

PART IV

Aboriginal Customary Law in the International Context

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Aboriginal Customary Law in the International Context

In framing its proposals for recognition of Aboriginal customary law the Commission is required by its Terms of Reference to have regard to relevant Commonwealth legislation and to Australia's international obligations. The Commission published three background papers on Aboriginal customary law in the international arena by experts in the area. Each of these papers focused on a different topic namely, Aboriginal customary law in the context of international human rights law;¹ conceptual issues in recognition of customary law at the international level;² and international developments in benchmarking to reduce Indigenous disadvantage.³ It is not the intention of the Commission to reproduce these papers here; however, the topics covered in these background papers do merit some discussion in order to place the recognition of Aboriginal customary law in Western Australia in its international context, in particular the human rights context.

International Law and Australia's International Human Rights Obligations

International law can be understood as a body of rules that governs relationships between nations. These rules cover such matters as the conduct of nations during war; the control of nuclear and chemical weapons; the regulation of international waters beyond state boundaries; the regulation of environmentally harmful practices, such as whaling; the conduct of trade between nations; and, importantly, the protection of human rights. Rules binding at international law can take the form of treaties, conventions, protocols,⁴ covenants or an exchange of letters: each of these is a form of agreement (whether bilateral or multilateral) between nation states.

International Law: The Human Rights Focus

The United Nations General Assembly and its charter-based agencies or commissions are responsible for negotiating treaties between member states and setting international standards. In the human rights field the primary standard-setting agency is the United Nations Commission on Human Rights, an organ of the United Nations Economic and Social Council which is responsible for the promotion and protection of human rights. The International Labour Organisation (ILO), which was established by the Treaty of Versailles in 1919, also negotiates treaties that have human rights elements, although these are generally confined to labour matters such as working conditions and protection from child labour. Other relevant agencies are the Sub-Commission on the Prevention of Discrimination and Protection of Minorities and, of particular relevance to the current reference, the



1. Davis M & McGlade H, *International Human Rights Law and the Recognition of Aboriginal Customary Law*, Law Reform Commission of Western Australia (LRCWA), Project No 94, Background Paper No 10 (March 2005).
2. Cunneen C & Schwartz M, *Customary Law, Human Rights and International Law: Some conceptual issues*, LRCWA, Project No 94, Background Paper No 11 (March 2005).
3. Marks G, *The Value of a Benchmarking Framework to the Reduction of Indigenous Disadvantage in the Law and Justice Area*, LRCWA, Project No 94, Background Paper No 3 (June 2004).
4. Protocols are usually used to extend or amend treaties or conventions, such as the First Optional Protocol to the *International Covenant on Political and Civil Rights* (ICCPR) which sets up the complaints mechanism to the United Nations Human Rights Committee for violation of the ICCPR. A party to a treaty is not obliged to become a party to a protocol.

United Nations Working Group on Indigenous Populations.

Perhaps the best known international law treaties are those that make up what is known as the 'International Bill of Rights': the *International Covenant on Civil and Political Rights* (ICCPR) and the *International Covenant on Economic, Social and Cultural Rights* (ICESCR).⁵ The ICCPR and ICESCR were preceded by the *Universal Declaration of Human Rights* (UDHR) in 1948, itself a response to the atrocious breaches of human rights during World War II. Although the UDHR is not officially legally binding (remaining, as it does, at the status of a non-binding 'declaration'), its precepts have become generally accepted as rules of 'customary international law';⁶ that is, rules that are 'accepted as binding by a majority of civilised nations'.⁷ These documents form the core of the international human rights norms established by the United Nations; however, there are many other conventions that set standards for human rights generally and for the rights of vulnerable groups. These include the *International Convention on the Elimination of All Forms of Racial Discrimination* (ICERD), the *Convention on the Rights of the Child* (CROC), the *Convention on the Elimination of All Forms of Discrimination Against Women* (CEDAW), and the *International Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (ICAT). Each of these treaties sets up a body to oversee the obligations of state parties under the treaties and, in relation to ICERD, ICCPR, ICAT and CEDAW, to hear individual complaints against treaty violations.

Australia's International Human Rights Obligations

Although Australia has ratified almost 900 international treaties⁸ and is considered bound by the terms of these treaties at international law, it does not necessarily mean that Australian governments must observe them at home. This is because a ratified treaty does not have



any binding legal effect in Australian law until it is incorporated by legislation passed by both houses of federal Parliament. Whilst a proper and perhaps necessary restriction on the executive treaty-making power, this rule has meant that Australians are not automatically protected by the human rights norms contained in international conventions.

Fortunately, the primary human rights instruments, such as the ICCPR, ICERD and some provisions of the ICESCR have been incorporated into Australian laws such as the *Racial Discrimination Act 1975* (Cth), the *Sex Discrimination Act 1984* (Cth) and the *Disability Discrimination Act 1992* (Cth). These laws are overseen by the Human Rights and Equal Opportunity Commission (HREOC) which investigates and attempts to conciliate human rights complaints.⁹ Australians also have the right to make complaints of violations of the ICCPR to the United Nations Human Rights Committee (or of violations of ICERD to the Committee on the Elimination of All Forms of Discrimination) once all remedies have been exhausted in the Australian legal system.¹⁰ However, the effectiveness of these international complaints mechanisms is questionable. Megan Davis and Hannah McGlade report that although Australia was placed on a CERD human rights watch list following such a complaint for 'its failure to meaningfully consult with Aboriginal people' in respect of amendments to the *Native Title Act 1993* (Cth), this had no substantive effect on the government's ultimate actions.¹¹ In fact

5. The ICCPR and the ICESCR were established in 1966 and Australia became bound to these conventions in 1980 and 1976 respectively.
6. To become a rule of customary international law to which a state is bound, the rule must be consistently practised by the state and the state must have accepted its obligation to adhere to such rule.
7. O'Neill N & Handley R, *Retreat From Injustice* (Sydney: Federation Press, 1994) 13.
8. *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273 (McHugh J).
9. The Western Australian government is bound to a certain extent by the *Human Rights and Equal Opportunity Commission Act 1986* (Cth) but also has its own commission and tribunal established under the *Equal Opportunity Act 1984* (WA).
10. See Davis M & McGlade H, *International Human Rights Law and the Recognition of Aboriginal Customary Law*, LRCWA, Project No 94, Background Paper No 10 (March 2005) 23.
11. *Ibid* 23–24.

the Australian government is reported as having rejected the Committee's criticisms as 'unbalanced' and 'intruding unreasonably into Australia's domestic affairs'.¹²

The status of Australia's international obligations under human rights treaties that have not been incorporated into Australian law is currently ambiguous. Australia is required at specified intervals to report to the relevant treaty body on the domestic measures adopted to give force to the conventions it has ratified but this may have very little effect on some of the day-to-day administrative decisions made by governments. In 1995 a case came before the High Court concerning the domestic application of CROC, an international convention ratified by Australia. A majority of the High Court in *Minister for Immigration and Ethnic Affairs v Teoh*¹³ found that the fact that a ratified treaty is not incorporated does not mean that it is without significance in Australian law. The Court held that the terms of a ratified treaty can provide assistance in statutory interpretation; can provide a source for the development of the common law; and, if there is no expressed parliamentary or executive intention to the contrary, can create a legitimate expectation at administrative law that a government decision-maker will exercise any statutory discretion consistently with Australia's relevant treaty obligations.¹⁴ Although successive federal governments have been unsuccessful in passing legislation to overcome this decision,¹⁵ there have been executive declarations by numerous governments, including the Western Australian government, circumscribing the effect of international instruments upon administrative decision-making.¹⁶ The High Court's recent decision in *Re Minister for Immigration and Multicultural Affairs; ex parte Lam*,¹⁷ while not going so far as to overturn *Teoh*, indicates that ratification might not now be enough to create a legitimate expectation. Essentially this means that unincorporated treaties ratified by Australia may provide

assistance to courts in interpreting the law but will not create rights or expectations within the Australian legal system.

International Law and Indigenous Peoples

Current International Protection of Rights of Indigenous Peoples

ICCPR

The rights of indigenous peoples or ethnic minorities are recognised in a number of international instruments that have been ratified by Australia. Principal among these is the ICCPR which contains, in Article 1, a right to self-determination¹⁸ and in Article 27, a collective right to enjoyment of culture, religion and language. Although the applicability of Article 1 to Indigenous peoples is the subject of debate,¹⁹ the rights provided to ethnic minorities by Article 27 have been successfully relied upon by indigenous peoples in cases before the United Nations Human Rights Committee.²⁰ Nonetheless, the Committee (which oversees state party compliance with the ICCPR) has made clear that the rights protected by Article 27 are not absolute and cannot be exercised in a manner that is inconsistent with other provisions of the ICCPR.²¹ The potential of conflict between indigenous cultural practices and international law will be examined in more detail below.

ILO Convention 169

Another important international convention protecting the rights of indigenous peoples is ILO Convention 169. The Convention confirms rights to autonomous economic and social development of indigenous peoples²² and places positive obligations on signatories to have regard to customary laws in the application of

12. ATSI, 'Aboriginal and Torres Strait Islander Peoples and Australia's Obligations Under the United Nations Convention on the Elimination of all Forms of Racial Discrimination' (2000) <http://www.atsic.gov.au/issues/Indigenous_Rights/International/CERD/Default.asp>.

13. (1995) 183 CLR 273.

14. Ibid.

15. The Administrative Decisions (Effect of International Instruments) Bill 1995 (Cth) was introduced by the Keating Labor government but lapsed when Parliament was dissolved for the 1995 general election. The succeeding Howard Coalition government introduced its own legislation to Parliament in 1997 but the Labor opposition withdrew its support in the Senate leaving the issue unresolved by the time of the 1998 election. A second attempt by the re-elected Coalition government in 1999 also lapsed for the same reason. See Cranwell G, 'Treaties and Australian Law – Administrative Discretions, Statutes and the Common Law' [2001] *Queensland University of Technology Law and Justice Journal* 5.

16. See Lacey W, 'In the Wake of *Teoh*: Finding an Appropriate Government Response' (2001) 29(2) *Federal Law Review* 219.

17. (2003) 195 ALR 502. See, in particular, the joint judgment of McHugh and Gummow JJ and the judgments of Hayne and Callinan JJ.

18. The same provision appears in Article 1 of the ICESCR and in the *United Nations Charter 1945*. Issues relating to Indigenous self-determination in Western Australia are discussed in greater detail in Part X 'Aboriginal Community Governance in Western Australia', below pp 419–38.

19. See Eide A & Daes E, *Working Paper on the Relationship and Distinction Between the Rights of Persons Belonging to Minorities and those of Indigenous Peoples*, UN Doc: E/CN.4/Sub.2/2000/10, 19 July 2000, [21].

20. See the discussion of cases by Davis M & McGlade H, *International Human Rights Law and the Recognition of Aboriginal Customary Law*, LRCWA, Project No 94, Background Paper No 10 (March 2005) 55–56.

21. United Nations Commission on Human Rights, *The Rights of Minorities*, 50th session (1994) CCPR General Comment No 23.

22. International Labour Organisation, *Convention Concerning Indigenous and Tribal Persons in Independent Countries*, ILO Convention 169, Article 7.

national laws and regulations upon Indigenous peoples.²³ Although not ratified by Australia, ILO Convention 169 has been employed by the Australian judiciary in the interpretation of statutes.²⁴ And, as Chris Cunneen and Melanie Schwartz report in their background paper to this reference, the Convention is also used as a framework for international funding agencies in regard to the establishment of policies and programs for the benefit of indigenous peoples.²⁵ These applications of the Convention by non-state parties have led some commentators to suggest that, like the UDHR, the Convention is becoming accepted as binding international customary law.²⁶

ICERD

ICERD deals specifically with non-discrimination in the context of race and has therefore become an important weapon in the human rights armoury of indigenous peoples. In particular, it sets benchmarks of internationally agreed minimum standards which Aboriginal people have used to measure Australia's performance in respect of its international obligations.²⁷ In 1997, the ICERD treaty body (the Committee on the Elimination of Racial Discrimination) adopted a General Recommendation pertaining specifically to Indigenous peoples which called upon state parties, including Australia, to:

- (a) recognise and respect indigenous distinct culture, history, language and way of life as an enrichment of the State's cultural identity and to promote its preservation;
- (b) ensure that members of indigenous peoples are free and equal in dignity and rights and free from any discrimination, in particular based on Indigenous origin or identity;
- (c) provide indigenous peoples with conditions allowing for a sustainable economic and social development compatible with their cultural characteristics;
- (d) ensure that members of indigenous peoples have equal rights in respect of effective participation in

public life, and that no decisions directly relating to their rights and interests are taken without their informed consent; and

- (e) ensure that indigenous communities can exercise their rights to practice and revitalise their cultural traditions and customs, to preserve and to practice their languages.²⁸

This recommendation supports the protection of cultural rights of indigenous peoples under Article 27 of the ICCPR and indigenous peoples' claims to a greater range of rights under the *Draft Declaration on the Rights of Indigenous Peoples*.

Working Toward an International Declaration on the Rights of Indigenous Peoples

Since the early 1970s, the rights of indigenous peoples have been a priority of the United Nations Sub-Commission on the Prevention of Discrimination and Protection of Minorities. In 1986 the Sub-Commission released a comprehensive report into human rights and discrimination issues affecting Indigenous populations worldwide.²⁹ This report, known as 'the Cobo Report', found that racial discrimination was a common experience amongst all indigenous people and that this discrimination affected indigenous peoples in areas beyond fundamental human rights including housing, education, employment and health. The Cobo Report recommended national and international measures to eliminate such discrimination.³⁰

In response to the preliminary findings of the Cobo Report, in 1982 the Sub-Commission set up a five-member Working Group on Indigenous Populations (WGIP) to:

- review national developments pertaining to the promotion and protection of the human rights and fundamental freedoms of indigenous peoples; and

23. Ibid, Article 8.

24. See *Police v Abdulla* (1999) 106 A Crim R 466, 472 (Perry J).

25. Cunneen C & Schwartz M, *Customary Law, Human Rights and International Law: Some Conceptual Issues*, LRCWA, Project No 94, Background Paper No 11 (March 2005) 19.

26. Anaya J, *Indigenous Peoples in International Law* (New York: Oxford University Press, 1996), as cited in ibid 19.

27. For example, as mentioned above, Australian Aboriginal peoples brought international attention, via the Committee on the Elimination of Racial Discrimination complaints mechanism, to Australia's breach of ICERD in relation to its failure to meaningfully consult Aboriginal people on amendments to the *Native Title Act 1993* (Cth).

28. Committee on Elimination of Racial Discrimination, *General Recommendation XXIII on the rights of indigenous peoples*, UN Doc A/52/18 annex V (18 August 1997).

29. United Nations, *The Problem of Discrimination Against Indigenous Populations*, E/CN.4/Sub2/1986/7. For a fuller discussion of this study undertaken over a decade by Jose R Martinez Cobo see: Davis M & McGlade H, *International Human Rights Law and the Recognition of Aboriginal Customary Law*, LRCWA, Project No 94, Background Paper No 10 (March 2005) 42ff.

30. Office of the United Nations High Commissioner for Human Rights, Fact Sheet No. 9 (Rev 1), *The Rights of Indigenous Peoples* (July 1997) <<http://www.ohchr.org/english/about/publications/docs/fs9.htm>>.

- develop international standards concerning the rights of indigenous peoples, taking account of both the similarities and the differences in their situations and aspirations throughout the world.³¹

The WGIP has concentrated the bulk of its efforts on the second of these two mandates and in 1985 began work on the content of a *Draft Declaration on the Rights of Indigenous Peoples*. The Draft Declaration was adopted by the Sub-Commission in 1995 and submitted to the Commission on Human Rights for consideration. Since that time another working group has been set up to review the text and oversee the Draft Declaration's passage through the United Nations system. Currently, the Draft Declaration addresses matters such as the preservation of culture and language; the practice and development of spiritual traditions, customs and ceremonies;³² the maintenance of economic structures; the ownership, possession or use of traditional lands and resources;³³ protection against genocide and ethnocide;³⁴ the principle of self-determination through self-government; and rights of participation in dominant political structures. It also provides for minimum standards for the survival and wellbeing of Indigenous peoples.³⁵

The United Nations' intention was to have the Draft Declaration before the General Assembly to celebrate the First International Decade of the World's Indigenous Peoples (1995–2004). Although this ultimately did not come to fruition, it has been observed that the Draft Declaration has nonetheless been of enormous normative significance to the world's indigenous peoples and it is consistently cited in support of Indigenous claims in the international arena.³⁶ Importantly, the Draft Declaration was the subject of rigorous consultation with indigenous peoples and therefore addresses the charges of cultural relativism that have been made against existing so-called 'universal' human rights derived

from Western liberal tradition.³⁷ It is expected that the Draft Declaration will be introduced for ratification by state parties during the Second International Decade of the World's Indigenous Peoples which began on 1 January 2005.

United Nations Special Indigenous Mechanisms

In response to growing international concern during the past two decades about the marginalisation of indigenous peoples, the United Nations has established several mechanisms dedicated to indigenous issues. In addition to the WGIP and the Commission on Human Rights' working group on the Draft Declaration (discussed above), there are other notable mechanisms that contribute to the consideration of indigenous issues within the United Nations. One of these is the United Nations Permanent Forum on Indigenous Issues. Established in 2000, the Forum has a broad mandate to examine issues relating to indigenous peoples' economic and social development, the protection of Indigenous culture and environment, and matters such as Indigenous peoples' health, education and human rights. It also provides expert advice to the United Nations Economic and Social Council and promotes 'the integration and coordination of activities on indigenous issues within the United Nations system'.³⁸

An important focus on indigenous matters within the United Nations is also provided by the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous Peoples. The Special Rapporteur, established in 2001, complements the work of the WGIP and the Permanent Forum by providing thematic research on such matters as the impact of development projects on indigenous human rights and freedoms, analysis of indigenous-specific

31. See Office of the United Nations High Commissioner for Human Rights, Fact Sheet No. 9 (Rev 1), *The Rights of Indigenous Peoples* (July 1997) <<http://www.ohchr.org/english/about/publications/docs/fs9.htm>>.

32. As noted by Chris Cunneen and Melanie Schwartz in their background paper to this reference, the recognition of the right to develop traditions and customs is significant because it acknowledges that such customs do not remain static. Cunneen C & Schwartz M, *Customary Law, Human Rights and International Law: Some Conceptual Issues*, LRCWA, Project No 94, Background Paper No 11 (March 2005) 21.

33. Article 10 of the Draft Declaration provides for the fair compensation of Indigenous peoples who are deprived of their lands.

34. The term 'ethnocide' pertains to the destruction of culture and would include policies of assimilation or integration imposed by a dominant power.

35. See Office of the United Nations High Commissioner for Human Rights, Fact Sheet No. 9 (Rev 1), *The Rights of Indigenous Peoples* (July 1997) <<http://www.ohchr.org/english/about/publications/docs/fs9.htm>>. See also the more detailed discussion of the separate articles of the Draft Declaration in Cunneen C & Schwartz M, *Customary Law, Human Rights and International Law: Some Conceptual Issues*, LRCWA, Project No 94, Background Paper No 11 (March 2005) 20–25.

36. See Davis M & McGlade H, *International Human Rights Law and the Recognition of Aboriginal Customary Law*, LRCWA, Project No 94, Background Paper No 10 (March 2005) 45. An excellent summary of the work of the WGIP and its significance in respect of mobilising the international movement of the world's Indigenous peoples may be found in the Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice Report* (2002) ch 6.

37. The debate about the universality of human rights provided by the primary international instruments is covered in some detail in Davis & McGlade's background paper to this reference: see *ibid* 25–28.

38. *Ibid* 45.

legislation of states, participation of indigenous peoples in decision-making processes, and governance and investigation of old and new forms of racial discrimination. The Special Rapporteur also visits countries and communicates with governments concerning allegations of violations of human rights and fundamental freedoms of indigenous peoples worldwide.³⁹

Conflict Between Existing International Human Rights Standards and the Recognition of Aboriginal Customary Law

Recognition of Customary Law and the Principle of Equality

Perhaps the most pervasive principle of international human rights law is that of equality before the law. This principle is enumerated in the UDHR⁴⁰ and the ICCPR⁴¹ but can also be found—in the guise of non-discrimination—in ICERD⁴² and CEDAW.⁴³ Article 26 of the ICCPR provides:

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

According to Davis and McGlade, 'the most significant challenge to recognition of Aboriginal law is that recognition would violate the principle of non-discrimination and equality before the law'.⁴⁴ For example, recognition of Aboriginal customary law in the Western Australian context might mean that Aboriginal people are entitled to hunt game or fish in

circumstances whereas non-Aboriginal people may be prohibited or must otherwise apply for a licence. It might also allow for a broader range of kin to be entitled to a deceased estate where otherwise an estate might escheat to the Crown. And in certain circumstances recognition of Aboriginal customary law might mean that Aboriginal persons may be able to adduce evidence in mitigation of sentence for an offence that might not be available to a non-Aboriginal person. Each of these examples of recognition of Aboriginal customary law would appear to place Aboriginal people at an advantage over non-Aboriginal people. How then, can recognition that discriminates in favour of Aboriginal people be reconciled with the principle of equality at international law?

The International Court of Justice has held that the principle of equality before the law does not mean that everyone must be treated equally without regard to individual circumstances.⁴⁵ There are some cases where concrete conditions of inequality require state parties to take affirmative action and discriminate in favour of a minority in order to assist the achievement of substantive equality.⁴⁶ In Australia, unequal treatment on the basis of race is permitted under s 8 of the *Racial Discrimination Act 1975* (Cth) where special measures are required to address substantive inequality. In relation to Aboriginal people this provision has supported special legislative measures allowing unfettered access to tribal lands⁴⁷ and restrictions on the consumption and serving of alcohol.⁴⁸ Although in the first example the right of access was denied to non-Aboriginal (specifically non-Pitjantjatjara) people and in the second example the right to unrestricted consumption of alcohol was denied to Aboriginal people, it was nonetheless considered that each of these special measures was taken to benefit an Aboriginal minority by securing 'advancement of the beneficiaries so that they may enjoy and exercise equally with others their human rights and fundamental freedoms'.⁴⁹

39. Office of the United Nations High Commissioner for Human Rights, *Information Note on the Special Rapporteur on the situation of human rights and fundamental freedoms of Indigenous peoples* (February 2005), <<http://www.ohchr.org/english/issues/indigenous/rapporteur/>>.

40. Article 7.

41. Article 26.

42. Article 1(1) as reflected domestically in the *Racial Discrimination Act 1975* (Cth) s 10.

43. Articles 1 & 2.

44. Davis M & McGlade H, *International Human Rights Law and the Recognition of Aboriginal Customary Law*, LRCWA, Project No 94, Background Paper No 10 (March 2005) 56.

45. *South West Africa Cases (Second Phase)* [1966] ICJ Rep 305 (Tanaka J), as cited in *ibid* 58.

46. Davis & McGlade, *ibid* 58–59.

47. *Pitjantjatjara Land Rights Act 1981* (SA), as determined by the High Court in *Gerhardy v Brown* (1985) 159 CLR 70.

48. *Liquor Act 1978* (NT) s 122.

49. Human Rights and Equal Opportunity Commission, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Submission to the Northern Territory Law Reform Committee Inquiry into Aboriginal Customary Law in the Northern Territory* (14 May 2003), as cited in Davis M & McGlade H, *International Human Rights Law and the Recognition of Aboriginal Customary Law*, LRCWA, Project No 94, Background Paper No 10 (March 2005) 60.

The Commission can see no impediment in international or Commonwealth anti-discrimination laws to the specific legislative recognition of Aboriginal customary laws.

However, under Article 1(4) of ICERD (and s 8 of the *Racial Discrimination Act*) special measures are only temporary and the differentiation of rights cannot be maintained once the objectives of substantive equality are achieved. This represents a problem for recognition of Aboriginal customary law under this provision because Aboriginal customary law is essentially permanent, though like all legal systems it is evolving. Davis and McGlade suggest that a better means of recognition would be to recognise Aboriginal peoples as 'distinct peoples entitled to differential treatment rather than temporary special measures'.⁵⁰ As one commentator has said:

Recognition of customary law as an original part of the Australian legal system is not equivalent to being sensitive to or making allowances in the Australian legal process for the cultural differences of the various ethnic groups now making up multicultural Australia. In the post-*Mabo* era it is important to understand

that legislative and community recognition of customary laws is because those laws are the laws of Aborigines and Torres Strait Islanders as the first people of this country.⁵¹

The Commission's proposal for constitutional recognition of the unique status of Aboriginal peoples as 'first Australians'⁵² might be understood to support the differential treatment of Aboriginal peoples in Western Australia and the Commission can see no impediment in international or Commonwealth anti-discrimination laws to the specific legislative recognition of Aboriginal customary laws and culture in this state. Already the Western Australian government, through the Equal Opportunity Commission, has committed to entrenching a policy framework for substantive equality across all government agencies. The policy takes into account the effects of past discrimination against Indigenous peoples (and ethnic minorities), recognises that rights, entitlements, opportunities and access are

not equally distributed throughout society and acknowledges that the equal application of rules to unequal groups can have unequal results.⁵³ It is the Commission's opinion that the government's substantive equality agenda (which is focused on policy and planning, service delivery, and employment and training) can only be enhanced by the proposals for recognition of Aboriginal customary laws advanced by this Discussion Paper.



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50. That is, to legitimise the differentiation of treatment under ss 9 or 10 of the *Racial Discrimination Act 1975* (Cth): Davis & McGlade, *ibid* 62. See also the comments of former Aboriginal and Torres Strait Islander Social Justice Commissioner, Bill Jonas in 'Discrimination Against Indigenous Peoples in the Justice System' (Paper delivered to the Expert Seminar on Indigenous Peoples and the Administration of Justice, Madrid, 12–14 November 2003) 4.
51. Rose A, 'Recognition of Indigenous Customary Law: The way ahead' (Speech delivered at the Forum on Indigenous Customary Law, Canberra, 18 October 1995), as cited in Davis & McGlade, *ibid*.
52. See Part III 'Constitutional Recognition', above pp 57–61.
53. Equal Opportunity Commission (WA), Substantive Equality Unit, *The Public Sector Anti-Racism and Equality Program* (undated) 7.

Aboriginal Customary Law Practices and International Human Rights Standards

A concern that is frequently voiced in relation to the recognition of Aboriginal customary law is that certain customary practices of Indigenous Australians violate the human rights considered fundamental by the international community and protected by international law. Typical examples given in support of this concern are the practices of spearing (often referred to as 'payback') and non-consensual child marriage. For instance, it has been suggested that spearing and other ritual forms of corporal punishment under Aboriginal customary law may contravene prohibitions against torture or cruel, inhuman and degrading treatment or punishment under Article 7 of the ICCPR and the provisions of ICAT. However, in its submission to the NTLRC's 2003 inquiry into Aboriginal customary law, HREOC noted that such tribal punishments will not always meet the exacting standard of intention to inflict cruelty and humiliation required by ICAT.⁵⁴ The NTLRC have also observed that the question of what is cruel, inhuman or degrading treatment or punishment is determined solely by cultural perspectives and that their discussions with Aboriginal people suggested that ritual punishments were not viewed in this manner.⁵⁵ But whilst spearing might not, in all circumstances, offend international law it does offend Western Australian law. In particular it may render the person administering the tribal punishment liable to prosecution for assault or wounding.⁵⁶

In contrast, the practice of non-consensual child marriage clearly contravenes international law, which requires the free and full consent of parties to a marriage and denies legal effect to child betrothal.⁵⁷ Although there is clear evidence that this practice is declining amongst Aboriginal peoples in Western Australia, recent Northern Territory cases have shown that promised marriages between young girls and older men are still a reality in Australian Aboriginal society and that there will inevitably be cases of conflict with

Australian law and international standards. In particular the imbalance of power relations between the parties to a promised marriage can cause infringement of rights of a vulnerable girl child to be free from violence and non-consensual sexual relations. According to HREOC, Australia's obligations at international law require governments to take active measures to prevent non-consensual traditional marriage and non-consensual sexual relations within all marriages.⁵⁸

Each of these areas of conflict is examined in detail in the relevant Parts below;⁵⁹ however, it is important to keep these aspects of Aboriginal customary law in perspective. As this Discussion Paper shows, Aboriginal customary law is much wider and its application more complex and internally regulated than these practices might suggest. Among the topics discussed in this paper are Aboriginal customary laws relating to kinship obligations (including in tort and contractual arrangements), distribution of intestate estates, harvesting of natural food resources, intellectual property, family law issues, dispute resolution and community governance. Many of these areas do not feature practices that conflict with international human rights standards and, in fact, the law in these areas may be improved by reference to the rights of Indigenous peoples under international law.

Rights of Women and Rights of Indigenous Peoples at International Law

As mentioned earlier, the rights of indigenous peoples to freely practise their culture is protected by Article 27 of the ICCPR, which reads:

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

Under this provision, and the provisions of the *Draft Declaration on the Rights of Indigenous Peoples*,

54. Human Rights and Equal Opportunity Commission, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Submission to the Northern Territory Law Reform Committee Inquiry into Aboriginal Customary Law in the Northern Territory* (14 May 2003) 18.

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

56. For further discussion of the interaction between Aboriginal customary law and the criminal justice system, see Part V below.

57. See, for example, the *International Covenant on Civil and Political Rights* (Art 23(3)); the *International Covenant on Economic, Social and Cultural Rights* (Art 10(1)); and the *Convention on the Elimination of All Forms of Discrimination Against Women* (Art 16(2)); *Universal Declaration of Human Rights* (Art 16(2)).

58. Human Rights and Equal Opportunity Commission, Sex Discrimination Commissioner, *Submission to the Northern Territory Law Reform Committee Inquiry into Aboriginal Customary Law in the Northern Territory* (May 2003) 21.

59. Discussion of the practice of payback and issues of recognition of spearing and child marriage (including sexual relations with a child-bride) are dealt with in Parts V and VII respectively.

governments are encouraged to protect and recognise the practice of Aboriginal customary laws. However, it has been noted (both in Australia and in other countries with indigenous populations) that the recognition of certain cultural practices may conflict with women's individual human rights which are also protected under international instruments, including the ICCPR.⁶⁰ Failure to consider apparent conflicts between collective rights of minorities and the individual rights of members of those minorities may lead to entrenched discrimination and significantly undermine the benefits of customary law recognition.

Of course, as noted earlier, the Human Rights Committee has warned that recognition of cultural rights of minorities pursuant to Article 27 must not infringe other rights protected by the ICCPR.⁶¹ In the context of Aboriginal customary law, Davis and McGlade point out that this includes the right to equality between men and women (Article 3); the inherent right to life (Article 6); the right to be free from torture or cruel, inhuman or degrading treatment (Article 7); and the right to free and informed consent for marriage (Article 23).⁶²

Article 3 of the ICCPR—the right to equality between men and women—has been upheld by the Human Rights Committee to protect against violations of women's rights by traditional cultural practices and states have been urged to ensure that 'traditional, historical, religious or cultural attitudes are not used to justify violations of women's right to equality before the law and to equal enjoyment of all Covenant rights'.⁶³ It is therefore understood that the recognition of Aboriginal customary laws as part of the right to enjoyment of culture under the ICCPR must be subjected to a careful balancing act with other fundamental human rights, particularly the rights of Aboriginal women and children. The test established by the Human Rights Committee to determine

whether a minority right under Article 27 should prevail over a more general individual human right is:

Whether the restriction upon the right of the member of a minority could be shown to have a reasonable and objective justification and be necessary for the continued viability and welfare of the minority as a whole.⁶⁴

As will become clear in Part VII of this Discussion Paper, the individual human rights of Aboriginal women and children have been uppermost in the Commission's mind in relation to the recognition of customary laws and cultural practices that impact upon family life. In this the Commission is supported by HREOC who have asserted that women's individual human rights must prevail where there is irreconcilable conflict with Aboriginal customary law.⁶⁵ However, in the absence of a decision on Aboriginal customary laws by the Human Rights Committee and in recognition of the diversity of Aboriginal peoples and cultural practices in Australia, the question whether irreconcilable conflict exists must be made on a case-by-case basis.⁶⁶

Do Conflicts Between Aboriginal Customary Law and International Human Rights Law Create a Barrier to Recognition?

As the preceding discussion reveals, there are three main areas of potential conflict between Aboriginal customary law and international human rights law that could present a barrier to recognition of Aboriginal customary law in Western Australia. The first is that specific recognition of the laws of a section of society would violate the principle of equality before the law. However, as was seen above, there are peculiar reasons why Aboriginal peoples should be seen as a special case. Firstly, as the original inhabitants of Australia, Aboriginal people cannot simply be seen as one of many ethnic

60. See, for example, Office of the United Nations High Commissioner for Human Rights, 'Harmful Traditional Practices Affecting the Health of Women and Children', Fact Sheet No 23 (1995). One such harmful practice is that of female genital mutilation which was the subject of a major United Nations education campaign during the 1990s. Other identified practices worldwide are foot-binding, early marriage, dowry deaths and female infanticide driven by cultural preference for male children.

61. Article 5 of the ICCPR declares that 'Nothing in the present Covenant may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights or freedoms recognised herein or at their limitations to a greater extent than is provided for in the present Covenant'.

62. Davis M & McGlade H, *International Human Rights Law and the Recognition of Aboriginal Customary Law*, LRCWA, Project No 94, Background Paper No 10 (March 2005) 53.

63. United Nations Human Rights Commission, *Equality of Rights Between Men and Women*, CCPR/C/21/Review.1/Add.10, CCPR General Comment No 28 (29 March 2000) [5], as cited in *ibid* 53–54.

64. NTLRC, *International Law, Human Rights and Aboriginal Customary Law*, Background Paper No 4 (2003) 34. This test was used in *Lovelace v Canada* (HRC 24/77) and *Kitok v Sweden* (HRC 197/85).

65. Human Rights and Equal Opportunity Commission, Sex Discrimination Commissioner, *Submission to the Northern Territory Law Reform Committee Inquiry into Aboriginal Customary Law in the Northern Territory* (May 2003) 6.

66. *Ibid* 5.

International human rights standards . . . provide important benchmarks against which the protection and promotion of the rights of Aboriginal people . . . can be measured.

minorities; and secondly, the concrete conditions of inequality experienced by Aboriginal people (described in Part II) suggest the need for affirmative discrimination. In addition, it must be acknowledged that the cultural rights of indigenous peoples are also protected by the ICCPR.

The other two potential conflicts involve the recognition of particular Aboriginal customary practices that may contravene international laws. The discussion in relation to each of these areas highlights the fact that although recognition of Aboriginal customary law may be considered desirable as part of a program of affirmative discrimination and reconciliation, blanket recognition is not possible. The clear message from both Aboriginal and non-Aboriginal commentators is that the potential for recognition of particular laws and practices to impact upon protected individual human rights must be determined on a case-by-case basis. This is considered essential not only to protect the fundamental human rights of all Australians, but also to protect the rights of vulnerable groups, such as women and children, within the indigenous minority.

The Commission has already voiced its opinion that Aboriginal customary laws and culture should be appropriately recognised in Western Australia and that such recognition can take many forms including constitutional, administrative, legislative and judicial. In view of the potential conflict described above, the Commission has taken, as its threshold test for recognition, the consistency of relevant Aboriginal customary laws or practices with international human rights standards. The Commission also recognises that international human rights standards and the decisions of international treaty bodies provide important benchmarks against which the protection and promotion of the rights of Aboriginal people in Western Australia can be measured.⁶⁷

Proposal 5

Recognition of Aboriginal customary laws and practices in Western Australia must be consistent with international human rights standards and should be determined on a case-by-case basis.

Recognition of Aboriginal Customary Law in Other Countries

Although not required by its Terms of Reference, the Commission has been informed by the development of recognition of Aboriginal customary laws in other countries, in particular New Zealand, Canada and Papua New Guinea. The Commission has found that, despite the differences in colonial backgrounds (especially the existence of treaties between the colonising power and indigenous peoples in Canada and New Zealand) and the levels of recognition of Aboriginal customary laws, the indigenous populations of these countries are facing similar social and cultural problems to those found in Australia. But although Western Australia can be informed by recognition initiatives and responses to indigenous disadvantage in these other countries, the substantive differences between our indigenous populations cannot be ignored and detailed comparison is therefore of limited value. Thus, in the following Parts, the Commission has made overt reference to the experiences of non-Australian jurisdictions only where these experiences are found to be directly relevant to the examination of the particular areas of Western Australian law discussed in this paper.

67. See Marks G, *The Value of Benchmarking to the Reduction of Indigenous Disadvantage in the Law and Justice Area*, LRCWA, Project No 94, Background Paper No 3 (June 2004).