

# background paper 9

## Aboriginal customary law: can it be recognised?

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# 1. Introduction

This paper focuses upon the following aspects of the terms of reference concerning Aboriginal Customary Law received by the Law Reform Commission of Western Australia from the Attorney General on 2 December 2000:

Recognising that all persons in Western Australia are subject to and protected by this State's legal system; and there may be a need to recognise the existence of, and take into account within this legal system, Aboriginal customary laws:

The Law Reform Commission of Western Australia is to enquire into and report upon Aboriginal customary laws in Western Australia other than in relation to Native Title and matters addressed under the *Aboriginal Heritage Act 1972 (WA)*.

Particular reference will be given to:

...

3. whether those laws should be recognised and given effect to; and, if so, to what extent, in what manner and on what basis...

This paper discusses recognition of Aboriginal customary law by accommodation or incorporation of Aboriginal customary law within the state legal system on the one hand, or through acknowledgement by the state legal system, on the other. Reference is made to the option of enacting a general recognition provision in relation to Aboriginal rights and duties, as part of Western Australia's Constitution. Arguments against recognition and hurdles which appear to inhibit recognition are also outlined and discussed.

Throughout this paper, account is taken of the experience of other legal regimes in the international arena in dealing with the issue of recognition of Indigenous law, particularly other common law jurisdictions. Account is also taken of recognition of traditional law and custom by Australian courts and other common law courts in a variety of contexts. Although expressly excluded by the Commission's Terms of Reference, it is helpful to refer to Australia's native title jurisprudence because the development of the law in that field contributes substantially to understanding how other elements of Aboriginal customary law may be accommodated within the state legal system. Thus the High Court's various decisions on the subject are explored in some detail.

## 2. Recognition of Aboriginal customary laws

### Forms of recognition

When land is colonised it is open to the colonising power to 'recognise' the existence of laws of local Indigenous groups by:

- subjecting itself to the Aboriginal laws of the place;<sup>1</sup>
- rejecting or refusing to recognise Aboriginal law or some aspect of it;<sup>2</sup>
- incorporation of certain aspects of the Aboriginal law, at the discretion of the colonising power;<sup>3</sup>
- acknowledgement by the colonising power of a pre-existing Aboriginal legal system, which operates in its own right with immunity from the legal system imposed by the colonising power.<sup>4</sup>

Subjection to a pre-existing Aboriginal legal system is not an option that has been adopted in Australia and, as Brad Morse suggests, is not in the nature of colonialism.<sup>5</sup>

### Rejection

The early history of the Australian colonies' rejection of Aboriginal customary law was rationalised on the basis that Aboriginal people had no law or that those laws that existed were too barbaric to be recognised by a 'civilised' legal system, or that they were otherwise unable to survive European contact.<sup>6</sup>

1. Morse BW, 'Indigenous Law and State Legal Systems: Conflict and Compatibility' in Morse BW & Woodman GR (eds), *Indigenous Law and the State* (Dordrecht: Foris Publications, 1988) 105. McRae H, Nettheim G, Beacroft L & McNamara L, *Indigenous Legal Issues* (Sydney: LBC Information Services, 2nd ed., 1997) 123.

2. McRae et al, *ibid* 123.

3. Morse, above n 1, 102; McRae et al, *ibid*.

4. As exemplified by various restorative justice models: see Hazelhurst KM, 'Community Healing and Restorative Justice: Two Models of Recovery in Aboriginal Australia' (Paper presented at the 11th Commonwealth Law Conference, Vancouver, 27 August 1996); McRae et al, *ibid* 115–120, 123.

5. Morse, above n 1, 102; McRae et al, *ibid* 123.

6. McRae et al, *ibid* 124; *R v Murrell* (1836) 1 Legge 72; *R v Neddy Monkey* (1861) 1 W & W (L) 40; *R v Cobby* (1883) 4 LR (NSW) 355; *Tuckiar* (1934) 52 CLR 335; Reynolds H, *Aboriginal Sovereignty* (Sydney: Allen & Unwin, 1996) Ch 4.

Justice Blackburn in *Milirrpum v Nabalco* was the first to articulate the contrary view that:

[T]he social rules and customs of the plaintiffs [Aboriginal clan groups of the Gove Peninsula in the Northern Territory] cannot possibly be dismissed as lying on the other side of an unbridgeable gulf. The evidence shows a subtle and elaborate system highly adapted to the country in which the people led their lives, which provided a stable order of society and was remarkably free from the vagaries or personal whim or influence. If ever a system could be called 'a government of laws, and not of men', it is that shown in the evidence before me.<sup>7</sup>

Aboriginal customary law may be rejected by the state legal system for a variety of reasons, including:

- an irreconcilable conflict between the two systems;
- a desire for the same law to apply to everyone in the same way;
- a conflict between Aboriginal customary law and human rights standards;
- the aim of avoiding undesirable consequences for Aboriginal people; and
- ignorance of Aboriginal customary laws.<sup>8</sup>

In recommending 'functional' recognition, the Australian Law Reform Commission (ALRC) sought to distinguish between areas where recognition was appropriate and those where rejection was preferable. An example of how the approach of the ALRC would operate is in the area of recognition of Indigenous promised marriages.

### **Conflict: promised marriage**

The ALRC recommended against the general law enforcing promised marriages on the basis that it would deny the fundamental right not to be coerced into marriage.<sup>9</sup> However, it did countenance recognition where, by the time the issue of recognition had arisen, the parties had consented to the relationship.<sup>10</sup>

Background Paper No 1 to the recent report of the Northern Territory Law Reform Committee (NTLRC) on Aboriginal customary law<sup>11</sup> provides a description of what is regarded as the traditional law in respect to promised marriages in that jurisdiction. It is noted there that 'such arrangements are not universal in Aboriginal communities, and many communities no longer practice such marriages'.<sup>12</sup> The author's experience of interacting with Aboriginal communities throughout Western Australia since 1993 and exploring with them the continuity of practise of their traditional laws and customs suggests that, while promised marriage was practised among the current adult population, it is no longer practised in many of the Aboriginal societies that exist in Western Australia.<sup>13</sup>

Generally the practice involves a female child being promised by her parents to an older male. Among the elements of the process, recited by the NTLRC background paper, it is stated that: 'The girl can choose not to comply with the marriage agreement at any time prior to living with the husband'.<sup>14</sup>

The ALRC's concerns regarding coercion would be considerably diluted if the element of choice, which is a part of customary law promised marriages (at least in some places), was required by state law as a necessary precondition to the enforcement of any customary law marriage contract.

The issue of promised marriages has recently arisen for judicial consideration in the criminal arena. In *Pascoe v Hales*<sup>15</sup> a 50 year old man from West Arnhem Land in the Northern Territory was convicted of unlawful carnal knowledge of a 15 year old female, who had been the subject of a promise of marriage by her family. He was sentenced by the magistrate to 13 months' imprisonment, taking into account an element of compulsion to enter into the relationship and the duty of the law to deter Aboriginal communities from engaging in promising under-age wives. On appeal to a single judge of the Supreme Court of the Northern Territory, evidence was presented from anthropologist Geoffrey

7. (1971) 17 FLR 141, 267–68.

8. McRae et al, above n 1, 127.

9. Australian Law Reform Commission (ALRC), *The Recognition of Aboriginal Customary Laws*, Report No 31 (1986) [246]–[253]. Article 16.1(b) of the Convention on the Elimination of All Forms of Discrimination against Women enjoins state parties to undertake measures to eliminate discrimination against women in relation to the right to freely choose a spouse and only enter into marriage with full consent. Rights Article 16.2 provides that: 'The betrothal and the marriage of a child shall have no legal effect, and all necessary action, including legislation, shall be taken to specify a minimum age for marriage...'. Article 23 of the International Convention on Civil and Political Rights makes similar provision.

10. ALRC, *ibid* [262]; Northern Territory Law Reform Committee (NTLRC) *Legal Recognition of Aboriginal Customary Law*, Background Paper No 3 (2003) 17.

11. NTLRC, *Report of the Committee of Inquiry into Aboriginal Customary Law* (August 2003).

12. NTLRC, *Aboriginal Communities and Aboriginal Law in the Northern Territory*, Background Paper No 1 (2003) 26.

13. For example, the author has been informed by women and men aged 50 and over in the East Kimberley that they were the subject of promises to marry; however, in the majority of cases the promise was not carried out.

14. NTLRC, above n 12, 26.

15. *Pascoe v Hales* [2002] Unreported SCC 20112873. See also Williams V, *The Approach of Australian Courts to Aboriginal Customary Law in the Areas of Criminal, Civil and Family Law*, LRCWA Background Paper No 1, above pp 1–76, 53.

Bagshaw that it is a 'cultural ideal, sanctioned and underpinned by a complex system of customary law and practice'<sup>16</sup> for an older man to enjoy sexual relations with a promised wife who, though post-menarche, may often be under the age of 16. Justice Gallop, after considering that evidence, said that Pascoe was exercising his conjugal rights and that the girl 'knew what was expected of her'.<sup>17</sup> He reduced the term of imprisonment to 24 hours.

Kenneth Maddock<sup>18</sup> commented of the *Pascoe* case that those who entered into the contract in 1986

must have known ... that the system was breaking down. They should also have known that even in earlier times promises were not always kept, that a girl might be promised to more than one man ... and that girls would sometimes resist being handed over to men, especially men a lot older than themselves.<sup>19</sup>

This analysis appears to be consistent with the suggestion in the NTLRC background paper that promised brides have some choice as to compliance. Maddock drew from the comments of the appeal judge that the possibility that 'an Australian court was ignoring what anthropologists have said about social change and, worse, was allowing itself to be persuaded not only that Aboriginal women were chattels in traditional society but that they continue to be so treated even when rebelling against it'.<sup>20</sup> Maddock's comments emphasise the necessity to preserve the element of choice and the opportunity to opt out of the traditional system where it oppresses free will in the choice of a sexual partner.

The ultimate result of the *Pascoe* case was that, on appeal to the Full Court, a two to one majority increased the sentence to 12 months, suspended after one month. In his reasons for decision Chief Justice Martin commented that:

[N]otwithstanding the cultural circumstances surrounding this particular event, the protection given by the law to girls under the age of 16 from sexual intercourse is a value of the wider community which prevails over that of this section of the Aboriginal community.<sup>21</sup>

So, in the circumstances of the *Pascoe* case the Northern Territory courts have concluded that there is an irreconcilable conflict between Aboriginal customary laws relating to promised marriage and the legal system applying generally in the Northern Territory. *Pascoe* could also be characterised as a case which results in avoiding an undesirable consequence for an Aboriginal person (and, as a matter of principle, exemplifying the avoidance of that consequence for Aboriginal people more generally). It may also be said to manifest a conflict between Aboriginal customary law and human rights standards, such as the right of a child to enjoy all the protections of childhood embodied in the Convention on the Rights of the Child (CROC), where an act of sexual intercourse or forming a sexual relationship with a child is regarded as the antithesis of childhood. However, it should be noted that CROC defines a 'child' as being under the age of 18, unless the relevant legal regime provides otherwise. The law in this state does provide otherwise. It deems a person under 16 years to be a child in relation to the capacity to consent to sexual relations. A statutory provision could be enacted defining a child in such a way as to allow for it to be proved that under Aboriginal customary law in the relevant Aboriginal society a young woman who is capable of child-bearing is not a child for the purpose of consenting to sexual relations.

For the Law Reform Commission of Western Australia the question remains as to whether a post-menarche female below the age of 16 should be deemed in state law to be incapable of giving consent to sexual intercourse where the customary law to which she adheres says otherwise.<sup>22</sup> In this respect it is noted that the present state of statute law in Western Australia is the same as it is in the Northern Territory.

## Incorporation

'Incorporation' of Aboriginal customary law means the recognition of certain aspects of Aboriginal customary law at the discretion of the state legal system.<sup>23</sup> It may take the form of incorporation at the initiative of the judiciary of aspects of Aboriginal customary law into the decisions they have power to make at common law. Alternatively, it may be in the

16. *Pascoe v Hales* [2002] Unreported SCC 20112873, 7.

17. As reported in *The Australian*, 9 October 2002, 2. A term of imprisonment was imposed because the offence was subject to the mandatory imprisonment provisions applying in the Northern Territory.

18. *The Australian*, 10 October 2002.

19. *Ibid.*

20. *Ibid.*

21. *Hales v Jamilmira* [2003] NTCA 9, [26]; Williams, above n 15, 55.

22. If, in fact, there is any practical prospect in this state of that circumstance arising.

23. Morse, above n 1, 105.

form of a statutory provision which directs judicial and administrative decision-makers of the state to be guided by aspects of Aboriginal customary law as part of their normal decision-making process.

Even without the formal recognition of Aboriginal law by Australian governments, some judges have apparently found the notion of total rejection of Aboriginal law unjust and have selected some aspects of Indigenous law for incorporation by judicial application.<sup>24</sup> The notion of recognition of Aboriginal customary law by incorporation is one which comes from the perspective of a person within a dominant legal system, in this case a state-based system, which is alien to the system which gives legitimacy to Aboriginal customary law. To pose the question of recognition raised by the Commission's Terms of Reference is to contemplate whether or not the dominant state legal system ought to extend legitimacy to Aboriginal laws within that system.

Such contemplation of recognition assumes that one system is dominant and that it is possible, necessary, appropriate or desirable for the 'dominant' system to legitimise Aboriginal customary laws by incorporation or recognition. Depending upon one's perspective, that may or may not be so in relation to some or all of the laws in contemplation. Incorporation therefore reinforces a power relationship where the dominant legal system chooses how and when to incorporate compatible portions of Indigenous laws.<sup>25</sup>

The notion of the law of a sovereign state recognising Aboriginal customary law by incorporation is not one which leads to the recognition or maintenance of plural legal systems. It is directed to a single state legal system. That system is contemplating broadening its cultural base; moving from recognising norms and practices which stem from one culture to recognising norms and practices from more than one culture.<sup>26</sup> The Western Australian sovereign-based legal system has arisen from English culture. That, in turn, had Norman and Anglo-Saxon origins. What is contemplated by recognition by incorporation of Aboriginal customary law is that the state legal system becomes a degree more multicultural in its purview. The result would be to take into account the norms and practices of the Aboriginal society<sup>27</sup> or societies which existed prior to, and have continued to exist, since the colonisation by the British sovereign of the state.

To the extent that there have been, and will continue to be, laws and customs of Aboriginal societies in this state which do not have any interface with the state legal system, then there is a plural legal system operating in the state which may continue to operate and govern the lives of members of Aboriginal societies within the state. The taking of any steps towards recognising the existence of Aboriginal customary laws by incorporation, does not increase, but rather reduces, the pluralism within the state.

In this regard, Joseph Raz points out that:

[T]wo legal systems can co-exist, can both be practised by one community. If they do not contain too many conflicting norms it is possible for the population to observe both systems and the institutions set by them could all function.<sup>28</sup>

Raz postulates that a legal system must be an open normative system, in the sense that it is 'characteristic of legal systems that they maintain and support other forms of social grouping'.<sup>29</sup> An open system adopts 'alien' norms which are not normally regarded as part of the legal system. Such a system must have norms which recognise and make binding within the legal system any adopted 'alien' norms. Raz notes that 'alien' norms will only be adopted by a legal system if:

- (a) they belong to another normative system for so long as it is practised;<sup>30</sup> or
- (b) they were made by or with the consent of those who are subject to them.

Taking account of Aboriginal laws and customs within the state's legal system will only be *necessary* where the Aboriginal laws and state laws directly or indirectly conflict with one another.

24. See, for example, *Muddarubba* [1976] NTJ 317.

25. Morse, above n 1, 101–02; McRae et al, above n 1, 128.

26. E Adamson Hoebel tells us that 'culture is the integrated sum total of learned behaviour patterns which are manifested and shared by the members of a society... Culture is, therefore, a distinguishing feature of human society when compared to that of lower animals': Hoebel EA, *The Law of Primitive Man* (New York: Atheneum, 1973) 7.

27. The term 'society' used throughout this paper is employed in the sense identified by Hoebel, *ibid* 6: '[S]ociety exists only among sentient beings... [I]t always involves a multitude of creatures interacting... an animal aggregation... a patterned organisation in the interrelations of the members of the animal group... [T]he group exists with a degree of separation from all other groups... a measure of differentiation but organised behaviour within the group and with sufficient centralised cohesion resulting from this organisation to maintain the group as a discrete entity. Every society exists over and against other societies. Implied in the concept of aggregation is a spatial location of each society the members of which have in the main a closer local contiguity with one another than they do with outsiders. Almost all societies are territorially rooted to an area of more or less defined limits'.

28. Raz J, *Practical Reason and Norms* (London: Hutchison, 1975) 152.

29. *Ibid* 153.

30. This analysis is echoed in the dicta of the High Court in the *Yorta Yorta* case, discussed in detail below, in relation to the recognition of native title by the common law.

The imperative of recognition by incorporation is not to eliminate any existing plurality of legal systems (or indeed recognise a plurality), but to accord a fairness of treatment before the law which the state administers and which pays due regard to the human rights and fundamental freedoms of Aboriginal persons within the broader society. It allows for treatment of Aboriginal peoples by the legal system of the state which fully respects their culture in a manner equivalent to the way it respects other cultures within the state. The achievement of that objective requires a dispassionate examination of whether or not the artifacts of the English culture which the state has inherited dominate any aspect of the operation of the state legal system which could not be justified if one were to apply a more multicultural perspective to the legal system.

One of the key issues upon which participants in any reform process will need to maintain a keen focus is the maintenance of a touchstone as to the ultimate object of recognition of Aboriginal customary law. If, as the ALRC has suggested, the object is the maintenance of the cultural identity of Aboriginal people, the question needs to be asked in relation to each element of reform being considered: does this contribute to or detract from the cultural identity of Aboriginal people?

Peter Kulchyski poetically tells us that 'Aboriginal cultures are the waters through which Aboriginal rights swim'.<sup>31</sup> The object of recognition of Aboriginal customary law is to accord just so much recognition of Aboriginal rights and obligations by the state legal regime as is necessary to preserve the flow of the Aboriginal culture in which such rights and obligations are sourced, in harmony with the introduced species of English law.

Maintenance of Aboriginal cultural identity also assumes an understanding and consideration of the relevant elements of identity of the relevant Aboriginal group to whom the proposed new law will apply. Once one understands that, then it dictates a process of reform of the kind recommended by the NTLRC which is organic, incremental and involves a continuing process of dialogue with Aboriginal people, informing the state as to what is essential to the maintenance of their identity.

Of course, where there are two legal systems co-existing, questions arise as to their compatibility. As Raz points out, it is a general trait of a legal system that it claims to be comprehensive in regulating behaviour and to be supreme in that regard with respect to its subject community.<sup>32</sup> Raz notes, that 'almost every legal system permits some normative systems to apply to its subject community, but perhaps it does not permit this if the other system is also a legal system?'<sup>33</sup> He suggests that '[m]ost legal systems are at least partly compatible ... [but, a]ll legal systems ... are partly incompatible, at least to a certain extent'.<sup>34</sup> The proposal for recognition by the state of Aboriginal customary law does not contemplate recognising it as a competing legal system which is comprehensive and supreme in relation to its subject community, but rather as a normative system only. Further, it is axiomatic that only those aspects of the normative system of Aboriginal customary law that are compatible with the state legal system are capable of being incorporated into it.

The notion of recognition by incorporation is more neutral than that of recognition by the adoption of alien norms. It is a process of merely expanding the scope of the state system to accommodate Aboriginal customary law. It is the contention of this paper that the common law has the flexibility to accommodate a variety of customary rules. Among those customary rules may be included Aboriginal customary rules. The accommodation of the rules which give rise to native title rights and interests is a good example of that process. Applying the common law in *Mabo v Queensland [No 2]*<sup>35</sup> the High Court reached a conclusion as to the existence of the native title of the Meriam people based on the continuity of their adherence to traditional laws and customs.

There is good reason to acknowledge the capacity of the common law to accommodate Aboriginal custom. It is consistent with the notion of a sovereign state, which is unified and a legal system which fits the definition of a legal system by being comprehensive<sup>36</sup> in its normative impact upon its citizens as a whole. It recognises that its citizenry is multicultural in its make-up. And it rejects or avoids the notion that there are enclaves within the nation of separate societies operating under distinguishable and separate legal systems.

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31. Kulchyski P, *Unjust Relations: Aboriginal Rights in Canadian Courts* (Canada: Oxford University Press, 1994) 13 as cited in Dodson M, 'From Lore to Law: Aboriginal Rights and Australian Legal Systems' (1995) 72 *Aboriginal Law Bulletin* 2, 2.

32. Raz, above n 28, 152.

33. *Ibid.*

34. *Ibid.*

35. (1992) 175 CLR 1.

36. See Raz, above n 28.

## Acknowledgement

Luke McNamara suggests that acknowledgement of Aboriginal customary law differs fundamentally from recognition by incorporation. Acknowledgement is exemplified by the state legal system providing for the operation of Aboriginal customary law dispute resolution processes with immunity from interference from outside the Aboriginal customary law system.<sup>37</sup> Some might argue that this results in a plurality within the state legal system. The alternative characterisation—which this author favours—is that acknowledgement of Aboriginal customary law is another form of accommodation of Aboriginal customary law within the state legal system.

Acknowledgement usually takes the form of a procedural approach to statutory recognition of Aboriginal customary law, by providing for specialised local Aboriginal courts, operating alongside the courts of state jurisdiction. For example, the *Village Fono Act 1990* (Samoa) provides for the incorporation and application of custom centrally in the operation and jurisdiction of the Fono (village assembly or council). It places on a legislative footing pre-existing systems of community administration and governance.<sup>38</sup> Section 6 grants the Fono power to 'impose punishment in accordance with the custom and usage of its village' and deems that such power includes:

- (a) the power to impose a fine in money, fine mats, animals or food; or partly in one or partly in others of those things; and
- (b) the power to order the offender to undertake any work on village land.

Section 8 provides that:

Where punishment has been imposed by a Village Fono in respect of village misconduct by any person and that person is convicted by a Court of a crime or offence in respect of the same matter the Court shall take into account in mitigation of the sentence the punishment by the Village Fono.

To use another example, the State of Queensland, for most of its history, has maintained a parallel system of local Aboriginal and Torres Strait Islander courts established under special state legislation, with a specified limited local civil and criminal jurisdiction in relation to Aboriginal and Torres Strait Islander reserves.<sup>39</sup> The *Community Services Act 1984* (Qld)<sup>40</sup> provides for the creation of by-laws by the local Aboriginal Council and invests in an Aboriginal Court jurisdiction to hear and determine:

- (a) matters of complaint that are breaches of the by-laws applicable within its area;
- (b) disputes concerning any matter that –
  - (i) is a matter accepted by the community resident in its area as a matter rightly governed by the usages and customs of that community ...

and shall exercise that jurisdiction referred to in paragraph (a) in accordance with the appropriate by-law having regard to the usages and customs of the community within its area and that jurisdiction referred to in paragraph (b) in accordance with the usages and customs of the community within its area.

The current legislative regime in Queensland has evolved from a long history in that state of recognition of local Aboriginal law. For example, it was noted in *Mabo*<sup>41</sup> that a 'system of self government' on Murray Island at some time between 1892 and 1907 provided for a native chief to deal summarily with offences. A perusal of the Murray Island court records<sup>42</sup> reveals that the local leaders regularly applied local customary law in their determinations of criminal and civil matters.

The tendency in Queensland has been to integrate Aboriginal courts with the magistrates' courts and to appoint local Aboriginal leaders as Justices of the Peace. The *Community Services Act 1984* (Qld) does not specifically limit the local community by-law making power, but it provides that the Governor-in-Council may declare that a by-law ceases to have effect if 'it is necessary to protect the state interest'. That is a mechanism for identifying local laws regarded as repugnant to state law or previously recognised common law which is similar to that suggested by the NTLRC.

37. McNamara L, *Aboriginal Human Rights, the Criminal Justice System and the Search for Solutions: A Case Study for Self-Determination*, Discussion Paper No 19 (Darwin: Australian National University North Australian Research Unit: 1993) 7; McRae et al, above n 1, 130–33.

38. Newton-Cain T, 'Convergence or Clash? The Recognition of Customary Law and Practice in Sentencing Decisions of the Courts of the Pacific Island Region' (2001) 2 *Melbourne Journal of International Law* 2, 55.

39. Since the 1980s reserves have been converted to Deed of Grant in Trust areas or Aboriginal Shire areas.

40. It replaced the *Aborigines Act 1971* (Qld) and its predecessors, which also allowed for local courts. It has a companion *Community (Torres Strait Islanders) Act 1984* (Qld), which replaced the *Torres Strait Islanders Act 1971* (Qld).

41. (1992) 175 CLR 1, 23.

42. Such investigation was conducted by Bryan Keon-Cohen, Barbara Hocking and the author in preparing the Meriam people's case for trial.

In Western Australia the *Aboriginal Communities Act 1979* allows for the Council of a community to make by-laws which prescribe matters 'for the purpose of securing decency, order and good conduct on the community lands'.<sup>43</sup> The Act applies to two specified West Kimberley incorporated communities and other incorporated Aboriginal communities, to which the Governor declares it to apply. A pre-requisite to such a declaration is that 'there are provisions in the constitution or rules of the community under which the council of the community will have to consult with the members of the community and take proper account of their views before making, amending or revoking by-laws'.<sup>44</sup> Those provisions enable the creation of by-laws which incorporate local Aboriginal customary law, as recognised by the members of the community. The Act limits the application of the by-laws to lands within the boundaries of the community, but otherwise, they apply to all persons within those boundaries.<sup>45</sup> The by-laws are also declared by the Act to be subordinate to any civil or criminal liability at common law or under statute or any act pursuant to statute.<sup>46</sup> That approach results in a similar relationship to that which the NTLRC has recommended should exist between local customary laws and the general law of the state.

## Recognition by statute

Recognition of Aboriginal customary law by statute is a form of recognition by incorporation. It will not necessarily effect a substantive change in the law. The instances where that might be achieved can be allocated to two categories. The first is where the statutory provision is merely declaratory of the common law position. The declaration has an educative effect, assisting in uniformity of practice. The second is where machinery is created to enable recognition of customary law within the legal system of the state.

By way of illustration of the above proposition, one area where suggestions of recognition of Aboriginal customary law by statute are frequently made is criminal law. Consideration could be given, for example, to introducing provisions into Western Australia's Criminal Code, which make provision for Aboriginal customary law to be taken into account in determining criminal liability. It should be recognised, however, that such provisions may be more educative than necessary. Courts in this state and elsewhere have recognised that Aboriginal customary law is properly to be taken into account in establishing defences, at least where the custom is asserted as giving rise to a native title right, in relation to regulatory offences concerning fisheries<sup>47</sup> and wildlife protection.<sup>48</sup>

The *Laws of Kiribati Act 1989* (Kiribati), which takes a broad-ranging approach to statutory recognition of customary law in relation to criminal matters, provides an example of a discretionary procedural direction. It provides that:

Subject to this Act and any other enactment, customary law may be taken into account in a criminal case only for the purpose of –

- (a) ascertaining the existence or otherwise of a state of mind of a person; or
- (b) deciding the reasonableness or otherwise of an act, default or omission by a person; or
- (c) deciding the reasonableness or otherwise of an excuse;

...

or where the court thinks that by not taking the customary law into account injustice will or may be done to a person.<sup>49</sup>

Tess Newton-Cain<sup>50</sup> emphasises that this provision does not make the application of customary law mandatory. It is an attempt to meld customary law with the legislative form. Adducing evidence of custom in such circumstances is problematic. Newton-Cain notes that problems may arise if customary concerns appear to be in conflict with other concerns, particularly where such concerns form part of the spirit of the law rather than the letter of the law.<sup>51</sup> What is considered reasonable by the articulators of customary law and practice may not be considered reasonable elsewhere in the community, including in the courts.

It can be seen that a provision, of the kind in the sub-paragraphs (a), (b) and (c) of the *Laws of Kiribati Act* recited above, is not necessary to enable a court to take into account customary law in ascertaining a subjective or objective

43. *Aboriginal Communities Act 1979* (WA) s 7(k).

44. *Aboriginal Communities Act 1979* (WA) s 4(2)(a).

45. *Aboriginal Communities Act 1979* (WA) s 9(1).

46. *Aboriginal Communities Act 1979* (WA) s 13.

47. *Sutton v Derschaw* (1995) 82 A Crim R 318; *Derschaw v The Queen* (1996) 17 WAR 419; *Wilkes v Johnsen* (Unreported, Supreme Court of Western Australia, Kennedy, White and Wheeler JJ, 23 June 1999, BC9904155); *Mason v Tritton* (1994) 34 NSWLR 572 at 600.

48. *Yanner v Eaton* (1999) 166 ALR 258.

49. Schedule 1, para 3. Adapted from the *Customs Recognition Act 1962* (PNG) s 4; see also *Laws of Tuvalu Act 1987* (Tuvalu).

50. Newton-Cain, above n 38, 48–68.

51. *Ibid.*

state of mind. A subjective state of mind must always be judged after taking into account the particular circumstances of the individual, including whether that individual's state of mind is affected by the existence of a customary law. Similarly, an objective standard of reasonableness must also be applied only after taking into account any special knowledge, personal characteristics or position of the person in question,<sup>52</sup> including those facts which exist only by reason of membership of an ethnic group.<sup>53</sup> That would enable the personal adherence of an individual to customary law, or the impact on an individual of customary law, to be taken into account in any particular instance where an objective standard was to be applied. There remains, however, an argument for reciting such matters in a statutory provision so as to ensure that the same is not overlooked or to ensure a degree of uniformity of application of such principles.

In relation to sentencing law, it is again generally accepted that there is power in courts of the state to consider evidence of Aboriginal customary law in mitigation of penalty.<sup>54</sup> The New South Wales Law Reform Commission (NLRRC),<sup>55</sup> after a detailed consideration of the matter, makes the point that there is ample common law precedent for a judicial discretion to recognise Aboriginal customary law in the sentencing process. However, the NLRRC nevertheless advocated statutory recognition of the fact that Aboriginal customary law is to be taken into account in sentencing in order to avoid injustice, avoid dependence on individual judicial discretion, and to promote consistency and clarity in the law.

The *Customs Recognition Act 1963* (PNG) s 4(e) provides an example where a similar approach to that suggested by the NSWLRRC has been adopted. That provision directs the courts (where they deem fit) to take into account issues of custom when determining sentence, subject to the condition that custom is relevant and can be adequately proved.<sup>56</sup>

## Maintenance and modification

The discussion by the High Court of the recognition of native title rights and interests in *Yorta Yorta v Victoria*<sup>57</sup> (elaborated upon below) suggests an apparent necessity to establish, for the purpose of recognition by the court, the existence of a continuing Aboriginal normative society which is distinguishable from the majority society in Australia in order to provide a basis for the accommodation of native title rights and interests by the common law. There is, thus, an imperative towards the maintenance of separate viable normative societies.

It should be noted, however, that the statutory recognition by the state of certain norms of an Aboriginal society may have subtle modifying effects upon the Aboriginal society and its norms. For example, in relation to native title, the effect of a determination of native title pursuant to the *Native Title Act 1993* (Cth) (NTA) bears examination. As mentioned above, *Yorta Yorta* requires the maintenance of a viable normative Aboriginal society to reach the point of a determination of native title. Thereafter, the native title rights and interests derive their force and effect both from the normative system of the Aboriginal society and from the determination of the court. The determination of the court that native title exists precipitates a further determination under the statute which vests the native title or its management in a corporate body. Thereafter, at least in relation to dealings with non-Aboriginal persons or corporations the procedure under the NTA for the exercise of native title rights which arises from traditional laws and customs is to be carried out through the agency of

- (a) the statutory corporate structure required to hold a native title which is determined pursuant to the statute to exist<sup>58</sup> and
- (b) the statutorily defined procedures for decision-making set out in the NTA for the purpose of interacting with the broader Australian society.<sup>59</sup>

One of the primary objects of the NTA<sup>60</sup> is to create a mechanism for native title holders to interact with the non-Aboriginal society with whom they come into contact. Perhaps this will have no impact on the maintenance of

52. See *Bouhey v The Queen* (1986) 161 CLR 10; *Stingle v The Queen* (1990) 171 CLR 312 at 328-30; *Palmer v The Queen* [1985] Tas R 138; *R v Loughnan* [1981] VR 443; *In the Marriage of Holley* [1982] FLR 77,431 at 77,440; *R v Voukelatos* [1990] VR 1 at 24; Fleming JG, *The Law of Torts* (Sydney: LBC, 8th ed., 1992), 106-14.

53. *Neal v The Queen* (1982) 42 ALR 609; *Jadurin v The Queen* (1982) 44 ALR 424; *R v Minor* (1992) A Crim R 227; *R v Rictor* (Unreported, Supreme Court of Western Australia, No 34/2002, McClure J, 30 April 2002).

54. *Halsbury's Laws of Australia*, Vol 1(1) (Sydney: Butterworths, 1999) [5-1890]; Williams, above n 15, 16. The *Criminal Law Act 1876* (SA) s 6A reflects the common law (see cases cited in *Halsbury's* at nn 1-5).

55. New South Wales Law Reform Commission (NSWLRC), *Sentencing: Aboriginal Offenders*, Report No 96, [3.31]-[3.89].

56. See also Banks C, 'Custom in the Courts: *Criminal Law (Compensation) Act of Papua New Guinea*' (1998) 38 *British Journal of Criminology* 299, 302.

57. [2002] HCA 58, [41]-[42].

58. *Native Title Act 1993* (Cth) ss 56 and 57.

59. *Native Title Act 1993* (Cth) s 58.

60. *Native Title Act 1993* (Cth) s 3.

traditional laws and customs of the Aboriginal society. However, one can readily see how an Aboriginal society might adapt to accommodate this 'alien' interaction within its normative system.

## Reconciliation

At a national level in Australia there has been much discussion about the reconciliation of the original race of Aboriginal people of Australia and their culture with those of the colonising people who have claimed British sovereignty over the colonies formed into the Commonwealth of Australia. Various forms of documentation of the concept of reconciliation have been suggested from time to time. One of those involves the addition to the provisions of the *Constitution Act 1901* (Cth) of specific statements of the rights of Aboriginal peoples. Reconciliation has also commonly been aligned with a discussion of the appropriateness of a treaty being entered into between the Aboriginal peoples and the colonising sovereign. Between 1979 and 1983 the Commonwealth government discussed with the National Aboriginal Conference a proposed treaty, compact or 'Makarrata'.<sup>61</sup> In September 1987 then Prime Minister, Robert Hawke suggested that a 'treaty or compact' would be worth consideration. In June 1988 the Chairmen of the Central and Northern Land Councils presented Mr Hawke with the Barunga Statement, to which the Prime Minister responded in positive terms.<sup>62</sup> The Barunga Statement read:

We, the Indigenous owners and occupiers of Australia, call on the Australian government and people to recognise our rights:

- to self-determination and self-management, including the freedom to pursue our own economic, social, religious and cultural development;
- to permanent control and enjoyment of our ancestral lands;
- to compensation for the loss of our lands, there having been no extinction of original title;
- to protection of and control of access to our sacred sites, sacred objects, artifacts, designs, knowledge and works of art;
- to the return of the remains of our ancestors for burial in accordance with our traditions;
- to respect for and promotion of our Aboriginal identity, including the cultural, linguistic, religious and historical aspects, and including the right to be educated in our own languages and in our own culture and history;
- in accordance with the Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights, the International Covenant on Civil and Political Rights, and the International Convention on the Elimination of all forms of Racial Discrimination, rights to life, liberty, security of person, food, clothing, housing, medical care, education, and employment opportunities, necessary social services and other basic rights.

We call on the Commonwealth to pass laws providing:

- a national elected Aboriginal and Islander organisation to oversee Aboriginal and Islander affairs;
- a national system of land rights;
- a police and justice system which recognises our customary laws and frees us from discrimination and any activity which may threaten our identity or security, interfere with our freedom of expression or association, or otherwise prevent our full enjoyment and exercise of universally recognised human rights and fundamental freedoms.

We call on the Australian government to support Aborigines in the development of our international declaration of principles for Indigenous rights leading to an international covenant. And we call on the Commonwealth Parliament to negotiate with us a treaty recognising our prior ownership, continuing occupation and sovereignty and affirming our human rights and freedoms.

The United States of America, Canada and the British and other European sovereign powers that preceded them, entered into treaties with many Indigenous groups in North America. In the United States that took place until the Indian *Appropriations Act 1871* forbade further acknowledgement or recognition of independent Indian nations, tribes or powers with whom treaties might have been contracted. In Canada negotiations are still continuing in relation to what are now described as 'comprehensive land claim settlements'.<sup>63</sup>

As Reconciliation Australia sets out on its website,<sup>64</sup> in 1991 the:

61. Wright J, 'What Became of That Treaty?' (1988) 1 *Australian Aboriginal Studies* 40; McRae et al, above n 1, 469.

62. McRae et al, *ibid.*

63. McRae et al, *ibid.*, 148; see discussion in Bartlett RH, *Native Title in Australia* (Sydney: Butterworths, 2000) 549–561.

64. <<http://www.reconciliationaustralia.org.au/aboutus/whatis.html>> (accessed 27 August 2004).

Report of the Royal Commission into Aboriginal Deaths in Custody explained that Indigenous disadvantage was a product of the history of dispossession. The cycle of poverty, poor health and limited education trapped Aboriginal and Torres Strait Islander Australians in an existence very different from most other Australians.

For these reasons, the Royal Commission recommended that all political leaders and their parties recognise that reconciliation between the Aboriginal and non-Aboriginal communities in Australia must be achieved if community division, discord and injustice to Aboriginal people are to be avoided.

Shortly afterwards [in the same year], the Commonwealth Parliament voted unanimously to establish the Council for Aboriginal Reconciliation and a formal reconciliation process. The Parliament noted that there had been no formal process of reconciliation to date, and that it was 'most desirable that there be such a reconciliation' by the year 2001, the centenary of Federation.

A Council for Aboriginal Reconciliation was established under legislation which directed the Council to consider, among other things, whether reconciliation would be advanced by 'a document or documents of reconciliation'. Such a document could be recognised and the rights and interests asserted in it protected by a state Constitution.

Submissions to the Commonwealth Government by the Council for Aboriginal Reconciliation spoke of an Indigenous Bill of Rights, possibly as part of a general Bill of Rights. However, The Council has always cautioned against proceeding in that direction without detailed Indigenous consultation as to the content of substantive provisions.<sup>65</sup> After ten years the Council for Aboriginal Reconciliation was dissolved pursuant to the sunset clause in its enabling legislation. Before that happened, the Council established Reconciliation Australia as a non-government, not-for-profit foundation to continue the national focus for reconciliation.

Shelley Reys and Fred Chaney, the Co-Chairs of Reconciliation Australia set out their current role as follows:

In its final report, the Council for Aboriginal Reconciliation recommended the establishment of an agreement or treaty process to negotiate the unfinished business of reconciliation. Reconciliation Australia has taken up that call. We support the Aboriginal and Torres Strait Islander Commission's decision to inform, educate and seek a mandate from Indigenous Australians on the next steps to be taken relating to a treaty. At the same time, we accept we need to promote an informed and objective debate on these issues within the wider community. The issues are varied and include matters involving consideration of the rights and status of Indigenous Australians as the first peoples of Australia, including the recognition of traditional and customary law.<sup>66</sup>

Jon Altman and Boyd Hunter note that in 1996 the Howard Government announced that they were going to replace the 'symbolic' reconciliation of the Keating Government years with 'practical' reconciliation, focused on such issues as health, housing, education and employment.<sup>67</sup>

Prime Minister Paul Keating's approach to reconciliation was epitomised in his 1992 'Redfern speech':

The starting point might be to recognise that the problem starts with us non-Aboriginal Australians.

It begins, I think, with the act of recognition. Recognition that it was we who did the dispossessing. We took the traditional lands and smashed the traditional way of life. We brought the disasters, the alcohol. We committed the murders. We took the children from their mothers. We practised discrimination and exclusion.

It was our ignorance and our prejudice and our failure to imagine these things being done to us. With some noble exceptions, we failed to make the most basic human response and enter into their hearts and minds. We failed to ask: how would I feel if this were done to me?<sup>68</sup>

In 2004 Prime Minister, John Howard emphasised what 'practical reconciliation' meant when he said:

All the theories in the world will not replace the value of employment, will not replace the value of sustainable economic opportunities and will not replace the value of the embracement of the Indigenous people as part of our

65. Council for Aboriginal Reconciliation, *Going Forward, Social Justice for the First Australians: A Submission to the Commonwealth Government* (Canberra: AGPS, 1995) 43–44; Aboriginal and Torres Strait Islander Commission, Native Title Social Justice Committee, *Review of the Native Title Representative Bodies* (Canberra: AGPS, 1995) 37–38; Aboriginal and Torres Strait Islander Social Justice Commissioner, *Indigenous Social Justice, Volume One – Strategies and Recommendations: Submissions to the Parliament of the Commonwealth of Australia on the Social Justice Package* (Sydney: Office of the Aboriginal and Torres Strait Islander Social Justice Commissioner, 1995) 15; see also Pierluigi C & McIntyre G, *A Negotiation Process to Establish an Australian Convention of Indigenous Peoples Rights*, IOCPs Occasional Paper No 43 (June 1995); McRae et al, above n 1, 454–60.

66. Reconciliation: a theory in practice. <[www.reconciliationaustralia.org/upload/ART\\_006.DOC](http://www.reconciliationaustralia.org/upload/ART_006.DOC)> (accessed 5 July 2004).

67. Altman JC & Hunter BH, *Monitoring 'Practical' Reconciliation: Evidence from the Reconciliation Decade 1991–2001*, Discussion Paper No 254 (2003), <[www.anu.edu.au/caepr/Publications/DP/2003\\_DP254.pdf](http://www.anu.edu.au/caepr/Publications/DP/2003_DP254.pdf)> (accessed 30 August 2004).

68. Keating P, 'Speech at Redfern Park' (Sydney, 10 December 1992). See: <http://apology.wes.net.au/redfern.html> (accessed 30 August 2004).

economic future. And that is why my Government has placed such a great emphasis on what I call practical reconciliation, on giving all of the people of this country, irrespective of their background or their heritage, economic opportunity. And the greatest measure of that, of course, is to give people employment.<sup>69</sup>

'Practical reconciliation' has also been promoted as a way to decrease Indigenous truancy, alcoholism, family violence and the number of people in prison.<sup>70</sup>

Lowitja O'Donohue, a former chairwoman of the Aboriginal and Torres Strait Islander Commission, has had this to say about 'practical reconciliation':

It is with a very heavy heart that I say that the Government's reconciliation policy has failed. In this respect we lag sadly behind countries such as New Zealand, Canada and the United States. Reconciliation and native title have fallen off the Government's agenda. Instead we have what John Howard calls 'practical reconciliation' – the provision of basic resources for health, housing, education and employment.

It is a welfare model, a Band-Aid model, not one seated in a fundamental recognition of the rights and entitlements of Australia's first peoples. And what's more it has failed. If anything, the health and wellbeing of Australia's Indigenous people is getting worse.

We still have a situation where Indigenous Australians have Third World health status, where our children are dying as babies at the same rate as in the poorest countries in the world, and where Indigenous life expectancy is 20 years lower than for the non-Indigenous population.

We still have a situation where most Aboriginal people live below the poverty line. Where 60 per cent of Australian youth in care or custody or other forms of detention are Aboriginal. Where 20 per cent of adult male prisoners and a staggering 80 per cent of female prisoners are Aboriginal.

This in a society where we make up only two per cent of the population!

Family violence and child abuse are endemic in Indigenous communities. This is a huge problem. It needs to be tackled as a matter of priority.

Earlier this year, the Federal Government announced with great fanfare the formation of a working group of Indigenous leaders to advise the Government on this matter. I was a member of this group. At the time I was optimistic. When will I ever learn! Our report provided a framework for governments, in partnership with communities, to combat the tragic consequences of violence and abuse in Indigenous communities.

It went to the Council of Australian Governments on August 29. But, as you might remember, this was the conference in which state and territory leaders walked out, in protest, over health funding. They did not even consider, let alone endorse, our report. And there has been no progress since. I have this awful feeling that this will become yet another example of Indigenous concerns being placed in the too-hard basket. Or overlooked because they are not vote winners.

One of my greatest fears is that 20 years from now, nothing will have changed, despite enormous energy and goodwill from the people's movement for reconciliation.<sup>71</sup>

Patrick Dodson, former chair of the Council for Aboriginal Reconciliation, in his May 2000 Wentworth Address echoed the views of Lowitja O'Donohue, when he said:

The Government wants to drive a wedge between the concepts of rights and welfare, and between those who advocate a rights agenda and those seeking relief from appalling poverty. This is an old attempt at a new spin on a very old wicket of divide and rule. If it were merely a matter of rice bowl politics it would not be so bad but it is far more sinister than that. It is about removing the centrality of community as the life centre; it models on the individual as the essential unit of society. This is not our way. With all our social problems it is not to attack the foundations of our community by putting the individual before the community.<sup>72</sup>

And, as Mick Dodson, former Aboriginal and Torres Strait Islander Social Justice Commissioner, said at Corroboree 2000:

The notion of 'practical reconciliation' is...a furphy. Although the issues of the health, housing and education of Indigenous Australians are of key concern to the nation, they are not issues that are at the heart or the very soul of

69. Howard JW, 'Address at the Launch of the Trust Exhibition' (Speech delivered at Australian Prospectors and Miners Hall of Fame, 5 February 2004). See <[www.pm.gov.au](http://www.pm.gov.au)> (accessed 30 August 2004).  
70. Tomlinson J, 'The Inherent Flaw in the Concept of "Practical Reconciliation"' <<http://www.onlineopinion.com.au/view.asp?article=2056>> (posted 9 March 2004).  
71. O'Donoghue L, edited extract from the 3rd Annual Human Rights Oration (Melbourne Town Hall, 10 December 2003): *The Age*, 11 December 2003.  
72. Dodson P, 'Beyond the Mourning Gate – Dealing with Unfinished Business', Wentworth Lecture, 12 May 2000, available at <<http://www.antar.org.au/wentworth.pdf>>. See also Peter Yu to similar effect, quoted by ANTaR, *Why "practical reconciliation" is bad policy* <[http://www.antar.org.au/prac\\_rec.html](http://www.antar.org.au/prac_rec.html)>.

reconciliation. But they are—quite simply—the entitlements every Australian should enjoy. The tragedy is that they are entitlements successive governments have denied.<sup>73</sup>

On 3 December 2004, however, a meeting between the Prime Minister John Howard, Patrick Dodson, Noel Pearson and Aboriginal footballer Michael Long<sup>74</sup> heralded the possibility of a 'new accord' based on mutual obligation.<sup>75</sup> Mr Dodson said, following the meeting:

We want to reopen the dialogue with the Prime Minister. Such a dialogue would be about clarification and trying to find common ground in the social arena. The perception that some people have that we are only concerned with the symbolic issues is a misconception. The mutual obligation stuff has a lot of resonance with Aboriginal culture and within Aboriginal notions of kinship. This concept has a grounding within our culture and society. It is not just a Western concept and this how we need to see it...

We want to explore with the Prime Minister the social conditions of our people to see that they are improved. Collectively we have the foundation now for a serious search for practical solutions.

...

I am not naïve enough to think he will come over to our rights agenda. But for the remainder of his Prime Ministership that's not what we are about. What we are concerned with is the social agenda. We want to see progress here over the next three to six years.<sup>76</sup>

Mr Pearson added:

The point is that a lot of the rights we seek cannot be secured unless we also accept the responsibilities. Progress is not made just through a political settlement. The mistake we made in the past is that we did not get the basic building blocks in place—like education and work—and we went through one cycle of welfare after another.<sup>77</sup>

## Constitutional recognition

It is with this 'reconciliation' background at the Commonwealth level in mind that one returns to a consideration of whether there is merit in a state government setting out in a constitutional document of the state a form of recognition of Aboriginal customary law.

The State of Western Australia may wish to contemplate a general statement of recognition of the status of Aboriginal peoples and their rights and interests under Aboriginal customary law, as a constitutional provision or in the form of a statutory general statement of rights. No such statements of civil or individual status, rights or interests exist in the current constitutional document of Western Australia for any of the citizens of the state, but it is something that has been raised by the current Attorney General for Western Australia in more than one public address<sup>78</sup> as a matter for future contemplation.

Constitutional provisions relating to Aboriginal people may have one or all of the following foci:

- (a) a general statement of reconciliation;
- (b) recognition of rights; or
- (c) recognition of Aboriginal customary law as a source of law to be incorporated into the general law of the state.

## Statement of reconciliation

An example of a general constitutional statement of reconciliation is to be found in the exposure draft of a proposed amendment to the Victorian Constitution which was the subject of an announcement by the Premier of Victoria on 28 May 2004. The *Constitution (Recognition of Aboriginal People) Bill Exposure Draft* provides as follows:

1. The purpose of this Act is to amend the *Constitution Act 1975* to give recognition within that Act to Victoria's Aboriginal people and their contribution to the State of Victoria

73. Australians for Native Title and Reconciliation, 'What's wrong with "practical reconciliation"?', ANTaR News, <[http://antar.dovenetq.net.au/03\\_news/practical.html](http://antar.dovenetq.net.au/03_news/practical.html)> (accessed 30 August 2004).

74. Who had walked on a 'quixotic journey' from Melbourne to Canberra to meet the Prime Minister: Rintoul S, 'Long Walk Over But Longer Journey Ahead', *The Weekend Australian*, 4–5 December 2004, 1.

75. Kelly P, 'Black Leaders Offer New Accord', *The Weekend Australian*, 4–5 December 2004, 1 and 10.

76. *Ibid.*

77. *Ibid.*

78. Including at a Seminar at the University of Western Australia on 2 August 2003 organised by the Society of Labor Lawyers of Western Australia, which canvassed the topic of a Bill of Rights for Western Australia. The Attorney-General expressed a preference for the statutory form of Bill of Rights that has been adopted by the United Kingdom: *Human Rights Act 2000* (UK).

2. ....
3. After section 1 of the *Constitution Act 1975* insert –

#### 1A. Recognition of Aboriginal People

- (1) The Parliament acknowledges that the events described in the preamble to this Act occurred without prior consultation, recognition or involvement of the Aboriginal people of Victoria.
- (2) The Parliament recognises that Victoria's Aboriginal people –
  - (a) were the original custodians of the land on which the Colony of Victoria was established;
  - (b) have a unique status as the descendents of Australia's first people;
  - (c) have a spiritual, social, cultural and economic relationship with their traditional lands in Victoria;
  - (d) have made a unique and irreplaceable contribution to the identity and wellbeing of Victoria.
- (3) The Parliament does not intend by this section –
  - (a) to create any legal right or give rise to any civil cause of action; or
  - (b) to affect in any way the interpretation of this Act or any law in force in Victoria.

It can be seen from the text of a provision of that kind that it is intended to have a symbolic value only. Proposed section 1A(3) makes it clear that it is to have no legal effect. It is, therefore, not an example of reform of the law, but a mere political statement of goodwill. A statement such as that in proposed section 1A(2) might be of some significance if enacted as a preamble, with impact on the interpretation of substantive provisions relating to the recognition of Aboriginal rights or Aboriginal customary law.

## Constitutional rights recognition

The best known and perhaps most apposite example of a constitutional 'Bill of Rights' provision relating particularly to Aboriginal peoples is in the Canadian Constitution. Reference to the Canadian provision is appropriate because of the relatively close cultural and legal parallels between Canada and Australia.<sup>79</sup>

Section 35(1) of the *Constitution Act 1982* (Canada) provides that: 'The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed'.

Chief Justice Lamer in *R v Van der Peet*<sup>80</sup> made the point that:

The Canadian, American and Australian jurisprudence thus supports the basic proposition put forward at the beginning of this section:<sup>81</sup> the aboriginal rights recognized and affirmed by s. 35(1) are best understood as, first, the means by which the Constitution recognizes the fact that prior to the arrival of Europeans in North America the land was already occupied by distinctive aboriginal societies, and, as second, the means by which that prior occupation is reconciled with the assertion of Crown sovereignty over Canadian territory. The content of aboriginal rights must be directed at fulfilling both of those purposes.<sup>82</sup>

In Canada the 'aboriginal rights' recognised and affirmed by the constitutional provision have been accepted as deriving from 'historic occupation and use of ancestral lands and do not depend on any treaty, executive order or legislative enactment'.<sup>83</sup>

Justice L'Heureux-Dube in *Van der Peet*<sup>84</sup> pointed out that:

Aboriginal rights...relate not only to aboriginal title, but also to the component elements of this larger right—such as aboriginal rights to hunt, fish or trap, and their accompanying practices, traditions and customs—as well as to other matters, not related to land, that form part of a distinctive aboriginal culture.<sup>85</sup>

79. This has been particularly marked in the recent cross-referral between Australian and Canadian superior courts in relation to the development of the notion of native title or Aboriginal title: reflected in the cases of *Calder v Attorney-General of British Columbia*, [1973] SCR 313; *Mabo v Queensland [No 2]* (1992) 175 CLR 1; *Delgamuukw v British Columbia* (1993) 91 DLR (4th) 470; *R v Van der Peet* [1996] 2 SCR 507.

80. [1996] 2 RCS 507, 547.

81. [1996] 2 RCS 507, 538–47.

82. Lamer CJ (at 546) notes the agreement of academic commentators with the proposition that prior occupation is the foundation of s 35(1): see Elliott D, *Law and Aboriginal Peoples of Canada* (Ontario: Canada Captus Press, 2nd ed., 1994) 25; Macklem P, 'Normative Dimensions of an Aboriginal Right of Self-Government' (1995) 21 *Queen's Law Journal* 173, 180; Peiney W, 'The Rights of the Aboriginal Peoples of Canada in the *Constitution Act, 1982*, Part II – Section 35: The Substantive Guarantee' (1988) 22 *University of British Columbia Law Review* 207.

83. [1996] 2 RCS 507, 577. See also *Calder v Attorney-General (British Columbia)* [1973] SCR 313, 390; *Guerin v The Queen* [1984] 2 SCR 335, 379; *R v Sparrow* [1990] 1 SCR 1075; *Mabo v Queensland [No 2]* (1992) 175 CLR 1; Slattery B, 'The Constitutional Guarantee of Aboriginal and Treaty Rights' (1983) 8 *Queen's Law Journal* 223, 242; Hogg PW, *Constitutional Law of Canada* (Ontario: Caswell, 3rd ed., 1992) 679; Asch M & Macklem P, 'Aboriginal Rights and Canadian Sovereignty: An Essay on *R v Sparrow*' (1991) 29 *Alberta Law Review* 498; Macklem P, 'First Nations Self-Government and the Borders of the Canadian Legal Imagination' (1991) 36 *McGill Law Journal* 382; McNeil K, *Common Law Aboriginal Title* (Oxford: Clarendon Press, 1989).

84. [1996] 2 RCS 507, 579.

85. See Binie WIC, 'The Sparrow Doctrine: Beginning of the End or the End of the Beginning?' (1990) 15 *Queen's Law Journal* 217; Sanders D, 'The Rights of the Aboriginal Peoples of Canada' (1983) 61 *Canadian Bar Review* 314.

To adopt the language of the High Court of Australia in *Yorta Yorta*, if one were to conclude that there are Aboriginal societies connected to places in the State of Western Australia which have continued as 'viable groups' with 'normative systems', then there is a basis for recognition of Aboriginal rights that could be declared to be a subject for recognition and affirmation by the legislature.

The author's own experience across a broad range of native title claims in Western Australia over the past decade suggests that there are probably several normative societies of Aboriginal peoples in the state. The Full Court in *De Rose v South Australia*<sup>86</sup> accepted the evidence of the existence of a broad-based Aboriginal society across the Western Desert, which covers approximately one-sixth of the Australian continent and straddles the borders of Western Australia, South Australia and the Northern Territory. It appears, from the evidence in the various native title claims that have been heard in Western Australia, that there are probably several Aboriginal societies in Western Australia which broadly cover the South-West, Murchison-Gascoyne, Pilbara,<sup>87</sup> Western Desert<sup>88</sup> and North,<sup>89</sup> South, East<sup>90</sup> and West<sup>91</sup> Kimberley Regions of the state. An interminable and largely barren debate could probably be pursued as to the cut-off points (if there are any) between such societies. The best approach to such matters would be to investigate, when it becomes necessary, the laws and customs of the relevant society that bind the persons affected in any particular instance, on a case-by-case basis.

If a legislative form of recognition of Aboriginal customary law is to be adopted—that could readily include a statutory form of a declaration of intent to recognise Aboriginal laws and customs and the rights and obligations which stem from the same—then a simple statement similar to that in s 35 of the Canadian Constitution may be appropriate. The Canadian Constitution only speaks of 'rights'. A more complete recognition of Aboriginal law and custom would appropriately also make reference to the duties which arise from Aboriginal laws and customs.

## Constitutional incorporation of Aboriginal customary law

The Sessional Committee of the Northern Territory Legislative Assembly on Constitutional Development in its Discussion Paper No 4 on *Recognition of Aboriginal Customary Law* raised the issue whether Aboriginal customary law should be recognised in the proposed Northern Territory Constitution. The Committee reported in 1996, proposing that the Constitution recognise Aboriginal customary law as a source of law 'on a par with the common law'; the two running 'in tandem' and 'in a complementary manner as part of the one system of laws for the whole of the Northern Territory'.<sup>92</sup> It further proposed that '[b]oth would be subject to any legislation' and that:

Aboriginal customary law will not be able to be implemented and enforced through the institutions and officers of government except insofar as the courts are prepared to do so or as Territory legislation so provides. For example, this would prevent the use of practices which may be harsh or unjust on international principles.<sup>93</sup>

If a general statement of legislative recognition was to include recognition of duties and the enforcement of duties under traditional laws and customs, in addition to the recognition of rights,<sup>94</sup> then it would be appropriate for the statement to be qualified by the entitlement of individuals to assert the fundamental human rights that are recognised in international law.

A constitutional provision might also include procedural directions for the recognition of Aboriginal customary law. The *Constitution of Tuvalu* [Cap 1] (Tuvalu) s 85 provides a general, though qualified, procedural direction to the courts for the recognition of native custom and tradition:

[I]n the exercise of their jurisdiction the courts shall, to the extent that circumstances and the justice of any particular case permit, modify or adapt such [jurisdictional] rules so as to take account of Tuvalu custom and tradition.<sup>95</sup>

By way of contrast, the *Constitution of the Republic of Vanuatu 1980* invests the following power in the legislature:

86. [2002] FCAFC 286, [31], [41], [42], [178], [229], [230].

87. See *Daniel v State of Western Australia* [2003] FCA 666, [429].

88. See *De Rose v South Australia* [2003] FCAFC 286, [271], [273], [283].

89. See *Neowarra v Western Australia* [2003] FCA 1402.

90. See *Ward v Western Australia* (1998) 159 ALR 483.

91. See *John Dudu Nangkiriny & Ors on behalf of the Karajarri People v The State of Western Australia & Ors* (WAG 6100) of 1998 and *Paul Sampi & Ors v State of Western Australia & Ors* (WAG 49/1998).

92. Northern Territory Sessional Committee on Constitutional Development, 'Foundations for a Common Future: The Report on Paragraph 1(a) of the Sessional Committee on Constitutional Development's Terms of Reference on a Final Draft Constitution for the Northern Territory', Vol 1 (November 1996) 5–6.

93. *Ibid* 6–7.

94. To which the Canadian Constitution is limited.

95. See also *The Constitution of Solomon Islands 1978* sch 3, s 75(2)(1).

Parliament may provide for the manner of the ascertainment of custom, and may in particular provide for persons knowledgeable in custom to sit with the Judges of the Supreme Court or Court of Appeal and take part in its proceedings.<sup>96</sup>

Some legislatures have enacted legislation pursuant to such a constitutional power that directs subordinate courts as to how to apply customary law. For example the *Island Courts Act* [Cap 167] (Vanuata) s 10 provides that:

Subject to the provisions of this Act an island court shall administer the customary law prevailing within the territorial jurisdiction of the court so far as the same is not in conflict with any written law and is not contrary to justice, morality and good order.

The *Local Courts Act* [Cap 19] (Solomon Islands) s 16, based on a constitutional provision similar to that of the *Constitution of Tuvalu*, provides for the application of customary law provided that 'the same has not been modified by any Act'.

In conclusion, it is a matter for political consideration whether a constitutional statement of recognition of Aboriginal customary law would be:

- (a) subject to amendment or repeal by any legislation which might be enacted in the future (as proposed for the Northern Territory); or
- (b) entrenched as a 'constitutional' provision of the state by adding 'manner and form' provisions<sup>97</sup> as a fetter on the amendment or repeal of the statutory declaration.

## Recognition by development of the common law

The central thesis of this paper is that Aboriginal customary law can be readily recognised by a process of development of the common law. That is principally so because the common law is itself a customary form of law that has evolved from, and may include, the recognition and enforcement of local customs. The law relating to native title provides an example of the recognition of Aboriginal customary law by means of the development of the common law. In particular, it is an example of:

- (1) the manner in which Aboriginal customary law may be recognised by the common law;
- (2) how Aboriginal customary law relates to the Aboriginal society or societies from which it arises;
- (3) the necessary focus on a normative system in identifying laws and customs;
- (4) the analytical approach to be applied to the accommodation of change; and
- (5) how Aboriginal customary law may integrate with the statute law of the state and the common law of the state, in particular.

### Manner of recognition

Brennan J in *Mabo [No 2]*<sup>98</sup> indicated the following considerations in approaching the task of recognition of Aboriginal customary law at common law:

- (a) Recognition will be by means of 'such legal and equitable remedies as are appropriate to the particular rights and interests established by the evidence'.
- (b) A determination must be made as to the incidents of particular Aboriginal laws and customs which create the rights or obligations in question.
- (c) Recognition is only precluded 'where those laws and customs are not so repugnant to natural justice, equity and good conscience that sanctions under the new regime must be withheld'.<sup>99</sup>
- (d) Recognition 'is not precluded by an absence of communal law to determine a point in contest.... By custom, such a point may have to be settled by community consensus or in some other manner prescribed by custom'.
- (e) 'A court may have to act on evidence which lacks specificity in determining a question' in issue.

96. *Constitution of the Republic of Vanuatu 1980*, Article 49.

97. Manner and form provisions require special procedural requirements to be complied with in order to alter constitutional provisions: see *Colonial Laws Validity Act 1865* (Imp) s 5. The *Constitution Act 1889* (WA) s 73, for example, requires the concurrence of an absolute majority of both house of the state Parliament in order to effect any change in the constitution of the Legislative Council or the Legislative Assembly.

98. (1992) 175 CLR 1, 61–63.

99. See *Idewau Inasa v Oshodi*, [1934] AC 99, 105.

Toohey J said further, in relation to the circumstances in that case, that:

It is true that the findings of Moynihan J do not allow the articulation of a precise set of rules and that they are inconclusive as to how consistently a principle was applied in local law, for example, with respect to inheritance of land, but ... the particular nature of the rules which govern the society or which describe its members' relationship with land does not determine the question of traditional land rights. Because rights and duties *inter se* cannot be determined precisely, it does not follow that traditional rights are not to be recognised by the common law.<sup>100</sup>

Native title case law has addressed the relationship of the law inherited from the English legal system with Aboriginal customary law. In doing so it has adopted a broad approach in defining the concept of 'law'. That is an approach which is apposite to the consideration of what law is when contemplating the recognition of Aboriginal customary law in accordance with the terms of reference of this inquiry.

### Social derivation

The High Court in *Yorta Yorta*<sup>101</sup> provided a useful analysis of where to look to find the Aboriginal laws and customs which might be recognised when it said:

Laws and customs do not exist in a vacuum. They are, in Professor Julius Stone's words, 'socially derivative and non-autonomous'. As Professor Honoré has pointed out, it is axiomatic that 'all laws are laws of a society or group'. Or as was said earlier, in Paton's Jurisprudence, 'law is but a result of all the forces that go to make society'. Law and custom arise out of and, in important respects, go to define a particular society. In this context, 'society' is to be understood as a body of persons united in and by its acknowledgement and observance of a body of law and customs.<sup>102</sup>

The Court also explained that:

We choose the word 'society' rather than 'community' to emphasise this close relationship between the identification of the group and the identification of the laws and customs of that group.<sup>103</sup>

The normative society is made up of the broadest group who are so united. Within that society there may be sub-groups. Such sub-groups will, by definition, also be united in the same way, but that does not make each sub-group a separate society. Justices Brennan and Toohey in *Mabo [No 2]* said that it is not necessary to prove the 'kind of society' which existed prior to the assertion of sovereignty in order to find that there was a society which sustained rights and duties from which present laws and customs are derived.<sup>104</sup>

### Normative system

As mentioned previously, the High Court in *Yorta Yorta* linked native title rights and interests to the existence of a normative system of an Aboriginal society.<sup>105</sup> However, in doing so the High Court did not adopt a narrow Austinian definition of a normative system which requires that there be an expectation of some adverse consequences for abnormal behaviour.

In their joint judgment in *Yorta Yorta* Gleeson CJ and Gummow and Hayne JJ suggested a much broader notion of what might comprise a normative system when they said:

To speak of such rights and interests being possessed under, or rooted in, traditional law and traditional custom might provoke much jurisprudential debate about the difference between what HLA Hart referred to<sup>106</sup> as 'merely convergent habitual behaviour in a social group' and legal rules. The reference to traditional customs might invite debate about the difference between 'moral obligation' and legal rules.<sup>107</sup> A search for parallels between traditional law and traditional customs on the one hand and Austin's conception of a system of laws, as a body of commands or general orders backed by threats which are issued by a sovereign or subordinate in obedience to the sovereign,<sup>108</sup> may or may not be fruitful. Likewise, to search in traditional law and traditional customs for an identified, even an identifiable, rule of recognition<sup>109</sup> which would distinguish between law on the one hand, and moral obligation or mere habitual behaviour on the other, may or may not be productive.

100. (1992) 175 CLR 1, 199. See also Deane and Gaudron JJ (at 115) who adopted a similar approach.

101. [2002] HCA 58.

102. *Ibid* [49].

103. *Ibid* fn 31.

104. *Mabo [No 2]* (1992) 175 CLR 1, 61 and 187.

105. McIntyre G, 'Native Title Rights After *Yorta Yorta*' (2003) 9 *James Cook University Law Review* 268, 269.

106. Hart HLA, *The Concept of Law* (Oxford: Clarendon Press, 2nd ed., 1994) 10.

107. *Ibid* 13.

108. Austin J, *The Province of Jurisprudence Determined* (1832) Lecture I (Library of Ideas ed., 1968) 11; Hart, above n 106, 20–25.

109. Hart, *ibid* 100.

This last question may, however, be put aside when it is recalled that the *Native Title Act* refers to traditional laws acknowledged and traditional customs observed. Taken as a whole, that expression, with its use of 'and' rather than 'or', obviates any need to distinguish between what is a matter of traditional law and what is a matter of traditional custom. Nonetheless, because the subject of consideration is rights or interests, the rules which together constitute the traditional laws acknowledged and traditional customs observed, and under which the rights or interests are said to be possessed, must be rules having normative content. Without that quality, there may be observable patterns of behaviour but not rights or interests in relation to land or waters.<sup>110</sup>

## Customary law and change

Leon Sheleff has said that:

A perception of custom as some formalised relic of a backward people, will lead to certain inescapable consequences, that customs can only be recognised if they are of long standing usage, and once recognised, cannot be changed; or alternatively that they are not acceptable by the standards of the dominant culture and thus must be totally eradicated; or where several such customs exist, that whole system must be rejected, without any opportunity for the customs to respond dynamically to the changing environment, including those changes which are triggered by the impact of another culture, which may also be the dominant culture.

It is clear that, in the modern world, any approach that sees custom—particularly of another culture—in static terms, dooms that culture to stagnation, and ultimately rejection, by imposing on it a rigidity which is generally by no means inherent in its nature.... It is quite possible that tribal customs that seem to be incongruous in the modern age will be gradually eased out by the members of the tribe themselves.... Custom is an important source of law for all legal systems, particularly for the common law system. An awareness of its flexible nature is essential for its vitality and for the continuing vitality of the culture.<sup>111</sup>

The necessity to source customary law in its Aboriginal (or pre-British) origin and its continuity from that origin does not require that its content be static. Indeed, the complementary requirement, suggested by the High Court in *Yorta Yorta*, of continuing vitality suggests the inevitability of change over time. It is important that in relation to any approach to recognition of Aboriginal customary law, there is no implicit assumption that Aboriginal customary law is to be identified as some artifact of history, frozen at some particular point in time. Aboriginal customary law (and the Aboriginal societies in which it exists) is like the law of all other normative societies. As legal anthropologists have recognised, there are 'unceasing processes of change in all legal orders'.<sup>112</sup>

In *Yorta Yorta* Gleeson CJ and Gummow and Hayne JJ acknowledged the capacity of the common law to accommodate change in customary laws. They said that the laws or customs in which the rights or interests comprising native title find their origins must be laws or customs having a normative content and deriving, therefore, from a body of norms or a normative system that existed before sovereignty.<sup>113</sup> As long as this requirement is met, the individual laws or customs do not have to be substantially the same. It is the normative system that has to have continuous existence.<sup>114</sup> The key question as far as any change is concerned, is whether the law or custom can still be seen to be a traditional law and traditional custom and whether the change or adaptation is of such a kind that it can no longer be said that the rights and interests are possessed under the traditional laws acknowledged and traditional customs observed by the relevant peoples.<sup>115</sup>

However, laws and customs are not required to be the same now as they were 'pre-contact' in order for them to be 'traditional'. Traditional laws and customs may change, evolve or transform without losing their 'traditional' character.<sup>116</sup> Deane and Gaudron JJ, in *Mabo [No 2]* said, in relation to the traditional law and custom basis of native title, that:

The traditional law or custom is not ... frozen as at the moment of establishment of a Colony. Provided any changes do not diminish or extinguish the relationship between a particular tribe or other group and particular land, subsequent developments or variations do not extinguish the title in relation to the land.<sup>117</sup>

110. *Yorta Yorta* [2002] HCA 58, [41]–[42].

111. Sheleff L, *The Future of Tradition Customary Law, Common Law and Legal Pluralism* (London: Frank Cass, 2000) 84–85.

112. Woodman Gr, *Customary Law In Common Law Systems* (University Of Birmingham, UK) <<http://www.ids.ac.uk/ids/govern/accjust/pdfs/idswoodman.pdf>> (accessed 7 June 2003) 4; Moore SF, 'Law and Social Change: The Semi-autonomous Social Field as an Appropriate Subject of Study' (1973) *Law & Society Review* 719–46, reprinted in Moore SF, *Law as Process: An Anthropological Approach* (London: Routledge & Kegan Paul, 1978).

113. *Yorta Yorta* [2002] HCA 58, [38] and [46].

114. *Ibid* [47].

115. *Ibid* [83].

116. *Ibid* [35], [43], [119] and [122]–[132].

117. *Mabo [No 2]* (1992) 175 CLR 1, 110.

Traditional laws and customs may change, evolve or transform without losing their 'traditional' character.<sup>118</sup> The High Court in *Yorta Yorta* said:

The rights and interests in land which the new sovereign order recognised included the rules of traditional law and custom which dealt with the transmission of those interests. Nor is it to say that account could never be taken of any alteration to, or development of, that traditional law and custom that occurred after sovereignty. Account may have to be taken of developments at least of a kind contemplated by that traditional law and custom.<sup>119</sup>

### Interweaving or umbrella

In *Mabo [No 2]* Justice Brennan explained that:

Native title, though recognised by the common law, is not an institution of the common law and is not alienable by the common law. Its alienability is dependent on the laws from which it is derived. If alienation of a right or interest in land is a mere matter of the custom observed by the Aboriginal inhabitants, not provided for by law enforced by a sovereign power, there is no machinery which can enforce the rights of the alienee.... The common law can, by reference to the traditional laws and customs of an Aboriginal people, identify and protect the native title rights and interests to which they give rise... Australian law can protect the interests of members of an Aboriginal clan or group, whether communally or individually, only in conformity with the traditional laws and customs of the people to whom the clan or group belongs and only where members of the clan or group acknowledge those laws and observe those customs (so far as is practicable to do so).<sup>120</sup>

This passage from Brennan J's judgment suggests an interweaving of what Brennan J refers to as 'the common law' and 'the traditional laws and customs of an Aboriginal people'. The interweaving is occasioned by Brennan J treating the common law as an entity that is distinguishable from the traditional laws and customs of an Aboriginal people. Justice Brennan's interweaving is somewhat imperfect because, for some reason (which is not obvious), he would not allow the common law to recognise an alienation which is based on observed custom but not enforced by a sovereign power. Contrary to this view, the thesis of this paper is that there is no true dichotomy between the common law and the traditional laws and customs of an Aboriginal people. The better analysis is that the common law is an umbrella under which the local and general customs inherited from English legal history co-exist with the customs of the various Aboriginal societies of Australia. Australian common law is able to accommodate a multiplicity of cultures. The common law, in recognising Aboriginal customary law, is not juxtaposing itself against alien traditional laws and customs.

Obviously, prior to the colonisation of Australia, the common law which British citizens acknowledged and observed did not include any elements of Aboriginal customary law to be taken into account. Upon the colonisation of Australia, the common law applied in Australia and it accommodated the rights and interests of Aboriginal peoples that arise out of their laws and customs;<sup>121</sup> 'provided those laws and customs are not so repugnant to natural justice, equity and good conscience that sanctions under the new regime must be withheld'.<sup>122</sup>

The general analysis of law and custom in this paper also rejects the notion expressed by Brennan J that a right or interest based upon observed custom is not enforceable by the common law unless enforcement is provided for by a law enforced by a sovereign power.<sup>123</sup> It is rejected in so far as it implies the adoption of an Austinian analysis of law which requires a form of sovereign power to enforce law in order for law to exist.

### Partial statutory code

Following the *Mabo [No 2]* decision the Commonwealth Parliament enacted the NTA. Among its main objects was that of providing for the 'recognition and protection of native title'.<sup>124</sup> It enacted a statutory definition of native title rights and interests, which it describes in the heading to the definition as 'Common law rights and interests'.<sup>125</sup> As the High Court has pointed out, the NTA

118. In relation to the evolution of traditional laws and customs: see *Yorta Yorta Aboriginal Community v Victoria* [2001] FCA 45 [35], [43], [119] and [122]–[132].

119. *Yorta Yorta* [2002] HCA 58, [44].

120. *Mabo [No 2]* (1992) 175 CLR 1, 59–60.

121. *Ibid* 57; *Calder v Attorney-General (British Columbia)* [1973] SCR 313, 416 (Hall J).

122. *Ibid* 61 (Brennan J); *Idewau Inasa v Oshodi*, [1934] AC 99, 105.

123. Presumably Brennan J is there referring to a sovereign power which preceded that of the colonising sovereign.

124. *Native Title Act 1994* (Cth) s 3(a).

125. *Native Title Act 1994* (Cth) s 223.

does not deal with the ascertainment or enforcement of native title rights by curial process. It provides for the establishment of native title and recognises it and protects it...in accordance with the [NTA] (s 10). If actual or claimed native title rights are sought to be enforced or protected by court order, the party seeking that protection must take proceedings in a court of competent jurisdiction.<sup>126</sup>

In *Western Australia v Ward* the High Court also suggested that:

Paragraphs (a) and (b) of s 223(1) [of the statutory definition] indicate that it is from the *traditional* laws and customs that native title rights and interests derive, not the common law. The common law is not the source of the relevant rights and interests; the role accorded to the common law by the statutory definition is that stated in par (c) of s 223(1). That is the 'recognition' of rights and interests. To date, the case law does not purport to provide a comprehensive understanding of what is involved in the notion of 'recognition'.

There may be some laws and customs which meet the criteria in pars (a) and (b) of s 223(1), but which clash with the general objective of the common law of the preservation of and protection of the society as a whole, but the case law does not provide examples. Secondly, the statement in *Mabo [No 2]* that native title 'may be protected by such legal or equitable remedies as are appropriate to the particular rights and interests established by the evidence' is yet to be developed by decisions indicating what is involved in the notion of 'appropriate' remedies.<sup>127</sup>

It is open for the state to follow a similar approach to recognition as that taken in the NTA. The state may enact statutory criteria for recognition of Aboriginal customary law. Statutory provisions might establish mechanisms for the application of the common law and the provision of remedies in respect of the rights and duties which might be found to arise from Aboriginal laws and customs.

### 3. Problems and issues for recognition

Rob McLaughlin<sup>128</sup> points to a range of problems and issues to be confronted in approaching the recognition of Aboriginal customary law, such as:

- competing values: reciprocity and communitarianism versus possession and individualism; spiritual religious versus secular;
- separate systems of law and racial discrimination;
- lack of recognition of customary law offences;
- lack of jurisprudential study of Aboriginal law;
- regional variation of Aboriginal law;
- secrecy of some aspects of Aboriginal law; and
- unlawfulness of customary punishments under Criminal Codes and International Conventions.<sup>129</sup>

Referring to the findings of a number of historians and anthropologists, McLaughlin<sup>130</sup> states that:

The clash of Indigenous and settler cultural systems was 'a fundamental clash of principle, the outward showing of the most significant moral and political struggles in Australian history. The settlers were transplanting a policy of possessive individualism, hierarchy and inequality. Aboriginal society was reciprocal and materially egalitarian.... One or the other had to prevail'.<sup>131</sup>

This diametrical difference in philosophical basis is important in assessing the degree to which customary law can ever be recognized in Australia. 'Twenty three years ago', observed Kenneth Maddock in 1984 'the anthropologist WEH Stanner wrote that Aboriginal customary law conflicted in almost every respect with the root assumptions of Australian law. The two were irreconcilable in notions of tort and crime, in procedures of arrest and trial, in concepts of admissible evidence, and so on.<sup>132</sup>

Those views are necessarily an expression of generalisations. They are an assessment of how things may have stood historically in a general sense. They do not allow for the evolution of both Aboriginal society and the settler

126. *Fejo v Northern Territory* (1998) 195 CLR 96, 120-121 [22]; *Western Australia v Ward* [2002] HCA 28, [21].

127. *Western Australia v Ward*, *ibid*, [20]–[21] (footnote omitted).

128. McLaughlin R, 'Some Problems and Issues in the Recognition of Aboriginal Customary Law' (1996) 3(82) *Aboriginal Law Bulletin* 4, 7–9.

129. Including the *International Convention on Civil and Political Rights*, the *Convention Against Torture*, and the *Convention for the Elimination of Discrimination Against Women*.

130. McLaughlin, above n 155, 7–8.

131. Reynolds H, *The Other Side of the Frontier* (Middlesex: Penguin, 1981) 69–70.

132. Maddock K, 'Aboriginal Customary Law' in Hanks P & Keon-Cohen B (eds), *Aborigines and the Law* (Sydney: Allen & Unwin, 1984) 232–33.

society. For example, there has been a significant shift over the past half century towards international human rights which value egalitarianism in a way which may not have been the case at the time of the colonisation of Australia.

Much of what WEH Stanner may have regarded as 'root assumptions' of state law are more accurately described as matters of procedure, which are not fundamental to a legal system and, as will be discussed in more detail below, are not such as to prohibit any reconciliation between Aboriginal customary law and a state legal system. In any event, Maddock points out that Stanner attributed the 'irreconcilable conflict' to 'a kind of sightlessness [of whites] towards the central problems of what it is to be a blackfellow in the here-and-now of Australian life'.<sup>133</sup> Maddock noted 'decisive changes...in the politico-legal environment of Aborigines' since Stanner wrote to the point where it would 'no longer be possible to write quite as Stanner did'.<sup>134</sup> Maddock made reference to the Commonwealth Attorney General's reference in relation to Aboriginal customary law to the Australian Law Reform Commission as 'yet another symptom of benign and encouraging interest in traditional Aboriginal culture'.<sup>135</sup> Another two decades of politico-legal change since Maddock expressed those views and the current reference to the Law Reform Commission of Western Australia are indicative of a continuation of that trend.

## Groups versus individuals

McLaughlin says that:

[T]he need for maximum cooperation in Indigenous societies manifests itself in a 'greater emphasis on social identity, membership of a group and the obligations and responsibilities of individuals to conform to the expectations of others contrasting with the Western emphasis on individualism'.<sup>136</sup> It is group interests and rights, with the attendant importance of kinship law, which shape customary law.<sup>137</sup>

McLaughlin cites this as one of the elements of 'diametrical difference in philosophical basis' which 'is important in assessing the degree to which customary law can ever be recognised in Australia'.<sup>138</sup>

There are several problems with McLaughlin's analysis. Firstly, McLaughlin proceeds on an assumption that a problem in relation to the recognition of Aboriginal customary law lies in the limited degree to which it may be recognised or capable of recognition by a state system in Australia. However, there is no imperative to achieve a particularly high quantity of recognition of Aboriginal customary law. The goal of recognition of Aboriginal customary law is to incorporate only so much Aboriginal customary law into the state legal system as is compatible with according justice to the citizenry. That may mean that incorporation may achieve that end by the incorporation of Aboriginal customary law to a very limited degree only. It may be unnecessary for the state system and detrimental to Aboriginal culture to incorporate more than the minimum of Aboriginal customary law into the state legal system.

Secondly, group conformity is one of the underlying objectives of law, if one is to accept the analysis of those many jurists and anthropologists who count coercion as one of the defining elements of law.<sup>139</sup> For those who do not, such as Hans Oberdiek, it is at least a common element of laws within a legal system.<sup>140</sup> So that is not a relevant distinguishing element between law in a Western society and custom in an Aboriginal society. There is nothing to suggest that Aboriginal customary law is significantly different from state law in that respect.

Thirdly, the idea that Aboriginal customary law cannot be recognised by a legal system based in an English legal tradition because there are some inherent values which apply to Aboriginal law which clash with some inherent values of non-Aboriginal normative societies, may be somewhat exaggerated. It could be said to be a one-dimensional and naïve assessment of both Aboriginal and non-Aboriginal societies. Non-Aboriginal normative societies aspire to the common good or 'communitarianism' no less than do Aboriginal societies. The individual desire to possess things is able to be observed in Aboriginal and non-Aboriginal societies, and the assumption of a communal ethic in Aboriginal societies is not universal in all circumstances. It may be significant in some circumstances, but absent in

133. *Ibid.*

134. *Ibid.*

135. *Ibid.* 233.

136. Berndt RM, 'Traditional Concepts of Aboriginal Land' in Berndt RM (ed), *Sites, Rights and Resource Development* (Perth: University of Western Australia Press, 1981) 1, 3–4; see also 'The Berndts: A Select Bibliography' in Tonkinson R & Howard M (eds), *Going it Alone? Prospects for Aboriginal Autonomy* (Canberra: Aboriginal Studies Press, 1990).

137. McLaughlin, above n 128, 8.

138. *Ibid.* 7.

139. See, for instance, Bentham J, *Of Laws in General*, edited by HLA Hart (London: The Athlone Press of the University of London, 1970), 54; Austin, above n 107, 13–15; von Ihering R, *Law as a Means to an End*, translated by Husik I (Boston: The Boston Book Company, 1913) 176; Kelsen H, *General Theory of Law and State*, translated by Webert A (Cambridge: Harvard University Press, 1945) 29; Kant I, *The Metaphysical Elements of Justice*, translated by Ladd J (Indianapolis: The Bobbs-Merrill Company Inc, 1965) 36; and Raz, above n 28, 3.

140. Oberdiek H, 'The Role of Sanctions and Coercion in Understanding Law and Legal Systems' (1976) 21 *American Journal of Jurisprudence* 71, 71–72 and 75.

others. It is arguable that all societies tend to behave communally when there is an advantage to be gained from doing so. They desist when that is not the case. Within Aboriginal and non-Aboriginal societies there are individuals who conform to and desire to conform to communal aspirations. There are also those who do not. The degree of conformity, and aspiration of individuals to conform, varies over time.

Nicholas Peterson<sup>141</sup> points out that, while generosity and sharing are well-established features of hunting and gathering societies, a 'performative view of kinship' focuses on the giving and taking that is involved in producing and reproducing relationships. He suggests that such behaviour is 'a great deal more contingent, strategic and pragmatic than more received views of sharing and constructs generosity as much in terms of responding to demands as of spontaneous giving'.<sup>142</sup> He expresses the view that '[m]odernisation places pressure on sharing' and '[p]overty, discrimination and marginalisation may, in some circumstances, increase the intensity of sharing, while affluence and emerging consumer dependency ... start to reduce its frequency and nature'.<sup>143</sup> In other words 'communitarianism' in the form of an imperative to share is not based on an inherent characteristic of being Aboriginal. Sharing arises out of the socio-economic disadvantage which is commonly associated with being Aboriginal. It meets the needs which may arise out of that disadvantage.

Cape York Aboriginal leader and lawyer, Noel Pearson, warns against 'romantic foolishness' and 'utopian tendencies in...thinking about Indigenous people'.<sup>144</sup> He says that the 'idea that Aboriginal people desire to take themselves anywhere else than to the forefront of economic development in the global economic marketplace' is a problem; as is the 'romantic idea' that 'Aboriginal people must find a way other than "secularism, materialism and individualism"'.<sup>145</sup> This is not to deny what Pat Dodson is quoted above as saying about the 'centrality of community as the life centre' of Aboriginal societies; as against 'putting the individual before the community'. Aboriginal societies, like any organised society, may embrace a certain amount of individual benefit without discarding the importance of communal cooperation.

Beyond the issue of the sharing of material goods, there are a number of elements of the culture common to Aboriginal societies where customs oblige individuals to behave communally. Participation in traditional ceremonies, for example, is necessarily a communal activity. Custom prescribes the role of individuals within the ceremony. The rules of kinship of the particular society are generally highly significant in placing an individual in his or her role in the ceremony. An individual may also hold a particular role based on knowledge or experience in a ceremony or on a particular association with a place significant to the ceremony. While the ceremonies of Aboriginal societies are unique to the culture of those societies, the notion of communal activity, similarly reflected in ceremony, is not alien to non-Aboriginal societies. A wedding ceremony in Western culture, for example, has all the same characteristics described above which place individuals in communal roles. There is no irreconcilable philosophical difference in that regard between Aboriginal and non-Aboriginal culture.

While differences undoubtedly exist between Aboriginal cultures and the culture of those who have colonised Australia, difference is not synonymous with 'irreconcilable inconsistency'. The differences which exist between Aboriginal and non-Aboriginal societies (beyond those which might be said to be inconsistent with universal human rights) are not of a kind which ought to be regarded as inhibiting a state from accommodating the variety of culture which exists in the state within its legal system. Indeed a true legal system ought to be striving to make that accommodation to promote harmony among the cultural groups and individuals comprising the citizens of the state.

## Religious vs secular

McLaughlin argues that the relationship between religion and law is fundamentally different between the Indigenous and settler cultural systems. He says that:

[W]hilst Judeo-Christian morality does impact upon Australian law, the role of the spiritual in customary law is indivisible from its application. Land is a 'spiritual resource' held 'in trust for the deities and future generations'<sup>146</sup> – a concept foreign to the legal system.<sup>147</sup>

141. An anthropologist with significant Australian experience, 'From Mode of Production to Moral Economy: Sharing and Kinship in Fourth World Social Orders' (Paper delivered to the 9th International Conference on Hunting and Gathering Societies, Edinburgh, 9–13 September 2002). See <[www.abdn.ac.uk/chang9/1peterson.htm](http://www.abdn.ac.uk/chang9/1peterson.htm)>

142. *Ibid.*

143. *Ibid.*

144. Pearson N, 'A Fair Place in Our own Country: Indigenous Australians, Land Rights and the Australian Economy' (2004) 3(2) *Castan Centre for Human Rights Law Newsletter* 6.

145. *Ibid.*

146. Berndt, above n 136, 9.

147. McLaughlin, above n 128, 8. The majority judges in the High Court in *Western Australia v Ward* [2002] HCA 28, [14] said: 'As is well recognised, the connection which Aboriginal people have with "country" is essentially spiritual'. Further, Blackburn J in *Milirpump v Nabalco Pty Ltd* (1971) 17 FLR 141, 167 described the Aboriginal relationship to the land as a 'religious relationship'.

As Hoebel points out, a good many societies fervently believe that the gods and other supernatural forces are active and, often, determinative forces in their law systems. Hoebel, however, notes that it is possible to adopt the approach of the 'functional realist' and accept such beliefs as cultural realities, without needing to determine their empirical reality before recognising and applying those systems which otherwise satisfy the definition of law which has been discussed above.<sup>148</sup>

In any event, the so-called 'fundamental difference' to which McLaughlin points may not be so great or fundamental a difference as makes such matters of Aboriginal culture unable to be accommodated within the state legal system. The notion of property held in perpetual trust for charitable objects, which is well known in the state legal system, is strongly analogous to the notion of land being held for deities and future generations, to which McLaughlin refers.

Further, it is not accurate to proceed on an assumption that Aboriginal law is primarily or wholly religious and non-Aboriginal law is primarily or wholly secular. It is also not accurate to assume that there is a clearly understood dividing line between what is religious and what is secular. Much of what may be described as Aboriginal religion is a form of pantheism.<sup>149</sup> The distinction between secularism and pantheism is often elusive. Likewise, much non-Aboriginal 'secular' law is festooned with ritualistic trappings which accord it a 'religious' quality. It is still the case, for example, that the majority of evidence received in courts in the Western world is dependent for its veracity upon an oath which has a religious base, in the sense that it gains its influence in the legal realm from the supernatural.<sup>150</sup>

Moreover, 'religion' in its simplest form is to be found in devotion to a principle.<sup>151</sup> That may well be an adequate description of much of what some would describe as 'secular' law. After all the 'rule of law' is said to be based in a focus upon principle.<sup>152</sup> Raz notes that there exist '[c]ases of relatively stable and mutually recognised co-existence of secular and religious law in various countries [which] provide examples of different degrees of compatibility'.<sup>153</sup>

The dichotomy of 'religious' versus 'secular' which might be posited to describe Aboriginal versus non-Aboriginal law, therefore, does not have sufficient validity or effect upon the operation of a legal system to preclude recognition of Aboriginal customary law by a state legal system in Australia.

## Racial discrimination and equality within the law

It might be argued that any form of recognition of Aboriginal customary law is racially discriminatory and a breach of the principle of equality before the law. McLaughlin notes that the *Racial Discrimination Act 1957* (Cth) (RDA) s 9 makes it unlawful to

do any act involving a distinction, exclusion, restriction or preference based on race ... which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of any human right or fundamental freedoms.<sup>154</sup>

Section 10 of the RDA emphasises the ideal of equality before the law and the Convention on the Elimination of All Forms of Racial Discrimination (which the RDA was enacted to implement domestically) stresses the objective of equality of rights, notably the right to 'equal treatment before tribunals and all other organs administering justice'.<sup>155</sup>

Sir Anthony Mason said in *Walker v New South Wales*:

It is a basic principle of law 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 ... The presumption applies ... in the case of the criminal law, which is universal in its operation, and those aims would otherwise be frustrated.<sup>156</sup>

This is a general statement which needs to be understood in the context of the case which was being decided. The Chief Justice held that, in the face of the passage of criminal law statutes of general application in the State of New

148. Hoebel, above n 26, 261.

149. The term 'pantheism' is here used to refer to a belief system which holds that the ultimate reality is to be found in the universe (of which nature forms part) and that the living and dead are inseparable parts of the perceived universe.

150. See Hoebel, above n 26, 261.

151. Shorter Oxford Dictionary.

152. Walker G de Q, *The Rule of Law* (Melbourne: Melbourne University Press, 1988) 21, quoting Joseph Raz.

153. Raz, above n 28, 152.

154. McLaughlin, above n 128, 8.

155. Articles 2, 4 and 5; cited by McLaughlin, *ibid*.

156. (1994) 182 CLR 45, 49; (1994) 64 ALJR 111; (1994) 126 ALR 321, 323 (footnote omitted).

South Wales in exercise of its constitutional power, Aboriginal customary law of the Banjalung 'nation' of Aboriginal people could not exist as a separate legal system in relation to matters of criminal law, invalidating the common law in relation to Aboriginal people unless they accepted it. In those circumstances, the apparently absolute terms in which the statement of the Chief Justice might appear to suggest that the principle of equality before the law requires complete formal equality of sanctions is able to be understood as general statement which is open to explication in the nature of the following discussion.

## Substantive equality

It is a common error of analysis to confuse formal equality with an absence of discrimination. As John Chesterman has pointed out:

The principle of non-discrimination ... has never actually required identical treatment, something which has for many years worked to the detriment of Indigenous people ... [T]he RDA has never required that people of all races be treated equally. It has only required (section 9) that in certain strictly limited situations, racial grounds are not used as the basis for denying a person the enjoyment of a 'human right or fundamental freedom'.<sup>157</sup>

Chesterman argues that a recognition of the Aboriginal customary law which sanctions spearing, for example, does not challenge the tenet that the law is to be applied equally to all persons. Equality of treatment does not require that all persons, regardless of circumstances should receive exactly the same punishment for the same breach. He notes that one of the fundamental aspects of sentencing philosophy is the discretion to consider the particular circumstances of the offender. He suggests that the failure to take into account customary law in sentencing would provide a greater challenge to the rule of law, because it may result in Aboriginal persons being punished twice or more severely than a non-Aboriginal person for the same breach.<sup>158</sup>

Further, as the Race Discrimination Commissioner has said: 'Equality does not mean identical treatment without regard to concrete circumstances'.<sup>159</sup>

In its recent inquiry into Aboriginal customary law the NTLRC suggested that both the general law and Aboriginal customary law, in order to be recognised by the state, must be 'consistent with universally recognised human rights and fundamental freedoms'.<sup>160</sup>

As the ALRC<sup>161</sup> and NTLRC<sup>162</sup> have both noted, it is the notion of non-discrimination and the fundamental right to equality which drives and supports recognition of the customs and traditional laws of Aboriginal people which provide them with their cultural identity.

Chesterman has argued that:

[T]here are two broad concepts within the internationally recognised principle of non-discrimination that enable recognition of traditional rights, and that otherwise protect racially discriminatory programs that have been designed to improve the position of oppressed minorities.

The first is the international law concept of 'differential treatment'. This holds that some differing treatment of individuals on racial grounds will not constitute illegal discrimination where that discriminatory treatment is not 'invidious'. The 'reasonable differentiation' principle holds that the treatment of one racial group will not be discriminatory just because that treatment is different from the treatment received by another racial group ...

The second concept is the special measures exemption, according to which positive acts of discrimination are allowable where the purpose is intended to raise the status of an oppressed group.<sup>163</sup>

The Committee on the Elimination of Racial Discrimination under the Convention on the Elimination of all Forms of Racial Discrimination, in General Recommendation XIV on Article 1(1) of that Convention said that:

157. Chesterman J, 'Balancing Civil Rights and Indigenous Rights: Is There a Problem?' (2002) 8(2) *Australian Journal of Human Rights* 125, 134.

158. *Ibid* 142.

159. Race Discrimination Commissioner, *The CDEP Scheme and Racial Discrimination* (Sydney: Human Rights and Equal Opportunity Commission, 1997); Chesterman, above n 179, 135.

160. NTLRC, above n 11, [6.1], in response to a prerequisite for recognition of Aboriginal Customary law set by the terms of reference to its inquiry.

161. ALRC, above n 9, Summary Report, [37].

162. NTLRC, above n 11, [6.17].

163. Chesterman, above n 157, 134–35.

A differentiation of treatment will not constitute discrimination if the criteria for such differentiation, judged against the objectives and purposes of the Convention are legitimate or fall within the scope of Article 1, para. 4 of the Convention...In seeking to determine whether an action has an effect contrary to the Convention it will look to see whether that action has an unjustifiably disparate impact upon a group distinguished by race, descent, or national or ethnic origin.

Similarly, Judge Tanaka in the *South West Africa Cases* said that:

[T]he principle of equality before the law does not mean the absolute equality, namely equal treatment of men without regard to individual, concrete circumstances, but it means relative equality, namely the principle to treat equally what are equal and unequally what are unequal.<sup>164</sup>

A form of racial discrimination that is unlawful is where there is a lack of substantive equality. If a group does not have the opportunity to participate in the fundamental aspects of the society then it may be discriminated against unlawfully. But if, for example, different groups have different forms of property rights then one group is not being discriminated against in relation to the other by according recognition to each of those different forms of right. They are each participating in the universal right to own property. It is only if one group was to be arbitrarily deprived of the form of property to which they have been entitled that racial discrimination may occur which is inconsistent with international and domestic law.<sup>165</sup>

The existence of separate identifiable rights and interests held by one group of people or recognition of laws creating obligations among the members of an Aboriginal group is not the same thing as detrimental discrimination against the balance of the population who do not have those identified rights, interests or obligations.

## Beneficial discrimination

McLaughlin suggests that it is arguable that s 8 of the RDA, which provides the 'special measures' exception to acts which would otherwise contravene the RDA and the Convention, may not apply in relation to customary law. McLaughlin argues that:

The maintenance of a separate system of law for Aborigines would therefore be in breach of the RDA; and even if customary law's jurisdiction were made voluntary, it may be discriminatory in that only Indigenous Australians could apply to come under its terms.<sup>166</sup>

This poses the issue as to whether special consideration being given to a particular group within society is compatible with the rule of law or equal protection before the law. Can affirmative action benefit a formerly deprived group to redress past wrongs without inflicting new wrongs on others? Darlene Johnston says:

Reaction to the idea of collective rights is strongly negative in some quarters. Collective rights are seen as inherently dangerous and oppressive. This reaction stems from a perceived clash between individual rights and group rights. Collective and individual interests, however, are not inevitably antagonistic. The supposed antithesis seems to be based on a particular and intolerant conception of group rights.<sup>167</sup>

Section 8 of the RDA exempts from the proscriptions of that Act 'special measures' to which Article 1, paragraph 4 of the United Nations Convention on the Elimination of All Forms of Racial Discrimination applies. That paragraph of the Convention declares that:

Special measures taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals requiring such protection as may be necessary in order to ensure equal enjoyment or exercise of human rights and fundamental freedoms shall not be deemed racial discrimination.

So that, Aboriginal customary law recognition which results in 'positive discrimination' in favour of the rights of an individual as part of a racial group, is exempted from proscription in international law (adopted into Australian domestic law by the RDA). Section 8 may also operate to discriminate against and limit the exercise of rights by persons not part of the group favoured by the 'special measures'. For example, in *Gerhardy v Brown*<sup>168</sup> the High Court suggested that

164. (Second Phase) ICJ Rep. 1966, 219.

165. *Mabo v Queensland [No 1]* (1988) 166 CLR 186.

166. McLaughlin, above n 128, 8.

167. Johnston D, 'Native Rights as Collective Rights: A Question of Group Self-preservation' (1989) 2 *Canadian Journal of Law and Jurisprudence* 19.

168. (1984) 159 CLR 70.

it may validate a provision which interfered with the right of others to exercise freedom of access to land. In that case an Aboriginal group, Anangu Pitjantjatjara, had been granted a statutory title to their traditional lands which comprised a substantial part of the northern region of South Australia. The title carried with it a statutory right to exclude any person who was not Anangu Pitjantjatjara. The Court upheld the exercise of that right as a 'special measure' within the meaning of the RDA.

## Repugnancy

Sir Edward Grey, in his 1840 report on customary law, said: 'English law should supersede customary law in order to protect an Aborigine from the violence of his fellows'.<sup>169</sup>

An issue to which the ALRC and the NTLRC have each drawn attention is the potential danger of recognition of traditional law within Aboriginal communities resulting in an imposition upon individual Aboriginal persons of rules arising out of Aboriginal law which infringe rights that are available to an individual within the general law of Australia or would be regarded as a fundamental human right in international law. The ALRC suggested that recognition would not be racially discriminatory if:

- (a) it is a reasonable response to special needs of Aboriginal people affected,
- (b) is generally accepted, and
- (c) it does not infringe basic human and legal rights.<sup>170</sup>

But what of an individual detrimentally affected by the application of recognised Aboriginal customary law who is a member of the racial group whose law it comprises? Chesterman asks the question:

At what stage would a customary law punishment be seen as so serious a denial of the punished person's rights that intervention by the state would be justified? Or, to put it more generally, when do civil rights yield to Indigenous rights and vice versa?<sup>171</sup>

The NTLRC<sup>172</sup> discussed the notion of maintaining the principle of equality within the law, while allowing recognition of Aboriginal customary law within Aboriginal communities. It noted that it was considering enforcement of local laws which may be an aberration from the general common law and statute law and which may result in a detriment to an individual. It suggested that the key condition of recognition be that participation in the local legal system be voluntary. It recommended that an unwilling participant be entitled to opt out of, or be liable to expulsion from the community of those who do wish to be bound by local Aboriginal customary laws. So the NTLRC's answer to Chesterman's question is that an individual has the civil right to choose not to participate in a local Aboriginal society.

In parts of Africa colonised by the British there has been a pattern of legislation and proclamation 'that accorded recognition to tribal customs subject to the qualification that the custom was not "repugnant" to certain standards considered to be widely, if not universally, valid and applicable... The standards by which the customs were to be judged were of their compatibility with public policy, natural justice, equity, morality and good conscience' as those things were valued by Western culture.<sup>173</sup> Sheleff describes the repugnancy test as 'the acme of connection between law and morality'.<sup>174</sup> TO Elias notes that in applying the repugnancy test 'a constant dilemma is to strike a nice balance between what is reasonably tolerable and what is essentially below the minimum standards of civilised values in the contemporary world'.<sup>175</sup> Akintunde Olusegun Obilade is of the view that the dilemma has never been satisfactorily resolved.<sup>176</sup> While WB Harvey<sup>177</sup> suggests that the very idea of a repugnancy rule is incongruent in an independent country, for though the repugnancy rule was couched in general and universal terms, there can be little doubt that it was a reflection and an expression of a dominant culture imposing its rule, will and values over a subjugated people whose culture was forcibly made subordinate.<sup>178</sup>

169. ALRC, above n 9, 38; as cited by McLaughlin, above n 128, 8.

170. NTLRC, above n 10, 7.

171. Chesterman, above n 157, 131.

172. NTLRC, above n 11, [6.8].

173. Sheleff, above n 111, 122.

174. *Ibid* 123.

175. Elias TO, *The nature of African Customary Law* (Manchester: Manchester University Press, 1956) 174; Sheleff, above n 111, 127.

176. Akintunde Olusegun Obilade, *The Nigerian Legal System* (London: Sweet & Maxwell, 1979); Sheleff, above n 111, 127.

177. Harvey WB, *Law and Social Change in Ghana* (Princeton: Princeton University Press, 1968).

178. Sheleff, above n 111, 131.

The observation of the application of the repugnancy test in British African colonies should serve as a warning to current state legal regimes against the danger of adopting a narrow ethnocentric view in condemning as morally repugnant customary punishments on any other basis than a contravention of universally held human rights standards. The ALRC points out that 'the impact of human rights standards cannot be discussed in the abstract';<sup>179</sup> so, it is necessary to examine particular forms of customary punishments before condemning them as repugnant or otherwise inappropriate for recognition. The discussion below indicates that there are some customary punishments which may be contrary to universal human rights standards and others which are not, but are contrary to current state law.

### Customary punishments

Kayleen Hazelhurst asserts that 'Western Law has yet to come to grips with the reality that Aboriginals may face a second punishment from their own people on their release from prison'.<sup>180</sup> This is a reality which was consistently reported to the Commission during its consultations in the course of this reference. It was also a matter reported on by the ALRC.<sup>181</sup> Justice Mildren in *R v Minor*<sup>182</sup> made reference to the ALRC report when he took traditional punishment into account in sentencing the offender (although he did not condone such punishment).<sup>183</sup> In her Background Paper to the current reference, Victoria Williams<sup>184</sup> catalogues 13 cases in Western Australia and the Northern Territory where courts have taken traditional punishment into account in sentencing. In six of those cases the punishment had already taken place. In the balance of cases the court considered the possibility of a future punishment.

McLaughlin<sup>185</sup> suggests that '[p]enalties under customary law range between death, wounding, fear of sorcery, corporal punishment, and abuse or ridicule'.<sup>186</sup> Williams<sup>187</sup> summarises cases of traditional punishment that have become before Australian state and territory courts with penalties that include:

- spearing;
- physical beating;
- banishment;
- public meetings where the offender and victim agree to accept mutual responsibilities to each other and not breach the peace in the future;
- punishment of family members in lieu of the offender;
- punishment of family members in addition to the offender; and
- reprimand of an offender by a traditional elder.

There can be no moral objection to those forms of traditional punishment mentioned above which comprise a reprimand or an agreement as to mutual responsibilities. The other forms of penalty require more detailed consideration.

### Death penalty

While McLaughlin suggests that the death penalty is among the range of customary law penalties, Williams' summary of what has come before the courts reflects the present author's observation over the past three decades in various parts of Australia; that is, while the death penalty is spoken of as a penalty administered by past generations for a variety of transgressions of Aboriginal traditional law,<sup>188</sup> it is universally reported that such a sanction is no longer employed. It is, therefore, no longer an authorised or practiced penalty in any Aboriginal society in Australia.<sup>189</sup>

The apparent abandonment of the death penalty by Aboriginal societies is an instance of Aboriginal traditional law modifying to accord with international standards and the common law. As the court concluded in *Eleko v Government*

179. ALRC, above n 9, 141.

180. Hazelhurst KM, 'Australian Aboriginal Experiences of Community Justice' (1996) 6 *Law and Anthropology* 46; Sheleff, above n 111, 195.

181. ALRC, above n 9.

182. (1992) 59 A Crim R 227, 238.

183. See discussion of this case and issue by Williams, above n 15, 16–17.

184. *Ibid* 17.

185. McLaughlin, above n 128, 8.

186. Cox et al, 'Two Laws, One Land' in Bourke et al (eds), *Aboriginal Australia* (Brisbane: University of Queensland Press, 1994) 51.

187. Williams, above n 15, 18–20.

188. See Maddock, above n 132, 224–26, who recorded historical events of 'tribal execution' reported to him by Strehlow from the middle of the 19th century, 'within living memory' and in 1935 (a killing which was the subject of a trial in the Supreme Court at Alice Springs).

189. A possible exception is the unreported case of *R v Felton & Ors*, a 1976–77 Kalgoorlie case, in which the author represented nine Aboriginal men from Cundeelee Mission accused of murdering two other Aboriginal men. The linguist Wilf Douglas, in connection with a bail application for the accused, expressed the opinion that the killings may have been carried out in accordance with Aboriginal traditional law in response to breaches of law, such as revealing gender-restricted traditional law to women. The Crown ultimately withdrew the indictments in the course of the first trial due to a lack of reliable evidence and so Douglas' supposition was never tested and the accused never volunteered anything to that effect.

of Nigeria,<sup>190</sup> while a 'barbarous' custom like the killing of a deposed chief cannot be applied, if the custom is modified to a form of banishment, then it can be applied. Customs are not assumed to be frozen in time. They can change, and be recognised in their changed form, as long as they retain their essential character.<sup>191</sup>

It is unlikely, therefore, that it will be contended in any case in the future that a killing has been carried out in accordance with Aboriginal customary law. If there were such a contention in a regime that recognised Aboriginal customary law, the court would first be obliged to consider whether it did represent the current state of customary law of the relevant society. In view of the evidence referred to above, any justification based on such a contention would ultimately be rejected. Consistent with international human rights standards,<sup>192</sup> Western Australia's Criminal Code has placed the right to life above capital punishment, as a legitimate sanction.<sup>193</sup> There is thus an irreconcilable conflict with any customary law that asserts the contrary.

## Corporal punishment

When Aboriginal customary law dictates that a person be punished by a form of application of force, in order for the application of that customary law to be consistent with the common law and international law the person subject to punishment must voluntarily accept that form of punishment. As discussed below, that is a necessary pre-requisite, suggested by the ALRC, for recognition by the common law of such an Aboriginal customary law.

Basil Sansom describes a form of consensual punishment which he observed in the Northern Territory and which is consistent with what the present author has observed in the Eastern Goldfields/Western Desert of Western Australia:

The infliction of moral violence ... is a standard form for expressive activity ... the essence of moral violence is in the victim's passivity ... For the infliction to occur, the victim must be totally awed into passivity. Not attempting to escape, not retaliating, not protesting with words, not assuming a posture that protects the body, the victim by comportment answers the demand that he consents to the infliction.

[A]cts of moral violence have a judicial character. They are due punishments, executed with due attention to formal witnessing ... Because the moral violence can be promised, potential victims can be made to suffer the dread of anticipation ... made part of the awesome drama of due and publicly condoned inflictions ... [It is] moral violence precisely because it is the opposite of ... culpable causeless violence. When moral violence is inflicted, there are reasons and they are most heartily proclaimed. The blows are all backed by prior assertions ... During the performance, the intensity of each inflictive phase is tuned to public consent ... The violence in moral violence stops when witnesses communicate that further punishment will, for them, transform the act to make the sum of the inflictions not punishment, but 'damage' and a wrong. Shared responsibility takes these inflictions out of the category of interpersonal assault.<sup>194</sup>

Those punishments which involve consent to the application of force would generally have the consequence that the act of applying the force would not constitute an offence of assault.<sup>195</sup> An act that resulted in a wounding or bodily harm, however, even though consented to, would constitute an offence under the *Criminal Code* (WA). In relation to such offences the element of consent is irrelevant.<sup>196</sup> Although a person who consented to the same would be unlikely to make a complaint to the authorities, it would be open to a police officer to charge a person who wounded a consenting person in execution of customary law.

The position under the Criminal Code, which is reflective of the common law, is one which could be altered by statute to better accommodate Aboriginal customary law. A statutory provision could be enacted to provide a defence to a person administering traditional punishment. Appropriate pre-conditions for the application of such a defence would be:

- (a) that the punishment was voluntarily accepted;
- (b) that it was administered in accordance with Aboriginal customary law; and
- (c) that the punishment and the method of its administration did not contravene international law standards.

190. [1931] AC 662, 673.

191. NTLRC, *The Recognition of Aboriginal Customary Law as Law*, Background Paper No 2 (2003) 18.

192. The International Convention on Civil and Political Rights ('ICCPR'), Article 6.1 provides that: 'Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life'.

193. Article 6.2 of the ICCPR provides that: 'In countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the crime and not contrary to the provisions of the present Covenant and to the Convention on the Prevention and Punishment of the Crime of Genocide. This penalty can only be carried out pursuant to a final judgment rendered by a competent court'.

194. Sansom B, *The Camp at Wallaby Cross: Aboriginal Fringe Dwellers in Darwin* (Canberra: Australian Institute of Aboriginal Studies, 1980) 92–95, 97. See also Maddock, above n 132, 226–7.

195. *Criminal Code* (WA) s 222.

196. *R v Watson* (1986) 69 ALR 145, 148 (McPherson J).

One aspect of administration in accordance with Aboriginal customary law highlighted in *R v Minor*<sup>197</sup> was that it ought to be shown that the punishment had a positive benefit to the peace and welfare of the relevant community in order to distinguish it from a revenge attack.<sup>198</sup>

As mentioned above, Australian courts have so far generally adopted the approach of taking into account corporal punishment in accordance with Aboriginal customary law in sentencing and bail decisions, without condoning or sanctioning it.<sup>199</sup> One justification expressed by the ALRC for taking customary punishment into account is so as to avoid double punishment for the same offence.<sup>200</sup> The Law Reform Commission of Western Australia's consultations for the present reference suggest that it is a strongly held view of Aboriginal people in Western Australia that the courts should recognise the prospect of double punishment if they do not take account of the circumstances where Aboriginal customary law will take its course and punish either the offender or, in place of the offender, family members.

However, there may be a difficulty for a court in directly recognising the future administration of corporal punishment where the court has no control over the process of its administration. However, in *R v Wilson Jagamara Walker*<sup>201</sup> the court was prepared to involve itself indirectly in the supervision of the administration of the punishment by making it a condition of a sentence that the offender return to the community where the evidence suggested the punishment would be imposed and requiring that it be reported whether or not the punishment was administered.

In cases involving applications for bail where there was a prospect of corporal punishment in accordance with Aboriginal customary law, the Northern Territory courts have taken into account an added obligation declared under the *Bail Act 1982* (NT)—which similarly must be taken into account under the *Bail Act 1982* (WA)<sup>202</sup>—to protect the defendant from harm if released. The courts have generally only released a defendant on bail for the purpose of undergoing traditional punishment where the evidence does not suggest that the punishment would amount to a criminal act. That would generally arise because the recipient is legally able to consent to the punishment, which will not give rise to a wounding or bodily harm.<sup>203</sup> One would have thought that such circumstances would be rare, and that all cases involving the possibility of spearing would be excluded on that basis.

Even where the evidence suggested that wounding or bodily harm was not anticipated, a court would be expected to be cautious about giving its imprimatur to prospective corporal punishment. There have been instances of corporal punishment being administered in accordance with Aboriginal customary law where the consequences have exceeded what may have been permissible or intended, such as a thigh wound severing an artery, resulting in the death of the perpetrator of the original offence.<sup>204</sup>

The NTLRC recommended that the general law continue to apply 'overall' to the recognition of traditional punishments. This notion was elaborated upon by Justice Brennan in *Mabo [No 2]* when he said laws and customs would be recognised by the common law 'provided those laws and customs are not so repugnant to natural justice, equity and good conscience that sanctions under the new regime must be withheld'<sup>205</sup> and that recognition by the common law would be precluded if 'the recognition were to fracture a skeletal principle of our legal system'.<sup>206</sup> He also noted that:

The common law does not necessarily conform with international law, but international law is a legitimate and important influence on the development of the common law, especially when international law declares the existence of universal human rights.<sup>207</sup>

Given the concerns expressed by courts about authorising unlawful acts or failing in the duty of protection under the *Bail Act 1982* (WA), if the state does intend to respond favourably to the view of Aboriginal people that their customary laws which allow corporal punishment should be recognised so as to avoid double punishment, then a specific statutory authorisation to the courts to accommodate such punishments must be enacted.

197. (1992) 59 A Crim R 227, 228 (Asche CJ).

198. As reported in Williams, above n 15, 21, along with other cases in the Northern Territory in which that factor was relevant.

199. *R v Jungarai* (1981) 9 NTR 30; *R v Minor* (1992) 59 A Crim R 227 and other Northern Territory and Western Australian authorities referred to by Williams, *ibid* 16.

200. See ALRC, above n 9; Williams, *ibid* 16.

201. (1994) 68 (3) *Aboriginal Law Bulletin* 26; Williams, *ibid*, 21.

202. Schedule 1, Part C, cl 1(iv)(b).

203. Williams, above n 15, 5.

204. For example, the author can recall an incident at Blackstone in the Western Desert in 1979, where corporal punishment was administered by stabbing the perpetrator in the thigh and resulted in him bleeding to death. The person who administered the punishment was subsequently charged with manslaughter. It may have been that the traditional process was fatally adulterated in that instance by the use of a knife rather than the usual traditional implement, a spear (which may not have caused a fatal injury), and the ingestion of alcohol.

205. *Mabo [No 2]* (1992) 175 CLR 1, 61.

206. *Ibid* 43.

207. *Ibid* 42.

The defence proposed in relation to a wounding or bodily harm carried out in conformity with Aboriginal customary law ought to be qualified so as to comply with international standards and thus with the common law. It might be qualified so as not to authorise 'cruel, inhuman or degrading treatment', contrary to the International Convention on Civil and Political Rights, Article 7. The manner of its administration is likely to determine whether or not the punishment would infringe such a qualification. The voluntary subjection of the person receiving the punishment to the form of punishment would go a long way toward negating any cruel, inhuman or degrading elements of the act. The NTLRC suggested that what is cruel, inhuman or degrading is to be determined 'solely by cultural perspectives'.<sup>208</sup>

The *Bail Act 1982* (WA) would also need to be amended in a similar way to qualify the duty of protection of the defendant as subject to a power to allow bail where it may result in corporal punishment in accordance with Aboriginal customary law which was voluntarily accepted and did not constitute cruel, inhuman or degrading treatment.

## Social ostracism

It is a common suggestion, where Aboriginal communities have a degree of isolation from the broader non-Aboriginal community and Aboriginal community members have some say over the punishment of offenders within the community, that the form of punishment should be to banish the offender from the community. Often the suggestion will be that the offender be banished to a more remote outstation from the main community.<sup>209</sup> The obvious immediate effects are to remove the offender from contact with the community which has been offended by the conduct and to deprive the individual of the social supports and creature comforts of being part of the communal group. Usually the outstation will be supervised by a senior member of the community, who may put the offender to work or teach the offender the necessity of conformity to society's rules. That necessity is brought into sharp relief when one is stripped of one's accustomed social supports and creature comforts.

This approach mirrors the teaching process which typically is applied in Aboriginal societies where young men undergo a ceremonial initiation into adulthood. Young initiates are typically isolated from their families in an initiates' camp, established away from the general community. In those camps they are physically tested and taught the laws of proper behaviour and religious observance, as part of the process of becoming responsible adults within their society.<sup>210</sup>

McLaughlin has argued that 'exile cannot be countenanced due to the Convention on Civil and Political Rights';<sup>211</sup> however, he does not elaborate further. He may have had in mind Article 12.1 of that Covenant, which provides that: 'Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.'

If an Aboriginal society was to sanction breaches of customary law by exiling an individual from their society that would not ordinarily result in the person being exiled from the state.<sup>212</sup> It may, however, restrict how the individual would otherwise exercise a right to liberty of movement and choice of residence within the state; and thus, comprise a deprivation of that liberty. However, that right is not absolute, as indicated by Article 19.1 which provides that: 'No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.'

So that if state law recognised grounds and a procedure for an Aboriginal society to exile a member from that society, then any deprivation of liberty which might follow would fall within a recognised exception to the general rights declared by the Covenant.

Exile from an Aboriginal society is really just a variation on the deprivation of liberty which is manifest in the concept of imprisonment; a common sanction of the English legal system. It comprises a particular form of exile or social

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208. NTLRC, *International Law, Human Rights and Aboriginal Customary Law*, Background Paper No 4 (2003) 34.

209. An example of this was referred to during consultations with Aboriginal people: Law Reform Commission of Western Australia, *Thematic Summaries of Consultation – Pilbara*, 6–11 April 2003.

210. The present author's first observation of a court recognising such an approach in sentencing was as counsel appearing for an Aboriginal juvenile before Stipendiary Magistrate David McCann in the Kimberley in 1978. Evidence was given in the Children's Court at Halls Creek which convinced the magistrate to travel many miles South to Aboriginal-owned Bililuna Station to confer with senior lawmen (bedecked in traditional ochre and ceremonial costumes) who assured him that if that the young offender was compelled to reside at Bililuna they would put him through 'hard law'. The magistrate made an order to that effect.

211. McLaughlin, above n 128, 8.

212. The Convention is referring to a national 'state', but for the purposes of a consideration of the State of Western Australia's jurisdiction, the state referred to here is the State of Western Australia, as one of the federal components of the international sovereign state comprising the Commonwealth of Australia.

ostracism. In *R v Miyatawuy*<sup>213</sup> the Court took into account the fact that the offender was banished by her local community to an outstation as a mitigating factor, and described it as akin to a supervised good behaviour bond.<sup>214</sup>

The NTLRC also regards social ostracism as a non-legal form of sanction, and apparently regards that as comprising a distinction between 'custom' and 'law'.<sup>215</sup> In the author's view the form of sanction is not a sufficient basis for that distinction to be drawn. The jurist Oberdiek, for example, notes that ostracism may be a highly effective sanction. He does not distinguish between that form of sanction and any other as creating a dividing line between what is law and what is not law.<sup>216</sup>

## Shame

Sheleff has observed that anthropologists, psychologists, penologists and criminologists have developed the thesis of a dichotomy between two different kinds of culture:

- 'guilt-cultures', where the individual is aware from within of aberrant behaviour irrespective of any conviction; and
- 'shame-cultures', oriented to the exposure of the wrong-doer to the opprobrium of the community, particularly the victim, resulting in a sense of wrongdoing.<sup>217</sup>

Newton-Cain points out that in the Pacific Island region a prominent method of sanction for criminal offenders is community shaming.<sup>218</sup> Community shaming involves the community in the process. The offender's family, as a subgroup of the community, may take collective responsibility for the harm caused by an individual member of the family and for the rehabilitation of that individual.

Community shaming is a common form of sanction in Australian Aboriginal societies. It has been recorded as part of the normative system of the society of the 'Western Desert bloc',<sup>219</sup> which occupies the central desert areas of Australia<sup>220</sup> including a substantial part of Western Australia. The practice of shaming was also widely reported in the consultations carried out by the Commission in investigating this reference in many parts of Western Australia.<sup>221</sup>

Relying on the work of Nancy Williams, Sheleff suggests that corporal punishment, in the form of spearing, may be part of a process of re-integrative shaming in Australian Aboriginal communities.<sup>222</sup> The reports of consultations carried out by the Commission under this reference indicate a widespread practice in Western Australian Aboriginal societies of spearing and other forms of corporal punishment of individuals who may have killed another community member. In the absence of the individual perpetrator it is widely understood that members of the family of that person may be subjected to the corporal punishment. The fact that the corporal punishment is obviously not directly proportionate to the offence of unlawful killing and that it may be meted out to family members suggests that it is a form of 're-integrative shaming'. Another description would be the purging of family responsibility, resulting in reconciliation of the community or society. In *R v Corbett*, for instance, the court heard evidence that 'payback' was a practice of healing with the purpose in that case of restoring the relationship between the offender and the victim.<sup>223</sup>

The common law, on the other hand, tends to isolate the offender from the community and is said by Mark Findlay to require the individual to restore the social balance through individual guilt and shame.<sup>224</sup> However, in *State of Western Australia v 'JJS' (A Child)*<sup>225</sup> the Supreme Court of Western Australia confirmed the power under s 56 of the *Young Offenders Act 1994* (WA) to order that the parents of juveniles pay compensation – in that case for acts of arson which destroyed the homes of other families within a rural community. This suggests that the tendency of the common law of which Findlay speaks is not a necessary limitation upon state law.

213. (1996) 135 FLR 173.

214. Williams summarises this and other cases in which community banishment has been taken into account in sentencing: see Williams, above n 15, 19.

215. The author reiterates the argument above which rejects any distinction between 'custom' and 'law' of the kind which is made by the NTLRC.

216. Oberdiek, above n 140, 76.

217. Sheleff, above n 111, 305.

218. Newton-Cain, above n 38, 48–68.

219. From a supplementary report provided to the court in *Wongatha People v Western Australia* (Federal Court No WAG 6005 of 1998). Document on file with author.

220. Berndt R, 'The Concept of "The Tribe" in the Western Desert of Australia' (1959) *Oceania* 81, 84–106; Tonkinson R, *The Mardudjara Aborigines: Living the Dream in Australia's Desert* (New York: Holt, Rinehart & Winston, 1978) 27–28.

221. The same was also noted by Moynihan J in relation to the Meriam society of the Torres Strait.

222. Sheleff, above n 111, 311; Williams N, *Two Laws: Managing Disputes in a Contemporary Aboriginal Community* (Canberra: Australian Institute of Aboriginal Studies, 1987).

223. Williams N, *ibid* 21.

224. Findlay M, 'Crime, Community Penalty and Integration with Legal Formalism in the South Pacific' (1997) *Journal of Pacific Studies* 145, 148–49.

225. [2004] WASC 81 (22 April 2004).

The notion that the 'Western' or English legal system which Australia has inherited is distinguishable from the system of Aboriginal customary law because one is based on a 'guilt culture' and the other is based on a 'shame culture' does not appear to the author to be supported by modern day experience or anything inherent in the legal systems in question. The secular state legal system appears to the author to be strongly based on the exposure of the wrongdoer to public opprobrium. Although the word 'guilt' is used in criminal proceedings, and is applied to the individual wrongdoer, it does not signify any necessary individual awareness of aberrant behaviour. It is applied to the public declaration by the authorities of wrongdoing by an individual. There is very limited significance attached to whether the individual has a personal sense of guilt. An individual may marginally mitigate a penalty by indicating remorse, but that is not a sense of guilt which is independent of a conviction. In that sense the state legal system is predominantly indicative of a 'shame culture'. Christian religions, by way of contrast, have a significant 'guilt' ethic, manifested in self-identification and confession of aberrant behaviour. That notion is not manifest in the state legal systems of societies which have a predominant Christian membership; at least not to the extent that it has any obvious impact on the legal system. One would have thought that a 'guilt culture' is the antithesis of a criminal legal system which proclaims that a person is innocent until proven 'guilty'.

## Non-recognition of customary law offences and remedies

Not everything which is regarded as an offence under Aboriginal customary law has an equivalent provision in the Criminal law of the state which would outlaw the same behaviour or subject it to a criminal sanction. Based on different cultural values, Aboriginal customary law may draw the line differently from the current content of state law when identifying:

- (a) behaviour which may be tolerated by the society but for which no sanction will be imposed (though it may be deserving of some rebuke as being in poor taste or bad manners); and
- (b) behaviour which is deserving of a society-imposed sanction.

Likewise, not every method of social control which exists in one culture or society will exist in every other culture or society. Sorcery, for example, is still an important part of the social control system of most viable Aboriginal societies in the state. Twenty-first century Western societies, on the other hand, do not generally expect persons they recognise as having the mystical skills of a sorcerer to effect social control within the society. The modern mainstream Western society equivalent is more likely to be described as a judge or religious leader.

McLaughlin<sup>226</sup> puts the view that customary law offences such as 'failure to share food, to avoid particular relations, [or] perform rituals',<sup>227</sup> as 'sins of omission', are 'unsustainable under even the most generous approach to Australian law'.<sup>228</sup> McLaughlin<sup>229</sup> also suggests that the fact that Aboriginal customary law includes a belief in malevolent sorcery and a use of counter-sorcery<sup>230</sup> 'complicate any recognition of customary law under general law'.

Firstly, there is no need to assume, as McLaughlin seems to, that recognition of Aboriginal customary law requires recognition of all aspects of Aboriginal custom or enforcement of all aspects of Aboriginal custom by a state legal system. For example, it is unlikely that there is any need or inclination towards state law recognising sorcery. For those who believe in its effects, it will continue to be part of their lives, regardless of anything that a state legal system may have to say about it, either positive or negative.

Secondly, in order for a state legal system to adopt a principle of recognition of Aboriginal customary law, the state legal system need only have in place a capacity to recognise such Aboriginal customary laws as impact upon litigation before the court. Day-to-day matters of personal behaviour in accordance with a society's customs (as in all societies) are not all likely to come before the courts. It is only when they do that the court will need to investigate, on the basis of the evidence before it, what the relevant custom is and what action (if any) it should take to recognise it. It would generally do so applying, where appropriate, the repugnancy test discussed above.

For example, to use a custom cited by McLaughlin, it may be that, in a trial for assault, a person alleges provocation by the failure of a relation to comply with an obligation to provide food. An assessment of whether such a response

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226. McLaughlin, above n 128, 8.

227. Cox, above n 186, 50–51.

228. McLaughlin, above n 128, 9.

229. *Ibid.*

230. Reynolds, above n 6, 72; Maddock, above n 132, 219.

satisfies the *Criminal Code* (WA) test of provocation<sup>231</sup> may involve reaching a conclusion, on the basis of evidence, as to whether such a custom exists. A recognition that it does would then provide a basis for coming to a view as to whether the conduct was of such a nature as to deprive an ordinary person, who adheres to such a custom, of the power of self control.

## Regional variation

McLaughlin<sup>232</sup> cites as a hurdle to the recognition of customary law the lack of any systematic study of Aboriginal legal codes. Recognition of Aboriginal law does not require an immediate familiarity with all aspects of Aboriginal law or a body of jurisprudential writing on the subject. That is particularly so because customary law can be expected to vary between local areas and social groups. Recognition may therefore reflect customs which are specific to a local group.<sup>233</sup>

As Woodman points out, 'if a customary legal order is defined as the totality of customary norms which are observed by a population, it is unusual to find a customary law for which the population amounts to as many as a thousand'.<sup>234</sup> That is broadly consistent with this author's observations of the normative social groups which are emerging from the presentation of evidence in support of native title claims in Australia over the past decade. As Mantziaris and Martin have said:

Indigenous societies are typically characterised by an intense 'localism', in which social, economic and political allegiances are constructed around locally based and small-scale forms and institutions, rather than in large all-encompassing institutions based on larger socio-economic units. Consequently, Aboriginal authority operates in contexts and domains, which rarely extend beyond relatively small-scale groupings. Who has authority, over which matters, and in which contexts, may itself be contested, particularly for those groups with a long history of contact with non-Aboriginal society.<sup>235</sup>

The appropriate approach in the process of recognition of Aboriginal customary law, therefore, is much the same as for the development of the law generally. The principal ingredient in a legal system is a dispute resolution process. Where a dispute arises in relation to a particular matter, the legal authority charged with the resolution of the dispute must ascertain the relevant customary law and apply it to the resolution of the dispute. As Brennan J suggested in *Mabo [No 2]*, where Aboriginal customary law is recognised by the common law, rights and interests under that law

may be protected by such legal and equitable remedies as are appropriate to the particular rights and interests established by the evidence [as] determined by the laws and customs of the Aboriginal inhabitants.<sup>236</sup>

He further suggested that:

The recognition of the rights and interests ... is not precluded by an absence of communal law to determine a point in contest between rival claimants. By custom, such a point may have to be settled by community consensus or in some other manner prescribed by custom. A court may have to act on evidence which lacks specificity in determining a question of that kind.<sup>237</sup>

## Variety or uniformity

Woodman suggests that the recognition of Aboriginal customary laws:

- means that state laws treat the institutions or norms of customary law as if they were institutions or norms of state law and are enforced by the state's institutions;
- may empower people to control events in their localities; and
- may provide for the resolution of disputes between community members in accordance with a customary procedure.<sup>238</sup>

231. *Criminal Code* (WA) s 245.

232. McLaughlin, above n 128, 9.

233. *Ward v Western Australia* (1998) 159 ALR 483.

234. Woodman, above n 112, 10.

235. Mantziaris C & Martin D, *Native Title Corporations: a Legal and Anthropological Analysis* (Sydney: Federation Press, 2000) 40. Contention over authority and rights is not peculiar to Aboriginal societies with a long history of contact with non-Aboriginal society. The Meriam people were found by Justice Moynihan in his determination of facts on remitter from the High Court in *Mabo v Queensland* (unreported, 16 November 1989) to be a highly contentious society, despite its relative isolation from non-Aboriginal society.

236. *Mabo [No 2]* (1992) 175 CLR 1, 61–63.

237. *Ibid.*

238. Woodman, above n 112.

However, he acknowledges that Aboriginal customary laws exist as law outside of, and prior to, state law, are not a creation of the state and do not trace their origins to colonisation. He also rejects the centralist claim that law is, and should be the law of the state, uniform for all persons, exclusive of all other law and administered by a single set of state institutions.<sup>239</sup> As Raz points out, while a legal system espouses the ideal of being comprehensive in its impact within the society in which it operates, there remains room for co-existing normative systems which are not in conflict.<sup>240</sup>

Woodman appears to suggest that while 'recognition' institutionalises Aboriginal law as a part of state law it may still accord the possibility of local variation. The notion of local variation is not at all foreign to the common law, as is suggested above, in relation to the local customs of English law which have been recognised by the common law. The various forms of recognition discussed above, such as incorporation of some laws, acknowledgement of other laws, as well as the co-existence of laws which are not in conflict in continuing plural systems, allow for a balance between uniformity and variety in the process of recognition of Aboriginal customary law.

## Proof of custom

It is a commonly held view that the fact that Aboriginal culture is largely orally transmitted by its adherents impedes recognition of Aboriginal customary law.<sup>241</sup> However, much customary law has its origins in non-written forms. The laws of evidence in English legal tradition have risen to the occasion for much of its history in finding techniques to allow for the proof of custom. Thus, history shows that custom may be proved by evidence which is direct, circumstantial or hearsay.<sup>242</sup>

Direct evidence may be based on particular instances of the exercise of the custom or on the observation of many instances of the exercise of the custom. Evidence of a comparable custom to the one in question is circumstantial evidence supporting the existence of the custom. As to hearsay evidence of custom, Moynihan J in the *Mabo*<sup>243</sup> determination and Blackburn J in *Milirrpum v Nabalco*<sup>244</sup> accepted as an exception to the general rule against hearsay, evidence of the declarations of deceased persons concerning public or general rights. It was on that basis that evidence of native title claimants was held to be admissible in those cases to prove the laws and customs upon which their rights were based. Further, both customary rights and customary liabilities may be proved by reputation evidence of local matters of generally ancient origin in which the community are interested.<sup>245</sup>

Once a custom has been proved with sufficient frequency in other cases the courts are entitled to take judicial notice of it.<sup>246</sup> However, it is not always easy to say when a custom has been recognised with sufficient frequency to become the subject of judicial notice.<sup>247</sup> In relation to Aboriginal customary law, great care would need to be exercised in ensuring that, in taking notice of previous determinations of custom, for the purposes of a current matter, the court, in each instance, is dealing with the same Aboriginal society and the same normative system.

That position is declared by statute in Nigeria where the *Evidence Act* provides that –

- (1) A custom may be adopted as part of the law governing a particular set of circumstances if it can be noticed judicially or can be proved to exist by evidence. The burden of proving a custom shall lie upon the person alleging its existence.
- (2) A custom may be judicially noticed by the court if it has been acted on by a court of superior or co-ordinate jurisdiction in the same area, to an extent which justifies the court asked to apply it in assuming that the persons or the class of persons concerned in that area look upon the same as binding in relation to circumstances similar to those under consideration.<sup>248</sup>

The Nigerian legislation then declares that the evidence of custom may come from Chiefs and others with special knowledge of local customs or authoritative books. Such declaratory legislation does not advance the current position in law, but may be educative for those who have not previously thought of such matters.

239. Griffiths J, 'What is Legal Pluralism?' (1986) 24 *Journal of Legal Pluralism* 1.

240. Raz, above n 28.

241. McLaughlin, above n 128, 9.

242. Heydon JD, *Cross on Evidence* (Sydney: Butterworths, 1996), [41120].

243. *Mabo v Queensland* [1989] QR73.

244. (1971) 17 FLR 141.

245. Lord Campbell in *R v Bedfordshire (Inhabitants)* (1855) 119 ER 196, 198 (QB).

246. Heydon, above n 242, [3050]. See also the comments of the Privy Council in *Angu v Attah* (1874–1928) P 43.

247. *Ibid.* See also *Majeau Carrying Co Pty Ltd v Coastal Rutile Ltd* (1973) 129 CLR 48, 54–60.

248. *Evidence Law* (Lagos Laws, 1973, cap. 39) 14(1) and (92); *Evidence Law* (NN Laws 1963, Cap 40); *Evidence Law* (EN Laws, 1963, Cap 49); and see Sheleff, above n 111, 380.

## Encoding rules of evidence

Within the jurisdiction of Western Australian courts the rules of evidence are largely determined by the common law. The *Evidence Act 1906 (WA)* deals with a miscellany of topics that supplement the basic common law precepts of the law of evidence. However, it does not deal specifically with custom or with the rules of hearsay other than in relation to the proof of documents, in particular business records. It contrasts with the *Evidence Act 1995 (Cth)*, *Evidence Act 1995 (NSW)* and *Evidence Act 2001 (Tas)* which are more akin to an encoding of the laws of evidence. The Commonwealth, NSW and Tasmanian Acts adopt and modify the common law rules in relation to evidence. For example, s 74 of each of those Acts provides that hearsay does not apply to evidence of reputation concerning the existence, nature or extent of public or general rights.

The State of Western Australia would do well to consider enacting an encoding *Evidence Act* with a similar content to that of the Commonwealth and the States of New South Wales and Tasmania. In the absence of such an approach, provisions that are particularly relevant to the proof of customary law might be appropriately inserted in legislation dealing specifically with the recognition of Aboriginal customary law.

## Opinion evidence

In its report on the recognition of Aboriginal customary law, the ALRC observed that evidence of Aboriginal customary law is normally given in the form of opinion evidence.<sup>249</sup> Under the common law, opinion evidence can only be given by a suitably qualified expert. In *Milirrpum v Nabalco*,<sup>250</sup> for example, evidence was given by highly qualified anthropologists expressing opinions as to the social organisation of Aboriginal clan groups, based in part on statements by members of the groups.

Opinion evidence must be based on proven fact.<sup>251</sup> The *Evidence Act 1995 (NSW)* s 76 and *Evidence Act 1995 (Cth)* s 76(1) reflect the common law in disallowing evidence of an opinion to prove the existence of a fact (the opinion rule), but ss 78 and 79 respectively of each Act provide that:

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

In *Harrington-Smith on behalf of the Wongatha People v State of Western Australia [No 7]*,<sup>252</sup> *Daniel v State of Western Australia*<sup>253</sup> and *Lardil, Kaidalt, Yangkaal, Gangalidda Peoples v State of Queensland*<sup>254</sup> the Federal Court applied the *Evidence Act 1995 (Cth)* to questions of the admissibility of hearsay evidence and expert anthropological evidence tendered to prove the existence of native title in accordance with traditional laws and customs. The statutory provisions proved to be an adequate mechanism to that task, taking the place of application of the common law rules.<sup>255</sup>

## Dispensation from the rules of evidence

When the NTA was being enacted into law in 1993 the late AR (Ron) Castan QC, who had been senior counsel for the plaintiffs in the Mabo case, impressed upon the then Attorney General, Senator Gareth Evans, the difficulty which the plaintiffs in that case faced in presenting evidence of custom. In the vicinity of 300 objections were made to the evidence given by Eddie Mabo of what his grandfather had told him about the laws and customs of the Meriam people and the rights and interests he had under the same, on the grounds that it was hearsay. Detailed argument had to be mounted as to the various exceptions to the hearsay rule at common law which justified admission of the evidence.<sup>256</sup> The Commonwealth Parliament took Castan's concerns into account in enacting s 82 of the NTA. That section provided that, in conducting proceedings for the determination of applications for native title:

(1) The Federal Court must pursue the objective of providing a mechanism of determination that is fair, just, economical, informal and prompt.

249. ALRC, above n 9, [628]–[632].

250. (1971) 17 FLR 141.

251. Odgers S, *Uniform Evidence Law* (Sydney: LBC Information Services, 4th ed., 2000), [79.6]; *Ramsay v Watson* (1961) 108 CLR 642.

252. [2003] FCA 893.

253. (2000) 178 ALR 542.

254. [2000] FCA 1548.

255. *Milirrpum v Nabalco Pty Ltd* (1971) 17 FLR 141, 161; McIntyre G, 'Proving Native Title' in Bartlett R & Myers G (eds), *Native Title Legislation in Australia* (Perth: Centre for Commercial and Resources Law, 1994) 121.

256. See McIntyre, *ibid*; Keon-Cohen B, 'Some Problems of Proof: The Admissibility of Traditional Evidence' in Stephenson MA & Ratnapala S (eds), *Mabo: The Native Title Legislation* (St Lucia: University of Queensland Press, 1993) 84–103.

- (2) The Court, in conducting proceedings, must take account of the cultural and customary concerns of Aboriginals and Torres Strait Islanders.
- (3) The Court, in conducting proceedings, is not bound by technicalities, legal forms or rules of evidence.<sup>257</sup>

However, this provision was amended in 1998 by the repeal of sub-s (3) and the replacement of sub-s (1) with that the following:

The Federal Court is bound by the rules of evidence, except to the extent that the Court rules otherwise;

As well, the following proviso was added to sub-s (2):

but not so as to prejudice unduly any other party to the proceedings.

Such a provision as that which appeared in the original s 82 of the NTA is not necessary in order to prove custom. Custom can be proven in accordance with the common law, in particular by resort to the exceptions to the rule against hearsay which allow evidence of reputation in relation to public or general rights, evidence of pedigree and expert opinion evidence. The real question is whether it is desirable in the interests of the administration of justice that there be a special provision which facilitates the proof of custom by means which are less constrained than the technical requirements of the common law in relation to the proof of custom.

The *Sentencing Act 1995* (WA) s 15 provides that 'a court sentencing an offender may inform itself in any way it thinks fit'. In sentencing decisions, therefore, courts in Western Australia are not bound by the common law rules of evidence.<sup>258</sup> The effect of this provision is reflected in the variety of ways in which the courts have received information of Aboriginal customary law in the course of making sentencing decisions. In her Background Paper to this reference, Victoria Williams notes examples in the following categories:

- Evidence of elders during the sentencing process;
- Evidence of an anthropologist and an elder;
- A written statement;
- Evidence at trial of the observations of a police officer;
- Information from defence counsel accepted by counsel for the Crown; and
- Submissions by defence counsel.<sup>259</sup>

Justice Wheeler suggested in *R v Gordon*<sup>260</sup> that in order to take into account traditional punishment, for sentencing purposes evidence about the nature of the punishment would generally be required.

An appropriate general statutory relaxation of the complex common law requirements for the proof of Aboriginal customary law may be an amalgam of the provisions in the NTA, such as a section providing that:

A court, in determining matters of Aboriginal customary law, is not bound by the rules of evidence, except when a failure to abide by the rules of evidence would unduly prejudice a party to the proceedings.

Where the state is a party to the proceedings, as in criminal matters, then the interest it represents is the public interest. A provision of the kind suggested would allow for the balancing of the interest of a person seeking to prove Aboriginal customary law with any public interest in requiring that the rules of evidence be applied. The role of the state in criminal proceedings, as representative of the public interest, is probably sufficient to ensure that no injustice arises from the variety of methods which are open to the court under the *Sentencing Act 1995* (WA) of informing itself as to matters of Aboriginal customary law.

Administrative tribunals, which are not bound by the rules of evidence, are governed by the common law rules of procedural fairness in the manner in which they receive evidence. The primary focus is usually upon the weight to be accorded to evidence, rather than its form. Under the *Aboriginal Land Rights (Northern Territory) Act 1975* (NT), for instance, the Aboriginal Land Commissioner, who is not bound to apply the rules of evidence, makes findings of fact, based on the weight of the evidence, in relation to Aboriginal customary law concepts set out in the Act, including the persons who comprise 'local descent groups', based on 'spiritual affiliation' and 'spiritual responsibility' to sites and

257. Similar provisions are a common feature of legislation governing the conduct of administrative tribunals. See the discussion on this subject below.

258. The provision has a similar effect to the original NTA s 82 provision.

259. Williams, above n 15, 11–13.

260. [2000] WASCA 401, [22]; Williams, *ibid* 9–10.

land, and rights to forage under Aboriginal tradition. Aboriginal people give evidence orally and in the form of song, dance and other ritual performance. A claim book is prepared, usually by an expert anthropologist, which sets out an anthropological analysis applying the statutory concepts to the facts of the particular case.<sup>261</sup> The practice of the Northern Territory Aboriginal Land Commissioner could be modified for application to the exercise of the sentencing power under s 15 of the *Sentencing Act 1995* (WA) or if a general dispensation from the rules of evidence applied to the presentation of evidence of Aboriginal customary law.

A general dispensation provision of the kind suggested above is similar to the effect of s 136 of the *Evidence Act 1995* (Cth) which provides that the court 'may limit the use of the evidence if there is a danger that the particular use of the evidence might ... be unfairly prejudicial to a party'. Serious consideration should be given to adopting a statutory provision of that kind in dealing with proof of Aboriginal customary law in the State of Western Australia.

### Secret/gender restricted information

The notion of secrecy associated with some aspects of Aboriginal law has been perceived by some as an irreconcilable problem when contemplating the recognition of Aboriginal law by a legal system which has, as one of its basic tenets, that its administration is prima facie to be conducted in public, as a guarantee of fairness. The anthropologist Debra Bird-Rose wrote that:

[T]here is a fundamental dysfunction between the different systems of law. On the one hand, the Australian legal system requires an open and impartial inquiry. This is the heart and soul of natural justice: that opposing parties be treated equally, and that the proceedings be open so that equity can be ensured. On the other hand, in Aboriginal systems of law ... knowledge is organised as intellectual property which is not freely available to all.<sup>262</sup>

Gender-based secrecy within the religious domain is an integral feature of most Australian Aboriginal societies. Notwithstanding some occasional and limited instances of what may be termed cross-gender 'overlap', such culturally sanctioned secrecy typically pertains to esoteric knowledge which is deemed to be the exclusive preserve of adult members of a particular gender. In the case of males, access to knowledge of this kind is almost invariably confined to physically initiated men. The content and associated referents of such esoteric knowledge may variously include myths, names, designs, objects, songs and sites.<sup>263</sup>

The issue of accommodating the Aboriginal custom of gender-based secrecy has been prominent in the conduct of native title litigation in Australia in recent years, and the courts have found a resolution which accommodates the competing interests of Aboriginal law and Australian law. It is possible for legal proceedings to be conducted according to all the rules of procedural fairness while being subject to customary requirements of confidentiality.<sup>264</sup>

In *State of Western Australia v Ward (on behalf of the Miriuwung Gajerrong Peoples)*<sup>265</sup> the court concluded that s 17(4) of the *Federal Court Act 1976* (Cth) permitted the exclusion of certain persons from the proceedings<sup>266</sup> if it would be in the interests of justice to do so. The court concluded that the interests of justice require the weighing of competing interests, including the interests:

- (a) in the open administration of justice;
- (b) of the parties knowing all of the evidence actually or potentially adverse to their interests;
- (c) of the parties being able to test all evidence actually or potentially adverse to their interests;
- (d) of the parties respectively being able to be represented as to all aspects of the case by the one representative or team of representatives;
- (e) of the parties being able to freely choose their own legal or other representatives;
- (f) of ensuring that the parties are equally able to give, and lead from others, the evidence relevant to their respective cases;

261. See Toohy JL, 'Seven Years On: Report by the Aboriginal Land Commissioner to the Minister for Aboriginal Affairs on the *Aboriginal Land Rights (Northern Territory) Act 1976* and Related Matters' (Canberra: AGPS, 1984) xviii; 'Claim by the Warlpiri and Kartangaruru-Kurintji: Report by the Aboriginal Land Commissioner to the Minister for Aboriginal Affairs and to the Minister for the Northern Territory' (Canberra: AGPS, 1978); 'Warlmanpa, Warlpiri, Mudbura and Warumungu Land Claim: Report by the Aboriginal Land Commissioner to the Minister for Aboriginal Affairs and to the Administrator of the Northern Territory' (Canberra: AGPS, 1982); McRae et al, above n 1, 176–8.

262. Bird-Rose D, 'Whose Confidentiality? Whose Intellectual Property?' in Edmunds M (ed), *Claims to Knowledge, Claims to Country* (Canberra: Australian Institute of Aboriginal and Torres Strait Islander Studies, Native Title Research Unit, 1994) 1.

263. McIntyre G & Bagshaw G, 'Preserving Culture in Court Proceedings: Gender Restrictions and Anthropological Experts' in Weir J (ed) *Land, Rights, Laws: Issues of Native Title*, Issues Paper No 15, Vol. 2 (Canberra: Native Title Research Unit, AIATSIS, May 2002).

264. *State of Western Australia v Ward (on behalf of the Miriuwung Gajerrong Peoples)* (1997) 145 ALR 512.

265. *Ibid.*

266. In that case all females. In *John Dudu Nangkiriny & ors on behalf of the Karajarri People v The State of Western Australia & Ors* (WAG 6100 of 1998); *Paul Sampi & Ors v State of Western Australia & Ors* (WAG 49/1998) it was all persons other than the group of males who attended the presentation of evidence to the court on country. For a discussion of those cases, see McIntyre & Bagshaw, above n 263.

- (g) of the court showing respect for legitimate cultural and other differences between persons involved in the legal proceedings; and
- (h) of advancing, rather than detracting from, the purposes of the relevant legislation.<sup>267</sup>

The court indicated that before making an order allowing evidence to be presented in gender restricted circumstances, a court would need to be

satisfied, usually following the receipt of evidence of the existence of the asserted legal or cultural rule or norm, of the extent to which (if at all) such rule or norm admits of flexibility in its application, of the importance of the relevant evidence to the case of the party seeking to call it, of the degree of likelihood that if the requested restrictions are not imposed on the publication of such evidence the evidence will not be given, and of the proportion of the total evidence to be called by the applying party in respect of which orders restricting its publication are likely to be sought.<sup>268</sup>

It has been noted that courts, in some cases, have taken 'constructive and creative steps' to protect cultural confidences.<sup>269</sup> For instance, in the *Sydney Williams* case<sup>270</sup> an all-male jury was empanelled as a measure to protect the custom of gender-based secrecy. Further, in *Foster v Mountford*<sup>271</sup> the court granted an interlocutory injunction to prevent the publication of information that anthropologist Charles Mountford had a duty to keep confidential. In that case, Muirhead J<sup>272</sup> recognised a jurisdiction to restrain the publication of confidential information based on a 'duty to be of good faith' towards the persons who are entitled to have the confidence respected. Another example is found in the case *Pitjantjatjara Council v Lowe*<sup>273</sup> where an injunction was granted to prevent the display and sale of photographic slides showing secret ceremonies from the collection of the late Dr Mountford, based upon that same duty of confidentiality. However, it is clear that no such remedy is available where that relationship of confidentiality has not been established.

In *Attorney General (NT) v Maurice*<sup>274</sup> confidential information about the location of sacred sites, revealed to an anthropologist gathering evidence for a land claim, was protected from revelation by legal professional privilege. In *Western Australia v Minister for Aboriginal and Torres Strait Islander Affairs*<sup>275</sup> a significant element of the evidence related to the highly secret gender-restricted issue of men's initiation ceremonies, which were being conducted in the vicinity of an area proposed as a crocodile farm near Broome. The legal team for the State of Western Australia was a solely female group. Justice Carr held that the male-only information could be made available to one only of the female members of the state legal team as the best way of balancing the public interests in maintaining cultural confidentiality and administering the law.

On the other hand, in *Norvill v Chapman*<sup>276</sup> the court found that the Minister for Aboriginal Affairs was obliged to personally read material, which Aboriginal customary law dictated should be revealed only to women, in order to exercise his discretion under the *Aboriginal and Torres Strait Islanders Heritage Protection Act 1984* (Cth). The court found that his strategy of delegating his task to a female staffer who reported to him was not in compliance with the Act. An alternative approach may have been for the government to make an ad hoc appointment of a female Minister to perform the task under the Act in relation to the particular matter in issue.

It has been suggested that the protection, in equity, of confidentiality may apply to the secret, sacred content of designs.<sup>277</sup> In addition, an Aboriginal artist may have a fiduciary duty to the owners, in accordance with Aboriginal customary law, of a design under customary law to protect the design from exploitation. In *Bulun Bulun v The Queen & T Textiles Pty Ltd*<sup>278</sup> Von Doussa J suggested that cultural knowledge might be the property of a cultural group and an individual from within that group might have a fiduciary duty to the group not to misuse that knowledge. If such a fiduciary duty exists then the person with that duty is obliged not to misuse knowledge for personal gain or act in a way

267. *State of Western Australia v Ward (on behalf of the Miriungung Gajerrong Peoples)* (1997) 145 ALR 512, 529–30 (Branson J).

268. *Ibid* 530.

269. McRae et al, above n 1, 133.

270. Unreported, Supreme Court of South Australia, 14 May 1976; Wells J, 'The Sydney Williams Case' (1976) 50 *Australian Law Journal* 386.

271. (1976) 29 FLR 233.

272. *Ibid* 237–8.

273. (1982) 4 *Aboriginal Law Bulletin* 11.

274. (1986) 161 CLR 475; see also *Daniel v Western Australia* (1999) 94 FCR 537, [56]–[62].

275. Unreported, Federal Court, 29 July 1994 (Carr J).

276. (1995) 133 ALR 226.

277. Sims C, *Aboriginal Intellectual Property Rights – A Culture Needing Protection* (unpublished Masters dissertation, Murdoch University, 1997); Gray S, 'Aboriginal Designs and Copyright: Can the Australian Common Law Expand to Meet the Demand?' (1991) 9(4) *Copyright Reporter* 8; *Coco v AN Clark (Engineers) Ltd* [1969] RPC 41; *Foster v Mountford* (1976) 14 ALR 71.

278. (1998) 86 FCR 244.

which conflicts with that person's duty to respect or keep confidential such information. It may also be possible to argue that communal ritual knowledge is embodied in the minds of members of the Aboriginal community and when artwork by an individual was authorised by the communal group the artwork comprised the anticipated materialisation of the work.<sup>279</sup> However, that does not provide a remedy for the Aboriginal customary law owners as against any third party who may expropriate the Aboriginal communal knowledge by purchasing it from the artist or otherwise.

These threads of common law and equity approaches to dealing with confidential aspects of Aboriginal customary law are matters which it would be appropriate for the state to consider drawing together in an encoding statute.

## 4. Conclusions

The real issue that arises in contemplating recognition of Aboriginal customary law is the degree to which the state legal system is able to incorporate Aboriginal customary law or acknowledge its existence; as against the degree to which it regards it as irreconcilably inconsistent with state law. A proper appreciation of the state's obligations to treat all its citizens in accordance with universal human rights standards suggests that it should do all that it can, consistently with those standards, to incorporate or acknowledge Aboriginal customary law in ways which preserve the unique culture of Aboriginal societies in the state. The conclusion which can be drawn from this paper is that, upon careful analysis, there are only very limited circumstances of any practical significance where Aboriginal customary law might be found to be in irreconcilable conflict with universal standards of human rights; thereby precluding incorporation or acknowledgement.

Aboriginal customary law can be incorporated into the common law by the usual process of development of the common law by cases being decided as they come before the courts. However, there are advantages of education and uniformity of approach which flow from legislation that is declaratory or creates procedures which acknowledge and facilitate the existing capacity of the common law to incorporate Aboriginal customary law. Where the choice is made by the state to acknowledge or encourage the continuing practice of Aboriginal customary law, then legislation which declares and facilitates that would be appropriate.

A plurality of law may be said to follow from:

- (a) acknowledgement of aspects of Aboriginal customary law which interface with state law; and
- (b) continuation of some aspects of Aboriginal custom and Aboriginal norms which do not require any incorporation or acknowledgement by the state in order for them to co-exist comfortably with the state legal system.

However, that is not a reason to fail to address recognition of Aboriginal customary law by:

- (a) incorporation of certain aspects of it into state law; and
- (b) acknowledgement of other aspects of it by legislation.

There is merit in the state setting out in its constitutional document a declaration of recognition of the Aboriginal societies in Western Australia. The declaration ought to be to the effect that such societies have laws and customs which the state recognises as giving the members of those societies certain rights, duties and interests. The declaration ought to note the role of the state legal system in enforcing such rights; subject to compliance with universal human rights standards.

There are limitations upon what may be recognised as Aboriginal customary law. From the experience with native title we have learned that it must be sourced in a normative system that pre-dates the assertion of British sovereignty and has a continuing vitality. The laws of that system are not frozen and may evolve over time. However, it must be the case that there is a continuity of acknowledgement and observance of them by an Aboriginal society, without substantial interruption, in order for those laws to be capable of recognition today.

While there are differences of emphases between Aboriginal societies and Western societies on matters such as group conformity and religion, those differences are not such as to result in fundamentally irreconcilable conflicts in the operation of the legal systems of such societies. Suggested differences between Western and Aboriginal societies based on the notion that one is a 'guilt culture' and the other is a 'shame culture' do not stand up to close scrutiny.

<sup>279</sup>. *Sega Enterprises Ltd and Anor v Galaxy Electronics Pty Ltd* (1996) 35 IPR 161; *Sega Enterprises Ltd and Anor v Galaxy Electronics Pty Ltd* (1997) 37 IPR 462.

Recognition of Aboriginal customary law by a state legal system does not contravene the principle of equality before the law. Substantive equality requires the recognition of the right of Aboriginal people to have their laws applied to them. The fact that persons who are not Aboriginal do not have those laws applied to them does not effect any substantive discrimination against non-Aboriginal persons.

Aboriginal customary law is able to be enforced against individual Aboriginal persons without compromising the principle of equality before the law; so long as the individual is a voluntary member of the Aboriginal society from which the law stems. Certain forms of punishment, such as the death penalty, cannot be recognised by state law because they contravene universal human rights standards. Where an individual consents to a form of corporal punishment, administered in accordance with Aboriginal customary law, which is not cruel, inhuman or degrading (as judged from the perspective of the culture within which it is being administered), then state law relating to bodily harm and wounding offences should be amended to recognise that.

If the state is to proceed to a process of statutory recognition of Aboriginal customary law, then it should consider encoding rules for proof of Aboriginal customary law and dispensing with the rules of evidence except where undue prejudice would result. It should also consider encoding measures for the protection of cultural information which is confidential under Aboriginal customary law.