

background paper 14

Aboriginal customary law in the context of Western Australian constitutional law

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1. Introduction

Australian law—and, by extension, Western Australian law—accepts as axiomatic that all persons must be treated equally in the eyes of the law. The law is of equal application to natural persons, and corporate and governmental 'persons' in so far as is practicable or appropriate. Although the common law has long allowed special preferences for government (the Crown), it frowns on distinguishing between citizens in terms of their rights under the law.

That having been said, the position of Western Australia's Aboriginal population is clearly one distinguished from that of the remainder of the state's citizens, as a consequence of colonial and later historical events, and the fact that the Aboriginal population may be—at least in a substantial proportion—differentiated by appearance. Cultural differences between the majority and the Aboriginal minority have not been bridged, as is evidenced by the poor position of Western Australia's Aboriginal population in prospects for their health, education and frequency of criminal convictions.

If it is accepted that a readily distinguishable minority (about 3.2% of the state's population) is persistently ill-served by the cultural and governmental structures of the majority, then it may be appropriate to explore the possibility of placing the minority group in a special legal position, and in particular a position in which the legal apparatus of the state recognises that the minority is in need of special attention. Such special position may well extend not merely to recognition, but to the acceptance that a minority needs to take a measure of control over management of its own community, attracting also special measures of responsibility within that community.

Some Western Australian Aboriginal people have tribal attachments which carry obligations under Aboriginal customary law. In these circumstances, the above general comments should be considered. To what extent Aboriginal customary law may be integrated into or recognised by general law is itself a constitutional issue.

The LRCWA reference limited to exploring Aboriginal customary law in a constitutional context

It is immediately apparent that recognition of the special position of the Aboriginal minority is a constitutional problem separate from recognition of customary law. The former relates to all who hold themselves out to the world as, or are recognised as, Aboriginal. The latter is focused on matters which directly impinge on only a sub-class of Western Australian Aboriginal people, being those still sufficiently attached to tribal culture to recognise or be bound by—even if involuntarily, at the behest of others—customary law.

It is the latter issue to which the Law Reform Commission of Western Australia (LRCWA) reference attaches, and consequently this paper will focus on Aboriginal customary law in a constitutional context, although some broader issues will be touched on attendant on that focus.

2. Constitutional issues

The Constitution of Western Australia (the Constitution) serves as the basal document for the structure of government in Western Australia. The processes of parliamentary democracy, the exercise of executive power, and the work of an independent judiciary may all be tested, to some degree, against this standard. But the Constitution is not a *Grundnorm* in the sense of a charter of absolute sovereignty. Western Australia is a component part of the Australian federation and, in common with other federations such as Canada and the United States of America, power is diffused in the Australian polity. Furthermore, the Constitution is still substantially in the form in which the British government bestowed it on the colonists in 1890. It has no grand design as to restraint on the forces of government. It is still a Westminster boilerplate, dependent on the 'genius' of the common law as the ultimate restraining mechanism.

No absolute sovereignty

The fact that the Constitution is not a charter of absolute sovereignty makes the concept of involving Aboriginal customary law in the operation of the Constitution more acceptable. A basal document for the processes of unitary government might be thought impervious to inclusion of any reference to a legal system other than that prescribed as the one law for all. But Western Australia is a component state in a federation: the resulting federal body being the sovereign, the Commonwealth of Australia. Federation is the beginning of the acceptance of the limitation of the power of the 17th and 18th century European states that first embodied the concept of sovereignty; itself vested at that time in a king.

Sovereignty was bound up with the historical drive to uniformity of law and administrative standard in European nation-states. It was fundamental to the growing importance of kings (the Crown) in such polities that law be common throughout the realm. Such commonality of law was the very mark of royal power exercised throughout the realm, evenly and without exception.¹

In a polity of limited power such as Western Australia it is possible to conceive of legal systems operating in respect of recognisable communities; such legal systems differing from the norm of the general law which otherwise applies throughout the state. The heart of the problem, once such a possibility is accepted, is how the ambit of such alternative legal systems might be determined – to whom might they apply and in what circumstances?

That the Constitution is a charter of government in a non-sovereign context sits well with the modern understanding of the limits of sovereignty, in which

there has been an evolution in meaning away from the view of Bodin (and of Thomas Hobbes in his *Leviathan* which was published in 1651)—that a sovereign has *absolute, monopolistic and irrevocable* power—to a more *qualified* understanding of the term. Under this modern 'realist' conception, sovereignty is divisible and capable of being shared or pooled across different entities or locations.²

Non-sovereignty raises issues as to self-determination for Aboriginal peoples

Just as 'sovereignty' has reflected different meanings in Western legal thought over the last 400 years, it has a different meaning to Aboriginal people. The possibilities of meaning to them will matter as to how their customary law may be involved with the Constitution. Brennan, Gunn and Williams note: 'For others, sovereignty describes their capacity to make decisions across the range of political, social and economic life'.³

Sovereignty can be demonstrated as Aboriginal people controlling all aspects of our lives and destiny. Sovereignty is independent action. It is Aborigines doing things as Aboriginal people, controlling those aspects of our existence which are Aboriginal. These include our culture, our economy, our social lives and our Indigenous political institutions.⁴

The critical material in the quotation above concerns the references to 'our culture' and 'our social lives', as those concepts provide the springboard for understanding of Aboriginal customary law. It is such understanding that may make the contemplation of a place for customary law in the Constitution a matter of real worth with tangible outcomes for Aboriginal people. It is apparent from the above material, revealing Aboriginal views on sovereignty, that the possible role of customary law (in so far as it embodies controlling elements over Aboriginal communities in respect of culture and their social lives) must be addressed, and addressed in the context of providing an alternative—not necessarily an exclusive—mode for dealing with the necessary 'political' operation of such communities. It is at this point that the Constitution must be perceived as flexible and not monolithic. Referential inclusion of Aboriginal customary law will raise issues of self determination.

Brennan, Gunn and Williams quote Richard Ah Mat on the Cape York view of self-determination:

[S]elf-determination is about practice, it is about actions, it is about what we do from day to day to make changes, it is about governance. It is about taking responsibility for our problems and for our opportunities: because nobody else will take responsibility for our families, our children, our people. We have to do it ourselves.⁵

The Western Australian Department of Indigenous Affairs included in its Statement of Commitment the following:

Aboriginal people have continuing rights and responsibilities as the first people of Western Australia, including traditional ownership and connection to land and waters. These rights should be respected and accommodated within the legal, political and economic system that has developed and evolved in Western Australia since 1829.⁶

1. The reality, for example in pre-revolutionary France, was quite otherwise, but the trend was apparent and made abundantly clear in the 19th century.
2. Brennan S, Gunn B & Williams G "Sovereignty" and its Relevance to Treaty-Making Between Indigenous Peoples and Australian Governments' (2004) 26 *Sydney Law Review* 307, 312 (emphasis in original).
3. *Ibid* 314.
4. National Aboriginal and Islander Health Organisation, *Sovereignty* (1983), quoted in Behrendt L, *Achieving Social Justice: Indigenous Rights and Australia's Future* (Sydney: Federation Press, 2003) 100.
5. Rh Mat R, 'The Cape York View' (Paper presented at the Treaty Conference, Murdoch University, Perth, 27 June 2002), quoted in Brennan, Gunn & Williams, above n 2, 316.
6. Western Australian Department of Indigenous Affairs, 'Statement of Commitment to a New and Just Relationship Between the Government of Western Australia and Aboriginal Western Australians' (4 June 2004) <<http://www.dia.wa.gov.au/Policies/StateStrategy/StatementOfCommitment.aspx>>.

The principles enunciated in the Statement of Commitment appear at first blush to be too broad, or focused on land title issues specifically excluded from the remit of this paper, to be of assistance. However, Aboriginal customary law must now be examined in the light of possible connection to the Constitution.

3. Customary law – nature and content

Terms of reference to the LRCWA as to content of Aboriginal customary law and interaction with existing Western Australian law

The terms of reference to the LRCWA are relevantly that:

[T]he Commission is to have regard to:

- matters of Aboriginal customary law falling within State legislative jurisdiction including matters performing the function of or corresponding to criminal law (including domestic violence); civil law (including personal property law, contractual arrangements and torts); local government law; the law of domestic relations; inheritance law; law relating to spiritual matters; and the law relating to evidence and procedure;
- relevant Commonwealth legislation and international obligations;
- relevant Aboriginal culture, spiritual, sacred and gender concerns and sensitivities;
- the views, aspirations and welfare and welfare of Aboriginal persons in Western Australia.

Use of the term ‘customary law’ in Western Australian legislation: what is the meaning attached?

The references to customary law in Western Australian statutes are set out as follows:⁷

- (1) The *Aboriginal Heritage Act 1972* provides in ss 7 and 8:

7. Traditional use

(1) Subject to subsection (2), in relation to a *person of Aboriginal descent who usually lives subject to Aboriginal customary law*, or in relation to any group of such persons, this Act shall not be construed –

- (a) so as to take away or restrict any right or interest held or enjoyed in respect to any place or object to which this Act applies, in so far as that right or interest is exercised in a manner that has been approved by the Aboriginal possessor or custodian of that place or object and *is not contrary to the usage sanctioned by the Aboriginal tradition relevant to that place or object*; or
- (b) so as to require any such person to disclose information or otherwise to act *contrary to any prohibition of the relevant Aboriginal customary law or tradition*.

8. Availability for traditional use

Where the Committee is satisfied that a representative body of *persons of Aboriginal descent who usually live subject to Aboriginal customary law* has an interest in a place or object to which this Act applies *that is of traditional and current importance to it*, and which is in the custody or control of the Minister, the Minister after consultation with the Committee shall make that place or object available to that body as and whenever required for *purposes sanctioned by the Aboriginal tradition* relevant to that place or object.

- (2) The *Aboriginal Affairs Planning Authority Act 1972* (WA) provides in s 35(2):

A regulation made for the purposes of this section shall, so far as that is practicable, provide for the distribution of the estate *in accordance with the Aboriginal customary law* as it applied to the deceased at the time of his death.

- (3) The *Community Services Act 1972* (WA) provides in s 3:

'relative' in relation to a child, means –

- (a) [western familial relationships]; and
- (b) in relation to a child of Aboriginal descent, includes *a person regarded under Aboriginal customary law* as an equivalent relative in relation to the child as a person mentioned in paragraph (a).

- (4) The *Adoption Act 1994* (WA) provides in s 4(1), by reference to western type familial relationships:

(b) in the case of an Aboriginal person, a person regarded under the *customary law or tradition of the person's community* as the equivalent of a person mentioned in paragraph (a).

7. Emphasis has been added in extracts from the statutes.

In the above statutes there is no definition of 'customary law' or 'Aboriginal customary law'. It is apparent that the Western Australian parliament accepts the existence of Aboriginal customary law, but has not set out to define it. Dispute as to its existence attracts questions as to method of proof. Such questions are not germane to this paper, which proceeds on the simple assumption that customary law exists, at least relevantly to those Aboriginal members of the Western Australian community who live in a traditional manner or still have sufficient ties to Aboriginal culture to affect their conduct.

The view of Aboriginal customary law from majority Australian legal culture

The Northern Territory Law Reform Committee described Aboriginal customary law as 'an extremely broad and complex set of rules and unwritten legislation governing social relationships, economic rights, land ownership, wildlife conservation, land management and intellectual property rights'.⁸

In the *Gove Land Rights Case*,⁹ Blackburn J held that the clans in the Gove Peninsula area had a recognisable system of law which he described as

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 of 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 ... Great as they are, the differences between that system and our system are, for the purposes in hand, differences of degree. I hold that I must recognise the system revealed by the evidence as a system of law ... [T]he fundamental truth about the aboriginals' relationship to the land is that, whatever else it is, it is a religious relationship.¹⁰

In *Aborigines and the Law: Essays in Memory of Elizabeth Eggleston*¹¹ an essay entitled 'Aboriginal Customary Law'¹² contained the following:

Law and religion were intimately bound up in Aboriginal society ... and any attempt to identify certain segments of Aboriginal life as 'legal' involves the imposition of alien categories of thought on the tribal society. Some modern Aborigines have made comparisons between their law and the Australian legal system on the basis of common notions of rules and sanctions for their breach but they have also interpreted the word 'law' to mean 'way of life' and 'religion' ... This is not to deny that there was a system of 'law' in traditional Aboriginal society. I am using a functional definition of 'law', one which places primary emphasis on law as a means of social control ... The use of the word 'law' to describe measures of social control in Aboriginal society is justified ... by the belief that every society must have means for settling disputes, and must have law in this sense, no matter how difficult it might be to identify binding rules or institutions corresponding to the legal system in our own society.¹³

The restrictive aspects of the LRCWA terms of reference: no native title or heritage issues

It is apparent that the limitations on the terms of reference to the LRCWA are important and are relevantly restrictive.

[The LRCWA] 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)*.¹⁴

It would seem that in the absence of reference to land ownership and heritage aspects of Aboriginal customary law, the focus of this reference must be on (i) familial and social relationships, (ii) land management and associated intellectual property rights and conservation regimes under customary law, and (iii) Aboriginal community governance.

It may be noted at this juncture that in *Yanner v Eaton*¹⁵ a majority of the High Court applied the terminology of the *Native Title Act 1993 (Cth)* to find the right of the Aboriginal appellant in 'hunting' (a class of activity prescribed in the Act) to be available despite the adverse wording of the relevant Queensland legislation.¹⁶

8. Northern Territory Law Reform Committee, *Towards Mutual Benefit: Report of the Committee of Inquiry into Aboriginal Customary Law* (August 2003) 42, now found in *Report of the Committee of Inquiry into Aboriginal Customary Law 2004*, Appendix A to Report, prior to Background Papers.

9. *Milirrpum v Nabalco Pty Ltd* (1971) 17 FLR 141.

10. *Ibid* 267–268. This paragraph has been quoted by other judges: see *Mabo v Queensland (No 2)* (1992) 175 CLR 1, 39 (Brennan J), 186 (Toohey J); *Ward v Western Australia* (1998) 159 ALR 483, 512 (Lee J). See G Neate 'The "Tidal Wave of Justice" and the "Tide of History": Ebbs and Flows in Indigenous Land Rights in Australia' (Paper presented at the 5th World Summit of Nobel Peace Laureates, Rome, Italy, 10 November 2004) 30 ff.

11. Hanks P & Keon-Cohen B (eds), *Aborigines and the Law: Essays in Memory of Elizabeth Eggleston* (Sydney: Allen & Unwin, 1984).

12. Maddock K, 'Aboriginal Customary Law' in Hanks & Keon, *ibid* 212.

13. *Ibid* 230–232.

14. Emphasis added.

15. (1999) 201 CLR 351.

16. See reference to the *Native Title Act 1993 (Cth)*, p 9 below.

The content of Aboriginal customary law recognisable by majority Australian legal culture (and hence capable of inclusion into the framework of the Constitution)

The Northern Territory Legislative Assembly Sessional Committee on Constitutional Development in its Discussion Paper stated:

It is said that customary law is perceived by Aboriginal people as a wider system of social control than non-Aboriginal Australians would normally conceive law to be. Aboriginal customary law includes elements which could normally be described as 'private law' (eg: interpersonal relations and dispute resolution), 'public law' (community government), and religious beliefs and practices. These aspects of social control are inextricably mixed in a traditional Aboriginal community.¹⁷

The Discussion Paper went on to note that:

Many aspects of Aboriginal customary law are inaccessible to others, for a variety of reasons. These include the fact that the law varies from community to community, that it is usually not recorded in writing, that some of it is secret or confidential, that it can usually only be learnt orally in the relevant Aboriginal language, and that it is based on ideas and concepts radically different from 'Western' ideas and concepts.¹⁸

The Discussion Paper listed a number of instances of Northern Territory legislation that refer to Aboriginal customary law, focusing on land rights, heritage and family relationship issues – thus mirroring in part the Western Australian legislative references set out above.¹⁹ However, Northern Territory legislation refers to Aboriginal customary law in respect of 'traditional use of land and water', in the context of Crown or other public lands.

It is a commonplace that Aboriginal customary law may be taken into account in the sentencing process.²⁰ However, the Discussion Paper noted that, in addition:

Northern Territory courts have taken Aboriginal customary law into account in a variety of other contexts. For example, in the protection of secret Aboriginal ceremonies from disclosure by publication,²¹ in the immunity of confidentiality information about Aboriginal sacred sites from use in evidence,²² in taking into account Aboriginal traditional status and the ability to participate in ceremonies in determining damages for injuries²³ and in one unreported case in having regard to tribal marriages for purposes of adoption.²⁴

Commonwealth legislation, in the form of the *Native Title Act 1993* (Cth), has recognised the existence of aspects of Aboriginal customary law, which it deals with by referring to the exercise of those aspects of customary law in relation to land. The inhibition in the present reference to the LRCWA in regard to native title should not be taken to occlude inference as to the existence of, and recognition of, Aboriginal customary law (the *class of activity*) in this Commonwealth legislation.

The *Native Title Act 1993* (Cth) provides in s 211 as follows:

Preservation of certain native title rights and interests

Requirements for removal of prohibition etc. on native title holders

- (1) Subsection (2) applies if:
 - (a) the exercise or enjoyment of native title rights and interests in relation to land or waters consists of or includes carrying on a particular class of activity (defined in subsection (3));²⁵ and
 - (b) a law of the Commonwealth, a State or a Territory prohibits or restricts persons from carrying on the class of activity other than in accordance with a licence, permit or other instrument granted or issued to them under the law; and
 - (ba) the law does not provide that such a licence, permit or other instrument is only to be granted or issued for research, environmental protection, public health or public safety purposes; and
 - (c) the law is not one that confers rights or interests only on, or for the benefit of, Aboriginal peoples or Torres Strait Islanders.

17. Northern Territory Legislative Assembly, Sessional Committee on Constitutional Development, 'Recognition of Aboriginal Customary Law', Discussion Paper No 4 (August 1992) 4-8 (d).

18. Ibid 9.

19. Ibid.

20. Williams V, 'The Approach of Australian Courts to Aboriginal Customary Law in the Areas of Criminal, Civil and Family Law', Background Paper No 1, above p 1, 9ff.

21. *Foster v Mountford and Rigby* (1976) 14 ALR 71.

22. *Aboriginal Sacred Sites Protection Authority v Maurice* (1986) 65 ALR 247.

23. *Roberts v Devereux* (Unreported, NT Supreme Court, 22 April 1982).

24. Northern Territory Legislative Assembly, above n 17, 10.

25. Emphasis added.

Removal of prohibition etc. on native title holders

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

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

Definition of class of activity

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

From the above extracts it would seem that Aboriginal customary law going to 'use' of land, rather than claiming title in land, is within the instant reference to the LRCWA, and that Aboriginal customary law going to 'use' involves land management going to both the exploitation of resources on a non-commercial basis and the limitation of the exploitation of such resources.

Geographically fragmented and variable nature of customary law

It is axiomatic that the particularity of customary law will vary from tribal group to tribal group, but the generality is common in origin and outline. This is apparent from the Background Paper written for this reference by the Hon John Toohey.²⁶ It is enough for the purpose of this paper that Aboriginal customary law be accepted, in the words of Toohey, 'as a body of rules, accepted as binding by the society and enforced by recognisable constraints'.²⁷

It should also be noted that differences may arise among those of the same tribal grouping as to the nature of, or indeed the existence of, Aboriginal customary law. This situation was exemplified in the South Australian saga surrounding Hindmarsh Island. The solution appeared to be that both viewpoints (as to the existence or otherwise of particular 'secret women's business') were based in good faith,²⁸ but that Aboriginal peoples who, while still proud of their heritage, were substantially westernised in outlook, would not have been exposed to the tribal lore and law, and hence would deny its existence. Such existence will, in the event of contest, need to be proved by evidence.²⁹

Recognition in the Constitution must be at a general level

Recognition of Aboriginal customary law in the Constitution may proceed unhindered by any concerns as to tribal or geographical variation, as such recognition is conceptual only, and the particularity of Aboriginal customary law will need to be dealt with in discrete legislation. For example, customary law regarding allowable relationships for the purpose of marriage may vary greatly across the state. It may not be appropriate to recognise each individual customary variation on marriage relationships, but the particularity of customary law operating on that subject might be recognised in, for example, state legislation on superannuation which must attempt recognition of 'marriage-like relationships' for the purpose of ascertaining a survivor of such relationship as beneficiary. It would then be for claimants to establish by evidence that they had been in such relationships according to the customary law to which they were subject.

26. Toohey J, 'Aboriginal Customary Laws Reference – An Overview', Background Paper No 5, above pp 173–212.

27. *Ibid* 5.

28. Simons M, *The Meeting of the Waters* (Sydney: Holder Headline, 2003).

29. Eg, *Aboriginal Customary Laws (Recognition) Bill 1986* (Cth) set out in Australian Law Reform Commission, *Report into the Recognition of Aboriginal Customary Laws*, Report No 31 (1986). This report dealt substantially with criminal law issues and is consequently not germane to the instant paper.

Clause 26. A question concerning the existence or content of the customary laws of an Aboriginal community is a question of fact and not a question of law.
Clause 27. (1) Evidence adduced in a legal proceeding (whether in respect of a matter arising under this Act or not) as to the existence or non-existence, or as to the content, of the customary laws of an Aboriginal community in relation to a matter is not inadmissible in the proceeding only because it is hearsay evidence or is evidence of an opinion if the person giving the evidence: (a) has special knowledge or experience of the customary laws of the community in relation to that matter; or (b) would be likely to have such knowledge or experience if such laws existed.

(2) Sub-section (1) applies notwithstanding that the evidence relates to a fact in issue in the proceeding.

4. Limitation on those aspects of customary law that may be recognised and how they may be applied

Some aspects of Aboriginal customary law are too contrary to mainstream Australian legal culture and so cannot be invested in the Constitution

Recent events, particularly resulting from an Inquiry into Aboriginal Deaths in Police Custody in November 2004 at Palm Island in Queensland, have provided a timely reminder that some aspects of Aboriginal customary law are simply unacceptable to mainstream Australian legal culture. I refer in particular to the comments from the Aboriginal spokesman, Murrandoo Yanner, to the effect that customary law countenanced 'payback' against the police in general if the particular police officer who was involved in the relevant fatality could not be found.³⁰ 'Payback' on a communal basis is a staple of most tribal law amongst Indigenous peoples anywhere in the world, as it was of Anglo-Saxon law in its earliest forms, but it is completely antithetical to modern mainstream culture.

Therefore, I am of the view that it is not necessary to itemise those portions of customary law that are not acceptable. The columnist, Janet Albrechtsen,³¹ attacked recognition of Aboriginal customary law in the criminal field. However, judicial recognition of customary law in the sentencing process has a well-established history in this country.³² Concepts of 'group payback' or relationship practices that are unacceptable do not need to be itemised as excluded from recognition. Filter mechanisms exist for dealing with such aspects of customary law in the shape of judicial discretion, or provision in the Constitution that where customary law is inconsistent with state legislation, to the extent of the legislation, state legislation will prevail.³³

The business of sentencing must, however, be differentiated from the remainder of the criminal law, which is an example of an area in which mainstream Australian legal culture must apply universally:

English criminal law did not, and Australian criminal law does not, accommodate an alternative body of law operating alongside it.³⁴

An inconsistency provision in the Constitution will ensure that the state's *Criminal Code* will continue to apply universally for the purpose of framing charges and defining them.

Inconsistency between Aboriginal customary law and mainstream Australian legal culture can be managed

Ensuring paramountcy of one stream of law to the extent of inconsistency, where there are two or more such streams, is illustrated in the *Australian Constitution*.³⁵ However, two issues arise at this juncture – would the inconsistency of any Aboriginal customary law be measured against state legislation alone, or against the common law as recognised in the state, or Commonwealth law as well? The last is a matter for the Commonwealth, but the other distinction may be important. In addition, inconsistency may be too broad a sword for dealing with the issue of unacceptability. It may be appropriate to entrench in discrete legislation the non-offensive aspects of customary law that require preservation:³⁶ (i) familial and social relationships, (ii) land management and associated intellectual property rights and conservation regimes, and (iii) Aboriginal community governance.

Some aspects of customary law can only apply amongst Aboriginal peoples, while other aspects such as intellectual property and conservation must have general application

A troubling aspect of any multi-streamed legal system is determining those in the community to whom various aspects of the law should apply. Questions of familial and social relationships and of Aboriginal governance would appear to be substantially of application to Aboriginal communities only,³⁷ but matters of land management and

30. *The Australian*, 1 December 2004, 1.

31. *Ibid.* 15.

32. See Northern Territory Legislative Assembly, above n 17.

33. As to ensuring the existence of Aboriginal customary law in particular matters such as those serving as the parameters of this paper, see p 12 below.

34. *Walker v New South Wales* (1994) 182 CLR 45, 50 (Mason CJ).

35. Section 109.

36. As in at least portions of the fields enumerated above, pp 536–37.

37. Although, for example, the litigation that ensues on the death of a party to a marriage between Indigenous and non-Indigenous as to the rituals attending on death, serves to remind that there is always the potential for intersection between those under mainstream cultural law and those under Aboriginal customary law.

conservation regimes, as well as matters of intellectual property rights, involve connection with those aspects of general life shared by all Australians. It may be appropriate in discrete legislation on particular subjects to itemise whether the recognition of Aboriginal customary law is to apply throughout the entire Western Australian community. That is not a matter which affects the general recognition of customary law in the Constitution.

Recognition of Aboriginal customary law in the Constitution is one thing: the application of customary law will require consultation with Aboriginal people

The following comments gleaned in the course of work on this reference, from the Aboriginal community at Fitzroy Crossing, should be borne in mind as representative of the need for consultation about the use of and reference made to customary law:

The Fitzroy community voiced considerable concern about both the Aboriginal Justice Plan and the Justice Department's Kimberley Plan. The Aboriginal Justice Plan appears to be a 'top down' initiative. They wanted to know: Who was to be on the regional group? How were they to be chosen? Who decides? *It would be preferable to begin with a local reference group of elders and build a justice strategy from the bottom up.* The examples of Ali Curong and Lajamanu in the Northern Territory were offered as examples to be studied. Community Justice Mechanisms need to develop from within community structures.

The meeting also said that the Aboriginal Justice Plan and the Kimberley planning process would fail if they attempted to impose structures on the Fitzroy Valley they did not want. The locality had its own structures for Law and Justice issues, such as KALAC. Initiatives should be based on these. An Elders Panel of some kind should be a fundamental local mechanism. This constitutes the most up to date thinking in relation to the delivery of services to areas such as Fitzroy – do not set up new structures, rather 'add value' to structures already in place and piggy back on existing resources. Those developing the Aboriginal Justice Plan should not try to 'reinvent the wheel' when it comes to community based justice structures, rather work with those who are already involved in law and justice.³⁸

Those comments lead inevitably to the realisation that any system of 'law' requires methods of enforcement or regulation, and that for customary law to have any meaningful place in the state's legal system Aboriginal people must be empowered in respect of such enforcement and regulation.

Aboriginal people are born into the law, they maintain it as their choice. Authority comes from their Elders and comes from the community.³⁹

5. The inclusion of Aboriginal customary law in the Constitution

Whether limited aspects of Aboriginal customary law only should be invested under the instant reference

For the reasons set out above,⁴⁰ the reference to Aboriginal customary law in the Constitution should be kept entirely general, leaving issues of ambit and application to particular statutes. However, it may be appropriate to allow for mainstream law to override for inconsistency, so long as this is not structured in a manner that makes any reference to Aboriginal customary law entirely nugatory.

The position in other jurisdictions on inclusion of customary law

South Africa

Chapter 12 of the *Constitution of the Republic of South Africa 1996* provides as follows:

Recognition

- (1) The institution, status and role of traditional leadership, according to customary law, are recognised, subject to the Constitution.
- (2) A traditional authority that observes a system of customary law may function subject to any applicable legislation and customs, which includes amendments to, or repeal of, that legislation or those customs.

38. Law Reform Commission of Western Australia, *Thematic Summaries of Consultations – Fitzroy Crossing*, 3 March 2004, 47 (emphasis added).

39. *Ibid.*

40. See above pp 538–39

- (3) The courts must apply customary law when that law is applicable, subject to the Constitution and any legislation that specifically deals with customary law.⁴¹

Role of traditional leaders

- (1) National legislation may provide for a role for traditional leadership as an institution at local level on matters affecting local communities.
- (2) To deal with matters relating to traditional leadership, the role of traditional leaders, customary law and the customs of communities observing a system of customary law –
- (a) national or provincial legislation may provide for the establishment of houses of traditional leaders; and
- (b) national legislation may establish a council of traditional leaders.⁴²

It is apparent that South African legal theory accepts the existence of customary law and intends that it be recognised, not merely in the abstract, but specifically by recognition of 'traditional leadership' – the means of ascertaining and enforcing such customary law. The application of customary law may be deflected by legislation which will prevail to the extent of specific annulment or inconsistency.

New Zealand

The Treaty of Waitangi, dating from 1840, provides a very different basis, than is the position in Western Australia, for setting Indigenous rights up in a constitution. However, the modern jurisprudence regarding the treaty is very different from that which prevailed for the first 140 years of the treaty's existence.⁴³ The treaty, as it happened, dealt only with possessory rights in land as opposed to the protection of any cultural aspects of the Maori.⁴⁴

It was apparent from 1986 that a special Maori code had developed in dealing with Maori matters at government level.⁴⁵ The interest in Maori affairs evident from that time was displayed in the work of a Royal Commission on the electoral system.⁴⁶ The commission concerned itself deliberately with the issue of Maoridom in the context of the New Zealand Constitution (itself an inchoate English-style document), but the concern showed in concrete constitutional proposals for democratic representation. (It must be remembered that in New Zealand the Maori constitute a significantly greater proportion of the population than do Aboriginal people in Western Australia.) Advocating overhaul of the constitutional structure, the Royal Commission wrote:

[T]he Maori people's position would be much more secure if our constitutional and political systems were to reflect the diversity in our society and, more particularly, the special position of the Maori.⁴⁷

It is not apparent that the New Zealand experience provides any template for dealing with Indigenous customary law outside the issues of land claims and water rights, and to that extent does not carry the instant reference any further. On the other hand, the dishonouring until recent times by the Crown (and mainstream non-Indigenous culture) of the terms of the Treaty of Waitangi in regard to self-determination or sovereignty of the Maori (*te tino rangatiratanga*)⁴⁸ serves as a reminder of how fragile the terms of a written compact may be between two peoples different in numeric proportion and of widely differing cultures sharing the same space.

Canada

Canada and, before the creation of the Dominion, the relevant British colonies, have a long history of recognition of the position of the Indigenous people, stretching back to the end of the Seven Years' War in 1763.⁴⁹ Sovereignty, however, always remained with the British and successor central governments.

41. *Constitution of the Republic of South Africa 1996*, s 211.

42. *Constitution of the Republic of South Africa 1996*, s 212.

43. 'The Treaty was not properly respected or implemented for many years, even though the courts ruled early on (in *R v Symonds* (1847), [1840–1932] NSPCC 387 (NZSC)) that the treaty as well as the common law recognised the Aboriginal title of the Maori. Part of the rationale for this deficiency was the failure of the treaty to be ratified by parliament coupled with the absence of any written constitutional guarantees in a unitary state such that the Diceyan view of parliamentary supremacy allowed the government to ignore its treaty obligations. The Chief Justice of New Zealand subsequently ruled in 1877 that the treaty was unenforceable as he refused to recognise the Maori as possessing sufficient legislative sovereignty to enter into binding treaties (*Wi Parata v Bishop of Wellington*, 3 JUR (NS)): BW Morse 'Comparative Assessments of the Position of Indigenous Peoples in Quebec, Canada and Abroad' [2002] AILR 37, New Zealand 3.

44. Treaty of Waitangi, Article the Second. See Joseph PA, *Constitutional and Administrative Law in New Zealand* (Sydney: Law Book Co, 1993) 39.

45. Sharp A, *Justice and the Maori: Maori Claims in New Zealand Political Argument in the 1980s* (Auckland: Oxford University Press, 1990) 236.

46. New Zealand Royal Commission on the Electoral System, *Towards a Better Democracy* (Wellington: Government Printer, 1986).

47. *Ibid* 87, 110, quoted in Sharp, above n 45, 237.

48. Ward A, *An Unsettled History: Treaty Claims in New Zealand Today* (Wellington: Bridget Williams Books, 2001).

49. See references to the Royal Proclamation of that year, in cases such as *R v Sparrow* [1990] 1 SCR 1075.

The Canadian experience has been very different in detail from that in Australia, making comparisons difficult, although outcomes in the present may be useful comparators. The British, colonial, federal and provincial governments signed hundreds of treaties with Indigenous peoples as the Canadian frontier expanded west and north, but most were disregarded, leading to a wide measure of Indigenous distrust of authorities.⁵⁰ The modern trend has been to look to political structures to provide shelter for Indigenous rights. For example, the establishment in the early 1990s of the new Province of Nunavut, the population of which comprised 30,000 Inuit in north eastern Canada.

British Columbia, on the other hand, held a referendum in 2002 with the specific aim of gaining a clear electoral majority to register their desire that all persons in the Province be treated equally (ie, that there be no differentiation of law in favour of the Indigenous peoples whatsoever). This plan petered out into no more than a Memorandum of Understanding in late 2002, as Canadian federal constitutional law had evolved over the previous 20 years to lock in already recognised rights of Indigenous peoples.

The *Constitution Act 1982* (Canada) contained two particular provisions pertaining to the protection of Indigenous rights. The first, s 25, being in Part I: *Canadian Charter of Rights and Freedoms*; and the second, s 35, being in Part II: *Rights of the Aboriginal Peoples of Canada*. The former provides:

- 25 The guarantee in this Charter of certain rights and freedoms shall not be construed as to abrogate or derogate from any Aboriginal, treaty or other rights or freedoms that pertain to the Aboriginal peoples of Canada including
- (a) any rights or freedoms that have been recognised by the Royal Proclamation of 7 October 1763; and
 - (b) any rights or freedoms that now exist by way of land claims agreements or may be so acquired.

The latter is as follows:

- 35(1) The existing Aboriginal and treaty rights of the Aboriginal peoples of Canada are hereby recognised and affirmed.

These provisions operate to protect Indigenous rights from being undermined by 'equal rights' lawsuits launched by members of Canada's majority non-Indigenous population.

The *Indian Act 1985* (Canada) made provision for bands of Indigenous peoples to be self governing at a local level, and the scope of the by-laws power under s 81 is extensive. Only a sample is set out here, to illustrate the possibilities for local Indigenous communities to protect their position within a limited geographical area. This does not go directly to recognition of customary law, but does illustrate the capacity for self-management of a local area, which might facilitate the recognition and protection of customary law. Section 81 reads (in part) as follows:

81(1) Powers of the Council

By-laws

The council of a band may make by-laws not inconsistent with this Act or with any regulation made by the Governor in Council or the Minister, for any or all of the following purposes, namely,

- (a) to provide for the health of residents on the reserve and to prevent the spreading of contagious and infectious diseases;
- (b) the regulation of traffic;
- (c) the observance of law and order;
- (d) the prevention of disorderly conduct and nuisances.⁵¹

While the Canadian experience does not concern itself with the discrete issue of protection of customary law, the agitation over the past 40 years to put Indigenous issues on the Canadian political landscape is credited with raising the profile of Indigenous peoples internationally, to the point of germinating the *Convention Concerning Indigenous and Tribal Peoples in Independent Countries* (ILO Convention 169) and the United Nations *Draft Declaration on the Rights of Indigenous Peoples*.

Article 8 of the ILO Convention 169 provides as follows:

1. In applying national laws and regulations to the peoples concerned, due regard shall be had to their customs or customary laws.
2. These peoples shall have the right to retain their own customs and institutions, where these are not incompatible with fundamental rights defined by the national legal system and with internationally recognised human rights.

50. Morse, above n 43, Canada 3.

51. This is very similar to the powers invested in Aboriginal communities in Western Australia under the *Aboriginal Communities Act 1979* (WA) s 7.

Procedures shall be established, whenever necessary, to resolve conflicts which may arise in the application of this principle.

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

The first signatory to this convention was Norway, which has a population of approximately 50 000 Sami (Laplanders), a distinguishable minority group numbering less than one per cent of the population.

Norway

In 1988 the Norwegian Constitution was amended to affirm a special status for the Sami by declaring that: 'It is the responsibility of the authorities of the State to create conditions enabling the Sami people to preserve and develop its language, culture and way of life'.⁵²

In 1990, Norway signed the ILO Convention 169. In 2001, the Norwegian Supreme Court, in a test case concerning a Sami charged with not keeping his dog on a leash, indicated that:

[I]t was prepared to accept that Sami customary law was part of the Norwegian legal system as a result of Article 8 of the International Labour Organisation's Convention 169; however, the evidence in that case as to the specifics of Sami customary law on this topic was too unclear.⁵³

Australia is not a signatory to this Convention, so the very little reference in Australian law provided for conventions signed but not statutorily incorporated⁵⁴ has no application.

It is noticeable that writers on both the Canadian and Norwegian experiences place at the forefront the recognition of Indigenous peoples' necessity to maintain their economic integrity. That translates in practical terms into control, if not ownership, over land and marine territories that have been controlled under Aboriginal customary law. The preservation of customary law is then assumed to be able to flow in the wake of such control.⁵⁵ The control over land and marine resources is, of course, beyond the scope of this reference.

Queensland

Queensland has no constitutional references to Aboriginal customary law, but the Queensland Constitutional Review Commission has looked at the possibilities of reserved seats in the Queensland parliament for Aboriginal people, or the possibility of their own assembly.⁵⁶ Nothing has come of these proposals. However, in May 2004, the Queensland Anti-Discrimination Commission delivered a report on the utility of a preamble to the state Constitution with the purpose of reflecting Indigenous interests. The report is worth setting out in full:

Response to Legal Constitutional and Administrative Review Committee, 'Hands on Parliament' Report No 42

PREAMBLE TO QUEENSLAND CONSTITUTION

1. Should the Queensland Constitution contain a preamble?

The Anti-Discrimination Commission Queensland (ADCQ) supports the proposition that the Queensland Constitution contain a preamble. The Commission agrees with the view that both as a component of reconciliation, and an important aspect in Indigenous peoples' participation in Queensland's democratic processes, it is essential that Indigenous people are recognized and acknowledged in the preamble to the Constitution.

The ADCQ would also urge the Committee and the Government to reconsider the proposal that the Constitution contain a prohibition against discrimination on the basis of race, particularly in light of the decision of LCARC'S 1998 recommendation that Queensland should not adopt a Bill of Rights in any form. While the ADCQ agrees with the present Committee's view that such a provision is most appropriately based in a Bill of Rights, in the absence of such a Bill, discrimination based on race is a breach of a fundamental human right. It is appropriate for the Queensland

52. Norwegian Constitution, s 110(a).

53. Morse, above 44, 'Nordic Countries' 3.

54. See the High Court's decision in *Teoh v Minister for Immigration* (1995) 183 CLR 273.

55. Eg, Bjorklund I, *Sapmi – Becoming a Nation: The Emergence of a Sami National Community* (Tromsø, 2000) Part III: Resource Crises and Demands for Rights.

56. Struthers K, 'Hands on Parliament' (2003) 5 *Indigenous Law Bulletin* 3.

Constitution to refer to such a fundamental right, as being an absolute foundation principle of democracy in Queensland.

If any changes to the Queensland Constitution are made, it should be quite clear and explicit that any such legislative changes shall not have the intention or effect of diminishing or compromising any Indigenous rights, which may or may not have been recognised by the law in Queensland at the time of the amendments.

2. What elements should the preamble contain?

The ADCQ considers the following to be important elements of the preamble.

- A society that values and respects the dignity and diversity of its people, and provides justice and equity to all.
- Equality of all persons before the law regardless of their race, origin, gender, faith, age, sexuality, impairment, political belief, parental status or family responsibility, or trade union activity.
- The importance of the rule of law.
- *Recognition of Aboriginal and Torres Strait Islander peoples as the original owners and custodians of the land and sea; with their own customs, lore and laws.*
- The responsibility of all to respect and care for the land and environment, for present and future generations.

3. How should the wording around those elements be developed?

The use of words and concepts and their symbolic meaning are extremely important in whatever becomes part of the preamble. The draftsman/s given responsibility for the development of the wording should be briefed carefully, after a full consultation by the committee with stakeholders, and in particular with Indigenous stakeholders, on the inclusion or omission of important and symbolic words and concepts in the preamble. There should possibly be two phases to the drafting, a preliminary phase of gathering together key words and concepts, followed by a second phase of consultation on a draft of the proposed preamble as recommended by the committee.

4. How should the committee consult with communities, particularly Indigenous communities, regarding this issue?

If consultation with both the Indigenous and non Indigenous community is done in a comprehensive and considered way, the process of the people of Queensland finding the right words, and Parliament then moving to insert a preamble into the Constitution, could help achieve two significant aims. A discussion in the greater community about recognizing Indigenous peoples in the Constitution should contribute to the aims of reconciliation; and the discussion with Indigenous people about recognition and acknowledgement of them in the Constitution sets an important symbolic platform which can assist in the aim of an increased participation and the inclusion of Indigenous peoples in Queensland's democratic processes. The process may also be an opportunity to inform and educate the wider community on the structures, institutions and workings of the democratic process in Queensland, and allows for a partnership in contributing to the implementation of the 'Hands on Parliament' recommendation on the preamble.

The ADCQ suggests that consultation with Indigenous peoples could occur through the existing peak bodies, community networks, and negotiation table processes presently utilized by DATSIP; including the remaining regional councils of ATSIC; and the remaining ACC and ICC structures. In addition, the Indigenous media should be utilized so that Indigenous people across Queensland are made aware of the issues that the committee is considering, and are informed of how they can make their views known to the committee. It is important that information is provided in an accessible way both orally and via written material, and that Indigenous people are given opportunities to provide their views to the committee through oral means as well as through written submissions.

Given that 2004 is the end of the International Decade of the World's Indigenous People, the symbolism of the recognition of Indigenous peoples in the Queensland Constitution, is an opportunity the committee may wish to consider in the timing of the consultation and implementation phases of the recommendation.

5. ADCQ's response to Queensland Government response to Report No 42

The Commission is pleased at the Government's overall positive reply to the twenty-five recommendations proposed by the Legal, Constitutional and Administrative Review Committee's 'Hands on Parliament' Report No. 42.

In particular, the Commission commends the Government's support of Report No. 42 recommendations 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 15, 16, 17, 19 to encourage all political parties to examine measures to increase Aboriginal and

Torres Strait Islander peoples' participation in the political process; enhancement of civics education for all students in Queensland schools, inclusive of Indigenous perspectives of Indigenous systems of governance and the training of all teachers in relation to Aboriginal and Torres Strait Islander studies, encouragement of Indigenous youth participation in local and state government machinery processes and the ongoing monitoring and evaluation of those recommendations.

The Commission notes that recommendation 14 in relation to the role of ATSIC and efficient service delivery to Aboriginal and Torres Strait Islander peoples needs to be thoroughly reconsidered by the government to ensure efficiencies in service delivery for Aboriginal and Torres Strait Islander people across the levels of government in Queensland in light of the recent decision by the Commonwealth to abolish ATSIC and the impact this decision will have on Aboriginal and Torres Strait Islander Queenslanders.

The Commission requests the Government to reconsider its response to recommendation 21 concerning funding to appoint Parliamentary Indigenous Liaison Officers, where it states that 'there is insufficient justification for the appointment and that existing staffing levels within the Parliamentary Service are sufficient for the provision of advice to Committees concerning Aboriginal tradition and Island custom.' The response fails to recognize the value such a role could contribute to the Queensland Parliament. Aboriginal and Torres Strait Islander people are best placed to provide specialist advice in relation to advisory, education and protocol functions relating to Aboriginal and Torres Strait Islander peoples. While not only providing specialist advice to Parliament and its Members, these positions would also address the need to provide equal employment opportunities for Aboriginal and Torres Strait Islander people across the spectrum of employment experience. Having Indigenous people working in and observing the Parliament, may have significant flow on benefits in making Parliament a much less daunting place to Indigenous people.

The Commission notes the Committee's and government's response to recommendations 22 and 24 regarding the issues of an Aboriginal and/or Torres Strait Islander Assembly and dedicated seats. While the Committee notes minimal support expressed during public consultations for these two concepts the Commission is conscious of the ongoing participation of Aboriginal and Torres Strait Islander Queenslanders in human rights and international laws forums and the evolution of contemporary Indigenous governance which may continue to require the government's consideration of alternative forms of Indigenous representation and participation within our political processes.

Furthermore the decisions by the Commonwealth government to abolish ATSIC and the Queensland government to abolish its Aboriginal and Torres Strait Islander Advisory Board has created uncertainty [sic] within the Aboriginal and Torres Strait Islander communities as to their future involvement in government advisory processes and their future generally.

It is essential that Indigenous communities with their unique needs have a means to enable their continuing participation in the parliamentary decision making process, about matters that have a direct impact on them and their communities.⁵⁷

The concepts addressed by the above report are apt to an agenda aimed at general reconciliation, but they are very short on specifics going to Aboriginal customary law and its recognition in a constitution. The report eventually circles back to a report of some years earlier recommending dedicated seats in Parliament for Indigenous members, a proposal which was not accepted. Rather than aim at economic determinism as in Canada and Norway, the proposals in Queensland are focused on inclusion in the political process. No particular lessons are provided as to the inclusion of Aboriginal customary law for the Western Australian experience.

Northern Territory

The Northern Territory's Discussion Paper of 1992 has already been canvassed.⁵⁸ Nothing further has emerged from the Northern Territory on this topic.

Victoria

In August 2004 the Victorian Parliament passed the *Constitution (Recognition of Aboriginal People) Act 2004*, and on 10 November 2004 that Act came into force. This amendment to the Victorian Constitution does not deal with Aboriginal customary law, but consists of a new section 1A to the Constitution which recognises the status of the Aboriginal

57. Anti-Discrimination Commission (Queensland, 28 May 2004) (emphasis added).

58. See above p 537.

people as the descendants of Australia's first people and their unique and irreplaceable contribution to Victoria. It further goes on to provide that nothing in this section is to create legal rights or alter the interpretation of any statutes.

This amendment to the Victorian Constitution adds nothing to the debate on the place of Aboriginal customary law, and no further reference is appropriate.

New part to the Constitution: recognising Aboriginal customary law (detail of the application of customary law in separate legislation)

The Constitution contains a number of provisions that have become outdated and lacking in any utility.⁵⁹ Section 76, 'Operation of Act', which is concerned with the non-application of two 19th century Imperial Acts to the Constitution (meaningless after the commencement of the Constitution in 1890), might, along with other like measures, be repealed and replaced with 'Recognition of Aboriginal Customary Law'.

The new s 76 could provide that Aboriginal customary law, in so far as it extended to:

- (i) familial and social relationships;
- (ii) land management and associated intellectual property rights and conservation regimes under customary law; and
- (iii) Aboriginal community governance,

is to be recognised as part of the legal structure of Western Australia. The concepts of recognition, paraphrased (as to (i) and (ii)) from the *South African Constitution*,⁶⁰ in general form, allowing for detailed legislation to deal with specifics, would read as follows:

- (i) An Indigenous community⁶¹ that observes a system of customary law may function in accordance with such customary law, subject to any applicable legislation.
- (ii) The courts must apply customary law when that law is applicable, subject to this Constitution and any legislation that specifically deals with customary law.
- (iii) Persons not associated with an Indigenous community may be required to comply with the terms of customary law only so far as legislation specifically provides.

6. Preservation of the recognition of Aboriginal customary law

The history of reservation of special position for Aboriginal people in the Constitution

The Constitution, in the form despatched by the Western Australian colonists to London in 1889 to be made law as a schedule to an Imperial Act setting up the Western Australian Parliament contained—at the urging of the British government—s 70, which provided that one per cent of public revenue would go to the welfare of the Indigenous peoples. This section was guarded against simple repeal by the new legislative body being created by the Constitution, the Western Australian Parliament, by s 73, which provided that a Bill to repeal s 70 and a few other sections (including s 73) could not be presented to the Governor for assent, but required the assent of the British government.

Indigenous peoples in the late 19th century had no vote in Western Australia, so their position was not merely that of a minority group (and they were then far less a minority than they are today). The colonists took until 1894 to send a Bill to the United Kingdom seeking the repeal of s 70. It lapsed for breach of constitutional provisions and the colonists sent a second Bill in 1897. This Bill was assented to by the British government, but in 1905 the British law officers advised that the Bill had not been proclaimed in constitutional form and the repealing Act was bad at law. The colonists' third Bill for repeal of s 70 was assented to in 1905 and came into force in 1906.

59. As a result of the repeal of s 70 which had provided for 1% of public revenue to go to Aboriginal welfare (see *Yougarla v WA* (2001) 207 CLR 344) and the introduction of the *Australia Acts 1986* (Cth) and (Imp).

60. Set out at above p 540.

61. And the existence of at least some such communities is presently recognised under Western Australian law: see the *Aboriginal Communities Act 1979* (WA).

That Act was the subject of litigation in *Yougarla v Western Australia*,⁶² in which the High Court found the repeal of s 70 to have been valid. The point of the story is that even an entrenching clause, operable only by a polity removed from Western Australia, was not a protection to the minority Indigenous peoples who had been the subject of such concern from one British government in 1889 but disregarded by British governments from 1897 onwards.

The existing machinery for scrutiny of change to the Constitution and the inadequacy of such machinery to ensure the position of Aboriginal customary law in the Constitution

The original machinery of s 73 providing for reservation to the British government of amending Bills regarding some sections of the Constitution was made obsolete by the *Australia Acts 1986* (Cth) and (Imp). But in 1978 the sections had been amended to provide that, with respect to major changes to the parliamentary system or the role of Governor, absolute majorities of both Houses and of a referendum were necessary.

On the example of the repeal of s 70, it seems unlikely that a constitutional provision concerning Aboriginal customary law, even if entrenched under the 1978 terms of s 73, would survive a determined attempt at repeal. Such is the grim reality of the position of a minority group comprising about three per cent of the state's populace. In the absence of an entrenched Bill of Rights, putting the position of Aboriginal customary law beyond removal by simple majority, customary law must always be vulnerable to removal from the Constitution. Its survival would depend on acceptance in the Western Australian population at large as having utility in the wider community.

62. (2001) 207 CLR 344.