non-prosecution policies, for example, such policies in respect of attempted suicide and women who procure their own abortion have been noted in Australia in the past. Such policies may be considered as part of the public interest.

(b) Intention to commit an offence⁴⁹

Apart from exceptions not presently relevant, criminal responsibility under Northern Territory law depends on the basis of a person's state of mind, and in certain cases the "reasonableness" of his or her actions.

Additionally, murder can be reduced to manslaughter due to the existence of a partial excuse (provocation, excessive self-defence, diminished responsibility and infanticide). The partial excuses do not negate intent rather they "recognise and make a concession for human frailty."⁵⁰ The issue which arises is to determine what circumstances will suffice to diminish the fault element for murder.

The ALRC Report recommended that:

- There should not be a general defence based on authorisation of the defendant's actions pursuant to Aboriginal customary law.
- The law concerning existing defences such as provocation should not be amended to remove existing standards provided that those standards are taken to include the ordinary Aboriginal person.
- Generally the taking into account of acts done under traditional law could be accommodated within the sentencing discretion.
- There should be a partial defence having the effect of reducing murder to manslaughter where a defendant acted on the well-founded belief that Aboriginal customary law compelled the defendant to commit the act in question.⁵¹

Where the law provides for subjective tests, either as a fault element or in a defence, if evidence of rights and responsibilities under traditional law helps to show the person's state of mind, it will be admitted and taken into account.

(i) Claim of Right

Under s.30(2) of the Criminal Code, an act done in accordance with an "honest belief"⁵² of a claim of right with respect to property will not be an offence where that belief

⁴⁹ Eames, G "Aboriginal Homicide: Customary Law Defences or Customary Lawyers' Defences?" in H Strang and S Gerull (eds) *Homicide: Patterns, Prevention and Control* (AIC Conference Proceedings No 17, 1993). The Model Criminal Code Officers Committee of the Standing Committee of Attorneys General, [MCCOC] has taken into account the ALRC Report in making recommendations to governments on the reform of substantive criminal law.

⁵⁰ MCCOC Chapter 5: Fatal Offences against the Person (Discussion Paper 1998) at p 69.

⁵¹ ALRC Report Chapter 18.

⁵² Section 30(2) states: "A person is excused from criminal responsibility for an act or omission done or made with respect to, or for an event caused to, property in the exercise of an honest claim of right and without intention to defraud. "The defence of honest claim of right having been raised it is then for the prosecution to show beyond reasonable doubt that the accused was not exercising an honest claim of right. For the defence to apply, the belief of the appellant must be genuinely held. It need have no foundation in law or fact and it need not be reasonable. However reasonableness is a factor which is part

negates an element of the offence. In *Walden v Hensler*⁵³ the High Court held that an honest belief that traditional law permitted a person to do an act (in this case, kill a bush turkey) was not sufficient; the defence of honest claim of right, required a belief that the Australian law recognised such right.

(ii) Provocation

Provocation may be a defence to a charge of an offence of assault or with respect to property, and can reduce a charge of murder to manslaughter. Section 1 of the Criminal Code defines “provocation” as

any wrongful act or insult of such a nature as to be likely, when done to an ordinary person, or in the presence of an ordinary person, to deprive him of the power of self-control.

Section 34 of the Criminal Code provides:

(1) A person is excused from criminal responsibility for an act or its event if the act was committed because of provocation upon the person or the property of the person who gave him that provocation provided –

- (a) he had not incited the provocation;
- (b) he was deprived by the provocation of the power of self-control;
- (c) he acted on the sudden and before there was time for his passion to cool;
- (d) an ordinary person similarly circumstanced would have acted in the same or a similar way;
- (e) the act was not intended and was not such as was likely to cause death or grievous harm; and
- (f) the act did not cause death or grievous harm.

(2) When a person who has unlawfully killed another under circumstances that, but for this subsection, would have constituted murder, did the act that caused death because of provocation and to the person who gave him that provocation, he is excused from criminal responsibility for murder and is guilty of manslaughter only provided –

- (a) he had not incited the provocation;
- (b) he was deprived by the provocation of the power of self-control;
- (c) he acted on the sudden and before there was time for his passion to cool; and
- (d) an ordinary person similarly circumstanced would have acted in the same or a similar way.

(3) A person is excused from criminal responsibility for the use of such force as was reasonably necessary to prevent the repetition of a wrongful act or insult as to be provocation for him provided –

- (a) he had not incited the wrongful act or insult;
- (b) an ordinary person similarly circumstanced would have acted in the same or a similar way;
- (c) the force used was not intended and was not such as was likely to cause death or grievous harm; and

of the objective circumstances which may be considered in determining the issue of genuine belief: *R v Bowman* (1987) 49 NTR 48 at 54.

⁵³ (1987) 163 CLR 561 with respect to the Queensland Code, followed in the Northern Territory in DPP Reference No 1 of No 1 of 1999 (1999) 128 NTR 1 (Supreme Court); [2000] NTSC 6 (Court of Appeal).

(d) the force used did not cause death or grievous harm.

The provocation must have been such that it would cause an ordinary person to lose self control. The seriousness of the provocation must be weighed from the viewpoint of the particular accused. There is no specific requirement in the Criminal Code that Aboriginal customary laws be taken into account in determining provocation. The Court of Criminal Appeal in *Mungatopi*⁵⁴ endorsed the test with respect to an Aboriginal person of “the powers of self-control as everyone is entitled to expect an ordinary person of that culture and environment to have.”⁵⁵

The law with respect to provocation in the Northern Territory appears to meet the standard referred to by the ALRC.⁵⁶

Although an insult may not amount to provocation in law, it is nevertheless “a highly significant extenuating circumstance” and can be taken into account in assessing the culpability of the offender.⁵⁷ Provocation can result in a substantial discount in sentence.⁵⁸

(iii) Compulsion

Sections 40 and 41 of the Criminal Code provide the excuse of compulsion relieving a person from criminal responsibility for acts or omissions in certain circumstances.

40. Duress

(1) A person is excused from criminal responsibility for an act, omission or event if it was done, made or caused because of duress provided –

- (a) he believed the person making the threat was in a position to execute the threat;
- (b) he believed there was no other way he could ensure the threat was not executed;
- (c) an ordinary person similarly circumstanced would have acted in the same or a similar way; and
- (d) he reported the threat to a police officer as soon as was reasonably practicable, unless the nature of the threat was such that an ordinary person similarly circumstanced would not have reported that threat.

⁵⁴ (1991) 57 A Crim R 341.

⁵⁵ (1991) 57 A Crim R 341 at 346-7 endorsing *Jabarula v Poore* (1989) 96 FLR 34.

⁵⁶ Since that Report, the High Court has ruled that for provocation, ethnicity may be taken into account in assessing the gravity of the provocation, but not in assessing the power of self-control of the ordinary person: *Stingel v R* (1990) 171 CLR 312; similarly *Brennan, Deane, Dawson and Gaudron JJ in Masciantonio v The Queen* (1995) 183 CLR 58 at 66-67. In *Green v the Queen* (1997) 191 CLR 334 at 368 *McHugh J* offered one qualification: “The only qualification I would make to this statement is to add considerations of ‘ethnic or cultural background of the accused’ to age and maturity as relevant to any inquiry into the objective standard by which the self-control of an accused is measured”. His test has not been adopted. With respect to self-control, which deals in essence with the proportionality of the response, the ordinary person is not imbued with any characteristics personal to the accused. The law as set out in *Mungatopi* (1991) 57 A Crim R 341 may be different to the law in *Stingel*. MCCOC, Chapter 5: Fatal Offences against the Person (Discussion Paper 1998) at p 79 was critical of the law as laid down by the High Court. The NSW Law Reform Commission in its Discussion Paper: “Provocation, Diminished Responsibility and Infanticide”, 1993 at 47-50 noted that the double test problem was at its most acute with respect to Aboriginal persons subject to traditional law, where a jury will have no knowledge of relevant cultural practices.

⁵⁷ *R v Kenny* [2000] NTSC 43 at para 34.

⁵⁸ *R v Kenny* [2000] NTSC 43 at para 29.

(2) The excuse referred to in subsection (1) does not extend to an act, omission or event that would constitute murder, manslaughter or a crime of which grievous harm or an intention to cause such harm is an element; nor to a person who has rendered himself liable to have such a threat made to him by having entered into an association or conspiracy that has as any of its objects the doing of a wrongful act.

A defence of duress was accepted where an Aboriginal woman was required by customary law to assault another woman. Under customary law, it was stated that the woman was liable to injury if she did not act in the customary way.⁵⁹ This was also the earlier conclusion of Eggleston, where non-performance would result in death or physical harm.⁶⁰ The ALRC Report noted that the defence of duress may be inappropriate because traditional Aborigines follow the laws not only because of threat, but because they believe in the legitimacy of the laws.⁶¹

41. Coercion

(1) When a person who has unlawfully killed another under circumstances that, but for this subsection, would have constituted murder, did the act or made the omission that caused death because of coercion of such a nature that it would have caused an ordinary person similarly circumstanced to have acted in the same or a similar way, he is excused from criminal responsibility for murder and is guilty of manslaughter only.

(2) The excuse referred to in subsection (1) does not extend to a person who has rendered himself liable to have such coercion applied to him by having entered into an association or conspiracy that has as any of its objects the doing of a wrongful act.

MCCOC noted that the ALRC proposal for a partial defence to murder was based on the premise that compliance with customary law was analogous to diminished responsibility. MCCOC was not persuaded by the analogy and also not in favour of a partial defence of diminished responsibility in principle.⁶²

(c) Customary Law Offences

There are matters which are wrong under traditional law, such as neglect of kinship obligations, but are not civil or criminal wrongs under Australian law. Where these wrongs have been committed, the members of the community cannot look to non-Aboriginal law to compensate the person suffering, nor provide a victim with redress. The only alternatives are to deal with the wrongdoers under traditional law, or not at all. If the imposition of punishment of these wrongs under traditional law results in an offence being committed under the Australian criminal law, such as an assault, traditional law will be in conflict with the Australian criminal justice system.

Should breaches of Aboriginal customary laws should be incorporated into general law as a basis for criminal liability? The ALRC considered, but did not support, the general codification of Aboriginal customary law or its enforcement by existing courts.

⁵⁹ R v Isobel Phillips (Northern Territory Court of Summary Jurisdiction, No1529-1530 of 1982, Murphy SM, 19 September 1983, unreported) cited ALRC Report Vol 1 at p 308.

⁶⁰ Eggleston E, Fear, Favour or Affection, Aborigines and the Criminal law in Victoria, South Australia and Western Australia (ANU Press, Canberra 1976).

⁶¹ ALRC Report Vol 1 at p 308.

⁶² MCCOC Chapter 5: Fatal Offences against the Person (Discussion Paper 1998) p 141.

As a matter of policy, the Legislative Assembly is able to enact criminal laws of general or limited application, or through such mechanisms as the community government scheme under *Local Government Act*, confer on Aboriginal communities the power to make laws of general application binding all persons within the relevant community area, and enforceable by the Northern Territory Police.

There is clearly limited scope for community by-laws to create customary law offences, additional to actions already criminalised by Australian law. It is the general recommendation of the Committee of Inquiry that Aboriginal communities be assisted to develop law and justice plans which may incorporate traditional law in the manner that the community thinks appropriate. The application of traditional law under such plans must comply either with the general Northern Territory law, or be authorised by the by-law making power under the *Local Government Act*.

In the event that a community seeks to criminalise behaviour or impose sanctions in a manner not presently authorised by Northern Territory law or legislation, the community will have to seek the enactment of either general or special legislation by the Legislative Assembly.

The Committee of Inquiry has not recommended the enactment of legislation permitting the registration and general application of community law and justice plans in a way that overrides the general application of Northern Territory criminal or civil law.

(d) Evidence

At common law a person is neither a competent nor compellable witness in proceedings involving his or her spouse. The general rule is overturned by the s.9 of the *Evidence Act 1939 (NT)* which provides:

(5) The husband or wife of any accused person in a criminal proceeding shall be compellable to give evidence in the proceeding in every Court, either for the prosecution or for the defence, and without the consent of the accused.

(6) A husband or wife shall be competent and compellable to disclose communications made, whether before or after the commencement of this Act, between the husband and the wife during the marriage.

Thus persons recognised as married under traditional law are compellable to give evidence.

The ALRC recommended that:

- Evidence concerning the effect of Aboriginal customary law on a defendant should be admissible where a question arises as to whether the defendant had a particular intent.
- Legislation provide for the giving of evidence by a witness about Aboriginal customary law where the witness had special knowledge or experience of the customary laws of the community.

The rules of evidence, strictly applied, would preclude much evidence from Aboriginal witnesses about traditional law. To overcome this evidentiary problem, the ALRC Report recommended providing that evidence of Aboriginal customary laws is not inadmissible by reason that it is hearsay or opinion evidence or that it relates to a fact in issue.¹⁴³ The NSW Law Reform Commission [NSWLRC] concluded that this evidence would probably now be admissible under the uniform *Evidence Act*.⁶³ The uniform *Evidence Act* has been enacted by the Commonwealth, New South Wales and the ACT and is under consideration in a number of jurisdictions.⁶⁴

Evidence of customary law is normally categorised as “opinion evidence” and opinion evidence could only be given by a suitably qualified expert. While the uniform *Evidence Act* disallows evidence of an opinion to prove the existence of a fact, however,

If a person has specialised knowledge based on the person’s training, study or experience, the opinion rule does not apply to evidence of an opinion of that person that is wholly or substantially based on that knowledge.⁶⁵

A person knowledgeable about traditional law could more easily come within this exception to the opinion rule.¹³⁸

However, courts in the Northern Territory appear to have taken a broad approach in determining the ability of a person to speak authoritatively on traditional law.

The review of the law evidence, as it affects evidence about traditional law, is identified as an issue for inclusion in the government law reform strategy, as part of its consideration of whether the Northern Territory should adopt the uniform *Evidence Act*.

The ALRC Report also noted practical difficulties surrounding the giving of Aboriginal evidence:

- whether a witness has authority to speak for the community
- the fact that disclosure of some Aboriginal customary laws may be forbidden
- publication of material may breach customary laws
- a witness's evidence may disclose a past violation by that witness of a customary law, exposing him or her to shame or retaliation under traditional law.⁶⁶

Courts have general inherent powers to receive evidence on a restricted basis, either in closed session or to make orders prohibiting publication of evidence. It is within the court's power to apply “gender restrictions” when Aboriginal people are giving evidence about traditional law.⁶⁷ It was the view of the NSWLRC that the necessary judicial powers to receive such evidence clearly existed, and were being exercised without difficulty.⁶⁸

⁶³ Sentencing: Aboriginal offenders Report 96 (2000) para 3.101.

⁶⁴ S Odgers, *Uniform Evidence Law* (4th ed, LBC Information Services, 2000).

⁶⁵ *Uniform Evidence Act* s.79.

⁶⁶ ALRC Report at para 644-665.

⁶⁷ *Western Australia v Ward* (1997) 145 ALR 512.

⁶⁸ Sentencing: Aboriginal offenders Report 96 (2000) at 3.108.

(e) Trial

Aboriginal people have also raised a concern with their experience with the general criminal law in the delay between the commission of an offence and the punishment imposed, a problem which is exacerbated in remote communities. As a result, general criminal law sanctions may be considered to be less effective than those carried out through customary law.

Interpreters

The law relating to how people who cannot use English at all, or only as a second or subsequent language, are treated by the criminal justice system, as an issue relating to the fair trial of a person accused of an offence. However, the issue of interpreters may also come up where actions require interpreters to facilitate communication as a matter of sound administrative practice. There is no general right in the Northern Territory, as such, requiring the assistance of a court-appointed interpreter, for an accused to be able to understand English as part of an accused's right to a fair trial.

Section 357(1) of the Criminal Code provides

if, when an accused person is called upon to plead to the indictment ... it appears to be uncertain, for any reason, whether he is capable of understanding the proceedings at the trial so as to be able to make a proper response, the court shall enquire into the question of whether he is capable or not.

In *Ngatayi v the Queen*⁶⁹ the High Court said of the similar Western Australian provision:

The incapacity to which [the section] refers may arise "for any reason". It need not be due to any physical or mental condition. For example, if the prisoner cannot speak English, and no interpreter can be found who can translate the proceedings into his tongue, the section would seem to apply.

This right of a person to have an interpreter (unless the right is waived by counsel) only applies to trials.⁷⁰ However "the duty to act fairly would no doubt require a magistrate to ensure an interpreter is made available in committal proceedings, if one can be found."⁷¹

In order for an accused to participate in a trial, and in order for the relevance of traditional law to be either understood by the accused, his or her counsel, or the Court, it is axiomatic that an adequate interpreter service be available.

(f) Sentencing⁷²

In sentencing a person found guilty of an offence in Australian law, the judge or magistrate selects an appropriate punishment from within the range of punishments authorised by law. The aims of punishment are:

⁶⁹ (1980) 147 CLR 1.

⁷⁰ *R v Lee Kun* [1916] 1 KB 337; *Ngatayi; Mohammed Ahmed Saraya* (1994) 70 A Crim R 515.

⁷¹ *Ebaterinja v Deland and ors* (1997) 6 NTLR 107.

⁷² See NSWLRC, *Sentencing: Aboriginal offenders*, Report 96 (2000).

- retribution (called punishment, vengeance etc, so that the community can see the wrongdoer is dealt with);
- deterrence (to stop the offender, and others, committing that wrong again);
- realisation (helping the offender to understand the wrongness of his/her acts);
- rehabilitation (helping the offender to learn how to avoid offending again).

Section 5(1) of the *Sentencing Act* 1995 provides:

The only purposes for which sentences may be imposed on an offender are –

- (a) to punish the offender to an extent or in a way that is just in all the circumstances;
- (b) to provide conditions in the court's order that will help the offender to be rehabilitated;
- (c) to discourage the offender or other persons from committing the same or a similar offence;
- (d) to make it clear that the community, acting through the court, does not approve of the sort of conduct in which the offender was involved;
- (e) to protect the Territory community from the offender; or
- (f) a combination of 2 or more of the purposes referred to in this subsection.

(i) Factors relevant to sentencing generally

Within the framework provided by the general principles, the common law, and legislation in several jurisdictions, indicates the various factors concerning the offence and the offender which may also be taken into account in determining an appropriate sentence.

Common law

While the mere fact that an offender is Aboriginal is, itself, not relevant to what sentence should be imposed:

... in imposing sentences courts are bound to take into account, in accordance with those principles, all material facts including those facts which exist by reason of the offender's membership of an ethnic or other group. So much is essential to the even administration of criminal justice. That done, however, the weight to be attributed to the factors material in a particular case, whether of aggravation or mitigation is ordinarily a matter for the court exercising the sentencing discretion of first instance⁷³

Northern Territory

Section 5(2) of the *Sentencing Act* provides:

In sentencing an offender, a court shall have regard to –

- (a) the maximum and any minimum penalty prescribed for the offence;
- (b) the nature of the offence and how serious the offence was, including any physical, psychological or emotional harm done to a victim;
- (ba) if the offence is a sexual offence –

⁷³ Neal v The Queen (1982) 149 CLR 305 per Brennan J at 326, adopted R v Wurraramara [1999] NTSCCA 45 at para 35.

- (i) whether the victim contracted a sexually transmissible medical condition as a result of the offence; and
- (ii) whether the offender was aware at the time of the offence that he or she had a medical condition that could be sexually transmitted;
- (c) the extent to which the offender is to blame for the offence;
- (d) any damage, injury or loss caused by the offender;
- (e) the offender's character, age and intellectual capacity;
- (f) the presence of any aggravating or mitigating factor concerning the offender;
- (g) the prevalence of the offence;
- (h) how much assistance the offender gave to law enforcement agencies in the investigation of the offence or other offences;
- (j) whether the offender pleaded guilty to the offence and, if so, the stage in the proceedings at which the offender did so or indicated an intention to do so;
- (k) time spent in custody by the offender for the offence before being sentenced;
- (m) sentences imposed on, and served by, the offender in a State or another Territory of the Commonwealth for an offence committed at, or about the same time, as the offence with which the court is dealing;
- (n) sentences already imposed on the offender that have not been served;
- (p) sentences that the offender is liable to serve because of the revocation of orders made under this or any other Act for contraventions of conditions by the offender;
- (q) if the offender is the subject of a community work order, the offender's compliance with the order;
- (r) anything else prescribed by this Act to which the court is required to have regard; and
- (s) any other relevant circumstance.

There is no express requirement to take account of traditional law, if it is otherwise relevant. However, when determining sentences, courts already in practice take account of the customary laws of the community of the offender.

Australia

The *Crimes Act* 1914 (Cwth) s.16A(2)(m) requires the court to consider “the character, antecedents, cultural background, age, means and physical or mental condition of the person” as one of the factors in sentencing.⁷⁴ In Queensland, sentencing legislation requires courts to take into account an offender's cultural background.⁷⁵

(o) if the offender is an Aboriginal or Torres Strait Islander person--any submissions made by a representative of the community justice group in the offender's community that are relevant to sentencing the offender, including, for example-

- (i) the offender's relationship to the offender's community; or
- (ii) any cultural considerations; or
- (iii) any considerations relating to programs and services established for offenders in which the community justice group participates

⁷⁴ Similarly Crimes Act 1900 (ACT) s 429A(1)(k).

⁷⁵ The Penalties and Sentences Act s.9(2) requires judicial officers to listen to submissions from Elders or respected members from the Indigenous community when sentencing Murri offenders.

In its Report on Sentencing, the NSWLRC declined to recommend that sentencing legislation in New South Wales follow the trend to include such factors, preferring reliance on the common law statement of principles.⁷⁶

(ii) Opinions of the offender's and/or victim's community

In determining sentence, courts have taken into account the effect that particular sentences may have on relationships within a community.⁷⁷

Courts have taken account of the opinion of an Aboriginal community about matters such as whether the offender should return to the community, the seriousness of the offence, the defendant's character, and what an appropriate penalty might be, although, as with the general community, these considerations cannot prevail over what might otherwise be a proper sentence.⁷⁸

(iii) The effect of the sentence on victims

Where traditional law is relevant, victims of crime are likely to be from the same community. Aboriginal women and children have been seen as particularly vulnerable. The importance to Aboriginal communities of the deterrent effect of an adequate sentence has also been recognised by the courts.

(iv) Imprisonment as a sanction of last resort/Mandatory imprisonment

The most fundamental principle of sentencing is that imprisonment should be a punishment of last resort, to be imposed only where a non-custodial punishment is inappropriate. This principle has statutory recognition in most Australian jurisdictions. In the Northern Territory the principle of imprisonment as a last resort is over-ridden by statutes making imprisonment mandatory for certain offences.

(v) Significant Cases

The common law in the Northern Territory has made clear that judges can take customary law into account in sentencing an Aboriginal person for a criminal offence.⁷⁹

R v Wilson Jagamara Walker⁸⁰

⁷⁶ Report 90 at 2.47: "The Commission is of the view that legislative prescription of sentencing principles would add nothing to the existing common law and is consequently unnecessary." The Crimes (Sentencing Procedure) Act 1999 (NSW) provides for the NSW Court of Criminal Appeal to issue guideline sentencing judgments in relation to any matter on application from the Attorney General: s 37.

⁷⁷ *R v Minor* (1992) 79 NTR 1; Criminal Code s43ZL- reports that can be requested by Court when determining whether to make, vary or suspend an order relating to the supervised release of a supervised person: "if the supervised person is a member of an Aboriginal community – a report setting out the views of members of the Aboriginal community."

⁷⁸ In *R v William Davey* (1980) 2 A Crim R 254: "The Court has for many years now considered it should, if practicable, inform itself of the attitude of the Aboriginal communities involved, not only on questions of payback and community attitudes to the crime, but at times to better inform itself as to the significance of words, gestures or situations which are otherwise incomprehensible. The information may be made available to the court in a somewhat informal and hearsay style. This is unavoidable as it will often depend on a consultation with Aboriginal communities in remote areas."

⁷⁹ The ALRC Report and a Research Paper reviewed over 50 cases decided prior to 1986 in which Aboriginal customary law was recognised in the sentencing process.

The defendant was convicted of manslaughter and sentenced to three years imprisonment, suspended on condition that he enter into a bond to be of good behaviour for two years and return to live in a particular Aboriginal community. In determining the appropriate sentence, the Chief Justice took into account that the defendant would face traditional punishment, probably by spearing in the thigh.

R v Minor⁸¹

In *R v Minor* the offender pleaded guilty to charges of manslaughter and other offences, and had consented to receive a payback (spearing in the thigh) from his community upon his release from gaol. The trial judge sentenced him 10 years, with a direction that he be released on a behaviour bond after four years. In the appellate court, Chief Justice Asche observed that the trial judge:

was influenced by the consideration that the infliction of payback would be of benefit to a community which possessed a philosophy that, once inflicted, payback wiped out all feuds arising from the defendant's actions. Hence, his Honour's remark that the community "may put the whole episode behind them and get on with the more positive aspects of their lives". His Honour was careful to say that the circumstances were such that the court did not condone payback but recognised it as inevitable.⁸²

Justice Mildren noted that "there is ample authority" for taking the possibility of future payback punishment into account in sentencing.⁸³

Munungurr v The Queen⁸⁴

The trial judge admitted into evidence a letter on the effect of the defendant's imprisonment on the community, and its desire that he be returned to the community to be dealt with in the traditional manner. He gave no weight to the letter.

On appeal, the Court of Criminal Appeal held that, despite the informality of the process, the trial judge should not have rejected the relevance of the matters in the letter. In particular, the trial judge failed to consider the nature of the reconciliation ceremony referred to in the letter; the effect of imprisonment on the offender's family and his people generally; the community's wish that he be dealt with in the traditional way; and what traditional punishment, if any, the community proposed. The court held that the views, wishes and needs of the offender's community are relevant considerations, but will not prevail over what is a proper sentence.

The court allowed the appeal and ordered that the defendant be released on a bond after three months on the condition that he attend at a tribal reconciliation for the purposes of sealing the peace between the two clans involved, as was prescribed by the relevant Aboriginal custom.

⁸⁰ Supreme Court of the Northern Territory, Unreported 10 February 1994, SCC No.46 of 1993. See G. Zdenkowski, "Customary Punishment and Pragmatism: Some Unresolved Dilemmas. The Queen v Wilson Jagamara Walker" (1994) 68 Aboriginal Law Bulletin 26

⁸¹ (1992) 79 NTR 1.

⁸² Ibid at 14.

⁸³ Ibid.

⁸⁴ (1994) 4 NTLR 63.

(vi) Diversion programs

The ALRC Report saw advantages to a diversion scheme for minor offences, in that such a scheme might:

- reduce the degree of contact by Aboriginals with the criminal justice system
- break the common cycle of offence and imprisonment and
- recognise the role that Aboriginal people may already play unofficially in dealing with offenders.

The Royal Commission into Aboriginal Deaths in Custody recommended support for Community Justice Panels, described as small groups of Aboriginal people working as volunteers with the criminal justice agencies to ensure the welfare of their community members in that system.

(vii) Community input to sentencing

In the Northern Territory, approaches have been examined to facilitate greater involvement of Aboriginal people in the criminal justice system. Magistrates in the NT have held court in Aboriginal communities in the presence of Aboriginal elders to obtain advice and assistance, particularly in sentencing.

The Aboriginal Community Justice Project operated at Galiwinku (Elcho Island) between 1983 and 1986.⁸⁵ The plan involved obtaining input from tribal elders, who sat in court with magistrates, as well as from an anthropologist employed to provide a background report on the offender and to obtain local information and views. One aim of the scheme was to try to resolve disputes in traditional ways in consultations held before the matter appeared in court. The Magistrate would hear from relevant kin about sentencing options which would enhance the authority of kin to deal with the defendant and prevent further offending.

The Katherine Community Aid Panel assisted Magistrates at Katherine Court by providing a greater range of sentencing options. The panel provided assessment and other assistance and supervision with the aim of altering life styles, and assisting offenders to make some reparation to victims of crime or to the wider community. Thus the panel options included: drug and alcohol counselling, life skills training, self esteem building, goal setting and other relevant techniques.⁸⁶

Community involvement in sentencing is also a goal of the Aboriginal Law and Justice Strategy. Community involvement in sentencing, as proposed there, is when the sentencing court invites the community to have input into the sentencing process so that community needs are better reflected in the sentencing. This would allow members, the offender's family, the victim and the victim family, community elders and community service providers to discuss the offence, the offender, and appropriate sentencing actions. An important aspect of community involvement in sentencing is that it allows for the consideration of the need to heal and stabilise the community after the dislocation caused by an offender's crime.

⁸⁵ NT Department of Correctional Services Review of Aboriginal Community Justice Program (1993).

⁸⁶ Baxter JA Community Aid Panel Katherine - Evaluation for the Department of Correctional Services (1991).

Community involvement in sentencing therefore is considered a community empowerment strategy and an important part of the overall initiative of maintaining stability in indigenous communities. However, the same sentencing input model may not be effective in all communities due to the different characteristics of the communities. Aboriginal communities may need to work on different methods for involving the communities in the Court sentencing process.

New South Wales, Victoria, Queensland Western Australia and South Australia are presently trialing or developing community courts⁸⁷ dealing with offences against Australian law, which are modelled on the Canadian Circle Sentencing Courts. Participants in Circle Sentencing include the offender and his/her family, community elders, victim/s, police, service providers, defence lawyers and the Magistrate, and the central objective is to find a solution to the offender's problems.

Courts can exercise a wide discretion when dealing with offenders. The flexibility allowed during sentencing provides the means for enabling communities to work with Courts in finding appropriate solutions, and can address questions of accountability and responsibility, which are crucial to deal with the underlying problems that lead to offending behaviour.

⁸⁷ Koori Court in Victoria - Magistrates' Court (Koori Court) Act 2002. Two Koori courts are currently operating in Victoria as part of a two-year pilot program - Shepparton and Broadmeadows. An Aboriginal Justice Worker assists the court. The court hears guilty pleas for Magistrates' Court offences, with the exception of family violence and sexual offences. The Court is less formal with everyone sitting at a table. An Elder from the community advises the Magistrate on the sentence. Offenders' families and community members can give their views. The Koori court is based on the South Australian Nunga Court. The Nunga Court operates at Port Adelaide, Murray Bridge and Port Augusta. Offenders must plead guilty to be eligible. In July 2003 Port Augusta established a juvenile Nunga Court. Queensland also has one Aboriginal Court, the Brisbane Murri Court is a Magistrates Court which deals with sentencing adult indigenous offenders. The Murri Court takes into account cultural issues by providing a forum where Aboriginal and Torres Strait islanders have an input into the sentencing process.

6 COMMUNITY GOVERNMENT ISSUES

Under the *Northern Territory (Self-Government) Act 1978* (Cwth) and associated legislation, the Northern Territory is a separate body politic with its own political and judicial institutions. The Northern Territory Legislative Assembly has power to make laws for the peace, order and good government of the Territory.

(a) Community Government scheme

Local government is seen as the means by which Aboriginal people might gain more control over their affairs. The Northern Territory has enacted a community government scheme.⁸⁸ It should be noted that a number of Northern Territory community government schemes expressly extend to the function of the Council to “the maintenance and preservation of Aboriginal law and custom”.⁸⁹

Government service delivery to Aboriginal communities

In the *Social Justice Report 2000*, the Aboriginal and Torres Strait Islander Social Justice Commissioner recommended that social justice principles, including recognition of traditional law, be adopted as the framework for negotiations about service delivery arrangements and regional governance.⁹⁰

Local government and Community government working together

Local government authorities in the Northern Territory are able to use their powers to assist in the delivery of services to town camps, working together with town camp organisations. The *Alice Springs Town Council Memorandum of Understanding with Tangentyere Council* in 2000 (MOU) is an example. The MOU was the overall winner of the NT Best Practice in Local Government Award 2001. The MOU states in part:

(The Councils) understand the opportunity available to both parties to foster reconciliation between Aboriginal and non-Aboriginal people by successfully realising the principles of this Memorandum...

Both parties agree to work together to ensure the equitable provision of local government services to all members of the community; and to ensure that responsibility for the delivery of local government services is shared between them fairly and in accordance with the capacity of each;

Both parties agree to work together so as to initiate opportunity for those members of the community who are disadvantaged and to work together to address and ameliorate the disadvantage; in particular in relation to the disadvantage experienced by members of Tangentyere Council Inc who reside on town camps.

⁸⁸ See discussion in Background Paper 1: Aboriginal communities and Aboriginal law in the Northern Territory.

⁸⁹ The Numbulwar Numburindi Community Government Scheme, clause 12(ze), Lajamanu Community Government Scheme, clause 13(zf), the Daguragu Community Government Scheme, clause 13(zc), the Pirlangimpi Community Government Scheme, clause 12(zh) and the Belyuen Community Government Scheme, clause 12(w). For example: clause 12 of the Belyuen Scheme provides: The council may perform the following functions: ... (w) the maintenance and preservation of Aboriginal law and custom”.

⁹⁰ Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice Report 2000*, (HREOC, Sydney 2000) Recommendation 12.

(b) Local dispute resolution/justice mechanisms

In the Northern Territory there has been a recognition of the appropriateness of alternative dispute resolution as a method of resolving disputes within communities, to maintain social harmony.⁹¹ In the Territory, alternative dispute resolution is considered a mechanism for promoting self-management and self-sufficiency within Aboriginal communities.

In its Report, *Alternative Dispute Resolution in Aboriginal Communities*⁹² the Northern Territory Law Reform Committee made 17 recommendations with respect to alternative dispute models and community justice plans. The report contains a discussion of the options available in this area. Government is yet to respond to these recommendations. The Northern Territory's *Aboriginal Law and Justice Strategy*,⁹³ which commenced in 1995, outlines the work that has been done in the Northern Territory with respect to community law and justice plans.

Kurduju and Ngaanyatjarra Community Justice Strategy⁹⁴

The Northern Territory government has developed an Aboriginal Law and Justice Strategy that incorporates local justice mechanisms. A key element of the Aboriginal Law and Justice Strategy is the involvement of indigenous people in law and justice processes. This recognises that solutions to justice problems often come from within the community that are experiencing the problems, but the current formal processes may preclude them from being involved.

The Kurduju Committee is the umbrella organisation for the three Law and Justice Committees existing in the communities Ali Curung in 1996, Lajamanu in 1999 and eventually Yuendumu.

The Law and Justice Committees have had some success in providing community input into the sentencing process in their communities, though the input to date has largely been restricted to pre-court conferencing with the magistrates and providing the magistrate with information about matters that the magistrate otherwise would not have known. The three Law and Justice Committees (including their strategies) and the creation of Kurduju have been supported by a male/female team of two officers now outsourced from the Department of Community Development, Sports and Cultural Affairs. Kurduju has been recognised as an Indigenous Regional Crime Prevention Committee under Government's crime prevention policy framework. The Ali-Curung and Lajamanu committees are involved in diversionary programs, pre-court conferencing, victim offender conferencing, community service orders. Community involvement in sentencing is considered a community empowerment strategy. But the law and justice strategy asks: "Why focus on the sentencing phase alone?"

⁹¹ See generally the Reports of the Northern Territory Law Reform Committee: Report 17a, 17b, 17c and 17d.

⁹² *op cit*.

⁹³ Northern Territory Government (Department of Community Development, Sport and Cultural Affairs), *A Model for Social Change: The Northern Territory's Aboriginal Law and Justice Strategy 1995-2001*.

⁹⁴ Information from Jackie Antoun and Peter Ryan, Department of Community Development, Sport and Cultural Affairs; and see Ryan P, and Antoun J, *Report on the Law and Justice Plans* (Darwin: Department of Community Development, Sport and Cultural Affairs 2002).

The Strategy seeks to provide a whole-of-community and whole-of-government approach to addressing community justice issues within a law and justice planning process. The Law and Justice Committees have a wide range of responsibilities and comprise community representatives, elders, Safe House Committee, women's group, traditional owners, outstation representatives and other community organisations.

The aim of the plans is "to facilitate the empowerment of the local community to assume a greater role in law and justice, and to address law and justice concerns through local dispute resolution where practical."⁹⁵ This was

...not a straightforward revival of customary law ... [but] an innovative adaptation of traditional decision making in a contemporary situation through the merging of mainstream community based dispute resolution with mainstream law and justice. The process is negotiated and agreed to between community organisations and government agencies.⁹⁶

Ali Curung and Lajamanu identified more than 20 programs, services and initiatives, to be addressed by plan, with a further 20 community objectives projected over the three-year agreement. It is envisaged that every law and justice plan will entail the coordination of 10 Commonwealth and Territory agencies. The standard time-frame for development of a community law and justice plan was 12-18 months.⁹⁷

Community Wardens Scheme

A *Community Wardens Scheme* has been in operation in some communities. The scheme involves the selection by community leaders of a number of "wardens" as having sufficient clan respect and authority to mediate, intervene or deal with members of the community engaging in anti-social behaviour. They work closely with and support the police and Aboriginal community police officers.

⁹⁵ Report p 21.

⁹⁶ Report p 9.

⁹⁷ Report p12.

7 COMMITTEE'S GENERAL APPROACH

The Committee's general view is that *each Aboriginal community will define its own problems and solutions*.⁹⁸ For the sake of convenience it has called these strategies law and justice plans.

Law and justice plans may deal with family law, civil law, criminal law, or issues of administrative policy or practice with relationships between Aboriginal communities and government officers, private contractors while in Aboriginal communities, and so on.

Models to deal with general community issues or disputes, *not* involving interaction with the Australian legal system, are often likely to be the most important issues facing Aboriginal communities. These models may deal with matters such as alternate dispute resolution processes, a structured system of police caution protocols, a panel of experts to assist magistrates on issues of customary law and so on. They are part of the community developing its own strategies.

By way of example, the Committee envisages a situation where an Aboriginal community (resourced for this purpose) develops, in accordance with Police, a protocol with respect to cautioning of juvenile offenders. This will be a formal agreement between the community and the relevant government agency, not having the force of law. All such arrangements will be subject to the general law.

To the extent that such plans are to be embodied in Aboriginal community by-laws, issues of policy for the government may be raised. In practice, by-laws will create new legal duties. Plans that involve the interaction with Australian law are also likely to raise legal policy issues for government.

Plans that seek a modification of the general law can also be developed by communities and put to government. It will then be a policy matter for government to respond.

The Committee of Inquiry has adopted two fundamental policy principles with respect to law and justice plans:

- Processes must ensure that the voices of Aboriginal women, young people and less dominant groups are heard and taken into account
- No model can permit the infringement of human rights.

⁹⁸ Recommendation 4: Aboriginal communities should be assisted by government to develop law and justice plans which appropriately incorporate or recognise Aboriginal customary law as a method in dealing with issues of concern to the community or to assist or enhance the application of Australian law within the community.