

**BACKGROUND PAPER 4**

**INTERNATIONAL LAW, HUMAN RIGHTS AND ABORIGINAL  
CUSTOMARY LAW**

*This paper discuss how international law and Australian human rights law may affect  
the recognition of Aboriginal customary law in the Northern Territory*

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Background Paper 4: International law, human rights and 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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## International law Background

Australia's international obligations and commitment to basic human rights may be interpreted to require some recognition of Aboriginal customary law. Conversely, conduct which is required under customary law may be contrary to Australia's international human rights obligations.

The United Nations Charter<sup>1</sup> emphasizes the human rights possessed by all peoples. These rights are set out in various human rights conventions. Generally speaking, Australia has adopted all relevant international agreements protecting human rights<sup>2</sup>, but has not fully incorporated them into Australian law by legislation.<sup>3</sup>

The UN General Assembly Universal Declaration of Human Rights, the *International Covenant on Civil and Political Rights (ICCPR)*; the *International Convention on the Elimination of All Forms of Racial Discrimination [Racial Discrimination Convention]* and other relevant instruments have all created obligations for Australia at international law. Other international human rights instruments are relevant to the protection of the rights of indigenous peoples, such as the conventions against genocide and torture.

The rights of indigenous peoples are developing under international law. Treaties and customary international law impose obligations on State parties. United Nations General Assembly resolutions, draft declarations, state practices, and international judicial and tribunal decisions are not legally binding in Australian law, but they are evidence of evolving standards and principles under international law.

The *Convention Concerning Indigenous and Tribal Peoples in Independent Countries*, adopted by the International Labor Organization in 1989, affirms the right of indigenous peoples to decide their own rights and responsibilities. While the UN Charter recognises the right of all "peoples" to the right of self-determination, Australia takes the view that this protection does not extend to indigenous "people" because they are only recognized as a "people" and not as "peoples."

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<sup>1</sup> UN Charter, article 1(2), (3), articles. 55, 56, 73.

<sup>2</sup> The International Covenant on Civil and Political Rights (ICCPR) entered into force for Australia on 13 August 1980; The International Covenant on Economic Social and Cultural Rights (ICESCR) 10 December 1975; The Optional Protocol to the ICCPR 25 September 1991; The Second Optional Protocol to the ICCPR 2 October 1990; The Convention on the Elimination of all Forms of Racial Discrimination (CERD) 30 September 1975; The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) 28 July 1983; The Convention against Torture and other Cruel, Inhuman or Degrading Treatments or Punishment (CAT) 8 August 1989; The Convention on the Rights of the Child (CROC) 7 December 1990.

<sup>3</sup> Recent reports submitted by Australia (DFAT) have been on the Convention on the Elimination of All Forms of Discrimination against Women (1997), the Convention on the Rights of the Child (1997), the International Covenant on Economic, Social and Cultural Rights (Third Report, 1998) and the International Covenant on Civil and Political Rights (1998), Convention on the Elimination of All Forms of Racial Discrimination (1999); the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Second and Third Report under the Convention September 1991 - June 1997).

## Implementing international agreements in domestic law

Brennan J stated in *Mabo*:

The common law does not necessarily conform with international law, but international law is a legitimate and important influence on the development of the common law, especially where international law declares the existence of universal human rights.<sup>4</sup>

A UN Declaration applies to all places in the world. It becomes an international or universal standard. But it does not legally bind Australia in domestic law. Even a treaty to which Australia is a party is not part of Australian law.<sup>5</sup> However, it is legitimate to refer to international law standards in order to interpret ambiguous legislation<sup>6</sup> or to develop the common law where it is not clearly settled.<sup>7</sup> The *Racial Discrimination Convention* has been scheduled to the *Racial Discrimination Act*, but not made directly part of Australian law, *in toto*. The full implications of this process of quasi-incorporation have yet to be assessed by Australian courts.<sup>8</sup>

Ratification of a treaty by Australia raises a 'legitimate expectation' that the decision-maker will take into account the obligations the nation has accepted under international law.<sup>9</sup>

[I]f a decision-maker proposes to make a decision inconsistent with a legitimate expectation, procedural fairness requires that the persons affected should be given notice and an adequate opportunity of presenting a case against the taking of such a course.<sup>10</sup>

In *Teoh*<sup>11</sup> Mason CJ and Deane J said:

[R]atification by Australia of an international convention is not to be dismissed as a merely platitudinous or ineffectual act, particularly when the instrument evidences internationally accepted standards to be applied by courts and administrative authorities in dealing with basic human rights affecting the family and children. Rather, ratification of a convention is a positive statement by the Executive Government of this country to the world and to the Australian people

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<sup>4</sup> *Mabo v Queensland* (1992) 175 CLR 1 at 42; Ivan Shearer, "The Relationship Between International Law and Domestic Law" in Brian Opeskin and Donald Rothwell (eds), *International Law and Australian Federalism* (Melbourne: Melbourne UP 1997) 34, 55–7.

<sup>5</sup> *Dietrich v R* (1992) 177 CLR 292, 305 per Mason CJ and McHugh J, 318 per Brennan J, 347–9 per Dawson J, 359–60 per Toohey J.

<sup>6</sup> Legislation is to be interpreted and applied in conformity, and not in conflict, with any relevant established rules of customary international law, where there is ambiguity: *Kartinyeri v Commonwealth* (1998) 152 ALR 540, 571–3 Gummow and Hayne JJ.

<sup>7</sup> *Newcrest Mining (Western Australia) Ltd v Commonwealth* (1997) 190 CLR 513 at 657–658; S Donoghue, "Balancing Sovereignty and International Law: The Domestic Impact of International Law in Australia" (1995) 17 *Adel LR* 213 at 244–250.

<sup>8</sup> Gillian Triggs, "Australia's Indigenous Peoples and International Law: Validity of the Native Title Amendment Act 1998 (Cth)" (1999) 23 *MULR* 372 for a comprehensive discussion.

<sup>9</sup> *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273. Mason CJ and Deane J stated at 291: "That positive statement (ie: ratification by Australia of a convention) is an adequate foundation for legitimate expectation, absent statutory or executive indications to the contrary, that administrative decision-makers will act in conformity with the Convention".

<sup>10</sup> *Teoh* 291–2 per Mason CJ and Deane J.

<sup>11</sup> *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273.

that the Executive Government and its agencies will act in accordance with the Convention.<sup>12</sup>

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<sup>12</sup> Teoh at 291; Toohey JJ took a similar approach at 301.

## 1 INTERNATIONAL LAW: SELF-DETERMINATION

Aboriginal and Torres Strait Islander people have a special status under international law as indigenous peoples. The right of indigenous people to have customary law accommodated within the laws of the state in which they live is recognised in international instruments and by the United Nations.

### (a) International Covenant on Civil and Political Rights

The *International Covenant on Civil and Political Rights* (ICCPR)<sup>13</sup> recognises a wide range of human rights and prohibits discrimination on a number of grounds, including race. It provides that all people are equal before the law and entitled to its equal protection. In 1981 the Commonwealth passed the *Human Rights Commission Act 1981* (Cwth). This Act scheduled the ICCPR. The Act was replaced by the *Human Rights and Equal Opportunity Commission Act 1986* (Cwth). The function of the Commission is to inquire into any act that may be inconsistent with or contrary to any human right, and to endeavour, by conciliation, to effect a settlement of the matter or to report to the Minister in relation to the inquiry.

Of relevance are the following provisions:

#### *Article 1*

1. All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.
2. All peoples may, for their own ends, freely dispose of their natural wealth and resources ... In no case may a people be deprived of its own means of subsistence.<sup>14</sup>

As indicated, this right may not extend to indigenous people already forming part of a self governing non-colonial nation. However, the issue is politically contentious.<sup>15</sup>

#### *Article 27*

In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.

The Australian Government takes the view that Article 27 does not predicate the right to cultural enjoyment or recognition of indigenous laws.<sup>16</sup>

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<sup>13</sup> 999 UNTS 171, 6 ILM 368 (entered into force 23 March 1976). Australia became a party in 1980.

<sup>14</sup> Article 1 of the International Covenant of Economic Social and Cultural Rights (ICESCR), to which Australia is a party, is the same.

<sup>15</sup> For example: Special Rapporteur Miguel Alfonso Martinez, Study on treaties, agreements and other constructive arrangements between States and Indigenous populations, Commission on Human Rights, Sub-Commission on the Prevention of Discrimination and Protection of Minorities, UN Doc E/CN.4/Sub.2/1999/20, 22 June 1999 at para 256: "The Special Rapporteur also harbors no doubts concerning the much debated issue of the right to self-determination. Indigenous peoples, like all peoples on Earth, are entitled to that inalienable right."

<sup>16</sup> Third Report, op cit at para 1367.

Protection of minorities under Article 27 must be justifiable as being “directed towards ensuring the survival and continued development of the cultural, religious and social identity of the minorities concerned”.<sup>17</sup>

The right to enjoy one’s culture cannot be determined in abstracto but has to be placed in context. In this connection, the Committee observes that article 27 does not only protect traditional means of livelihood of national minorities... that the authors may have adapted their methods... and practice it with the help of modern technology does not prevent them from invoking article 27 of the Covenant.<sup>18</sup>

With regard to the exercise of the cultural rights protected under article 27, the Committee observes that culture manifests itself in many forms, including a particular way of life associated with the use of land resources, especially in the case of indigenous peoples. ... The enjoyment of those rights may require positive legal measures of protection and measures to ensure the effective participation of members of minority communities in decisions which affect them.<sup>19</sup>

The specific rights of minorities and indigenous peoples that have been recognised under Article 27 have been qualified by the requirement that their enjoyment shall not prejudice the enjoyment by all persons, including individuals from within the group, of the universally recognised human rights and fundamental freedoms.

An example where a restriction on an individual may be found to be reasonable under Article 27 has been provided by the Race Discrimination Commissioner in the 1995 *Alcohol Report*. In this, the Commissioner argued that restrictions on the availability of alcohol to Aboriginal communities (which have been consented to by the community as a whole) may constitute a legitimate restriction on the rights of an individual within that community.<sup>20</sup>

## **(b) ILO Convention 169**

The *Convention Concerning Indigenous and Tribal Peoples in Independent Countries*, [ILO Convention 169], superseded the *ILO Indigenous and Tribal Populations Convention 107* (1957), which was based on an underlying philosophy of integration or assimilation. ILO Convention 169 introduced the right to self-determination within the nation state, the right to consultation for participation, the right of indigenous and tribal people to decide their own rights and responsibilities.

ILO Convention 169 affirms the equality of indigenous peoples and their cultures, and it proposes general rights of autonomy.

### ***Article 1***

1. This Convention applies to:

(a) Tribal peoples in independent countries whose social, cultural and economic conditions distinguish them from other sections of the national community, and

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<sup>17</sup> Human Rights Committee, General Comment 23 para 9 in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies* UN Doc HRI/GEN/1/Rev5 2001

<sup>18</sup> Human Rights Committee, Communication No. 511/1992: Finland (Lansman), UN Doc: CCPR/C/52/D/511/1992, 8 November 1994, para 9.3.

<sup>19</sup> Human Rights Committee General Comment 23 para 7 in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies* UN Doc HRI/GEN/1/Rev5 2001.

<sup>20</sup> Race Discrimination Commissioner, *Alcohol report* (Canberra: AGPS 1995) Chapter 13 and 14.

whose status is regulated wholly or partially by their own customs or traditions or by special laws or regulations;

(b) Peoples in independent countries who are regarded as indigenous on account of their descent from the populations which inhabited the country, or a geographical region to which the country belongs, at the time of conquest or colonisation or the establishment of present State boundaries and who, irrespective of their legal status, retain some or all of their own social, economic, cultural and political institutions.

2. Self-identification as indigenous or tribal shall be regarded as a fundamental criterion for determining the groups to which the provisions of this Convention apply.

3. The use of the term "peoples" in this Convention shall not be construed as having any implications as regards the rights which may attach to the term under international law.

Article 1.3 states that the use of "peoples" does not imply other rights under international law, such as the right to constitute a separate nation.

The convention places affirmative duties on states to advance indigenous cultural integrity, uphold land and resource rights and secure non-discrimination in social welfare spheres.

***Article 7(1)***

The peoples concerned shall have the right to decide their own priorities for the process of development as it affects their lives, beliefs, institutions and spiritual well-being and the lands they occupy or otherwise use, and to exercise control, to the extent possible, over their own economic, social and cultural development.

Article 8 states that in applying national laws and regulations to indigenous peoples due regard shall be had to their customs or customary laws and that they should have the right to retain their own customs and institutions, "where these are not incompatible with other fundamental rights defined by the national legal system and with internationally recognised human rights."

***Article 8***

1. In applying national laws and regulations to the peoples concerned, due regard shall be had to their customs or customary laws.

2. These peoples shall have the right to retain their own customs and institutions, where these are not incompatible with fundamental rights defined by the national legal system and with internationally recognized human rights. Procedures shall be established, whenever necessary, to resolve conflicts which may arise in the application of this principle.

3. The application of paragraphs 1 and 2 of this Article shall not prevent members of these peoples from exercising the rights granted to all citizens and from assuming the corresponding duties.

The Convention requires the development of "special measures" to safeguard indigenous persons and cultures.

***Article 4***

1. Special measures shall be adopted as appropriate for safeguarding the persons, institutions, property, labour, cultures and environment of the peoples concerned.

2. Such special measures shall not be contrary to the freely-expressed wishes of the peoples concerned.
3. Enjoyment of the general rights of citizenship, without discrimination, shall not be prejudiced in any way by such special measures

The Convention requires that consultations with indigenous peoples "be undertaken, in good faith . . . with the objective of achieving agreement or consent."<sup>21</sup>

According to Professor Daes, indigenous self-determination entails a process:

through which indigenous peoples are able to join with all the other peoples that make up the State on mutually-agreed upon and just terms, . . . This process does not require the assimilation of individuals, as citizens like all others, but the recognition and incorporation of distinct peoples in the fabric of the State, on agreed terms.<sup>22</sup>

### (c) UN Draft Declaration on the Rights of Indigenous Peoples

The Working Group on Indigenous Populations developed in 1993 the Final Draft of the UN Draft Declaration on the Rights of Indigenous Peoples.<sup>23</sup> Since then, the Working Group for the United Nations Commission on Human Rights has been considering the Draft.<sup>24</sup>

Article 1 recognises the right of indigenous peoples to the full and effective enjoyment of all human rights.

#### *Article 1*

Indigenous peoples have the right to the full and effective enjoyment of all human rights and fundamental freedoms recognized in the Charter of the United Nations, the Universal Declaration of Human Rights and international human rights law.

Article 3 recognises a right of self-determination.

#### *Article 3*

Indigenous peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

Article 6 obliges governments to consult indigenous people in the decision making process and support their institutions.

#### *Article 6*

1. In applying the provisions of this Convention Governments shall:
  - (a) Consult the peoples concerned, through appropriate procedures and in particular through their representative institutions, whenever consideration is

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<sup>21</sup> Article 6.

<sup>22</sup> Erica-Irene A Daes, "Some Considerations on the Right of Indigenous Peoples to Self-Determination" (1993) 3 Trans'l L & Contem. Probs 1, 9.

<sup>23</sup> E/CN.4/Sub.2/1994/2/Add.1 (1994).

<sup>24</sup> Julian Burger, "The United Nations Draft Declaration on the Right of Indigenous Peoples" (1996) 9 ST. Thomas L. Rev 209.

being given to legislative or administrative measures which may affect them directly;

(b) Establish means by which these peoples can freely participate, to at least the same extent as other sectors of the population, at all levels of decision-making in elective institutions and administrative and other bodies responsible for policies and programmes which concern them;

(c) Establish means for the full development of these peoples' own institutions and initiatives, and in appropriate cases provide the resources necessary for this purpose.

2. The consultations carried out in application of this Convention shall be undertaken, in good faith and in a form appropriate to the circumstances, with the objective of achieving agreement or consent to the proposed measures

Article 14 provides that indigenous peoples have the right to revitalise, use, develop and transmit to future generations their histories, languages, oral traditions, philosophies, working systems and literatures, and that States are to take effective measures to protect this right. Article 33 states that indigenous peoples have the right to promote, develop and maintain their institutional structures and their distinct juridical customs, traditions, procedures and practices, in accordance with internationally recognised human rights standards.

## 2 AUSTRALIA/NORTHERN TERRITORY: SELF-DETERMINATION

There are no legislative provisions in Australia that clearly impose on the Northern Territory parliament a duty to legislate to recognise Aboriginal customary law, in the way that international agreements talk about traditional law as part of the process of recognition of a right of self-determination within the nation. However, some aspects of the protection of Aboriginal culture and tradition can be noted.

### (a) Self determination

Over the years, there has been discussion of the development of mechanisms enabling self-determination and self-management by Aboriginal people. To some extent, it can be said that the Commonwealth has legislated on the territorial aspect of self-determination by the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cwth), which provides for the application of traditional law with respect to land rights; that is ownership and management of land.<sup>25</sup>

The *Aboriginal and Torres Straits Islander Commission Act 1989* (Cwth), the *Aboriginal Councils and Associations Act 1976* and the community government scheme under the *Local Government Act* are all means by which limited forms of Aboriginal self government can be achieved with respect to particular matters. Some would consider these measures inadequate.

The Council for Aboriginal Reconciliation in its documents of reconciliation (*Australian Declaration Towards Reconciliation*, the *Roadmap Towards Reconciliation*, and four national strategies to achieve reconciliation) and its final recommendations (*Reconciliation - Australia's challenge*) proposed actions related to the recognition of customary law. The National Strategy identifies the following actions for implementation in relation to customary law:

Commonwealth and State governments negotiate with Aboriginal and Torres Strait Islander peoples about amending relevant legislation to reflect the rights of Aboriginal and Torres Strait Islander peoples to live in accordance with their laws, customs and traditions, consistent with all international human rights instruments, and to ensure that Australian laws will not impose unnecessary restrictions upon the exercise of those rights.

Commonwealth, State and Territory governments negotiate with Aboriginal and Torres Strait Islander peoples regarding community justice procedures and the use of alternative dispute resolution mechanisms and processes that recognise the diversity of Aboriginal and Torres Strait Islander laws that are consistent with all international human rights instruments.<sup>26</sup>

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<sup>25</sup> However, the purpose of the Act is that indicated by its short and long title: to recognise Aboriginal land rights. It is not an Act providing for other outcomes affecting Aboriginal people, such as health, education, economic development or self-determination, though it clearly provides a basis on which these outcomes can be pursued by appropriate government policy.

<sup>26</sup> Ways to implement the National Strategy to Recognise Aboriginal and Torres Strait Islander Rights, one of four National Strategies in the Roadmap for Reconciliation available online at: [www.austlii.edu.au/au/other/IndigLRes/car/2000/9/](http://www.austlii.edu.au/au/other/IndigLRes/car/2000/9/)

**(i) Northern Territory**

The general approach of the Committee of Inquiry is to empower Aboriginal communities to develop their own strategies to deal with law and justice issues facing those communities.<sup>27</sup>

The Northern Territory is presently conducting an inquiry into the relationship between government and Aboriginal communities.<sup>28</sup>

Two indigenous Constitutional Conventions were held in 1998: one at Kalkaringi in August and one at Batchelor in December. The Batchelor Convention resulted in a document entitled *Standards for Constitutional Development* which dealt with such matters as Aboriginal law, land rights, human rights, self-government and Aboriginal self-determination. The Batchelor Convention noted that constitutional reform to enhance and protect Aboriginal rights is an ongoing process. The Convention affirmed the principle embodied in the *Kalkaringi Statement* that Aboriginal people will not consent to Statehood unless there is a commitment that their rights and interests be recognised and protected in a Territory Constitution and the Northern Territory Government is willing to enter into good faith negotiations under a framework agreement which will allow recognition of Aboriginal self-government. An executive group, the Committee of the Indigenous Constitutional Convention, is charged with the objective of pursuing those matters raised in the Kalkaringi Statement and the Batchelor resolutions.<sup>29</sup>

The use of framework agreements to formalise the relationship between Aboriginal communities and State/Provincial governments is common in Canada.<sup>30</sup>

**(ii) Australian law**

The Aboriginal and Torres Strait Islander Commission<sup>31</sup> (ATSIC), established on 5 March 1990, and the Torres Strait Regional Authority,<sup>32</sup> established on 1 July 1994, provide structures capable of furthering self-determination at the national and regional level.

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<sup>27</sup> Report of the Committee of Inquiry Chapter 5.

<sup>28</sup> Northern Territory Standing Committee on Legal and Constitutional Affairs, *An Examination of Structural Relationships in Indigenous Affairs and Indigenous Governance within the Northern Territory* (Discussion Paper No. 1 - Northern Territory Indigenous Affairs) (June 2002). The Paper examines existing and possible new relationships between the Northern Territory community and government, and the indigenous communities and government, under: the present constitutional arrangements; arrangements involving a future grant of Statehood and the question of a Framework Agreement with indigenous communities. The Paper also identifies matters that could be included in any Framework Agreement such as Aboriginal customary law and indigenous autonomy, self-management and self determination.

<sup>29</sup> The Kalkaringi Convention and the Batchelor Convention and their outcomes are outlined in Chapter 3, Northern Territory Standing Committee on Legal and Constitutional Affairs, *Report into appropriate measures to facilitate Statehood* (1999). The Kalkaringi Constitutional Convention was organised by the Central Land Council and funded by ATSIC. More than 800 people discussed issues including the Draft Constitution which it rejected. The Kalkaringi Statement was signed by approximately 50 elders.

<sup>30</sup> The Canadian government has recognised an inherent right of Aboriginal Self-Government since 1995: *Federal Policy Guide: Aboriginal Self-Government, The Government of Canada's Approach to Implementation of the Inherent Right and the Negotiation of Aboriginal Self-Government* (Minister of Public Works and Government Services Canada 1995).

<sup>31</sup> Aboriginal and Torres Straits Islander Commission Act 1989 (Cwth).

<sup>32</sup> Aboriginal and Torres Straits Islander Commission Act 1989 (Cwth) ss.142-144ZQ.

In November 2000, the Council of Australian Governments (COAG) agreed to a reconciliation plan based on three priority areas including: "investing in community leadership and governance initiatives".<sup>33</sup>

**(b) Protection of Aboriginal culture**

The extent to which the law of the Northern Territory protects Aboriginal culture has been examined in Background Paper 3: Legal Recognition of Aboriginal customary law.

**(c) Protection from Genocide**

The *Convention on the Prevention and Punishment of the Crime of Genocide* was ratified by Australia on 8 July 1949 and entered into force on 12 January 1951. The Commonwealth Parliament has passed the *Genocide Convention Act 1949* (Cwth) which has *partly* implemented some of the obligations under the Convention.<sup>34</sup>

By Article I State parties undertake "to punish" the international crime of genocide and Article V "to enact ... the necessary legislation to give effect to the provisions of the present Convention".

The definition of "genocide" in Article II of the Convention states:

In the present Convention, genocide means any of the following acts committed *with intent to destroy*, in whole or in part, a national, ethnical, racial or religious group, as such:

- (a) Killing members of the group;
- (b) Causing serious bodily or mental harm to members of the group;
- (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- (d) Imposing measures intended to prevent births within the group;
- (e) Forcibly transferring children of the group to another group.

Many of the actions which would constitute genocide, constitute individual offences under the Northern Territory Criminal Code.<sup>35</sup> However, acts prohibited in paragraphs

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<sup>33</sup> COAG Reconciliation Framework: Report on Progress in 2001 [http://www.dpmc.gov.au/docs/reconciliation\\_framework.cfm](http://www.dpmc.gov.au/docs/reconciliation_framework.cfm): "COAG committed to fostering indigenous leadership and to making significant changes to the relationship between indigenous communities and governments to respond to communities' calls for greater self-reliance and to strengthen the capacity of communities to address the widespread social and economic issues that they, together with governments, face. The degree of long-term and sustainable change that will result from COAG's commitment to reconciliation will depend very much on the extent to which communities have strong leadership, good governance structures and established partnerships with governments."

<sup>34</sup> *Kruger v The Commonwealth* (1997) 190 CLR 1.

<sup>35</sup> The Code does not contain a specific offence of torture, but most, if not all, acts of torture in the Territory would be encompassed within other categories of offences in the Code - eg grievous bodily harm or bodily harm or assault. "Grievous harm" is defined in section 1 of the Criminal Code as meaning "any physical or mental injury of such a nature as to endanger or be likely to endanger life or to cause or be likely to cause permanent injury to health"; and "bodily harm" is defined as meaning "any physical injury that interferes with health". Section 188(1) of the Code makes it an offence for a person to unlawfully assault another. "Assault" is defined in section 187 of the Code as meaning the direct or indirect application of force (defined in section 1 of the Code as including striking, touching and moving) to a person without his consent (or the attempted or threatened application of such force where the person

(c), (d) and (e) of the definition are not expressly covered in Commonwealth, State or territory law.

Para (c)

The Northern Territory Criminal Code includes a number of offences relating to the commission of acts dangerous to human life or health<sup>36</sup>, which although wide, do not encompass acts deliberately directed at a specific group without any threat of injury to particular individuals. However, there are other relevant guarantees under Australian legislation which limit the scope for engaging in discriminatory conduct for such a purpose.<sup>37</sup>

Para (d)

To a considerable degree, such conduct is prohibited by s.154 of the Criminal Code and tort law.

Para (e)

The paragraph is designed to prevent the practice of forcibly removing children from their own group, and placing them somewhere else.<sup>38</sup>

The Report of the Senate Legal and Constitutional Committee Inquiry into the Anti-Genocide Bill 1999<sup>39</sup> concluded that anti-genocide legislation in Australia is both necessary and timely.

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has the ability to effect the purpose and the purpose is evidenced by bodily movement or threatening words) - except for the application of force in certain specified situations, one of which is the restraint (or attempted restraint) of a person who needs to be restrained for his own protection or benefit (section 187(c) of the Code). Depending on the facts, the situation may come within section 196(1) of the Code i.e. depriving a person of her or his personal liberty. Section 28 of the Code deals with circumstances in which force causing death or grievous harm is justified. Such force is justified under the section in the case of any person when acting in self defence or in the defence of another, where the nature of the assault being defended is such as to cause the person using the force reasonable apprehension that death or grievous harm will result.

<sup>36</sup> Section 154 of the Criminal Code: "Any person who does or makes any act or omission that causes serious danger, actual or potential, to the lives, health or safety of the public or to any person (whether or not a member of the public) in circumstances where an ordinary person similarly circumstanced would have clearly foreseen such danger and not have done or made that act or omission is guilty of a crime and is liable to imprisonment for 5 years."

<sup>37</sup> Racial Discrimination Act 1975 (Cwth) and Anti-Discrimination Act 1996 (NT).

<sup>38</sup> This matter is discussed in Human Rights and Equal Opportunity Commission, *Bringing Them Home: Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from their Families* (Sydney: HREOC, 1997). *Bringing Them Home* recommended that the Commonwealth Government legislate to implement the Genocide Convention with full domestic effect as part of official recognition that removal policies of the past are over and will not be repeated. The Commonwealth government has not accepted this recommendation.

<sup>39</sup> Senate Legal and Constitutional Committee, *Humanity Diminished: The Crime of Genocide* (Commonwealth of Australia, 2000).

### 3 INTERNATIONAL LAW: HUMAN RIGHTS

The issue of the extent to which traditional law must conform with existing international human right norms raises complex policy issues for government.

#### (a) Universal Declaration of Human Rights

The United Nations Charter<sup>40</sup> has adopted various fundamental objectives, including under article 1, 'respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion'.

The United Nations General Assembly in its *Universal Declaration of Human Rights* of 10 December 1948<sup>41</sup> elaborated the rights set out in the Charter. While the Universal Declaration was originally developed as a statement of guiding principles, it is now considered to be an authoritative interpretation of international standards in respect of human rights.<sup>42</sup>

##### *Article 2*

Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

##### *Article 5*

No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.

##### *Article 7*

All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.

##### *Article 9*

No one shall be subjected to arbitrary arrest, detention or exile.

##### *Article 10*

Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.

##### *Article 11*

1. Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence.

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<sup>40</sup> B Simma (ed), *The Charter of the United Nations: A Commentary* (New York: Oxford University Press, 1995).

<sup>41</sup> GA Res 217A, 3 UN GAOR (183<sup>rd</sup> plen mtg), UN Doc A/Res/217A (1948).

<sup>42</sup> Triggs op cit at 374.

**(b) International Convention on the Elimination of All Forms of Racial Discrimination**

Australia ratified the *Racial Discrimination Convention*<sup>43</sup> on 30 September 1975.

The Convention defines racial discrimination in Article 1(1) in terms of its purpose or effect:

... any distinction, exclusion, restriction or preference based on race, colour, descent or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.

The Convention obliges parties to refrain from engaging in racial discrimination against its citizens where to do so interferes with their equal enjoyment of human rights, to provide for equality before the law in the enjoyment of those rights.

***Article 2(1)***

States Parties condemn racial discrimination and undertake to pursue by all appropriate means and without delay a policy of eliminating racial discrimination in all its forms and promoting understanding among all races ...

Article 2(2) obliges parties to take special measures “when the circumstances so warrant”.<sup>44</sup>

***Article 5***

In compliance with the fundamental obligations laid down in article 2 of this Convention, States Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights:

- (a) The right to equal treatment before the tribunals and all other organs administering justice;
- (b) The right to security of person and protection by the State against violence or bodily harm, whether inflicted by government officials or by any individual group or institution;
- (c) Political rights, in particular the right to participate in elections-to vote and to stand for election-on the basis of universal and equal suffrage, to take part in the Government as well as in the conduct of public affairs at any level and to have equal access to public service;
- (d) Other civil rights, in particular:
  - (i) The right to freedom of movement and residence within the border of the State;
  - (ii) The right to leave any country, including one's own, and to return to one's country;
  - (iii) The right to nationality;
  - (iv) The right to marriage and choice of spouse;
  - (v) The right to own property alone as well as in association with others;

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<sup>43</sup> 660 UNTS 195, 5 ILM 352 (entered into force 2 January 1969).

<sup>44</sup> Australia has made declarations enabling individuals to complain directly to an international agency about alleged human rights breach - under Article 14 of the Racial Discrimination Convention and Article 22 of the Torture Convention.

- (vi) The right to inherit;
- (vii) The right to freedom of thought, conscience and religion;
- (viii) The right to freedom of opinion and expression;
- (ix) The right to freedom of peaceful assembly and association ...

**(c) Convention on the Rights of the Child**

The UN General Assembly adopted the *Convention on the Rights of the Child*<sup>45</sup> on 20 November 1989. The Convention has been ratified by every country in the world except two<sup>46</sup> and is therefore the most universally accepted human rights instrument. Australia must submit Reports under Article 44 of the Convention.<sup>47</sup> Two Optional Protocols, on the involvement of children in armed conflict and on the sale of children, child prostitution and child pornography, were adopted to strengthen the provisions of the Convention in these areas. They entered into force, respectively on 12 February and 18 January 2002.

The Convention is an international standard for the treatment of children. States parties are obliged to develop and undertake all actions and policies in the light of the best interests of the child. Article 1 defines a child to mean “every human being below the age of 18 years unless under the law applicable to the child, majority is attained earlier.”

Article 2 states:

1. States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status.
2. States Parties shall take all appropriate measures to ensure that the child is protected against all forms of discrimination or punishment on the basis of the status, activities, expressed opinions, or beliefs of the child's parents, legal guardians, or family members.

Article 3 states:

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.
2. States Parties undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her, and, to this end, shall take all appropriate legislative and administrative measures. ...

Article 5 states:

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<sup>45</sup> GA res. 44/25, annex, 44 UN GAOR Supp. (No. 49) at 167, UN Doc. A/44/49 (1989), entered into force 2 September 1990.

<sup>46</sup> The USA and Somalia.

<sup>47</sup> Australia's First and only Report under the Convention was lodged with the United Nations Committee on the Rights of the Child in January 1996. The Report was considered by the Committee in September 1997. The Committee presented its concluding observations in October 1997.

States Parties shall respect the responsibilities, rights and duties of parents or, where applicable, the members of the extended family or community as provided for by local custom, legal guardians or other persons legally responsible for the child, to provide, in a manner consistent with the evolving capacities of the child, appropriate direction and guidance in the exercise by the child of the rights recognized in the present Convention.

Australia is not a party to the *Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages*.<sup>48</sup> The convention recognises in the preamble that

men and women of full age have the right to marry and to found a family, that they are entitled to equal rights as to marriage and that marriage shall be entered into only with the free and full consent of the intending spouses, in accordance with the provisions of article 16 of the Universal Declaration of Human Rights,

The treaty provides

**Article 1**

1. No marriage shall be legally entered into without the full and free consent of both parties, such consent to be expressed by them in person after due publicity and in the presence of the authority competent to solemnize the marriage and of witnesses, as prescribed by law.

**Article 2**

States Parties to the present Convention shall take legislative action to specify a minimum age for marriage. No marriage shall be legally entered into by any person under this age, except where a competent authority has granted a dispensation as to age, for serious reasons, in the interest of the intending spouses.

The International Convention on the Rights of the Child is scheduled to the *Human Rights and Equal Opportunity Act 1986*. This enables the Commission to conciliate complaints about acts or practices of the government which breach the rights in the Convention.

**(d) Convention on the Elimination of All Forms of Discrimination Against Women**

The *Convention on the Elimination of All Forms of Discrimination Against Women*<sup>49</sup> (CEDAW) adopted in 1979 by the UN General Assembly.

The rights enshrined in CEDAW cover all aspects of women's lives, including health, education, employment, marriage, family relations, equality before the law and freedom from discrimination.

The Convention defines discrimination against women in Article 1

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<sup>48</sup> 521 UNTS 231, entered into force 9 December 1964.

<sup>49</sup> GA res. 34/180, 34 UN GAOR Supp. (No. 46) at 193, UN Doc. A/34/46, entered into force 3 September 1981. It was ratified by Australia on 28 August 1983 and is annexed to the Sex Discrimination Act 1984 (Cth). Australia has entered two reservations to CEDAW, with respect to maternity leave provisions (art11(2)(b)) and its general application to government policy excluding women from combat duties.

### ***Article 1***

For the purposes of the present Convention, the term "discrimination against women" shall mean any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.

The right to freedom from violence has been accepted as implicit in the right to freedom from discrimination since 1992.<sup>50</sup>

State parties undertake a series of measures to end discrimination against women in all forms, including:

- to incorporate the principle of equality of men and women in their legal system
- to ensure elimination of all acts of discrimination against women by persons, organizations or enterprises.

### ***Article 2***

States Parties condemn discrimination against women in all its forms, agree to pursue by all appropriate means and without delay a policy of eliminating discrimination against women and, to this end, undertake:

- (a) To embody the principle of the equality of men and women in their national constitutions or other appropriate legislation if not yet incorporated therein and to ensure, through law and other appropriate means, the practical realization of this principle;
- (b) To adopt appropriate legislative and other measures, including sanctions where appropriate, prohibiting all discrimination against women;
- (c) To establish legal protection of the rights of women on an equal basis with men and to ensure through competent national tribunals and other public institutions the effective protection of women against any act of discrimination;
- (d) To refrain from engaging in any act or practice of discrimination against women and to ensure that public authorities and institutions shall act in conformity with this obligation;
- (e) To take all appropriate measures to eliminate discrimination against women by any person, organization or enterprise;
- (f) To take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women;
- (g) To repeal all national penal provisions which constitute discrimination against women.

States parties agree to take all appropriate measures so that women can enjoy all their human rights and fundamental freedoms.

### ***Article 3***

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<sup>50</sup> The Committee on the Elimination of Discrimination Against Women General Recommendation 19 (11<sup>th</sup> session 1992). In 1994, the United Nations Declaration on the Elimination of Violence Against Women recognised that domestic violence is central to women's subordination in society.

States Parties shall take in all fields, in particular in the political, social, economic and cultural fields, all appropriate measures, including legislation, to ensure the full development and advancement of women, for the purpose of guaranteeing them the exercise and enjoyment of human rights and fundamental freedoms on a basis of equality with men.

***Article 5***

States Parties shall take all appropriate measures:

- (a) To modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women;
- (b) To ensure that family education includes a proper understanding of maternity as a social function and the recognition of the common responsibility of men and women in the upbringing and development of their children, it being understood that the interest of the children is the primordial consideration in all cases.

***Article 10***

States Parties shall take all appropriate measures to eliminate discrimination against women in order to ensure to them equal rights with men in the field of education and in particular to ensure, on a basis of equality of men and women:

...

- (c) The elimination of any stereotyped concept of the roles of men and women at all levels and in all forms of education by encouraging coeducation and other types of education which will help to achieve this aim and, in particular, by the revision of textbooks and school programmes and the adaptation of teaching methods;

...

- (g) The same Opportunities to participate actively in sports and physical education;
- (h) Access to specific educational information to help to ensure the health and well-being of families, including information and advice on family planning.

States are required to submit national reports, at least every four years, on measures they have taken to comply with their treaty obligations.<sup>51</sup> Reporting States are expected to describe steps taken to adhere to the Convention, or indicate difficulties encountered. The Committee on the Elimination of Discrimination Against Women (CEDAW Committee), established under Article 18 of the Convention, engages in dialogue with the States Parties reporting under the Convention. Following the exchange with representatives of States Parties, the Committee experts prepare concluding comments which are incorporated in the report of the session. The Committee is also empowered to formulate suggestions and general recommendations based on the examination of States Parties reports.

It has been put to the Committee of Inquiry, and is a generally held view, that customary law in some areas of social behaviour, as presently practised, favours men. This means that any program for the wider application of customary law may be

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<sup>51</sup> Article 18.

criticised by those who say that male dominance is unsuited to the values of contemporary society.<sup>52</sup>

The CEDAW Committee has also noted that CEDAW requires States to act to protect women against violence of any kind occurring within the family, workplace or any other area of social life and that traditional attitudes which subordinate women, including forced marriages, will breach Articles 2(f), 5 and 10(c) of CEDAW.<sup>53</sup> The CEDAW Committee has also stated that some cultural practices (in this case female circumcision) breach the Convention and thereby rejecting arguments based on cultural sanctity with respect to the rights protected under CEDAW.

**(e) Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment**

The *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*<sup>54</sup> [CAT] came into force in 1987.

The prohibition of torture or cruel, inhuman or degrading treatment under Articles 1 and 16 of the Convention.

***Article 1***

1. For the purposes of this Convention, the term "torture" means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.

2. This article is without prejudice to any international instrument or national legislation which does or may contain provisions of wider application.

***Article 16***

1. Each State Party shall undertake to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in article 1, when such acts are committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. In particular, the obligations contained in articles 10, 11, 12 and 13 shall apply with the substitution for references to torture of references to other forms of cruel, inhuman or degrading treatment or punishment.

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<sup>52</sup> Bell D, *Daughters of the Dreaming* (Sydney: Allen & Unwin 1983) argues that the "era of self-determination" has tended to empower men at women's expense.

<sup>53</sup> Committee on the Elimination of Discrimination Against Women, General Recommendation 12, preamble in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies* UN Doc HRI/GEN/1/Rev5 2001.

<sup>54</sup> GA res. 39/46, [annex, 39 UN GAOR Supp. (No. 51) at 197, UN Doc. A/39/51 (1984)], entered into force June 26, 1987.

2. The provisions of this Convention are without prejudice to the provisions of any other international instrument or national law which prohibits cruel, inhuman or degrading treatment or punishment or which relates to extradition or expulsion.

The Convention has been partly implemented by the *Crimes (Torture) Act 1988* (Cwth) but only creates an offence of torture for acts committed outside Australia.<sup>55</sup> The Northern Territory Criminal Code prohibits acts that would amount to torture.<sup>56</sup>

Recommendation 333 of the Royal Commission into Aboriginal Deaths in Custody stated:

While noting that in no case did the Commission find a breach of the Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment, it is recommended that the Commonwealth Government should make a declaration under Article 22 of the Convention and take all steps necessary to become a party to the Optional Protocol to the International Covenant on Civil and Political Rights in order to provide a right of individual petition to the Committee against Torture and the Human Rights Committee, respectively.’

On 28 January 1993 the Australian Government made declarations under Articles 21 and 22 of CAT.

CAT may be relevant to some forms of traditional law punishment, such as spearing. It is said that an action alleged to breach the prohibition of torture and cruel, inhuman and degrading treatment must be intended to inflict a degree of cruelty and humiliation on the victim.<sup>57</sup> If this is so, there may be circumstances in which some traditional punishments do not meet standards, whereas in other circumstances they will.

The determination of whether a punishment breaches such provisions may be context specific or the standard may be universal. The Aboriginal and Torres Strait Islander Social Justice Commissioner argues that “rather than imposing a uniform ban or refuse to recognise certain practices, the Commission notes that it is preferable for judicial organs to be required to balance Aboriginal Customary Law issues with human rights standards”.<sup>58</sup>

#### **(f) ILO Convention 169**

The relevant article in ILO Convention 169 is qualified by reference to "internationally recognised human rights standards". It has been argued that the words "in accordance with internationally human rights standards" may impinge upon indigenous cultural and spiritual beliefs and practices and thus it is for Aboriginal people alone to determine

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<sup>55</sup> Where ... (a) a person who ... is acting in an official capacity; or ... with the consent or acquiescence, of a public official ... does outside Australia an act that is an act of torture; and (b) that act, if done by the person at that time in a part of Australia, would constitute an offence against the law then in force in that part of Australia ... the person is guilty of an offence against this Act.

<sup>56</sup> Set out earlier.

<sup>57</sup> See discussion of ICCPR, Articles 7 and 9 in see Joseph. Schultz and Castan (eds) *The International Covenant on Civil and Political Rights: Cases, Materials, and Commentary* (Oxford, Oxford University Press 2000) pp140-43.

<sup>58</sup> Written Submission (2003) p 28.

whether they consider that customary law should be qualified by internationally recognised human rights standards.<sup>59</sup>

**(g) Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief**

Article 18 of the Universal Declaration of Human Rights declares the right to freedom of thought, conscience and religion or belief. The *Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief*<sup>60</sup> was adopted by the General Assembly in December 1981.

**Article 1**

1. Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have a religion or whatever belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.

2. No one shall be subject to coercion which would impair his freedom to have a religion or belief of his choice.

3. Freedom to manifest one's religion or belief may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health or morals or the fundamental rights and freedoms of others.

**Article 5**

1. The parents or, as the case may be, the legal guardians of the child have the right to organize the life within the family in accordance with their religion or belief and bearing in mind the moral education in which they believe the child should be brought up.

2. Every child shall enjoy the right to have access to education in the matter of religion or belief in accordance with the wishes of his parents or, as the case may be, legal guardians, and shall not be compelled to receive teaching on religion or belief against the wishes of his parents or legal guardians, the best interests of the child being the guiding principle.

3. The child shall be protected from any form of discrimination on the ground of religion or belief. He shall be brought up in a spirit of understanding, tolerance, friendship among peoples, peace and universal brotherhood, respect for freedom of religion or belief of others, and in full consciousness that his energy and talents should be devoted to the service of his fellow men.

4. In the case of a child who is not under the care either of his parents or of legal guardians, due account shall be taken of their expressed wishes or of any other proof of their wishes in the matter of religion or belief, the best interests of the child being the guiding principle.

5. Practices of a religion or belief in which a child is brought up must not be injurious to his physical or mental health or to his full development, taking into account article 1, paragraph 3, of the present Declaration.

**(h) Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities**

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<sup>59</sup> Working Group on Indigenous Populations, 25 July 1995 cited Indigenous Rights International Indigenous Issues An Analysis of the United Nations Draft Declaration on the Rights of Indigenous Peoples March (ATSIC 1999).

<sup>60</sup> GA res. 36/55, 36 UN GAOR Supp. (No. 51) at 171, UN Doc. A/36/684 (1981).

The *Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities* was made in 1992<sup>61</sup>

The Preamble states:

that the constant promotion and realisation of the rights of persons belonging to national or ethnic, religious and linguistic minorities, as an integral part of the development of society as a whole and within a democratic framework based on the rule of law, would contribute to the strengthening of friendship and cooperation among people and States.

Article 1 deals with the protection of minorities, including religious minorities.

1. States shall protect the existence and the national or ethnic, cultural, religious and linguistic identity of minorities within their respective territories and shall encourage conditions for the promotion of that identity.
2. States shall adopt appropriate legislative and other measures to achieve those ends.

Articles 2 and 3 deal with the rights of minorities, including religious minorities.

***Article 2***

1. Persons belonging to national or ethnic, religious and linguistic minorities (hereinafter referred to as persons belonging to minorities) have the right to enjoy their own culture, to profess and practise their own religion, and to use their own language, in private and in public, freely and without interference or any form of discrimination.
2. Persons belonging to minorities have the right to participate effectively in cultural, religious, social, economic and public life.
3. Persons belonging to minorities have the right to participate effectively in decisions on the national and, where appropriate, regional level concerning the minority to which they belong or the regions in which they live, in a manner not incompatible with national legislation.
4. Persons belonging to minorities have the right to establish and maintain their own associations. ..

Articles 4, 5, 6, 7 & 8 deal with State responsibilities for promoting and protecting the rights of minorities.

***Article 4***

1. States shall take measures where required to ensure that persons belonging to minorities may exercise fully and effectively all their human rights and fundamental freedoms without any discrimination and in full equality before the law.
2. States shall take measures to create favourable conditions to enable persons belonging to minorities to express their characteristics and to develop their culture, language, religion, traditions and customs, except where specific practices are in violation of national law and contrary to international standards ...

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<sup>61</sup> General Assembly resolution 47/135 of 18 December 1992.

### **Article 8**

...

2. The exercise of the rights set forth in the present Declaration shall not prejudice the enjoyment by all persons of universally recognized human rights and fundamental freedoms.

3. Measures taken by States to ensure the effective enjoyment of the rights set forth in the present Declaration shall not prima facie be considered contrary to the principle of equality contained in the Universal Declaration of Human Rights. ...

### **(j) Vienna Declaration and Program of Action**

The *Vienna Declaration and Program of Action* (VDPA) was adopted at the 1993 World Conference on Human Rights.

All human rights are universal, indivisible and interdependent and interrelated. The International Community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis...

The preamble to the VDPA notes

the responsibilities of all States, in conformity with the Charter of the United Nations, to develop and encourage respect for human rights and fundamental freedoms for all, without distinction as to race, sex, language or religion.

Paragraph 19 states:

The persons belonging to minorities have the rights to enjoy their own culture, to profess and practice their own religion and to use their own language in private and in public, freely and without interference or any form of discrimination.

By paragraph 22:

The World Conference on Human Rights calls upon all Governments to take all appropriate measures in compliance with their international obligations and with due regard to their respective legal systems to counter intolerance and related violence based on religion or belief, including practices of discrimination against women, and including the desecration of religious sites, recognising that every individual has the right to freedom of thought, conscience, expression and religion.

### **(k) Cultural relativity of human rights**

There is debate about how “universal” the standards of human rights embodied in international law and international agreements actually is. UN Secretary-General, Kofi Annan, addressed the issue when speaking to the Organisation of African Unity in Harare on 2 June 1997:

Some Africans still view the concern of human rights as a rich man's luxury for which Africa is not ready; or even as a conspiracy, imposed by the industrialized

West. I find these thoughts demeaning - demeaning of the yearning for human dignity that resides in every African heart.<sup>62</sup>

The possibility of conflict between customary practices and human rights has been noted at the international level:

Every social grouping in the world has specific traditional cultural practices and beliefs, some of which are beneficial to all members, while others are harmful to a specific group, such as women. These harmful traditional practices include female genital mutilation (FGM); forced feeding of women; early marriage; the various taboos or practices which prevent women from controlling their own fertility; nutritional taboos and traditional birth practices; son preferences and its implications for the status of the girl child; female infanticide; early pregnancy; and dowry price.<sup>63</sup>

It is clear that there are cases internationally where women's individual human rights and minority rights are in conflict.

The International Convention on the Elimination of All Forms of Discrimination Against Women proceeds from the assumption that all practices that harm women, no matter how deeply they are imbedded in culture, must be eradicated.<sup>64</sup>

In considering the relationship between protecting minority rights and the rights of women to equality, the Human Rights Committee has confirmed the importance of upholding women's rights.<sup>65</sup>

Inequality in the enjoyment of rights by women throughout the world is deeply embedded in tradition, history and culture, including religious attitudes... States should ensure that traditional, historical, religious or cultural attitudes are not used to justify violations of women's right to equality before the law and to equal enjoyment of all Covenant rights...<sup>66</sup>

The rights which persons belonging to minorities enjoy under Article 27 of the Covenant in respect of their language, culture and religion do not authorise any

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<sup>62</sup> Department of Foreign Affairs and Trade, Human Rights Manual (Canberra: DFAT 1998).

<sup>63</sup> Office of the High Commissioner for Human Rights "Harmful traditional practices affecting the health of women and children" Fact Sheet No.23 <http://www.unhchr.ch/html/menu6/2/fs23.htm>. Similarly, the Beijing Platform for Action defines violence against women to include traditional practices that are harmful to women. Beijing Platform for Action adopted by the Fourth World Conference on Women 15 September 1995 para 113(a).

<sup>64</sup> United National Development Fund for Women (UNIFEM) "Women, Culture and Traditional Practices" CEDAW Advocacy Kit [gopher://gopher.undp.org:70/00/unifem/poli-eco/poli/whr/cedaw/cedawkit/wctp](http://gopher://gopher.undp.org:70/00/unifem/poli-eco/poli/whr/cedaw/cedawkit/wctp).

<sup>65</sup> The Human Rights Committee has also noted that "... none of the rights protected under Article 27 of the Covenant may be legitimately exercised in a manner or to an extent inconsistent with other provisions of the Covenant." Human Rights Committee General Comment 23 para 8 in Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies UN Doc HRI/GEN/1/Rev5 2001.

<sup>66</sup> Human Rights Committee General Comment 28 para 5 in Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies UN Doc HRI/GEN/1/Rev5 2001.

State, group or person to violate the right to the equal enjoyment by women of any Covenant rights, including the right to equal protection of the law.<sup>67</sup>

While all attempts should be made to reconcile women's individual human rights with the minority rights of Indigenous peoples to retain and enjoy their culture, HREOC considered that women's individual human rights must ultimately prevail:

HREOC considers that the recognition of Aboriginal Customary Law must also take active steps to ensure women's right to individual safety and freedom from violence.<sup>68</sup>

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<sup>67</sup> Human Rights Committee General Comment 28 para 32 in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies* UN Doc HRI/GEN/1/Rev5 2001.

<sup>68</sup> Sex Discrimination Commissioner Written submission (2003) p 12.

## 4 AUSTRALIAN LAW: HUMAN RIGHTS

Australian law has not developed a common law human rights jurisprudence as such. Human rights jurisprudence in Australia arises from the application or interpretation of legislation protecting specified rights, often derived from international legal texts. At the founding of the Australian colonies, and at federation, almost none of these rights were given express recognition or protection under legislation.<sup>69</sup>

The extent to which the recognition of human rights can be implied into Constitutional legislation is limited. The Australian Constitution, with few exceptions, does not seek to protect human rights by placing restrictions upon the exercise of governmental power.<sup>70</sup> The protection of human rights are left to the common law and the supremacy of parliament. The fetters placed upon legislative power are, generally, for the purpose of distributing power between the federal government and State governments.

By ratifying human rights treaties, the Commonwealth Government has undertaken to ensure that all levels of government in Australia respect human rights. Under Article 50 of the ICCPR the Commonwealth has undertaken to apply the provisions of the Covenant to all parts of the federation without limitation or exception. Accordingly, any proposal to recognise Aboriginal customary law in a manner *inconsistent* with human rights standards would place Australia in breach of its obligations under international law, and may result in Commonwealth legislation to override such breaches.

All proposals for the recognition of Aboriginal customary law in Australia have accepted that recognition of Aboriginal customary law must be consistent with human rights standards.<sup>71</sup>

### (a) HREOC

The Human Rights and Equal Opportunity Commission [HREOC] has responsibility for the *Human Rights and Equal Opportunity Commission Act*, the *Racial Discrimination Act* and other related legislation. These responsibilities aim for domestic compliance with Australia's international legal obligations under the ICCPR, CERD, CEDAW, CROC, and the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief.

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<sup>69</sup> See generally George Williams, *Human Rights under the Australian Constitution*, (Oxford University Press, 1999). The Australian Constitution does guarantee some rights. Section 80 guarantees the right to trial by jury. Section 116 provides: The Commonwealth shall not make any law for establishing any religion, or for imposing any religious observance, or for prohibiting the free exercise of any religion, and no religious test shall be required as a qualification for any office or public trust under the Commonwealth. Section 51(xxxi) provides that Parliament may make laws for the "acquisition of property on just terms from any State or person for any purpose in respect of which the Parliament has power to make laws."

<sup>70</sup> See *Attorney-General (Cth); Ex rel McKinlay v The Commonwealth* (1975) 135 CLR 1 at 24; *Brown v The Queen* (1986) 160 CLR 171 at 208, 214; *Australian Capital Television Pty Ltd v The Commonwealth* (1992) 177 CLR 106 at 135-136, 186; *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104 at 193.

<sup>71</sup> The Council for Aboriginal Reconciliation and the Kalkaringi statement (cited earlier). The Social Justice Commissioner (submissions page 16) and the Sex Discrimination Commissioner (submissions page 7) both endorse this requirement as essential to any recognition of customary law. International proposals, such as Article 33 of the Draft Declaration on the Rights of Indigenous Peoples, recognise human rights standards. Both the Northern Territory Law Reform Committee and the ALRC were confined by the terms of reference to recognition consistent with human rights.

**(b) Racial Discrimination Act**

A guarantee of equality before the law and freedom from discrimination exists in Australian law by reason of the *Racial Discrimination Act*.

In 1975 the Commonwealth parliament enacted the *Racial Discrimination Act*, which came into force on 31 October 1975. The Act was designed to implement some of Australia's obligations under *Racial Discrimination Convention* which is scheduled to the Act. The Act is subject to subsequent Commonwealth legislation that expressly or impliedly amends or repeals any of its provisions.

The *Racial Discrimination Act* makes unlawful acts involving distinctions based on the "race, colour or national or ethnic origin" of a person which have the purpose or effect of interfering with the equal enjoyment of that person's human rights. It provides that, where people of a particular race do not enjoy human rights enjoyed by members of another racial group, or enjoy them to a more limited extent than members of another racial group, the first racial group is to enjoy human rights "to the same extent" as the second. The Act contains specific provisions with respect to discrimination in: employment, land, housing or accommodation, access to places and facilities for use by the public, advertising and joining a trade union. There is a complaints mechanism involving mediation by HREOC.

**(i) Discrimination**

Discrimination is generally said to lie in *singling out* a person or group for special (adverse) treatment.<sup>72</sup> In *Austin v the Commonwealth*, Gaudron, Gummow and Hayne JJ said:

The essence of the notion of discrimination is said to lie in the unequal treatment of equals or the equal treatment of those who are not equals, where the differential treatment and unequal outcome is not the product of a distinction which is appropriate and adapted to the attainment of a proper objective.<sup>73</sup> (*footnotes omitted*)

It is generally considered that not every distinction based on race that gives rise to an infringement of the right to freedom from racial discrimination.<sup>74</sup> The view that the prohibition on discrimination contained in Article 1(1) of the *Racial Discrimination Convention* does not apply to a law that makes a distinction on the grounds of race where the law was a reasonable, proportionate response to the special circumstances of the racial group, is also favoured by writers.<sup>75</sup> The task then becomes to evaluate whether the purpose of the law *justifies* the distinction.

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<sup>72</sup> *Kitkatla Band v. British Columbia (Minister of Small Business, Tourism and Culture)* 2002 SCC 31: "While legislation that singles out aboriginal people for special treatment is ultra vires the province, the impugned provisions do not single out aboriginal peoples or impair their status or condition as Indians."<sup>73</sup> [2003] HCA 3.

<sup>74</sup> S Pritchard "Special Measures" in *Race Discrimination Commissioner The Racial Discrimination Act: A Review* (AGPS, Sydney 1995) at Chapter 9.

<sup>75</sup> See discussion in *The Australian Law Reform Commission, The Recognition of Aboriginal Customary Laws*, Report No. 31 (3 volumes) (Canberra: AGPS, 1986) [ALRC Report] para 147ff.

The *Racial Discrimination Act* covers indirect discrimination as well as direct discrimination.<sup>76</sup> The fact that the distinction is not made specifically by reference to race will not prevent an act being racially discriminatory if the effect is to indirectly impose a distinction by reference to race. Discrimination based on race cannot be disguised by attaching some additional criteria which the disadvantaged race are not able to satisfy.<sup>77</sup>

(ii) Section 9

Section 8(1) of the *Racial Discrimination Act* exempts special measures that meet the requirements of Article 1(4) of the Convention from the prohibition of racial discrimination in s.9 of the Act:

**9 Racial discrimination to be unlawful**

- (1) It is unlawful for a person to do any act involving a distinction, exclusion, restriction or preference based on race, colour, descent or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of any human right or fundamental freedom in the political, economic, social, cultural or any other field of public life.
- (2) A reference in this section to a human right or fundamental freedom in the political, economic, social, cultural or any other field of public life includes any right of a kind referred to in Article 5 of the [*Racial Discrimination Convention*].

In the *South West Africa Case*, Judge Tanaka explained the principle of equality before the law:

The principle of equality before the law does not mean the absolute equality, namely the equal treatment of men without regard to individual, concrete circumstances, but it means the relative equality, namely the principle to treat equally what are equal and unequally what are unequal... To treat unequal matters differently according to their inequality is not only permitted but required.<sup>78</sup>

This understanding of equality, usually called ‘substantive equality’, takes into account ‘individual, concrete circumstances’. It acknowledges that racially specific aspects of discrimination such as the failure to recognise cultural distinctiveness must be taken into account in order to redress inequality in fact.

The alternative approach, ‘formal equality’, relies on the notion that all people should be treated identically regardless of their differing circumstances. Such an approach ‘denies the differences which exist between individuals and promotes the idea that the state is a neutral entity free from systemic discrimination.’<sup>79</sup>

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<sup>76</sup> P Bailey, *Human Rights in an International Context* (Sydney: Butterworths 1990) at 189; *Street v Queensland Bar Assn* (1989) 168 CLR 461 per Mason CJ at 488, Brennan J at 509-510.

<sup>77</sup> *Gerhardy v Brown* (1985) 159 CLR 70 Gibbs CJ at 84-5, Brennan J at 118 and Deane J at 145.

<sup>78</sup> *South West Africa Case (Second Phase)* {1966} ICJ Rep 6 pp 303-304, p 305.

<sup>79</sup> Thornton M, *The liberal promise: Anti-discrimination legislation in Australia* (Melbourne, Oxford University Press 1990) p16.

it has long been recognised that formal equality before the law is insufficient to eliminate all forms of racial discrimination... formal equality must yield on occasions to achieve... 'genuine, effective equality'.<sup>80</sup>

The Human Rights Committee, which oversees implementation of the ICCPR, and the Committee on the Elimination of Racial Discrimination, have adopted a substantive equality approach to the meaning of non-discrimination. The Human Rights Committee has indicated that equality 'does not mean identical treatment in every instance'.<sup>81</sup>

The Committee on the Elimination of Racial Discrimination has stated:

The Committee observes that a differentiation of treatment will not constitute discrimination if the criteria for such differentiation, judged against the objectives and purposes of the Convention, are legitimate or fall within the scope of article 1, paragraph 4, of the Convention. In considering the criteria that may have been employed, the Committee will acknowledge that particular actions may have varied purposes. In seeking to determine whether an action has an effect contrary to the Convention, it will look to see whether that action has an unjustifiable disparate impact upon a group distinguished by race, colour, descent, or national or ethnic origin.<sup>82</sup>

In accordance with this, there are basically two types of differential treatment that are permissible in order to achieve equality, and which are considered to be non-discriminatory. These are special measures (or affirmative action) and actions that legitimately recognise cultural difference.

### (iii) Special measures

In *Gerhardy v Brown*,<sup>83</sup> the question in issue was a decision of the South Australian Supreme Court to the effect that s.19 of the *Pitjantatjara Land Rights Act* 1981 (South Australia) was inconsistent with s.9 of the *Racial Discrimination Act*. Section 19 created an offence for a non-Pitjantatjara to enter the relevant Aboriginal land without permission. A question of inconsistency arose, and on the basis that one of the rights given by the Convention was that of freedom of movement.

The High Court ruled s.19 was a special measure within s.8(1) of the *Racial Discrimination Act* and Article 1.4 of the Convention and accordingly was a valid law. Deane J stressed that the issue of whether it is a "special measure" is a question of characterisation, to be necessarily determined in a factual context.<sup>84</sup> However, most

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<sup>80</sup> *Gerhardy v Brown* (1984) 159 CLR 70 per Brennan J, pp128-129.

<sup>81</sup> Human Rights Committee, General Comment XVIII, Non-discrimination (1989), paras 8, 9, in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, UN Doc. HRI/GEN/1/Rev.1, p 26.

<sup>82</sup> Committee on the Elimination of Racial Discrimination, General Recommendation XIV on article 1, paragraph 1 of the Convention, para 2, in *Compilation of General Comments and General Recommendations adopted by human rights treaty bodies*, UN Doc: HRI/GEN/1/Rev.5, 26 April 2001. Emphasis added.

<sup>83</sup> *Gerhardy v Brown* (1985) 159 CLR 70.

<sup>84</sup> *Op cit* at 148. A similar finding was reached in *Pareroultja v Tickner* (1993) 117 ALR 206. Aboriginal heritage protection laws were found to be a special measure in *Aboriginal Legal Rights Movement v South Australia* (Supreme Court SA, 25 August 1995) and the provision of rental assistance for Indigenous students, as a supplement to income support through *Abstudy*, were found to constitute a special measure to address the inequality in educational attainment in *Bruch v Commonwealth* [2002]

judges were prepared to decide that the legislation in that case was a "special measure", without engaging in a detailed factual investigation. All relied heavily on the fact that the Aboriginal people were an indigenous minority who historically had suffered many disadvantages.

The High Court identified four criteria to qualify as a special measure:

- The special measure must confer a benefit on some or all members of a class
- Membership of this class must be based on race, colour, descent or national or ethnic origin
- The special measure must be for the sole purpose of securing adequate advancement of the beneficiaries so that they may enjoy and exercise equally with others their human rights and fundamental freedoms
- The protection given by the special measure must be necessary so that its beneficiaries may enjoy and exercise equally with others, their human rights and fundamental freedoms.<sup>85</sup>

Brennan J also noted that:

- The wishes of the members of the class are relevant – a special measure will not bring about advancement if it is conferred against their will, and similarly, an advancement cannot confer benefits which convert members of the class from a disadvantaged class into a privileged class
- The special measure must not maintain separate rights
- The special measure must not be continued after the objectives for which they were taken have been achieved – although this does not mean that it is necessary that the special measure be created with a finite time for its existence.<sup>86</sup>

### **(c) Multiple marriages**

Multiple male marriages are permitted under traditional law. They are not prohibited by international law.

### **(d) Promised marriages**

Australian law does not permit promised marriages. The principle that marriage requires the consent of the parties is fundamental to international human rights obligations, and accordingly the *Sex Discrimination Act* 1984 (Cwth) or CEDAW on which that Act is based, means that traditional marriage cannot be unless the parties (at or before the time when the issue of recognition arose) had consented to the relationship. To do so would be to authorise sexually discriminatory marriage practices.

HREOC considered that it was possible to reconcile conflict between women's individual human rights and traditional law on the basis that Australian law should consider apparent conflicts between the systems, where required to do so:

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FMCA 29: information from Aboriginal and Torres Strait Islanders Social Justice Commissioner's Written Submission (2003) p 28.

<sup>85</sup> Gerhardy v Brown op cit p133.

<sup>86</sup> *ibid.*

.. on a case by case basis. It is also important to recognise that custom and law can adapt to general social change, thus allowing resolution of apparent conflict. The potential for conflict should not be used by government as an excuse to avoid recognition of Aboriginal Customary Law.<sup>87</sup>

**(e) Corporal punishment**

While corporal punishment has been recognised at common law with respect to both adults<sup>88</sup> and children<sup>89</sup> and expressly recognised by the laws of various countries, it can be accepted that Australian legal policy does not favour such punishments. Children are now the only class of Australians who can still be legally assaulted in the name of domestic correction. Corporal punishment as a penalty for an offence is not a punishment presently authorised by Australian law. Such punishment may amount to assault under Australian law.<sup>90</sup>

**(f) Payback (spearing)**

For the offence of murder, the appropriate penalty under traditional law almost always includes spearing in the thigh, however there may exist mitigating circumstances whereby payback is not imposed. Spearing could be argued to contravene CAT and Article 7 of the ICCPR, prohibiting “cruel inhuman or degrading treatment or punishment.” What is cruel inhuman or degrading treatment or punishment is determining solely by cultural perspectives. With respect to people bound by traditional law, the punishment is not regarded as such.<sup>91</sup>

The test established by the Human Rights Committee to determine whether a minority right should prevail over the more general human right, has been whether the restriction upon the right of the member of a minority could be shown to have a reasonable and objective justification and be necessary for the continued viability and welfare of the minority as a whole.<sup>92</sup>

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<sup>87</sup> Submission of the Sex Discrimination Commissioner (2003) at p 9.

<sup>88</sup> Corporal punishment for keeping domestic discipline, "domestic chastisement", allowed a husband to correct his wife by "moderate" beating. It allowed corporal punishment of domestic servants by their employers and of apprentices by their masters.

<sup>89</sup> At common law parents and other persons with charge or control of children are entitled to use force for the purpose of disciplining children: “By the law of England, a parent or schoolmaster may for the purposes of correcting what is evil in the child, inflict moderate and reasonable corporal punishment”: (1860) R v Hopley 2 F & F 202, 206. Similarly people with parental responsibilities in relation to the child, and anyone to whom they delegate this right may do so. In addition, a person with a close connection with the child, and who has care and control of the child, will also be entitled to physically punish a child. The European Court on Human Rights decided in *A v United Kingdom* 23 September 1998 ([www.dhcour.coe.fr](http://www.dhcour.coe.fr)) that the common law rules did not provide sufficient protection to children under the European Convention on Human Rights. Legislation was enacted for England and Wales in 1998 and for Scotland in 2000 with respect to prohibiting corporal punishment in school.

<sup>90</sup> Set out earlier.

<sup>91</sup> This proposition was both implicitly and explicitly affirmed in discussions with all Aboriginal people who spoke to the Committee. However, it should be noted that some Aboriginal communities no longer carry out spearing having developed other forms of appropriate punishment.

<sup>92</sup> Test used in *Lovelace v Canada* (Human Rights Committee 24/77) and *Kitok v Sweden* (Human Rights Committee 197/85).

**(g) Constitutional issues**

The plenary legislative power conferred on the Legislative Assembly by the *Northern Territory (Self Government) Act 1978* (Cwth) would seem to authorise legislation recognising Aboriginal customary law for some or all purposes, to the extent such recognition is not inconsistent with Commonwealth law.

Chapter III of the Constitution deals with the judicial power of the Commonwealth. It may have a limiting effect on the legislative power of the Northern Territory to enact legislation altering the requirement of trial by jury for serious offences, or the way judicial power is exercised in the Northern Territory by a person other than a court. Pursuant to s.122 of the Constitution (not in Chapter III) the Commonwealth parliament has enacted the *Northern Territory (Self Government) Act 1978* (Cwth).

The argument based on Chapter III starts with the proposition that the power to deprive people of their liberty is judicial power. It was held in *R v Bernasconi*<sup>93</sup> that s 80 of the Constitution, which is in Chapter III and which requires trial by jury for indictable offences "against any law of the Commonwealth", does not apply to offences created by a law made pursuant to a law enacted under s 122 of the Constitution. This requirement of trial by jury would seem not to apply. However, this view has been questioned.<sup>94</sup>

In the event that government develops policy options with respect to the recognition of Aboriginal customary law, it would be necessary to obtain the opinion of the Solicitor-General on the constitutional issues involved in implementing recognition in a way that may offend the express or implied terms of the Constitution.

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<sup>93</sup> (1915) 19 CLR 629; see also *Spratt v Hermes* (1965) 114 CLR 226 at 243 per Barwick CJ, 253 per Kitto J.

<sup>94</sup> In *Kruger v The Commonwealth* (1997) 190 CLR 1 Brennan CJ, Dawson and McHugh JJ adopting the settled view. For example: "But the judicial power exercised in the Territories is not the judicial power of the Commonwealth within the meaning of Ch. III. Courts created under s. 122 are not federal courts nor do they exercise federal jurisdiction." at p 62 per Dawson J; also Brennan CJ at p 42-45 and McHugh J at p 141-142. However, Gaudron J at 108-109 stated: "In my view, there is no convincing reason for treating the words "[t]he judicial power of the Commonwealth" in s 71 of the Constitution as not extending to the determination of justiciable conflicts by application of laws enacted by the Parliament of the Commonwealth pursuant to s 122." Similarly Gummow J at p 168. In *Re The Governor, Goulburn Correctional Centre; Ex parte Eastman* [1999] HCA 44, the High Court (Gleeson CJ, McHugh and Callinan JJ) reviewed *Bernasconi* and *Spratt* and declined to overrule those decisions. However, Gaudron, Gummow, Hayne and Kirby JJ gave indications they may be prepared to reconsider the matter.