

ELECTRONIC VERSION

**RECOGNITION GIVEN TO ASPECTS OF INDIGENOUS  
CUSTOMARY LAW IN QUEENSLAND**

**RESEARCH BULLETIN NO 8/98**

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BRISBANE  
November 1998  
ISSN 1325-1341  
ISBN 0 7242 7843 5

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## ABSTRACT

*In 1986 the Australian Law Reform Commission presented its report The Recognition of Aboriginal Customary Laws to the Commonwealth Parliament. Since then Indigenous customary title to land has been recognised both at common law and in Commonwealth and State legislation. There is currently no general legal recognition given to indigenous customary law in Australia. This Bulletin looks at existing mechanisms in Queensland which facilitate some recognition of aspects of indigenous customary law apart from recognition of native title including consideration given to indigenous traditions in civil and criminal law and in community management.*



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## 1. THE EXISTENCE OF ABORIGINAL CUSTOMARY LAW

In Aboriginal society there is no system of institutional government nor any law making body or court hierarchy.<sup>1</sup> Aboriginal customs are part of an oral culture which has evolved within the various indigenous communities over thousands of years.<sup>2</sup> It is consequently difficult to define Aboriginal customary law in non-indigenous terms.

There is acknowledgment of the existence in traditional Aboriginal society, of a body of rules, values and traditions which established standards or procedures to be followed and that these rules, values and traditions continue to exist in various forms today.<sup>3</sup> The Australian courts have identified the existence of a recognisable system of law in Aboriginal society.<sup>4</sup> In the decision of *Milirrpum v Nabalco Pty Ltd*, Blackburn J found that the system of land-holding and kinship rules of the North-East Arnhem Land people constituted a system of laws. Blackburn J stated that:

*If ever a system could be called 'a government of laws, and not of men', it is that shown to me in the evidence before me ... I hold that I must recognise the system revealed by the evidence as a system of law .... What is shown by the evidence is, in my opinion, that the system of law was recognised as obligatory upon them by the members of the community which, in principle, is definable in that it is the community of Aboriginals which made ritual and economic use of the subject land.*<sup>5</sup>

In an address to a forum on indigenous customary law at Parliament House, Canberra in 1996, the Australian Law Reform Commission President, Alan Rose offered a definition of

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<sup>1</sup> B Debelle, 'Aboriginal Customary Law and the Common Law', in E Johnston QC, M Hinton and D Rigney (eds), *Indigenous Australians and the Law*, Cavendish Publishing (Australia) Pty Limited, Sydney, 1977, pp 81-100, at 82.

<sup>2</sup> J Aldous, *Aboriginal Law and Justice - Case Studies in Just Outcomes*, VCTA Publishing, Melbourne, 1996, p 21.

<sup>3</sup> ALRC, *The Recognition of Aboriginal Customary Laws*, Volume 1, AGPS, Canberra, 1986, para 99. Although Australian courts have recognised the existence of Aboriginal customary laws, Australian judges and administrators have not always readily recognised a system of Aboriginal laws as a phenomenon: see *The Recognition of Aboriginal Customary Laws*, Volume 1, AGPS, 1986, para 98. In the recent Federal Court decision of *Yarmirr v The Northern Territory* the presiding judge noted that if there was a difference between traditional laws and traditional customs, it was not discernible: see *Yarmirr & Ors v The Northern Territory of Australia & Ors* [1998] 771 FCA (6 July 1998), internet item, [http://www.austlii.edu.au/au/cases/cth/federal\\_ct/1998/7871.html](http://www.austlii.edu.au/au/cases/cth/federal_ct/1998/7871.html), para 90.

<sup>4</sup> *Milirrpum v Nabalco Pty Ltd* (1971)17 FLR 141.

<sup>5</sup> (1971) 17 FLR 141 at 266-267.

indigenous customary law as:

*... the body of rules, values and traditions which are accepted by the members of an Aboriginal or Torres Strait Islander community as establishing standards or procedures to be upheld in that community.*<sup>6</sup>

Today, international law supports the recognition of the traditions and customs of indigenous peoples to the extent that they are consistent with fundamental human rights.<sup>7</sup>

The displacement of many Aborigines away from their traditional lands has resulted in Aborigines residing variously in urban environments in cities and large towns, in or on the fringe of country towns, on outstations or pastoral properties and in small remote

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<sup>6</sup> A Rose AO, 'Recognition of Indigenous Customary Law' 1995/96 (68) *Reform*, pp 46-51 at 46. For the purposes of interpreting Queensland legislation, the *Acts Interpretation Act 1954* (Qld) defines **Aboriginal tradition** as:

*... the body of traditions, observances, customs and beliefs of Aboriginal people generally or of a particular community or group of Aboriginal people, and includes any such traditions, observances, customs and beliefs relating to particular persons, areas, objects or relationships: see s 36.*

<sup>7</sup> The *International Covenant on Civil and Political Rights* (ICCPR), adopted by the United Nations General Assembly on 16 December 1966 and which entered into force on 23 March 1976, recognises the rights of persons to enjoy their own culture. The ICCPR entered into force for Australia on 13 November 1980. Article 27 of the ICCPR deals with the rights of minorities. Article 27 provides:

*Members of ethnic, religious or linguistic minorities shall not be denied the right, in a 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.*

In a General Comment on Article 27 adopted on 6 April 1994, the Committee stated that the Article recognises the existence of a 'right' of minorities '*... to enjoy and develop their culture and language and to practise their religion, in community with other members of the group ... That right may include such traditional activities as fishing or hunting ...*': see General Comment No 23 (50) (Art 27), paras 6.2 and 7, cited in Sarah Pritchard (ed), *Indigenous Peoples, the United Nations and Human Rights*, The Federation Press Pty Ltd, Leichardt, NSW, 1998, p 195; see also: Rose, p 46; and Articles 14 and 26 of the ICCPR which provide for equality before the law and before courts and tribunals and Article 24 of the *Draft Universal Declaration on the Rights of Indigenous Peoples* which requires that rights be '*consistent with universally recognised human rights and fundamental freedoms*'.

For a brief discussion on the International Law position in relation to the recognition of customary law including consideration of: the ICCPR; the *Convention Against Torture and Other Cruel, Inhuman and Degrading treatment or Punishment* of 1984 (ratified by Australia in 1989); the *Draft Universal Declaration on the Rights of Indigenous Peoples*; the *Convention Concerning Indigenous and Tribal Peoples in Independent Countries* (ILO No 169) of 1989; and the *European Convention for the Protection of Human Rights and Fundamental Freedoms* of 1953, see S Young, *Indigenous Australians and the Law*, Legal Studies Teacher's Workshop, Part 2, QUT Faculty of Law, 2 August 1997, pp 12-18.

communities.<sup>8</sup> Consequently, there is great variation in the extent to which Aborigines are governed by customary law and the extent to which Aboriginal customary law will continue to exist varies from community to community.<sup>9</sup>

## 2. CROWN SOVEREIGNTY

In Australia, 'the Crown' is invested with the power to make and enforce the law and the legal system and the Australian courts have not accommodated 'any claim based on sovereignty adverse to the Crown'.<sup>10</sup> Despite the acknowledgment that recognition of native title rights form part of the common law, the High Court has held that there is no discrete Aboriginal sovereignty that is adverse to the Crown and rejected claims that Aboriginal people or a group thereof constitute a 'domestic dependent nation'.<sup>11</sup>

The High Court has rejected claims that Australian Parliaments have no power to legislate in a manner affecting Aboriginal people without their consent.<sup>12</sup> Attempts by Aborigines to expand the effect of the Mabo decision to have the common law recognise Aboriginal customary law generally are faced with the court's regard for the sovereign power of governments and parliaments.<sup>13</sup> The application of Commonwealth, State or Territory laws to Aboriginal people is not subject to their acceptance, request or consent.<sup>14</sup> In *Walker v NSW*, Mason J (as he then was) stated:

*Mabo [No 2] is entirely at odds with the notion that sovereignty adverse to the Crown resides in the Aboriginal people of Australia. The decision is equally at odds with the notion that there resides in the Aboriginal people a limited kind of sovereignty embraced in the notion that they are a 'domestic dependent nation' entitled to self government and full rights (save the rights of alienation) or that as a free and independent people they are entitled to any rights or interests other than*

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<sup>8</sup> Debelle, p 87.

<sup>9</sup> Debelle, p 87.

<sup>10</sup> *Coe v The Commonwealth* (1979) 53 ALJR at 409 per Jacobs J. See also Nettheim G 'The Consent of the Native-Mabo and Indigenous Political Rights' in *Essays on the Mabo Decision*, Law Book Company, Sydney, 1993.

<sup>11</sup> *Coe v Commonwealth [The Wiradjuri Claim]* (1994) 68 ALJR 110 at 115.

<sup>12</sup> *Walker v New South Wales* (1995) 69 ALJR 111.

<sup>13</sup> F Brennan SJD 'Mabo and its Ramifications for the Future of Indigenous Australians' in, *Indigenous Australians and the Law*, pp 167-181 at 171.

<sup>14</sup> *Walker v New South Wales* at 112.

*those created or recognised by the laws of the Commonwealth, the State of New South Wales and the Common Law.*<sup>15</sup>

The Australian courts have rejected the existence of an alternative and equal legal system of law operating contemporaneously.<sup>16</sup>

### **3. THE NATURE OF ABORIGINAL CUSTOMARY LAW**

At the time of British settlement in 1788 there was no single Aboriginal nation. There were as many as 500 Aboriginal tribes all with different dialects.<sup>17</sup> Upon British Settlement the Colonial Office treated Australia as uninhabited by a sovereign or sovereigns or by people with institutions or laws. However, today, both at common law and in legislation there is some recognition of indigenous customary law. The most widely known example is the recognition of customary land ownership. Customary title to land, native title, has been recognised at common law and in legislation. The nature and content of native title, and Aboriginal and Torres Strait Islander customary law in general, must be determined with reference to the laws and customs of the relevant Aboriginal community. In *Mabo* [No 2] Brennan J stated that:

*Native title has its origins in and is given its content by the traditional laws acknowledged by and the traditional customs observed by the indigenous inhabitants of a territory. The nature and incidents of native title must be ascertained as a matter of fact by reference to those laws and customs.*<sup>18</sup>

The traditional laws and customs are not frozen in time, they are dynamic and evolve over time. It has been recognised by the High Court that it:

*... is immaterial that the laws and customs have undergone some change since the Crown acquired sovereignty provided the general nature of the connexion between the indigenous people and the land remains.*<sup>19</sup>

Although the content of the customary law is found from an examination of the relevant traditional laws, Aboriginal or Torres Strait Islander customary law is not a legal system

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<sup>15</sup> *Walker v New South Wales* at 112 per Mason J repeating his statement in *Coe v Commonwealth [The Wiradjuri Claim]* at 115.

<sup>16</sup> R McLaughlin, 'Some Problems and Issues in the Recognition of Indigenous Customary Law', *Aboriginal Law Bulletin*, 3(82), July 1996, pp 4-9, p 4.

<sup>17</sup> R M & C H Berndt, *The World of the First Australians*, 2<sup>nd</sup> ed, Ure Smith, Sydney, 1977, pp xi-xii.

<sup>18</sup> *Mabo and others v State of Queensland* [No 2] 107 ALR 1 at 42.

<sup>19</sup> *Mabo* [No 2] at 70 per Brennan J (Mason CJ and McHugh J agreeing).

having its own inherent legal force in the Australian system. The legal force of such laws in the wider Australian legal system is given to it by the common law or legislation.<sup>20</sup>

#### **4. THE 1986 ALRC REPORT ON THE RECOGNITION OF ABORIGINAL CUSTOMARY LAWS**

In 1986 the Australian Law Reform Commission (ALRC) published a report entitled *The Recognition of Aboriginal Customary Laws* which explored:

*...whether it would be desirable to apply either in whole or in part Aboriginal customary law to Aborigines, either generally or in particular areas or to those living in tribal conditions only...*<sup>21</sup>

The ALRC report considered the arguments in favour and against the recognition of Aboriginal customary laws in Australia. The arguments put to the ALRC are contained in **Appendix A** to this Bulletin.

The ALRC considered that recognition of Aboriginal customary law could take several forms including:

- codification or specific enforcement of customary law;
- specific or general forms of ‘incorporation’ by reference;
- the exclusion of the general law in areas to be covered by customary law;
- the translation of institutions or rules for the purposes of giving them equivalent effect;
- the accommodation of traditional customary ways through specific measures taken within the general legal system.<sup>22</sup>

The ALRC recommended against any comprehensive legal recognition of Aboriginal customary law throughout Australia. The ALRC preferred specific forms of recognition to general ones. Although the ALRC rejected codification and the general incorporation of Aboriginal customary law into the Australian legal system, it did not recommend that there be one specific approach to recognition.<sup>23</sup> The ALRC considered that the form of recognition given to the particular customary law should vary with the context. For example, the ALRC considered that general federal legislation was not appropriate in the

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<sup>20</sup> R McLaughlin, p 6.

<sup>21</sup> *The Recognition of Aboriginal Customary Laws*, vol 1, p xxxv.

<sup>22</sup> *The Recognition of Aboriginal Customary Laws*, vol 1, para 208.

<sup>23</sup> *The Recognition of Aboriginal Customary Laws*, vol 1, para 208.

areas of Aboriginal community justice mechanisms and the recognition of traditional hunting, fishing and gathering rights.<sup>24</sup>

## 5. RECOGNITION OF ABORIGINAL CUSTOMARY LAW IN QUEENSLAND

Historically any recognition that was given to Aboriginal customary laws and traditions was as result of a policy of non-involvement in Aboriginal quarrels or disputes which did not affect British settlements.<sup>25</sup> Attempts were made earlier this century to accord recognition to Aboriginal tradition. The *Legislative Standards Act 1992* (Qld) sets out a list of fundamental legislative principles which should be observed in drafting legislation. The *Legislative Standards Act 1992* (Qld)<sup>26</sup> now requires Queensland Parliamentary Counsel (and, by consequence, initiating departments) to have regard to Aboriginal tradition and Island custom in carrying out their duties.<sup>27</sup> When referring to this provision at the time of the introduction of the Legislative Standards Bill 1992 (Qld) into the Queensland Parliament the then Premier, Hon W K Goss stated:

*... for too long, little notice has been taken of the traditions and customs of our indigenous peoples when legislation is drafted by members of our non-indigenous majority.*<sup>28</sup>

In turn, the Parliamentary Scrutiny of Legislation Committee examines Bills before the Queensland Parliament, as to the application of fundamental legislative principles to Bills and subordinate legislation, according to section 4 of the Legislative Standards Act. The Committee reports to Parliament via its publication *Alert Digest*.

Queensland law gives some recognition to Aboriginal and Torres Strait Islander tradition in a number of ways including:

- allowing the practice of certain Aboriginal and Islander traditions;
- involving indigenous people in environmental management;
- involving indigenous people in management of their communities;

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<sup>24</sup> Rose, p 47.

<sup>25</sup> *The Recognition of Aboriginal Customary Laws*, vol 1, para 41.

<sup>26</sup> A private members bill was introduced to the Queensland Parliament on 19 November 1998 which seeks to remove from the *Legislative Standards Act 1992* (Qld) the specific requirement that Queensland legislation must be drafted in a way that has sufficient regard for Aboriginal tradition and Island custom. The Legislative Standards Amendment Bill 1998 (Qld) proposes instead to require that legislation ‘ensures everyone is equal before and under the law, regardless of race’ Clause 3.

<sup>27</sup> *Legislative Standards Act 1992* (Qld), ss 4 and 7.

<sup>28</sup> Hon W K Goss, Legislative Standards Bill 1992 (Qld), Second Reading Speech, *Queensland Parliamentary Debates*, Vol 322 1991-1992, p 5008.

- protecting areas and objects of special significance to Aborigines and Torres Strait Islander people.

Aspects of Aboriginal customary law can be taken into account in Queensland criminal law in areas including sentencing of offenders and in ascertaining the state of mind of an accused. There have also been Queensland Government initiatives to involve indigenous people in local government law enforcement in Aboriginal and Torres Strait Islander communities and community management generally, which gives some scope for incorporation of Aboriginal and Torres Strait Islander traditions at the community level. The following discussion of the recognition given to some aspects of Aboriginal and Torres Strait Islander customary law in Queensland will focus on Queensland legislative and other Government initiatives. Apart from the *Native Title Act 1993* (Cth), Commonwealth Government initiatives are not considered.

## **5.1 SPECIFIC LEGISLATIVE RECOGNITION AND PROTECTION OF ABORIGINAL AND ISLANDER TRADITIONS**

### **5.1.1 Interests in land**

In Queensland, some recognition is given to Aboriginal and Torres Strait Islander interests in land in a number of ways. *Mabo* [No 2] decided that Australian common law recognises an indigenous native title to land in Australia provided that such native title rights have not been extinguished. The principles relating to the extinguishment of native title at common law were set out plainly in *Mabo* [No 2]. Legislation which is inconsistent with the exercise of a native title right will extinguish such right, but a law which merely regulates the enjoyment of native title or which creates a regime of control that is consistent with the continued enjoyment of the native title rights and interests does not extinguish such native title rights.<sup>29</sup> In Queensland, the *Native Title Act 1993* (Cth) and the *Native Title (Queensland) Act 1993* (Qld) operate to recognise and protect native title rights.

Aboriginal people and Torres Strait Islanders are also able to make a claim of land in Queensland under the *Aboriginal Land Act 1991* (Qld) or *Torres Strait Islander Land Act 1991* (Qld) on the basis of traditional affiliation, historical association, or economic or

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<sup>29</sup> *Mabo* [No 2], per Brennan J at p 47.

cultural viability.<sup>30</sup> In the *Aboriginal Land Act 1991 (Qld)*, **Aboriginal tradition** is defined to be:

*the body of traditions, observances, customs and beliefs of Aboriginal people generally or of a particular group of Aboriginal people, and includes any such traditions, observances, customs and beliefs relating to particular persons, areas, objects or relationships.*<sup>31</sup>

The *Torres Strait Islander Land Act 1991 (Qld)* contains an equivalent definition of Island custom.<sup>32</sup> The grants of land are made to Aboriginal or Torres Strait Islander land trusts. A Land Tribunal is constituted under both Acts to hear evidence relating to land claims and to make recommendations to the Minister in respect of such claims.<sup>33</sup> If the Land Tribunal, constituted under the Act, recommends to the Minister that a grant of land should be made, it makes recommendations as to who should be appointed to be grantees of the land as trustees for the benefit of the Aboriginal people concerned. In making these recommendations, the Land Tribunal must act consistently with any Aboriginal tradition applicable to the land.<sup>34</sup> In appointing persons to be the grantees as trustees for the Aboriginal people concerned, and in making a decision concerning the devolution of land after the last surviving member of an Aboriginal group dies, the Minister must act in accordance with any Aboriginal tradition.<sup>35</sup> Similar provisions relate to Torres Strait Islanders under the *Torres Strait Islander Land Act 1991 (Qld)*.<sup>36</sup>

### 5.1.2 Hunting, Fishing and Gathering Rights

The ALRC recommended that recognition of Aboriginal hunting, fishing and gathering rights should reflect the variety of legitimate interests in the environment such as conservation, effective management of natural resources, pastoral and other residential and commercial interests and that no overriding recognition of traditional hunting, fishing and gathering practices is appropriate.<sup>37</sup> Recognition of traditional hunting and fishing rights should

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<sup>30</sup> *Aboriginal Land Act 1991 (Qld)*, ss 45 and 46.

<sup>31</sup> *Aboriginal Land Act 1991 (Qld)*, s 9.

<sup>32</sup> *Torres Strait Islander Land Act 1991 (Qld)*, s 8.

<sup>33</sup> *Aboriginal Land Act 1991 (Qld)*, Part 8; *Torres Strait Islander Land Act 1991 (Qld)*, Part 8.

<sup>34</sup> *Aboriginal Land Act 1991 (Qld)*, s 60(4).

<sup>35</sup> *Aboriginal Land Act 1991 (Qld)*, ss 65(3) and 79(2).

<sup>36</sup> *Torres Strait Islander Land Act 1991 (Qld)*, ss 57 and 76.

<sup>37</sup> *The Recognition of Aboriginal Customary Laws*, vol 2, para 1001.

include recognition of these practices for the purposes of ceremonial exchange and satisfaction of kinship obligations.<sup>38</sup> In prioritising interests the ALRC recommended that conservation (as well as ‘*other identifiable overriding interests*’) should be placed ahead of traditional hunting and fishing.<sup>39</sup>

It has already been noted that native title is recognised and protected in Queensland by Commonwealth and State legislation. The content of native title is ascertained by reference to indigenous laws and customs which can include hunting, gathering and fishing rights; Section 223(2) of the *Native Title Act 1993* (Cth) confirms that native title rights and interests may include hunting, gathering or fishing interests.<sup>40</sup> In exercise of native title rights, this legislation recognises the right of native title holders to hunt, fish and gather on their traditional land or waters without obtaining the usual licence or permit for such activity provided they do not use the produce for commercial purposes.<sup>41</sup> However, these ‘native title rights and interests’ are defined to include only such interests as are recognised by the common law of Australia.<sup>42</sup> These hunting gathering and fishing rights, also known as usufructuary rights, need not be associated with a right to occupy lands or waters.<sup>43</sup> In the 1998 decision of *Eaton v Yanner* it was held that the effect of s 7(1) of the *Fauna Conservation Act 1974* (Qld), in vesting the ownership of all fauna in the Crown, was to extinguish any native title right an Aborigine may otherwise have had in Queensland to hunt and kill fauna in accordance with Aboriginal tradition.<sup>44</sup> So far as fauna was concerned then the Court held that there was nothing on which the relevant provision of the *Native Title Act 1993* (Cth) could operate.

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<sup>38</sup> *The Recognition of Aboriginal Customary Laws*, vol 2, para 1001.

<sup>39</sup> *The Recognition of Aboriginal Customary Laws*, vol 2, para 1001.

<sup>40</sup> See *Yarmirr v The Northern Territory*, para 87.

<sup>41</sup> *Native Title Act 1993* (Cth), s 211. The 1998 Federal Court decision of *Mary Yarmirr v The Northern Territory* recognised that communal native title rights can exist in relation to areas of sea and sea-bed. The *Native Title Act 1993* (Cth) has been drafted in a manner to allow claims to be made for native title in offshore areas. In confirming the application of the *Native Title Act 1993* (Cth) in relation to the coastal sea and extending its effect to all waters over which Australia asserts sovereign rights, Parliament has indicated a specific intention to recognise that native title rights if proved to exist are capable of recognition in those waters; *Yarmirr v Northern Territory*, para 87.

<sup>42</sup> *Native Title Act 1993* (Cth), s 223(1)(c).

<sup>43</sup> *Yarmirr v The Northern Territory*, para 87.

<sup>44</sup> *Eaton v Yanner*, CA (QLD) Appeal No 10389 Of 1996, 27 February 1998 -BC9800571.

There is other legislation which recognises traditional Aboriginal ‘hunting and gathering’ rights in particular areas in Queensland and Aborigines are wholly or partly exempted from a range of Queensland legislation which regulates hunting and gathering.

The *Local Government (Aboriginal Lands) Act 1978* (Qld) allows Aboriginal residents of the Shires of Aurukun or Mornington to kill and consume native fauna and to remove forest products and quarry material for domestic use.<sup>45</sup> The *Community Services (Aborigines) Act 1984* (Qld)<sup>46</sup> and the *Community Services (Torres Strait) Act 1984* (Qld) permit the taking of fauna by a member of the relevant Aboriginal or Torres Strait Islander community resident on trust areas providing that the fauna is taken:

- by traditional means; and
- for consumption by a member of the relevant Aboriginal or Torres Strait Islander community.

Under the *Nature Conservation Act 1992* (Qld) Aborigines or Torres Strait Islanders are permitted to take and use protected wildlife under Aboriginal or Island custom provided that such wildlife is not in a protected area.<sup>47</sup> However, this is permitted only where:

- there is no conservation plan made under the *Nature Conservation Act 1992* (Qld) which expressly applies to the dealings with protected wildlife under Aboriginal or Island custom; and
- the use of any protected wildlife by Aboriginal or Torres Strait Islander people under Aboriginal or Torres Strait Islander tradition is economically sustainable.<sup>48</sup>

It is an offence for an Aborigine or Torres Strait Islander to deal with protected wildlife in contravention of a conservation plan where the plan expressly prohibits the taking, using or keeping of protected wildlife under Aboriginal Tradition or Island custom.<sup>49</sup> In protected areas, Aborigines or Torres Strait Islanders may be granted **Aboriginal tradition authority** or **Island custom authority** respectively, to authorise the taking or using of cultural or natural resources in accordance with Aboriginal or Torres Strait Islander tradition.<sup>50</sup> Such

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<sup>45</sup> *Local Government (Aboriginal Lands) Act 1978* (Qld), s 29.

<sup>46</sup> s 77(1)(a).

<sup>47</sup> *Nature Conservation Act 1992* (Qld), ss 62 and 93.

<sup>48</sup> *Nature Conservation Act 1992* (Qld), s 73(b)(iii).

<sup>49</sup> *Nature Conservation Act 1992* (Qld), s 93(3).

<sup>50</sup> *Nature Conservation Regulation 1994* (Qld) ss 28 and 29 and see generally, Chapter 2 Part 2.

authority cannot be granted in respect of rare or threatened wildlife or if it would result in reducing the natural population levels of the wildlife in the area.<sup>51</sup>

The *Fisheries Act 1994* (Qld) provides that Aborigines and Torres Strait Islanders may take, use or keep fisheries' resources, or use fish habitats, under Aboriginal tradition or Island custom, provided that there has not been a regulation or management plan made under the Act which expressly applies to acts done under Aboriginal tradition or Island custom.<sup>52</sup> Any such regulation or management plan can only be made after co-operation with Aborigines or Torres Strait Islanders.<sup>53</sup> The Queensland Fisheries Management Authority (QFMA), established under the *Fisheries Act 1994* (Qld) must ensure a fair division of access to fisheries resources for commercial, recreational and indigenous use.<sup>54</sup>

The *Torres Strait Fisheries Act 1984* (Qld) forms part of a legislative framework that gives effect to the *Torres Strait Treaty*, an arrangement between the Commonwealth Government and Papua New Guinea concerning the sovereignty and maritime boundaries in the area between Australia and Papua New Guinea, including the Torres Strait. In the zone of land and water in the Torres Strait region protected by the *Torres Strait Treaty*, traditional fishing is generally given priority over commercial fishing.<sup>55</sup> **Traditional fishing** is defined in the *Torres Strait Treaty* as the taking by traditional inhabitants, for consumption by themselves or their dependants or for use in other traditional activities, of the living natural resources of the sea, seabed, estuaries and coastal tidal areas.

## 5.2 INVOLVEMENT OF INDIGENOUS PEOPLE IN ENVIRONMENTAL MANAGEMENT

### 5.2.1 Nature Conservation Act 1992 (Qld)

Although the primary object of the *Nature Conservation Act 1992* (Qld) is the conservation of nature,<sup>56</sup> the Act gives recognition to Aboriginal tradition in a number of ways. Land may

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<sup>51</sup> *Nature Conservation Act 1992* (Qld), s 33(1).

<sup>52</sup> *Fisheries Act 1994* (Qld), s 14(1), 14(2).

<sup>53</sup> *Fisheries Act 1994* (Qld), s 14(3).

<sup>54</sup> *Fisheries Act 1994* (Qld), s 26(1).

<sup>55</sup> *Torres Strait Treaty*, Art 20(1). See *Torres Strait Fisheries Act 1984* (Cth), *Torres Strait Treaty (Miscellaneous Amendments) Act 1984* (Cth) and *Torres Strait Fisheries Act 1984* (Qld).

<sup>56</sup> *Nature Conservation Act 1992* (Qld), s 4.

be dedicated as a certain class of protected area which is then to be managed in accordance with the management principles for that class of protected area.<sup>57</sup> **Protected areas** include World Heritage management areas, national parks, conservation parks, nature refuges and wilderness areas.<sup>58</sup> Protected Areas which are designated to be National Park (Aboriginal Land) and National Park (Torres Strait Islander Land) are to be managed, as far as practicable, consistently with any respective Aboriginal or Torres Strait Islander tradition in the area.<sup>59</sup> This can include hunting and gathering traditions of the relevant indigenous group.

### **5.2.2 Wet Tropics Heritage Protection and Management Act 1993 (Qld)**

The Preamble of the *Wet Tropics Heritage Protection and Management Act 1993* (Qld), which provides for the management of the Wet Tropics of Queensland World Heritage area, states that it is the intention of the Parliament to acknowledge the significant contribution that Aboriginal people can make to the future management of cultural and natural heritage of the Wet Tropics of Queensland World Heritage Area.<sup>60</sup> The Wet Tropics Management Authority established under the *Wet Tropics Heritage Protection and Management Act 1993* (Qld) is required to enter into co-operative arrangements for the management of these areas with persons that include Aboriginal people concerned with land in the wet tropics area.<sup>61</sup> In performing its functions the Wet Tropics Management Authority must have regard to Aboriginal tradition of Aboriginal people concerned with the Wet Tropics area and liaise and cooperate with Aboriginal people.<sup>62</sup>

### **5.2.3 Coastal Protection and Management Act 1995 (Qld)**

The objects of the *Coastal Protection and Management Act 1995* (Qld) include the protection, conservation, rehabilitation and management of the coast, including its resources

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<sup>57</sup> *Nature Conservation Act 1992* (Qld), Part 4.

<sup>58</sup> *Nature Conservation Act 1992* (Qld), s 14; see discussion in G Neate and D Sweeney, 'Aboriginals and Torres Strait Islanders' in Sir Harry Gibbs GCMG AC KBE (ed in chief) *Halsbury's Laws of Australia*, Butterworths, Sydney, 1991, para [5-2255].

<sup>59</sup> *Nature Conservation Act 1992* (Qld), ss 18(2) and 19(2). See also Part 4 Division 3.

<sup>60</sup> *Wet Tropics World Heritage Protection and Management Act 1993* (Qld), Preamble, Recital (8).

<sup>61</sup> *Wet Tropics World Heritage Protection and Management Act 1993* (Qld), s 10(1)(f).

<sup>62</sup> *Wet Tropics World Heritage Protection and Management Act 1993* (Qld), s10(5).

and biological diversity.<sup>63</sup> This object is to be achieved in part by the preparation of coastal management plans which, amongst other requirements, must have regard to Aboriginal tradition and Island custom of Aboriginal and Torres Strait Islander people particularly affected by such plans.<sup>64</sup> The *Coastal Protection and Management Act 1995* (Qld) establishes the **Coastal Protection Advisory Council** to advise the Minister about coastal management issues.<sup>65</sup> Included in the obligations placed on the advisory council when performing its functions, are to, as far as practicable:

- have regard to Aboriginal tradition and Island custom of Aboriginal and Torres Strait Islander people particularly concerned with land in the coastal zone; and
- liaise and consult with Aboriginal people and Torres Strait Islanders particularly concerned with land in the coastal zone.<sup>66</sup>

The Minister is obliged to both prepare **regional coastal management plans** for the coastal zone and to appoint a **regional coastal consultative group** to assist with the preparation of the regional plan.<sup>67</sup> The membership of a regional consultative group must include representatives of certain groups including representatives of Aboriginal and Torres Strait Islander interests.<sup>68</sup> There is also power under the *Coastal Protection and Management Act 1995* (Qld) to declare a coastal area a **control district** where certain criteria are met.<sup>69</sup> Before declaring an area a control district s 49 of the *Coastal Protection and Management Act 1995* (Qld) requires that consideration be given to a number of things including:

*Aboriginal tradition and Island custom of Aboriginal and Torres Strait Islander people particularly concerned with land in the area.*

In addition, the *Environmental Protection Act 1994* (Qld) requires that its administration be, as far as practicable, in consultation with and having regard to the views of certain specified groups, including Aborigines and Torres Strait Islanders.<sup>70</sup>

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<sup>63</sup> *Coastal Protection and Management Act 1995* (Qld), s 3(a).

<sup>64</sup> *Coastal Protection and Management Act 1995* (Qld), s 4(a).

<sup>65</sup> *Coastal Protection and Management Act 1995* (Qld), Chapter 2, Part 1, Division 1.

<sup>66</sup> *Coastal Protection and Management Act 1995* (Qld), s 16(3).

<sup>67</sup> *Coastal Protection and Management Act 1995* (Qld), ss 19 and 30 and see generally Part 2.

<sup>68</sup> *Coastal Protection and Management Act 1995* (Qld), s 21.

<sup>69</sup> *Coastal Protection and Management Act 1995* (Qld), ss 47 and 48.

<sup>70</sup> *Environmental Protection Act 1994* (Qld), s 6.

### 5.3 PROTECTION FOR AREAS AND OBJECTS OF SPECIAL SIGNIFICANCE TO INDIGENOUS PEOPLE

#### 5.3.1 Cultural Record (Landscapes Queensland and Queensland Estate) Act 1987 (Qld)

The *Cultural Record (Landscapes Queensland and Queensland Estate) Act 1987* (Qld) has provisions that can be used for the protection of certain aboriginal remains. It also recognises some rights of indigenous Australians to have customary access, enjoyment or use of land and objects for traditional purposes. The objects of the *Cultural Record (Landscapes Queensland and Queensland Estate) Act 1987* (Qld) (the Cultural Records Act) include the preservation of all components of 'Landscapes Queensland' and the Queensland estate.<sup>71</sup>

**Landscapes Queensland** are areas or features within Queensland that have been or are being used, altered or affected in some way by humans and are of significance to humans for any anthropological, cultural, historic, prehistoric or societal reason, and includes any item of the Queensland estate found in those areas or features.<sup>72</sup> With some exceptions, **Queensland estate** includes evidence of human's occupation of the areas comprising Queensland at any time that is at least 30 years in the past.<sup>73</sup> Once an area is declared a designated landscape area it is an offence for a person to destroy, damage, move or interfere with any notice, structure or boundary mark on such area without authorisation.<sup>74</sup> This legislation can be used to protect areas of significance to indigenous people. While imposing restrictions on the ownership and handling of the Queensland estate, no provision may be construed so as to prejudice:

- 1) *rights of ownership had by a traditional group of indigenous people<sup>75</sup> or by a member of such a group in a part of the Queensland estate that is used or held for traditional purposes; or*
- 2) *free access to and enjoyment and use of a part of the Queensland estate where the access, enjoyment or use is sanctioned by traditional custom relating to that part, by a person who usually lives subject to the traditional custom of a group of indigenous people.<sup>76</sup>*

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<sup>71</sup> *Cultural Record (Landscapes Queensland and Queensland Estate) Act 1987* (Qld), Preamble.

<sup>72</sup> *Cultural Record (Landscapes Queensland and Queensland Estate) Act 1987* (Qld), s 5.

<sup>73</sup> *Cultural Record (Landscapes Queensland and Queensland Estate) Act 1987* (Qld), s 5.

<sup>74</sup> *Cultural Record (Landscapes Queensland and Queensland Estate) Act 1987* (Qld), s 24(1).

<sup>75</sup> **Indigenous** means pertaining to any people who inhabited any part of Australia before colonisation of Australia: see *Cultural Record (Landscapes Queensland and Queensland Estate) Act 1987* (Qld), s 5.

<sup>76</sup> *Cultural Record (Landscapes Queensland and Queensland Estate) Act 1987* (Qld), s 32.

Special provision is made for indigenous burial remains<sup>77</sup> where familial or traditional links exist between the remains and a traditional group of indigenous persons. These remains are the property of the traditional group or the person or persons with whom the links are shown to exist.<sup>78</sup>

## **5.4 INVOLVEMENT OF INDIGENOUS PEOPLE IN LOCAL GOVERNMENT, POLICING AND LAW ENFORCEMENT**

### **5.4.1 The Community Services (Aborigines) Act 1984 (Qld) and the Community Services (Aborigines) Act 1984 (Qld).**

The *Community Services (Aborigines) Act 1984* (Qld) and *Community Services (Torres Strait) Act 1984* (Qld) establish local government councils with the power to pass by-laws with respect to designated areas of land usually corresponding to boundaries of pre-existing Aboriginal reserves or settlements and the granting of a limited form of tenure over that land to those councils. The form of land tenure is known as a deed of grant in trust.<sup>79</sup> This legislation provides for the establishment of Aboriginal and Torres Strait Islander Councils for every trust area to discharge the functions of local government in that area. These councils are given the responsibility for the good government of the area in accordance with the customs and practices of the relevant Aborigines or Torres Strait Islander community.<sup>80</sup>

Aboriginal Courts and Island Courts are also established for each trust area.<sup>81</sup> The courts are required to have regard to the usages and customs of the community.<sup>82</sup> These courts have jurisdiction that includes hearing complaints concerning the breaches of by-laws applicable in

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<sup>77</sup> **Burial Remains** do not include human remains buried under the authority of a law of an Australian State or Territory, or human remains in or from a place recognised as a burial ground under the authority of a law of an Australian State or Territory: see *Cultural Record (Landscapes Queensland and Queensland Estate) Act 1987* (Qld), s 5.

<sup>78</sup> *Cultural Record (Landscapes Queensland and Queensland Estate) Act 1987* (Qld), ss 34(2) and 34(4).

<sup>79</sup> See also LF Wyvill QC, *Regional Report of Inquiry in Queensland* of the *Royal Commission into Aboriginal Deaths in Custody*, AGPS, Canberra, 1991, p 72.

<sup>80</sup> *Community Services (Aborigines) Act 1984* (Qld), s 25(1); *Community Services (Torres Strait) Act 1984* (Qld), s 23(1).

<sup>81</sup> *Community Services (Aborigines) Act 1984* (Qld), Part 3 Division 3; *Community Services (Torres Strait) Act 1984* (Qld), Part 3 Division 3.

<sup>82</sup> *Community Services (Aborigines) Act 1984* (Qld), s 43(1) and (2).

the area and matters that are governed by the usages and customs of that community which are not breaches of the community by-laws or a matter arising under the law of the Commonwealth or the State.<sup>83</sup> However, due to shortcomings in the legislative provisions governing community courts and difficulties in councils adequately resourcing and administering them, many communities have chosen not to establish community courts.<sup>84</sup>

This legislation purports to provide for self-management through a local government structure. However, in the *Royal Commission into Aboriginal Deaths in Custody Regional Report of Inquiry in Queensland*, Commissioner L F Wyvill Q C stated that this legislation has facilitated very little in the way of genuine re-empowerment of Aboriginal and Torres Strait Island people resident on communities.<sup>85</sup>

In August 1990, the Queensland Cabinet approved the establishment of the Legislation Review Committee<sup>86</sup> to review the *Community Services (Aborigines) Act 1984*, *Community Services (Torres Strait) Act 1984* and the *Local Government (Aboriginal Lands) Act 1978*. In the *Final Report of the Legislation Review Committee* in 1991, problems with the community services legislation were acknowledged. The Final Report stated that neither the *Community Services (Aborigines) Act 1984* (Qld), the *Community Services (Torres Strait) Act 1984* (Qld) nor the *Local Government (Aboriginal Lands) Act 1978* (Qld) provided a culturally appropriate structure for indigenous self government.<sup>87</sup> It was recommended that communities should be governed in a way that was culturally appropriate rather than an imitation of mainstream structures. The Final Report further recommended that the communities should continue with current community governing arrangements under the existing Community Service Acts until appropriate new structures had been agreed upon. It was recommended that the Aboriginal and Torres Strait Islander courts be retained to ensure

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<sup>83</sup> *Community Services (Aborigines) Act 1984* (Qld), s 43(2); *Community Services (Torres Strait) Act 1984*, s 41(2). In a 1996 discussion paper *The Recognition of Customary Law - The Way Forward*, the Aboriginal Justice Advisory Committee commented that although this legislation allows some scope for Aboriginal Courts to give recognition to customary law, such recognition has not occurred in practice, see Aboriginal Justice Advisory Committee, *The Recognition of Customary Law - The Way Forward*, Discussion Paper, Queensland, 1996, p 10.

<sup>84</sup> Hon. D E Beanland, Aboriginal, Torres Strait Islander and Remote Communities (Justice Initiatives) Amendment Bill 1997, Second Reading Speech, *Queensland Parliamentary Debates*, 4 June 1997, p 2055.

<sup>85</sup> *Regional Report of Inquiry in Queensland* of the *Royal Commission into Aboriginal Deaths in Custody*, p 72.

<sup>86</sup> The five members of this Committee were either Aboriginal or Torres Strait Islander.

<sup>87</sup> Queensland. Parliament. Legislation Review Committee. *Inquiry into the Legislation Relating to the Management of Aboriginal and Torres Strait Islander Communities in Queensland, Final Report*, Brisbane, November 1991, p 7.

that Aboriginal and Torres Strait Islander communities have some mechanism for determining matters according to Aboriginal and Torres Strait Islander customs and perceptions of justice.<sup>88</sup> To date there has not been a new legislative framework supportive of indigenous control over indigenous destinies as foreshadowed by the 1991 Legislative Review Committee Report.<sup>89</sup> However there have been other community justice initiatives in Queensland to promote self-management of Aboriginal and Torres Strait Islander communities.

#### 5.4.2 Community Justice Initiatives

The *Final Report of the Legislation Review Committee* recommended empowering Aboriginal and Torres Strait Islander communities to take control of community justice mechanisms for themselves.<sup>90</sup> The Committee recommended that legislation should recognise customary law and community involvement in the administration of justice, policing and community services.<sup>91</sup> The Royal Commission into Aboriginal Deaths in Custody stressed the need for Aboriginal self determination, empowerment and more opportunities for Aboriginal community involvement.<sup>92</sup>

In Queensland there have been several initiatives in community justice since the release of these reports. These include:

- The establishment of the Law Council at Aurukun which now derives its power from the *Local Government (Aboriginal Lands) Act 1978 (Qld)*.<sup>93</sup> This council is responsible for the control of alcohol in the shire of Aurukun;
- The establishment of the Elders Justice Network on the Cape York Peninsula;

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<sup>88</sup> *Inquiry into the Legislation Relating to the Management of Aboriginal and Torres Strait Islander Communities in Queensland, Final Report*, para 6(b).

<sup>89</sup> See discussion in P Grose, 'Affirming Indigenous Rights: A Queensland Frieze', (1998) 4 (1) *Indigenous Law Reporter*, pp 70-97 at p 89.

<sup>90</sup> *Inquiry into the Legislation Relating to the Management of Aboriginal and Torres Strait Islander Communities in Queensland, Final Report*, paras 11-27.

<sup>91</sup> *Inquiry into the Legislation Relating to the Management of Aboriginal and Torres Strait Islander Communities in Queensland, Final Report*, see generally paras 1-83.

<sup>92</sup> Australia. Parliament. *Royal Commission into Aboriginal Deaths in Custody, National Report*, AGPS, Canberra, 1991, recommendations 88, 104 and 214-216.

<sup>93</sup> *Local Government (Aboriginal Lands) Act 1978 (Qld)*, Part 6; see discussion in P Chantrill, 'Community Justice in Indigenous Communities in Queensland: Prospects for Keeping Young People out of Detention', (1998) 3 *Australian Indigenous Law Reporter* pp 163-179, p 167.

- The Local Justice Initiatives Program which began with the establishment of pilot community justice groups at Palm Island, Kowanyama and Pormpuraaw.<sup>94</sup>

As part of the Queensland Government's response to the recommendations of the Royal Commission into Aboriginal Deaths in Custody (RCIADIC) the Local Justice Initiatives Program (LJIP) was established, administered by the Office of Aboriginal and Torres Strait Islander Affairs. The LJIP funds Aboriginal and Torres Strait Islander communities and organisations to develop strategies within their communities for dealing with justice issues and to decrease Aboriginal and Torres Strait Islander peoples' contact with the criminal justice system.<sup>95</sup> Included in the objectives of the LJIP are to:

- *provide opportunities for Aboriginal and Torres Strait Islander input and participation in the rehabilitation of offenders; and*
- *sensitise the justice system to the needs and cultural values of Aboriginal and Torres Strait Islander peoples.*<sup>96</sup>

The program aims to extend traditional and culturally appropriate approaches to dealing with justice related issues by generating solutions using community development processes. It also aims to provide opportunities for Aboriginal and Torres Strait Islander communities to influence the criminal justice system in the development and application of appropriate and effective policies and practices, including the development of community-based alternatives to arrest and custody, in conjunction with the relevant agents.<sup>97</sup> A community might establish local justice initiatives to assist in achieving a number of goals including:

- addressing issues of law and order in line with community customs, laws and justice and the State criminal justice systems;
- consulting and negotiating with magistrates and judges about rehabilitative sentencing considered appropriate by both the community and the courts for offenders within the community.<sup>98</sup>

It is intended that the LJIP could support the transmission of cultural practices associated with correct behaviour and law and enable Aboriginal and Torres Strait Islander communities to maintain culturally appropriate social regulation and standards of acceptable behaviour.<sup>99</sup>

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<sup>94</sup> Chantrill, p 167.

<sup>95</sup> Office of Aboriginal and Torres Strait Islander Affairs, *Local justice Initiatives Program - Program Description and Funding Guidelines*, Brisbane, 1996, p 6.

<sup>96</sup> *Local Justice Initiatives Program - Program Description and Funding Guidelines*, pp 6-7.

<sup>97</sup> *Local Justice Initiatives Program - Program Description and Funding Guidelines*, p 10.

<sup>98</sup> *Local Justice Initiatives Program - Program Description and Funding Guidelines*, pp 10-11.

<sup>99</sup> *Local Justice Initiatives Program - Program Description and Funding Guidelines*, p 12.

The justice groups have no statutory authority and community members cannot

be compelled to go before a justice group. The LGIP Program Description notes that:

*Responses to law and order problems suggested by justice groups are essentially a means to bring forward Aboriginal and Torres Strait Islander communities' view and advice which may be incorporated into State systems, where appropriate, to make them more responsive to Aboriginal and Torres Strait Islander peoples' needs.*<sup>100</sup>

Options under the LJIP include providing or contributing to pre-sentence reports and to case management (child protection) reports, and suggesting options for sentencing to magistrates and judges in an endeavour to achieve outcomes considered appropriate by both the community and the court. The Program Description of the LGIP states justice groups could be involved in the pre-court, during-court and post-court stages of the justice process. Offenders who have been given cautions by the police may be dealt with using '*culturally appropriate strategies ... which may be better understood by the offender.*'<sup>101</sup> A table in **Appendix B** sets out the possibilities for intervening in the justice cycle.

In 1997 amendments were made to the Criminal Code (Qld) which aimed to give Justices of the Peace in Aboriginal and Torres Strait Islander and remote communities power to hear and determine certain indictable offences summarily.<sup>102</sup> The *Aboriginal, Torres Strait Islander and Remote Communities (Justice Initiatives) Amendment Act 1997* (Qld) replaced s 552C of the Criminal Code (Qld) which required that when a Magistrates Court dealt with the hearing of an indictable offence the court was to be constituted by a Magistrate. The replacement provision gave a limited jurisdiction to Justices of the Peace who are not Magistrates to deal with guilty pleas on certain indictable offences. These include offences where the Justice of the Peace is satisfied that the matter can be adequately dealt with by imposing a penalty of not more than six months imprisonment or 100 penalty units (\$7500.00). If the offence involves property, the loss or damage to the property must be not more than \$2 500.00.<sup>103</sup> The *Explanatory Notes* to the Bill state that:

*... by ensuring that appropriately qualified Justices of the Peace are appointed to hear and determine indictable offences summarily on Aboriginal and remote areas it [the Bill] enhances the prospect of local traditions and customs being represented in the Criminal Justice system to the extent that they are not in conflict with its underlying laws and principles.*<sup>104</sup>

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<sup>100</sup> *Local Justice Initiatives Program - Program Description and Funding Guidelines*, p 13.

<sup>101</sup> *Local Justice Initiatives Program - Program Description and Funding Guidelines*, p 14.

<sup>102</sup> *Aboriginal, Torres Strait Islander and Remote Communities (Justice Initiatives) Amendment Bill 1997* (Qld), *Explanatory Notes*, Vol 1 1997, p 800.

<sup>103</sup> Criminal Code (Qld), s 552C.

<sup>104</sup> *Aboriginal, Torres Strait Islander and Remote Communities (Justice Initiatives) Amendment Bill 1997* (Qld), *Explanatory Notes*, p 801.

The pilot community justice programs at Pormpuraaw, Palm Island and Kowanyama were facilitated by the Queensland Corrective Services Commission which made money available in 1993 for a consultant to explore community justice administration in these communities.<sup>105</sup> After consultation with the indigenous community on Kowanyama a community justice group was established with 18 members (with equal numbers of men and women) nominated by and representing the three family groups in the community. At Palm Island the membership of the 20 strong group was elected from a nominated group of recognised authority figures.<sup>106</sup>

The objectives of the Kowanyama community justice group include addressing the issues of law and order in a way that the community understands to be right and in accordance with its own customs, laws and understandings about justice.<sup>107</sup> In a recent article on community justice in indigenous communities, Paul Chantrill writes that:

*Despite the disruption to customary practices through historical experience of contact with missions and reserve administration in Indigenous communities in Queensland, there are strong claims that elder authority and culturally based practices can and are being used to make a significant difference to community administration of law and order.*<sup>108</sup>

Chantrill notes that while some of the responses of the Kowanyama community justice group may be influenced by notions of traditional authority and wisdom, other responses may be responses based on ingenuity and common sense.<sup>109</sup> While rejecting a return to customary ways linked with violence and pay-back, the Kowanyama justice group have chosen other forms of control associated with local custom including:

- avoiding people or not making them welcome at particular homes;
- forbidding access to the community canteen;
- asking people to leave the community for varying lengths of time;
- promoting reconciliation by bringing problems out in the open;
- allowing a meeting and confrontation of adversaries;
- growling and shaming (public humiliation) to promote socially acceptable behaviour.<sup>110</sup>

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<sup>105</sup> Chantrill, p 167.

<sup>106</sup> Chantrill, p 168.

<sup>107</sup> Chantrill, p 170.

<sup>108</sup> Chantrill, p 171.

<sup>109</sup> Chantrill, p 171.

<sup>110</sup> Chantrill, p 173.

The community justice groups work co-operatively with the Queensland Corrective Services. On Palm Island, for example, most breaches of community service orders are handled by the justice group rather than being referred back to the court. At Palm Island, all sentencing arrangements are brought to the attention of the justice group and the group provides visiting magistrates with pre-sentence reports which deal with individual case backgrounds and the community's thoughts on appropriate sanctions.<sup>111</sup> This initiative has received the endorsement of the President of the Children's Court.<sup>112</sup> The justice groups are also involved in ensuring adherence to court orders.

Paul Chantrill notes that:

*The notion of partnership is a critical one for furthering community involvement in justice administration. Self-determination does not imply that communities must undertake all tasks alone. The support of government or other agencies is needed as partners, facilitators, funding providers, trainers and advocates.*<sup>113</sup>

There are now more than 30 Community Justice Groups funded by the LGIP throughout Queensland.<sup>114</sup> A Draft Progress Report published in May 1998 indicates that the Community Justice Groups have a high degree of success in forging positive relationships with local justice agencies notably the State police. In some cases this has led to a willingness for people to divert certain minor matters to be dealt with by the Justice Group as an alternative to charging the person before the court.<sup>115</sup> In relatively fewer instances the Community Justice Groups have developed closer links with visiting magistrates enabling greater input by community members into the court through means such as pre-sentence reports.<sup>116</sup> Although, when sentencing an offender, a Magistrate is required by law to gather all relevant information, including information about the background and culture of the defendant, it has been suggested that specific legislation or practice guidelines should be put

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<sup>111</sup> Chantrill, p 174.

<sup>112</sup> Chantrill, p 176.

<sup>113</sup> Chantrill, p 176.

<sup>114</sup> Queensland. Department of Aboriginal and Torres Strait Islander Policy and Development, Program Development Branch, *Local Justice Initiatives Program, Interim Assessment of Community Justice Groups, Draft Report*, Brisbane, 1998, Executive Summary, p 6.

<sup>115</sup> *Local Justice Initiatives Program, Interim Report, Assessment of Community Justice Groups, Draft Report*, Executive Summary, p 7.

<sup>116</sup> *Local Justice Initiatives Program, Interim Report, Assessment of Community Justice Groups, Draft Report*, Executive Summary, p 7.

in place to ensure Magistrates take account of Indigenous communities' views about sentencing.<sup>117</sup>

The Draft Report on the LGIP states that:

*In general, Community Justice Groups can be said to be generating a general shift in the way agents of the justice system operate by encouraging agencies to work with local Indigenous communities and to respect and accommodate cultural differences.*<sup>118</sup>

Although these programs do not involve specific legislative recognition of Aboriginal or Torres Strait Islander customary law, the LGIP is a vehicle through which some cultural practices and aspects of customary law can be incorporated into community management and law enforcement.

## **5.5 ABORIGINAL AND TORRES STRAIT ISLANDER CUSTOM IN QUEENSLAND CRIMINAL LAW**

Due to the English origins of the criminal law in Australia, some commentators have described the criminal law as mono-cultural in its origins and not culturally neutral.<sup>119</sup> There are basic conceptual differences between the general Australian criminal law and the nearest equivalent Aboriginal or Torres Strait Islander concept. Unlike the concept of individual responsibility for wrongdoing in Australian criminal law, Aboriginal custom recognises collective responsibility based on kinship obligations.<sup>120</sup> A tribe could be considered responsible for the crime of one of its members.<sup>121</sup> In some instances Aboriginal custom would condone acts which the Australian criminal law would consider assaults.<sup>122</sup> The difficulty of reconciling the Australian criminal law and the Aboriginal and Torres

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<sup>117</sup> *Local Government Initiatives Program, Interim Report, Assessment of Community Justice Groups, Draft Report*, p 44.

<sup>118</sup> *Local Government Initiatives Program, Interim Report, Assessment of Community Justice Groups, Draft Report*, p 46.

<sup>119</sup> Stanley Yeo, 'The Recognition of Aboriginality by Australian Criminal Law', in G Bird, G Martin & J Nielsen (eds), *Majah - Indigenous Peoples and the Law*, The Federation Press, Sydney, 1996, pp 228-265 at 228-229.

<sup>120</sup> Yeo, pp 230-231.

<sup>121</sup> K Maddock, *The Australian Aborigines: A Portrait of their Society*, Penguin Books, Ringwood, 1982, Chapters 3 and 4.

<sup>122</sup> For example, spearing an offender, see Yeo, p 232.

Strait Islander customary law stems from the differing nature of each system. In 1994, P Hennessy wrote:

*Under the criminal law certain behaviour is prohibited by the State and constitutes an offence. A person who commits an offence may be attested, taken to court and if found guilty convicted and sentenced to imprisonment. There are no equivalent institutions within Aboriginal society or Aboriginal customary law. Under customary law behaviour that is unacceptable leads to conflict between people. These conflicts must be resolved. It is the resolution of such conflicts which, in the more extreme cases, may involve some form of physical punishment. This "punishment" is not inflicted by an authorised law officer but rather by people personally aggrieved by the behaviour. Hence a spear in the thigh must be viewed in this context. It is not the infliction of punishment by an authorised tribunal but the resolution of a conflict between two families or groups of people.<sup>123</sup>*

The application of the criminal law to Aborigines has been long established. The argument that the criminal law did not apply to people of Aboriginal descent has been rejected. The courts have also decided that any customary criminal law that survived British settlement has been '... extinguished by passage of criminal statutes of general application.'<sup>124</sup> In Walker's case Mason CJ (as he then was) stated:

*Even if it be assumed that the customary criminal law of Aboriginal people survived British settlement, it was extinguished by the passage of criminal statutes of general application. In Mabo [No 2], the Court held that there was no inconsistency between native title being held by people of Aboriginal descent and the underlying radical title being vested in the Crown. There is no analogy with the criminal law. English criminal law did not, and Australian criminal law does not, accommodate an alternative body of law operating alongside it. There is nothing in Mabo [No 2] to provide any support at all for the proposition that criminal laws of general application do not apply to Aboriginal people.<sup>125</sup>*

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<sup>123</sup> P Hennessy, 'When justice is served by a spear in the leg', *Sydney Morning Herald*, 31 March 1994, pp 1, 15, cited in H Mcrae, G Nettheim and L Beacroft, *Indigenous Legal Issues*, LBC Information Services, Sydney, 1997, p 384.

<sup>124</sup> *Walker v NSW* (1994) 69 ALJR 111 at 113.

<sup>125</sup> *Walker v NSW* at 112. At least one commentator has criticised this interpretation of the law arguing that:

*... Aboriginal rights to impose sanctions for breaches of Aboriginal law have not been extinguished either through contrary statutory enactments, or the abandonment by Aboriginal communities of their sui generis rights of social self-regulation.*

see N Lofgren, 'Aboriginal Community Participation in Sentencing', (1997) 21 *Criminal Law Journal* pp 127-133, at 130.

Recognition of Aboriginal or Torres Strait Islander tradition in Australian criminal law could be achieved by recognising a separate set of criminal laws and criminal justice system for Aborigines based on their own culture and customs or alternatively by promoting the recognition of Aboriginality within the confines of Australian criminal law.<sup>126</sup>

### 5.5.1 No General Customary Law Defence

At common law it is not a defence to a criminal charge that a person was acting according to his or her religious belief or cultural tradition.<sup>127</sup> In the decision of *Walker v New South Wales*, Mason CJ stated that:

*It is a basic principle that all people should stand equal before the law. A construction which results in different criminal sanctions applying to different persons for the same conduct offends that basic principle.*<sup>128</sup>

In its 1986 Report, the ALRC recommended against a broad customary law defence that would completely absolve a defendant from criminal liability because of adherence to Aboriginal or Torres Strait Islander customary law. The reasons given for this conclusion included that:

- translating a custom into a formal defence would be awkward;
- the defence would apply in practice in only a few cases;
- such a defence could have the effect of depriving some individuals, for example victims of assault, of legal protection;
- it might subject the customary laws to the kind of formal testing and public scrutiny that would risk damaging, violating or distorting those laws.<sup>129</sup>

However, the ALRC identified a number of measures that do not infringe any principles of equality in the criminal law including:

- the establishment of special procedures to take into account relevant cultural or other differences (an example of this is the option for persons to affirm a statement of fact rather than taking an oath);

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<sup>126</sup> Yeo, p 229.

<sup>127</sup> Australian Law Reform Commission, *Multiculturalism and the Law*, Report No. 57, Sydney, 1992, para. 8.8.

<sup>128</sup> (1995) 69 ALJR at 113; see *Racial Discrimination Act 1975* (Cth), s 10.

<sup>129</sup> *The Recognition of Aboriginal Customary Laws*, vol 1, para 449-450; *Multiculturalism and the Law*, para 8.10.

- the cultural sensitivity of the criminal law (in that it does not assume or require any particular set of beliefs or cultural background);
- taking into account ethnic origin, religion or culture where these are relevant considerations in the context of sentencing discretions;
- special rules incumbent upon a person by virtue of his holding a special office or position, or accepted by him as an aspect of his participation in a particular group or organisation. This includes penalties imposed on members of the armed forces under military law, on members of an association under its rules, or on public servants or employees as part of the rules of their employment.<sup>130</sup>

The ALRC recommended the introduction of a partial customary defence, in the case of a charge of murder, where the accused is found to have done an act that caused the death of the victim in the well-founded belief that the customary laws, of an Aboriginal community to which the accused belonged, required that he do the act. In this situation the ALRC proposed that the accused should be liable to be convicted for manslaughter rather than murder.<sup>131</sup> Otherwise, the ALRC concluded that the customary laws could be adequately accounted for in the exercise of discretions in prosecutions and sentencing.<sup>132</sup> Currently there is no partial customary defence in the criminal law of Queensland, however Aboriginality and Aboriginal and Torres Strait Islander tradition can be taken into account in some other ways within the confines of the Queensland criminal law.

### **5.5.2 Interrogation**

In 1976, a series of guidelines known as the Anunga Rules were developed by a Judge of the Supreme Court of the Northern Territory to guide the interrogation of Aboriginal suspects by police, and they were circulated to the Northern Territory Police by the then Commissioner of Police. These do not constitute a recognition of Aboriginal customary law but rather recognise that because of their different cultural background, Aborigines can be at a disadvantage when dealing with the broader Australian legal system. The guidelines require:

- an interpreter to be present if the suspect does not speak English;
- the presence of a prisoner's friend (someone in whom the Aborigine has apparent confidence);
- great care in administering the caution (the right to silence) and ensuring that it is understood;

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<sup>130</sup> *The Recognition of Aboriginal Customary Laws*, vol 1, para 168.

<sup>131</sup> *The Recognition of Aboriginal Customary Laws*, vol 1, para 453.

<sup>132</sup> *The Recognition of Aboriginal Customary Laws*, vol 1, para 450: See also Yeo, p 257.

- the provision of basic refreshments and substitute clothing if needed;
- no questioning while the person is ill, drunk or tired; and
- reasonable steps to obtain legal assistance if required.<sup>133</sup>

The ALRC recommended that rules governing the interrogation of Aboriginal suspects be enacted into legislation. These recommendations follow the *Anunga Rules* in broad terms.<sup>134</sup> Although there are similar guidelines in the operational procedures manual of the Queensland Police Service there is no specific legislation dealing with police questioning of Aborigines in respect of offences against the law of Queensland, as there is for offences committed by Aborigines, against the laws of the Commonwealth and the Northern Territory.<sup>135</sup> Departure from, or compliance with, the guidelines will not mean that a confession obtained from an accused is inadmissible or admissible respectively. The question remains if a confession was voluntary and if so whether there was any unfairness to the accused.<sup>136</sup>

### 5.5.3 Some Evidential Issues

#### *Admissibility of a Confession*

There is no specific Queensland legislation regarding the admissibility of confessions by Aboriginal persons in criminal matters.<sup>137</sup> The application of the common law principles for determining the admissibility of confessions may take into account matters arising from the Aboriginal heritage of the accused.<sup>138</sup> The need to protect Aboriginal persons' rights and the superior position of police in relation to Aboriginal persons are matters to be taken into account in the exercise of a discretion to exclude the confession.<sup>139</sup>

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<sup>133</sup> *R v Anunga* (1976) 11 ALR 412; see also DeBelle, pp 90-91.

<sup>134</sup> *The Recognition of Aboriginal Customary Laws*, vol 1, para 573.

<sup>135</sup> *Crimes Act 1914* (Cth), Part IC, s 23A(6).

<sup>136</sup> *Gudabi v R* (1984) 1 FCR 187.

<sup>137</sup> Contrast *Aboriginal Affairs Planning Authority Act 1972* (WA), s 49(1).

<sup>138</sup> *R v W* [1988] 2 Qd R 308.

<sup>139</sup> *R v W* at 323; *R v C (an infant)* [1976] Qd R 341.

### *Compellability of Traditional Spouses*

At common law a person is neither a competent nor compellable witness in proceedings involving his or her spouse.<sup>140</sup> In Queensland the *Evidence Act 1977 (Qld)* contains specific provisions about the compellability and competence of spouses in criminal proceedings.<sup>141</sup> These provisions do not extend to persons recognised as spouses only under Aboriginal or Torres Strait Islander customary law.

#### **5.5.4 Sentencing**

In its 1986 Report, the ALRC set out principles that should guide sentencing discretion. These principles are contained in **Appendix C** to this *Bulletin*.

The *Report of the Royal Commission into Aboriginal Deaths in Custody* included a recommendation that:

*... in the case of discrete or remote communities, sentencing authorities consult with Aboriginal communities and organisations as to the general range of sentences which the community considers appropriate for offences committed within the communities by members of those communities and, further, that subject to preserving the civil and legal rights of offenders and victims such consultation should in appropriate circumstances relate to sentences in individual cases.*<sup>142</sup>

Courts cannot incorporate or require traditional punishments or other customary law processes to occur as a condition to the release of offenders or in mitigation of punishment. However, it is possible for Aboriginal customary laws to be taken into account in sentencing discretion. In some circumstances, where the form of traditional settlement involved would not be illegal (for example, community discussion and conciliation, supervised by parents or persons in loco parentis, exclusion from land) a court may incorporate such proposals into its sentencing order, provided that it is possible under the principles of the general law governing sentencing. Care is needed to ensure appropriate local consultation in making such orders, and flexibility in their formulation. An opportunity to attend a ceremony which is important both to the offender and the community may be a relevant factor to be taken into account on sentencing, especially where there is evidence that the ceremony and its associated incorporation within the life of the community may have a rehabilitative effect.<sup>143</sup>

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<sup>140</sup> *Riddle v R* (1911) 12 CLR 622 at 632-3; see discussion in *Halsbury's Laws of Australia*, para [5-1870].

<sup>141</sup> See for example *Evidence Act 1977 (Qld)*, s 8.

<sup>142</sup> Johnston, E. *National Report: Overview and Recommendations, Royal Commission into Aboriginal Deaths in Custody*, Australian Government Publishing Service, Canberra, 1991, 3:85.

<sup>143</sup> *The Recognition of Aboriginal Customary Laws*, paras 504-522.

In 1996 the Aboriginal Justice Advisory Committee proposed that a provision be inserted into the *Penalties and Sentences Act 1992* (Qld) requiring a court, when sentencing an offender, to have regard to the customary laws of any Aboriginal or Torres Strait Islander community of which the offender is a member.<sup>144</sup> There is currently no such specific provision in the *Penalties and Sentences Act 1992* (Qld).<sup>145</sup>

In a recent publication by the Australian Institute of Criminology on customary law and sentencing, Rick Sarre states that:

*at the very least it is arguable that policy makers ought to consider the challenge offered by the Australian Law Reform Commission (ALRC) over a decade ago and explore the opportunities for “customary” sentencing in certain jurisdictions and forums. It is possible that there would be a greater likelihood of more appropriate and just outcomes for all Australians, Indigenous and non-Indigenous, if customary law were to be embraced in greater measure in Australia ...*<sup>146</sup>

### 5.5.5 Bail

In 1996, the Aboriginal Justice Advisory Committee called for amendments to the *Bail Act 1980* (Qld) so that the customary laws of the Aboriginal and Torres Strait Islander communities could be taken into account in making the decision to grant or refuse bail. The Committee suggested a draft clause be inserted into the *Bail Act 1980* (Qld) placing an obligation on the person or body granting bail to take account of the customary laws of any Aboriginal or Torres Strait Islander community of which the accused is a member.<sup>147</sup> There is currently no such provision in the *Bail Act 1980* (Qld). However, in the Northern Territory a court has recognised that the wish of an accused to be released on bail to undergo traditional punishment may be taken into account when a court is deciding whether to grant bail.<sup>148</sup> In its 1986 report, the ALRC recommended that a court should not prevent a defendant from returning to the defendant's community because of the possibility or even

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<sup>144</sup> *The Recognition of Aboriginal Customary Law - The Way Forward*, p 20.

<sup>145</sup> The Supreme Court of the Northern Territory has recognised Aboriginal customary law as relevant to the sentencing process: see for example *R v Miyatatawuy* (1996) 6 NTLR 44; *Munungurr v R* (1994) 4 NTLR 63. In order to take customary law into account the court must be satisfied of its obligatory nature within the indigenous community: *Ashley v Materna*, Supreme Court of the Northern Territory, JA1 of 1997, per Bailey J, Butterworths Unreported Judgements, No BC9703823, p 13

<sup>146</sup> Rick Sarre & Digby Wilson (ed), *Sentencing and Indigenous Peoples*, Australian Institute of Criminology Research and Public Policy Series No 16, Australian Institute of Criminology, Canberra, 1998, p 8.

<sup>147</sup> *The Recognition of Customary Law - The Way Forward*, p 14.

<sup>148</sup> *R v Jungarai* (1981) 9 NTR 30 at 31.

likelihood that the defendant will face some form of traditional punishment, if the defendant applies for bail, and the other conditions for release are met.<sup>149</sup>

### 5.5.5 State of Mind

The criminal law often assesses criminal responsibility on the basis of the accused's state of mind and in particular the reasonableness of the accused's actions. There has been criticism that the manner in which courts assess the accused's state of mind and in particular the 'reasonableness' of the accused's actions, is mono culturalistic and ethnocentric.<sup>150</sup> However, the Australian Courts have taken into account an accused's Aboriginality when assessing the state of mind of an accused. In certain circumstances the criminal law allows for states of mind which may be as a result of adherence to Aboriginal customary law.

#### *Claim of Right*

Under the Queensland Criminal Code, an act done in accordance with an honest belief of a claim of right with respect to property will not constitute an offence where that belief negates an element of the offence.<sup>151</sup> This claim of right may extend to situations where an Aboriginal person acts in accordance with Aboriginal tradition. In *Walden v Hensler* the High Court considered such an argument by an Aborigine accused of killing a bush turkey, contrary to the provisions of the *Fauna Conservation Act 1974 (Qld)*.<sup>152</sup> The accused argued that under s 22 of the *Criminal Code (Qld)* he had a defence on the basis that the accused had an honest belief that Aboriginal customary law permitted him to collect bush tucker and hence to kill the bush turkey. The court decided that it was insufficient for the Aborigine to establish that the Aborigine had the belief that the customary law permitted him to collect bush tucker. To be successful in the defence of honest claim of right, the accused Aborigine would have had to establish that he believed that the Queensland criminal law recognised such customary right. The Aborigine accused in *Walden v Hensler* was unable to establish that he believed that the Queensland law recognised his customary right to collect bush tucker.

Contrast this with the 1998 decision handed down in the Darwin Magistrate's Court in the matter of James Galarrway Yunupingu, where a Magistrate found that the defendant was able to rely on the defence of honest claim of right under the Northern Territory Criminal

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<sup>149</sup> *The Recognition of Aboriginal Customary Laws*, para 542.

<sup>150</sup> Yeo, p 243; *Multiculturalism and the Law*, para 8.31.

<sup>151</sup> *Criminal Code (Qld)* s 22.

<sup>152</sup> (1987) 163 CLR 561.

Code.<sup>153</sup> The decision concerned charges of assault and wilful damage to property that arose when Mr Yunupingu took steps to prevent a photographer from taking photographs at a sacred site of the Gumatj clan. The magistrate found that the defendant, in doing the acts that gave rise to the criminal charges, was acting ‘... *honestly, reasonably and within the discretions he has pursuant to Yolngu law. He had an honest belief that he was entitled to do what he did.*’<sup>154</sup>

### ***Provocation***

In Queensland provocation may be a defence to a charge of assault and if proven it can reduce a charge of murder to manslaughter.<sup>155</sup> Section 268 of the *Queensland Criminal Code* defines Provocation as:

*any wrongful act or insult of such a nature as to be likely, when done to an ordinary person, or in the presence of an ordinary person to another person who is under the person’s immediate care, or to whom the person stands in a conjugal, parental, filial, or fraternal, relation, or in the relation of master and servant, to deprive the person of the power of self control, and to induce the person to assault the person by whom the act or insult is done or offered.*

The test is an objective test. The provocation must have been such that it would cause an ordinary person to lose self control. The seriousness of the provocation must be weighed from the viewpoint of the particular accused.<sup>156</sup> There is no specific requirement in the *Queensland Criminal Code 1899* that Aboriginal and Torres Strait Islander customary laws be taken into account in determining provocation. However, in determining whether the words or conduct provoked an accused Aborigine, it is right to consider the reaction of a person who has a like background and cultural beliefs of the accused.<sup>157</sup>

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<sup>153</sup> *Police v James Galarrway Yunupingu*, unreported decision of Mr A Gillies, Court of Summary Jurisdiction, Darwin, Northern Territory, 20 February 1998.

<sup>154</sup> *Police v James Galarrway Yunupingu*, p 10.

<sup>155</sup> *Criminal Code* (Qld), ss 268, 269, 304.

<sup>156</sup> *Stingel v R* (1990) 171 CLR 312 at 326.

<sup>157</sup> *Stingel v R*, p 326. These developments were made much earlier in the Northern Territory where courts had recognised Aboriginality as being relevant in assessing whether the defence of provocation had been made out, see *R v Nelson*, 21 March 1956 (unreported), cited in DeBelle, p 95.

## **Duress**

Section 31 of the *Criminal Code* (Qld) provides the excuse of compulsion relieving a person from criminal responsibility for acts or omissions in certain circumstances. Compulsion is not an excuse for all offences under the *Criminal Code* (Qld), for example, it does not provide an excuse to the crime of murder.<sup>158</sup> There have been decisions in other Australian jurisdictions which support the argument that the courts could entertain a plea of duress based on threats of customary punishment<sup>159</sup> or adherence to customary law.<sup>160</sup>

### **5.5.6 Juvenile Justice**

#### ***Juvenile Justice Act 1992 (Qld)***

The *Juvenile Justices Act 1992* (Qld) establishes a code for dealing with children who have or are alleged to have committed offences in Queensland. The Act gives some recognition to the importance of indigenous culture. The objectives of the Act include special recognition given to the importance of indigenous families and their involvement in the rehabilitation of juvenile offenders from indigenous backgrounds. Section 3(e) of the Act states the objective:

- to recognise the importance of families of children and communities, in particular Aboriginal and Torres Strait Islander communities, in the provision of services designed to-*
- (i) rehabilitate children who commit offences; and*
  - (ii) reintegrate children who commit offences into the community.*

Section 4 of the *Juvenile Justice Act 1992* (Qld) sets out the **general principles juvenile justice** which underlie the operation of the Act. These general principles include a

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<sup>158</sup> *Criminal Code* (Qld), s 31(2).

<sup>159</sup> *R v Warren, Coombes and Tucker* (1996) 88 A Crim R 78 per Doyle CJ. This 1996 decision of the Court of Criminal Appeal in South Australia left open the possibility that courts may be able to entertain a plea of duress based on threats of customary law punishment. It was not necessary for the Court of Criminal Appeal to decide the issue, however Doyle CJ expressed the view that:

- the trial judge was wrong in concluding that a claim of duress would be inconsistent with the earlier High Court decision in *Walker v New South Wales*;
- the issues involved in a plea of duress would ‘*require very careful consideration*’.

<sup>160</sup> A defence of duress was accepted where an Aboriginal woman was required by customary law to fight in public any woman who became involved with her husband. Under customary law, the woman was liable to death or serious injury if she did not act in the customary way. The charges were dismissed on the ground that the defence of duress applied: *R v Isobel Phillips*, Northern Territory Court of Summary Jurisdiction (Mr JM Murphy SM), 19 September 1983 (unreported), cited in Debelle, pp 95-96.

requirement that where appropriate, cultural background of a child is a relevant consideration in a decision made in relation to the child under the Act.<sup>161</sup> The Act specifically recognises the importance and authority of respected persons in indigenous communities by authorising such respected persons to administer cautions under the Act to indigenous children of the same community.<sup>162</sup>

### *Children's Court initiative*

In 1997 the President of the Children's Court of Queensland conducted a special Children's Court at Cherbourg, an Aboriginal community near Kingaroy in Queensland. The special sitting of the court was conducted at the invitation of the Chairman of the Cherbourg Council. During these proceedings Mr Neville Bonner AO, chairman of the Indigenous Advisory Council sat with the president of the Children's Court throughout the proceedings. There was no statutory authority for this.<sup>163</sup> The law applied was the *Juvenile Justice Act 1992* (Qld). Although there was no application of Aboriginal customary law by the Children's Court, Mr Bonner, at the suggestion of the President of the Children's Court, spoke to the child and his family in a manner '*... appropriate to indigenous culture.*' This was a new procedure.<sup>164</sup> The President of the Children's Court noted that:

*... Aboriginal people will much more readily respond to a respected authority figure of their own culture... than an authoritarian Judge or Magistrate not of the child's kin. What the child says in such circumstances is generally very revealing, and helpful in the proper disposition of the case.*<sup>165</sup>

Whilst the final decision rested with the presiding Judge, the Judge and Mr Bonner deliberated on the sentencing of the offenders. In a statement to the court at the conclusion of the sitting Mr Bonner stated that he believed that this model for hearing of Children's Court matters involving indigenous persons should be given statutory recognition.

The President of the Children's Court in Queensland has recommended to Parliament that:

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<sup>161</sup> *Juvenile Justice Act 1992* (Qld), s 4(j).

<sup>162</sup> *Juvenile Justice Act 1992* (Qld), s 14(1). Section 14(2) of the Act provides that

*In a proceeding, evidence that a person purported to administer a caution under subsection (1) as a respected person mentioned in the subsection is evidence that the person was a respected person.*

<sup>163</sup> *Children's Court of Queensland Fourth Annual Report 1996/97*, Brisbane, 1997, pp 24-25.

<sup>164</sup> *Children's Court of Queensland Fourth Annual Report 1996/97*, p 25.

<sup>165</sup> *Children's Court of Queensland Fourth Annual Report 1996/97*, p 25.

- statutory recognition be afforded to Aboriginal elders and respected persons to administer cautions to children of their communities in appropriate cases in their own right; and
- responsible and respected leaders of Aboriginal communities be empowered to participate actively in the judicial process and, in particular, be afforded statutory recognition as approved supervisors of probation and community service orders.<sup>166</sup>

## **5.6 SOME OTHER AREAS FOR RECOGNITION OF CUSTOMARY LAW IN QUEENSLAND**

### **5.6.1 Adoption and Child Rearing Practices**

The *Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children From Their Families* (Bringing Them Home) has highlighted the trauma experienced by some Aborigines as a consequence of State intervention in Aboriginal families.<sup>167</sup> Historically this has been exclusively a matter of State responsibility.

The recommendation for an Aboriginal child placement principle (ACPP) to be incorporated into legislation affecting the care of indigenous children was first put forward by the ALRC in its 1986 report on the *Recognition of Aboriginal Customary Laws*. Included in the ALRC recommendations were that:

- there should be an Aboriginal child placement principle established by legislation, requiring preference to be given, in decisions affecting the care or custody of children, and in the absence of good cause to the contrary, to placements with a parent of the child; a member of the child's extended family; other members of the child's community (in particular, persons with responsibilities for the child under the customary laws of the community);
- where a placement is not possible, preference should be given to placement with families or in institutions for children approved by members of the relevant Aboriginal communities having special responsibility for the child, or by an Aboriginal child care organisation working in the area;
- in making these decisions account should be taken of the standards of child care and child welfare of the Aboriginal community to which the child belongs;
- child welfare legislation should provide explicitly for consultation with the relevant Aboriginal custodians of a child and (unless they direct to the contrary) with the

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<sup>166</sup> *Children's Court of Queensland Fourth Annual Report 1996-97*, p 24.

<sup>167</sup> See Carmel Bird (ed), *The Stolen Children: Their Stories*, Random House, Sydney, 1998.

relevant Aboriginal child care agency, before placement decisions (except emergency decisions involving short-term placement) are made.

- careful attention should be given to the possibility of devolving child care responsibilities to regional or local child care agencies by agreement, and with appropriate resources.<sup>168</sup>
- all Australian jurisdictions now recognise, either in legislation or policy, that when Aboriginal or Torres Strait Islander children are to be placed in substitute care, they should be placed within their own culture and community where possible.<sup>169</sup>

### ***Child Placement***

The Royal Commission into Aboriginal Deaths in Custody identified a need for statutory recognition of the ACCP.<sup>170</sup> The child placement principle has been used in determining child placement in Queensland since 1987. The Queensland Government has introduced legislation into the Queensland Parliament which proposes to give specific legislative recognition to the ACCP. The Child Protection Bill 1998 (Qld) (the CP Bill 1998), was introduced into the Queensland Parliament on 10 November 1998. At the time of the introduction of the CP Bill 1998, the Minister stated:

*One of the most unacceptable issues facing child protection in Queensland is the significant over-representation of indigenous children in the State's care.*

*It is therefore important that the Bill entrenches the child placement principle, which requires that departmental officers consult with appropriate agency or community representatives when making decisions about Aboriginal and Torres Strait Islander children, and must ensure the maintenance of indigenous children's cultural identity.<sup>171</sup>*

Clause 6(1) of the CT Bill 1998 states that prior to making any decision under the proposed Act, the chief executive, or an authorised officer under the proposed Act must consult with the recognised Aboriginal or Torres Strait Islander agency for the child. If such prior consultation is not practicable, or if urgent action is required to protect the child, the consultation must take place as soon as practicable after making the decision.<sup>172</sup>

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<sup>168</sup> *The Recognition of Aboriginal Customary Laws*, vol 1, paras 365-371.

<sup>169</sup> Human Rights and Equal Opportunities Commission, *Bringing Them Home, National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families*, Sydney, 1997, p 439.

<sup>170</sup> see also *Bringing Them Home*, p 446.

<sup>171</sup> Anna Bligh MLA, Minister for Families, Youth and Community Care, Minister for Disability Services, Child Protection Bill 1998 (Qld), Second Reading Speech, *Daily Hansard*, 10 November 1998, pp 2850 - 2852 at 2851.

<sup>172</sup> Child Protection Bill 1998 (Qld), clause 6(2).

The CP Bill 1998 requires that in exercising any power under the proposed legislation, the chief executive, an authorised officer and the Children's Court must have regard to:

- the views of the recognised Aboriginal or Torres Strait Islander agency for the child about Aboriginal traditions and Island Custom relating to the child; and
- if it is not practicable to obtain the agency's views-the views of members of the community to whom the child belongs; and
- the general principle that Aboriginal and Torres Strait Islander children should be cared for within their own communities.<sup>173</sup>

The CP Bill 1998 also requires that as reasonably as practical, an authorised person must try to conduct consultations, negotiations, family meetings and other proceedings involving an Aboriginal person or Torres Strait Islander (whether a child or not) in a way that is appropriate to Aboriginal tradition or Island custom.<sup>174</sup>

### ***Traditional Marriage and Adoption***

The *Adoption of Children Act 1964* (Qld) requires that a child of indigenous background be placed with adopters of similar indigenous background unless either such adopters are not available, or the Director considers that it is not in the best interests of the child to so place the child. However the adoption legislation in Queensland poses some problems for indigenous Australians.

In Queensland, as in some other States, a father's consent to the adoption of his child is not required if the father was not married to the mother when the child was born and has not subsequently married her unless the father also is the guardian of the child.<sup>175</sup> The ALRC considered that fathers of children born as a result of a traditional marriage should have the same rights as the father of a child born under the general law to consent to the adoption of the child.<sup>176</sup> Recognition of traditional marriage for this purpose would give the father an input into whether the child was placed for adoption.

A similar situation exists in Queensland in relation to fostered children. A male person cannot foster a child unless such a man is residing with his wife.<sup>177</sup> An Aboriginal man, who may be living with a woman in a traditional Aboriginal marriage, could not foster a child

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<sup>173</sup> Child Protection Bill 1998 (Qld), Clause 6(3).

<sup>174</sup> Child Protection Bill 1998 (Qld), clause 6(4).

<sup>175</sup> *Adoption of Children Act 1964* (Qld), s19(2), s 6.

<sup>176</sup> *The Recognition of Aboriginal Customary Laws*, vol 1, para 275.

<sup>177</sup> *Children's Services Act 1965* (Qld), s 105.

unless the 'wife' was defined to include a woman residing with a man in a traditional Aboriginal marriage.

### ***Torres Strait Islander Adoptive Practices***

Traditional adoption is the term used to describe the Torres Strait Islander practice of permanently transferring a child from one family to another with the child usually remaining within the extended family. The traditional adoption is by mutual consent between the families involved and the child takes the surname of the adoptive family.<sup>178</sup> It is uncertain how many Torres Strait Islander traditional adoptions take place each year but a recent survey of delegates at a workshop on customary adoption in Townsville indicated that the delegates thought that the number of traditional adoptions has increased in the past 10 years and that the majority of delegates knew of 5-10 traditional adoptions that had taken place in the previous 12 month period.<sup>179</sup> The Torres Strait Islander people have been making representations to the Queensland Government for over 19 years to have their traditional adoption practice legally recognised.<sup>180</sup> During the 1970s the Queensland government ceased the practice of 'rubber stamping' traditional Torres Strait Islander adoptions and issuing new birth certificates to adoptive parents. This practice ceased after the Department of Children's Services reviewed the process and began requiring strict compliance with the provisions of the *Adoption of Children Act 1964* (Qld) before legal recognition could be given to the adoption. In its 1986 Report, the ALRC recommended against specific recognition of customary adoption.<sup>181</sup> There is currently no provision under Queensland law that gives legal recognition to Torres Strait Islander traditional adoption.

In June 1994 a report - *The Tree of Life* - was presented to the Minister for Family Services and Aboriginal and Islander Affairs by the IINA Torres Strait Islander Corporation.<sup>182</sup> The report was developed after consultation with Torres Strait Islanders regarding the difficulties they experience arising from legal non-recognition of their customary adoption practices. The report highlighted the areas of greatest concern to the Torres Strait Islanders as being:

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<sup>178</sup> Office of Aboriginal and Torres Strait Islander Affairs, Department of Families, Youth and Community Care, *The Legal Recognition of Torres Strait Islander Traditional Adoption - Progress Report*, Brisbane, October 1997, p 8.

<sup>179</sup> Office of Aboriginal and Torres Strait Islander Affairs, Department of Families, Youth and Community Care, *The Legal Recognition of Torres Strait Islander Traditional Adoption - Progress Report*, p 21.

<sup>180</sup> *The Legal Recognition of Torres Strait Islander Traditional Adoption - Progress Report*, pp 3 and 5.

<sup>181</sup> *The Recognition of Aboriginal Customary Laws*, para 1006.

<sup>182</sup> P Ban, *Report to Queensland Government on Legal Recognition of Torres Strait Islander Customary Adoption* ('The Tree of Life'), IINA Torres Strait Islander Corporation, Fortitude Valley, 1994.

- traditionally adopted Torres Strait Islander children do not have birth certificates which reflect the traditionally adoptive status of the child;
- the need to clarify the status of traditionally adopted children in succession law particularly when the adoptive parents die without making a will;
- the birth parents can challenge the custody of the adopted children in the Family Court.<sup>183</sup>

Differences between traditional adoption principles and the provisions of the *Adoption of Children Act 1964* have been summarised in a 1997 Progress Report published by the Office of Aboriginal and Torres Strait Affairs.<sup>184</sup> One of the strategies suggested was the amendment of the *Adoption of Children Act 1964* (Qld) to include a separate section for Torres Strait Islanders. It was suggested that the legal effect of the Torres Strait Islanders customary adoption should be the same as western adoption but that the definitions and purposes section of the legislation for Torres Strait Islander adoption should be unique and distinct from the rest of the Act.<sup>185</sup> Changes to the *Adoption of Children Act 1964* (Qld) would resolve the birth certificate and inheritance problems currently faced by children adopted under Torres Strait Island customary law in Queensland but there would need to be similar amendments made in the other States and Territories if all Torres Strait Islander adoptions throughout Australia were to be treated consistently. An alternative strategy suggested was to amend the Queensland succession legislation, the *Registration of Births, Deaths and Marriages Act 1962* (Qld) and the *Public Trustees Act 1978* (Qld) to cater for the needs of Torres Strait Islanders.<sup>186</sup> Another option that has been suggested was to pass a separate piece of legislation regarding Torres Strait Islander customary adoption, and for a Torres Strait Islander advisory body to confirm whether a customary adoption has taken place.<sup>187</sup>

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<sup>183</sup> *The Legal Recognition of Torres Strait Islander Traditional Adoption*, pp 5-6.

<sup>184</sup> *The Legal Recognition of Torres Strait Islander Traditional Adoption*, pp 10-11.

<sup>185</sup> P Ban, 'Developments in the Recognition of Torres Strait Islander Customary Adoption', (1996) 3(78) *Aboriginal Law Bulletin* 14-15 at 15.

<sup>186</sup> Ban, 'Developments in the Recognition of Torres Strait Islander Customary Adoption', p 15.

<sup>187</sup> Ban, 'Developments in the Recognition of Torres Strait Islander Customary Adoption', p 15.

## 5.6.2 Succession

There are customary rules governing the distribution of property upon the death of an Aboriginal person and in particular the distribution of what are considered 'sacred objects'.<sup>188</sup> An example of such customary rules regarding distribution of property among one indigenous group, the Walbiri, was documented by MJ Meggitt:

[the] *dead man's goods are later given to the senior mother's brother of the matriline to share with the older mother's brothers of that kin and, sometimes, of his community. When a woman dies, her daughters and sisters hand her possessions to her senior mother's brother to distribute to the women of the matriline.*<sup>189</sup>

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

- Recognition of traditional marriages for the purposes of intestacy legislation;
- Aborigines should be able to apply to have an intestate estate distributed in accordance with the traditions or customary laws of the deceased's community;
- State and Territory Family Provision legislation should allow for applications by persons who could reasonably have expected support from the deceased in accordance with the customary laws of the community;
- Claims for family provision should prevail, in clear cases of need, over claims for traditional distribution on intestacy.<sup>190</sup>

The *Succession Act 1981* (Qld) does not make any special provision for Aboriginal kinship arrangements. For example, the *Queensland Succession Act 1981* (Qld) does not recognise traditional adoption and the Office of Aboriginal and Torres Strait Islander Affairs has noted that Torres Strait Islander people often quote incidences where traditionally adopted children have been unable to benefit from the estate of their adoptive parents when such parents have died without making a will.<sup>191</sup> Although there have been calls for traditional spouses to be recognised under the *Succession Act 1981* (Qld), traditional spouses are unable to claim under the family provision<sup>192</sup> or intestacy<sup>193</sup> provisions of the *Succession Act 1981* (Qld) unless they are able to bring themselves within the definition of a de facto spouse.<sup>194</sup>

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<sup>188</sup> *The Recognition of Aboriginal Customary Laws*, vol 1, para 331. See AP Elkin, *The Australian Aborigines*, Angus & Robertson, Sydney, 1979, pp 342-3.

<sup>189</sup> MJ Meggitt, *Desert People*, Angus and Robertson, Sydney, 1962, p 321.

<sup>190</sup> *The Recognition of Aboriginal Customary Laws*, vol 1, paras 333-342.

<sup>191</sup> *The Legal Recognition of Torres Strait Islander Traditional Adoption - Progress Report*, p 24.

<sup>192</sup> *Succession Act 1981* (Qld), Part 4.

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<sup>193</sup> *Succession Act 1981 (Qld)*, Part 3.

<sup>194</sup> *Succession Act 1981 (Qld)*, s 5.

## **6 CONCLUSION**

For Indigenous Australians who retain traditional values or lifestyles, customary law has a continuing influence and results in circumstances where indigenous peoples can find themselves living with the influence of two inconsistent sets of laws.<sup>195</sup> Whilst the legal system in Queensland is unlikely to be able to recognise the existence of two independent co-existing legal systems for indigenous and non-indigenous Australians respectively, aspects of Aboriginal and Torres Strait Islander Custom and Tradition can be incorporated into the wider legal system. Although specific recognition of customary law in legislation is rare, involvement of Indigenous peoples in areas such as environmental and community management have provided ways for Aboriginal and Torres Strait Island custom to be incorporated into the Queensland legal system. Any account taken of a person's culture in making determinations affecting legal rights provides an opportunity for indigenous traditions to play a part in shaping the legal system in Queensland.

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<sup>195</sup> Young, p 4.

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## **APPENDIX A - RECOGNITION OF ABORIGINAL CUSTOMARY LAW**

Source: Summary of Arguments put to ALRC contained in 'Recognition of Aboriginal Customary Law' in Northern Territory, Legislative Assembly, *Foundations for a Common Future: The Report on Paragraph 1(a) of the Committee's Terms of Reference on a Final Draft Constitution for the Northern Territory*, Vol 2, Part 1 - Published Papers, November 1996.

- (b) Arguments put to the Commission in support of some form of recognition were:
- (i) Customary laws influence the lives of traditionally oriented Aboriginal people, and non-recognition contributes to the undermining of traditional law and authority.
  - (ii) In some communities Aboriginal customary law may be the most appropriate vehicle for the maintenance of law and order.
  - (iii) Recognition would reinforce decisions by individual judges and officials to recognise customary laws in individual cases and would promote consistency and clarity in the law.
  - (iv) Non-recognition leads to injustice.
  - (v) Recognition now would act as at least partial compensation to the Aboriginal people for the effects of non-recognition since 1788.
  - (vi) Aboriginal people support some form of recognition of their laws, although they desire to maintain control of their law and to maintain secret aspects of it.
  - (vii) A certain degree of recognition is required to be consistent with Federal Government policy which recognises the right of Aborigines to retain their identity and traditional lifestyle if they wish.
  - (viii) Australia's international standing would benefit from appropriate forms of recognition.

On the other hand, arguments put to the Commission against any form of recognition were:

- (i) A court cannot recognise those aspects of Aboriginal laws which are secret and about which it cannot be informed.
- (ii) Recognition should be restricted to Aborigines living a traditional lifestyle, and should not extend to "fringe dwellers" or urban Aborigines.

- (ii) Difficulties in definitions and in formulating proposals for recognition make recognition impossible.
- (iii) It is too late to recognise Aboriginal customary laws because they have ceased to exist in any meaningful form. There were also very strong arguments that this was not the case. The committee supports this view in the Northern Territory.
- (v) Recognition in the form of the codification of Aboriginal customary laws or similar methods of direct enforcement by means of the general law would entail the loss of control of Aborigines over their law and traditions.
- (vi) Aboriginal women may benefit from the abandonment of certain Aboriginal traditions, particularly those that discriminate against women.
- (vii) Recognition would lead to the acceptance of certain punishments which infringe against basic human rights.
- (viii) Recognition would go against the notion that there should be one law for all Australians.



**APPENDIX B - TABLE 2. SOME OPPORTUNITIES FOR LOCAL JUSTICE DIVERSIONARY AND INTERVENTIONIST ACTIONS TARGETING BOTH ADULT AND JUVENILE OFFENDERS.**

\* Refers specifically to Juvenile Justice

Source: Queensland. Office of Aboriginal and Torres Strait Islander Affairs, Local Justice Initiatives Program, Program Description and Funding Guidelines, 1996.

Communities All of Govt.	LJIP Group Communities Police	Police LJIP Group Communities	Sentencing Authorities LJIP Group Communities	DFYCC* LJIP Group Community	DFYCC* QCSC LJIP Group Community	DFYCC* QCSC LJIP Group Community
↓	↓	↓	↓	↓	↓	↓
Social Environment	Pre-Arrest/ Diversion	Arrest	Courts	Community-based Orders	Detention * / Prison	Post Detention * / Prison
↑	↑	↑	↑	↑	↑	↑
Mediation	Respected persons cautioning *	Support for police	Pre-sentence reports & sentencing options	Supervision of community-based orders	Support for offender family visitation programs	Supervision of fixed release orders
Crime prevention	Mediation	Participation in police questioning *	Assisting children & families to attend court & to understand the process *	Dealing with non-compliance	Reconciliation between victim & offender	Supervision of post release orders
	Negotiation	Input into bail determination			Advice on parole options	Support to reduce recidivism
	Support for police	Support / bail / supervision Accommodation for alleged offenders *	Provision of translation services			



## **APPENDIX C - RELEVANCE OF ABORIGINAL CUSTOMARY LAWS IN SENTENCING**

Source: *The Recognition of Aboriginal Customary Laws*, Vol 1.

Although the defendant's (or the victim's) consent to traditional Aboriginal dispute-resolving processes (eg spearing) is relevant in relation to bail, in sentencing and in prosecution policy, the recognition of Aboriginal dispute resolution processes involving physical punishments is not to be achieved through the existing law relating to consensual assault or through changes to that law (para 503).

The courts do already recognise Aboriginal customary laws in the sentencing of Aboriginal offenders, to a considerable degree. In considering reform, it is helpful to build on the existing experience in this field, where necessary reinforcing or elaborating on it (para 491-7, 504).

The courts have recognised a distinction, which in the Commission's view is fundamental, between taking Aboriginal customary laws into account in sentencing, on the one hand, and incorporating aspects of Aboriginal customary laws in sentencing orders, on the other (para 504). In applying that distinction, the following propositions have been recognised:

A defendant should not be sentenced to a longer term of imprisonment than would otherwise apply, merely to 'protect' the defendant from the application of customary laws including 'traditional' punishment' (even if that punishment would or may be unlawful under the general law) (para 505).

Similar principles apply to discretions with respect to bail. A court should not prevent a defendant from returning to the defendant's community (with the possibility or even likelihood that the defendant will face some form of traditional punishment) if the defendant applies for bail, and if the other conditions for release are met (para 506).

Aboriginal customary laws are a relevant factor in mitigation of sentence, both in cases where customary law processes have already occurred and where they are likely to occur in the future (para 507-8).

Aboriginal customary laws may also be relevant in aggravation of penalty, in some cases, but only within the generally applicable sentencing limits (the 'tariff') applicable to the offence (para 509).

Within certain limits the views of the local Aboriginal community about the seriousness of the offence, and the offender, are also relevant in sentencing (para 510).

But the courts cannot disregard the values and views of the wider Australian community, which may have to be reflected in custodial or other sentences notwithstanding the mitigating force of Aboriginal customary laws or local community opinions.

Nor can the courts incorporate in sentencing orders Aboriginal customary law penalties or sanctions which are contrary to the general law (para 512-13).

In some circumstances, where the form of traditional settlement involved would not be illegal (eg community discussion and conciliation, supervision by parents or persons *in loco parentis*, exclusion from land) a court may incorporate such a proposal into its sentencing order (eg as a condition for conditional release or attached to a bond), provided that this is possible under the principles of the general law governing sentencing. Care is needed to ensure appropriate local consultation in making such orders, and flexibility in their formulation. In particular it is important that anyone into whose care the offender is to be entrusted, is an appropriate person, having regard to any applicable customary laws (eg is in a position of authority over him, and not subject to avoidance relationships), has been consulted and is prepared to undertake the responsibility (para 512).

An offenders opportunity to attend a ceremony which is important both to him and his community may be a relevant factor to be taken into account on sentencing, especially where there is evidence that the ceremony and its associated incorporation within the life of the community may have a rehabilitative effect. However initiation or other ceremonial matters cannot and should not be incorporated in sentencing order under the general law (para 515).

The Commission endorses these principles which strike the right balance between the requirement that the courts cannot incorporate or require traditional punishments or other customary law processes to occur as a condition to the release of offenders or for the mitigation of punishment, and the need to take account of traditional Aboriginal dispute-settlement procedures and customary laws (para 516).

A general legislative endorsement of the practice of taking Aboriginal customary laws into account is appropriate. It should be provided in legislation that, where a person who is or was at a relevant time a member of an Aboriginal community is convicted of an offence, the matters that the court shall have regard to in determining the sentence to be imposed on the person in respect of the offence include, so far as they are relevant, the customary laws of that Aboriginal community, and the customary laws of any other Aboriginal community of which some other person involved in the offence (including a victim of the offence) was a member at a relevant time (para 517).

In addition it should be provided that, in determining whether to grant bail and in setting the conditions for bail, account shall be taken of the customary laws of any Aboriginal community to which the accused, or a victim of the offence, belonged (para 517).

A sentencing discretion to take Aboriginal customary laws into account should exist even where a mandatory sentence would otherwise have to be imposed (in particular, in murder cases) (para 522).