If you have issues viewing or accessing this file contact us at NCJRS.gov.

CR-Sent 1-7-85

The Law Reform Commission

Discussion Paper No. 20
March 1984

ABORIGINAL CUSTOMARY LAW — THE CRIMINAL LAW, EVIDENCE AND PROCEDURE

THIS PAPER IS NOT A COMMISSION REPORT. It contains a summary of the Commission's work in the areas of criminal law, evidence, procedure and proof of Aboriginal customary law in the Aboriginal Customary Law Reference. The Paper summarizes a number of Research Papers prepared by the Commission. Copies of these Research Papers (listed overleaf) are available on request to persons and organisations willing to comment in detail on the issues raised in them. **THE VIEWS EXPRESSED IN THIS PAPER AND IN THE RESEARCH PAPERS DO NOT REPRESENT THE COMMISSION'S FINAL VIEWS. THEY ARE PUBLISHED TO RAISE ISSUES AND PROMOTE DISCUSSION.** Enquiries and comments should be directed to —

The Secretary,
Australian Law Reform Commission,
99 Elizabeth Street,
SYDNEY 2000. (Telephone: (02) 231 1733)
(G.P.O. Box 3708, Sydney 2001)

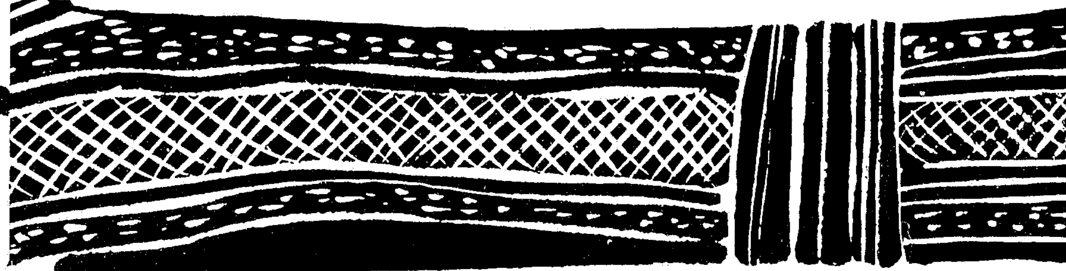
Submissions should be received, if possible, by 16 May 1984.

Commission Reference: ALRC DP 20.

Commissioner in Charge: Professor James Crawford

Research Staff: P.K. Hennessy
E.M. Fisher

95465



ABORIGINAL CUSTOMARY LAW REFERENCE

In 1977 the Commonwealth Attorney-General referred to the Law Reform Commission, for inquiry and report, the question whether it would be desirable to apply either in whole or in part Aboriginal customary law to Aborigines, either generally or in particular areas or to those living in tribal conditions only and, in particular:

(a) whether, and in what manner, existing courts dealing with criminal charges against Aborigines should be empowered to apply Aboriginal customary law and practices in the trial and punishment of Aborigines;

(b) to what extent Aboriginal communities should have the power to apply their customary law and practices in the punishment and rehabilitation of Aborigines; and

(c) any other related matter.

Since 1977 the Commission has conducted extensive consultations and research into the Reference. In November 1980 the Commission issued a Discussion Paper (ALRC DP17), which was widely distributed and commented on. In the light of these comments and further work, the Commission decided to produce further short Discussion Papers dealing with specific areas of its Final Report, to promote further public discussion and comment on the Commission's specific proposals. This is the second such short Discussion Paper. The earlier paper, Discussion Paper 18, summarised the Commission's tentative conclusions on marriage, children, and the distribution of property. This Paper outlines the tentative proposals in the areas of the criminal law and sentencing, evidence, procedure, and proof of Aboriginal customary law.

Both the earlier Discussion Papers and the following Research Papers, on which this Discussion Paper is based, are available upon request:

ACL RP 6 Aboriginal Customary Law: The Substantive Criminal Law

ACL RP 6A Appendix: Cases on Traditional Punishments and Sentencing

ACL RP 7 Aboriginal Customary Law: Sentencing of Offenders

ACL RP 8 Aboriginal Customary Law: A General Regime for Recognition

ACL R ... 'luralism

ACL R ... — Inter-

ACL R ... 'ocedure

ACL R

95465

U.S. Department of Justice
National Institute of Justice

This document has been reproduced exactly as received from the person or organization originating it. Points of view or opinions stated in this document are those of the authors and do not necessarily represent the official position or policies of the National Institute of Justice.

Permission to reproduce this copyrighted material in microfiche only has been granted by
Law Reform Commission of
Australia
to the National Criminal Justice Reference Service (NCJRS).

Further reproduction outside of the NCJRS system requires permission of the copyright owner.

TIMETABLE FOR COMPLETION OF REFERENCE

The Commission is preparing a Final Report on the Aboriginal Customary Law Reference, based on its Research and Discussion Papers and on the comments it has received. It is expected that that Report will be completed by mid-1984. Anyone wishing to comment on the issues or the draft Report should contact the Commission *as soon as possible* so that arrangements for consultation can be made.

Although the Commission's Report will be a Final Report discharging the Reference, the Commission does not believe that a single plan or scheme of 'reform' in this field is possible. Rather it is a matter for continuing consideration and action on the part of Aboriginal people and their organisations and Australian governments. The Commission's Report will contain recommendations aimed at assisting in that continuing process.

Aboriginal Customary Law — The Criminal Law, Evidence and Procedure

Table of Contents

	Paragraphs
The Reference	
Summary of Proposals	
Introduction	1–3
Aborigines and the Criminal Law	4–9
Aboriginal Customary Law and Liability under the General Criminal Law	10–13
Aboriginal Customary Law and the Sentencing of Offenders	14–20
Specific Recognition of Aboriginal Customary Law Defences or Offences	21–28
Other Criminal Law Issues	29
Questions of Evidence and Procedure	30–39
Proof of Aboriginal Customary Law	40–42

Summary of Proposals

In this Paper the Commission makes a number of tentative proposals.

- ***Substantive Criminal Law.*** Aboriginal customary law and traditions should be taken into account in determining intent and the reasonableness of acts for the purpose of the general criminal law (para 10–11).
- ***Evidence of Traditional Norms and Responses.*** Evidence of Aboriginal customary law and traditions should be admissible where relevant to show the likely reaction of an Aboriginal person in the defendant's circumstances (para 12).
- ***Relevance of Intoxication.*** Where Aboriginal customary law and traditions are relevant, they should be able to be taken into account both at the level of criminal responsibility and in sentencing notwithstanding other factors such as intoxication (para 13).

- ***Need for General Legislative Guidance.*** To reinforce these conclusions, legislation should provide that Aboriginal customary law and traditions shall be taken into account in determining liability under the general criminal law, and in particular in determining whether the defendant had the necessary intent and whether his acts were 'reasonable' for the purposes of any general defence (para 11).
- ***Prosecution and Sentencing Policy.*** Aboriginal customary law and local community opinion are, and ought to be, treated as relevant in deciding whether to prosecute, and in sentencing defendants to whom that customary law applies or who belong to the community in question (para 14–16). Taking traditional punishments into account in this way does not contravene basic human rights (including basic values of equality) nor does it involve condoning illegal acts (para 17–18). Legislation should provide that Aboriginal customary law and tradition are to be taken into account for these purposes (para 19). In addition there should be a special sentencing discretion in cases where there is a mandatory life sentence (e.g. murder) to take Aboriginal customary law into account (para 20).
- ***A Specific Customary Law Defence.*** If these safeguards are provided it is doubtful whether it is necessary to enact a specific customary law defence which would exonerate a defendant for actions he felt compelled to perform under his customary law. In the absence of clear evidence of need, other arguments against such a defence are decisive (para 21–24).
- ***A Partial Customary Law Defence.*** The arguments against such a customary law defence do not apply with the same force to a partial customary law defence (reducing murder to manslaughter). This would be an acknowledgement of the real conflicts that can occur, and an adjunct to the sentencing process. On balance the Commission is inclined tentatively to support such a defence (para 25).
- ***Diversion of Cases.*** There is potential for diversion of cases from courts and for the development of local mechanisms for resolution of disputes in particular cases. The Commission seeks views on the adequacy of existing procedural mechanisms and the extent to which, and ways in which, such mechanisms could be developed (para 26–27).
- ***Aboriginal Customary Law Offences.*** It is undesirable as a general rule to enforce Aboriginal customary law through making violations of it into offences within the jurisdiction of the ordinary courts. Specific offences may be desirable in particular cases to protect particular legitimate interests (para 28).
- ***Northern Territory Criminal Code.*** Provisions of the 1983 Code abolishing unsworn statements and the sentencing discretion in murder and reversing the onus of proof where alcohol is involved are most undesirable. Taken together they have the potential to convert many Aboriginal homicide cases to murder, thereby transferring sentencing powers from the courts to the executive (para 29).
- ***Questions of Evidence and Procedure.*** If the general criminal law is to be applied fairly to Aborigines, procedural and evidentiary safeguards are important. These include:

  - interrogation rules along the lines of those in the Criminal Investigation Bill 1981 (Cth) cl26 but with provisions to ensure that the prisoner's friend can provide real assistance to the suspect, and that all interrogations are tape-recorded (para 30–3);
  - reformed rules allowing for unsworn statements (para 34);
  - reformed procedures where unfitness to plead (not due to mental illness) is established (para 35);
  - clarification of the law relating to dying declarations (para 36);
  - non-compellability of Aboriginal traditional spouses (para 37);
  - better provision for interpreters (para 39).
- ***Proof of Aboriginal Customary Law.*** Where a court has to form an opinion on a matter of Aboriginal customary law or tradition, the opinions of persons with special knowledge and experience should be admissible, notwithstanding any general rules of the law of evidence (para 40–1). Views are sought on other methods of proof, including the use of assessors, court experts and written reports (para 42).

Introduction

1. ***Scope of this Paper.*** This is the second short Discussion Paper prepared by the Commission as part of the process of consultation and discussion leading to its Final Report. The previous Discussion Paper (DP 18) summarised the ways that Australian law might be changed to take account of differing Aboriginal family structures and of Aboriginal customs and rules of kinship and support. This Paper covers the areas of criminal law, sentencing, evidence and procedure (including the proof of customary law). These complex issues are set out here in a summary form with the main areas highlighted in an effort to promote discussion. The proposals do *not* represent the Commission's final views. The Commission welcomes comment, consultation and criticism upon them.

2. ***Local Justice Mechanisms: Customary Law or Self-Government?*** Part (b) of the reference asks the Commission to consider to what extent Aboriginal communities should have power to apply their customary law to Aboriginal offenders. In many respects this question is part of the wider issue of the extent to which Aboriginal communities should enjoy autonomy over local law and order matters (an autonomy which might, or might not, be exercised in recognisably 'customary' ways). The many differences among Aboriginal communities mean that no single proposal or plan of action is possible. Therefore the Commission's work on this topic can only be part of a continuing process. These questions are discussed in Research Paper 11/12 which sets out in detail the Australian and relevant overseas experience and suggests a number of options for further consideration and consultation.[1]

3. ***A Federal Inquiry in Areas of Traditional State Responsibility.*** Most of the areas discussed in this Paper have so far been mainly or wholly areas of State legal and administrative responsibility. The Commonwealth's power in these areas is

1. See P. Hennessy, ALRC ACL RP11/12, *Aboriginal Customary Law and Justice Mechanisms: Principles, Options and Proposals* (February 1984) (available on request); cf para 27.

to make special laws for people of any race (including the Aboriginal people) for whom such laws are deemed necessary.[2]

An advantage of Federal legislation is that it can be uniform throughout Australia, avoiding differences between the laws of different States. Agreement on uniform State legislation on any matter is very difficult to achieve. On the other hand there would be practical difficulties if special Federal machinery or administration were set up in areas that are generally under State control (such as the criminal law, or policing). The States have tended to be very sensitive about proposals for new Federal laws in such areas. This is a special difficulty for the Commission in its work on the recognition of Aboriginal customary laws.

Federal complications must not be allowed to get in the way of the basic question: what ought to be done? The Commission's tentative recommendations are an attempt to answer that question. If a sufficiently thorough and uniform response to the needs of Aboriginal people can be achieved in the States and the Northern Territory then federal action may be unnecessary. But the Commission's function is to make recommendations to the Federal Government and Parliament, leaving it to the judgment of those bodies whether direct Federal action is desirable.

Aborigines and the Criminal Law

4. ***The Reference.*** The Commission's Terms of Reference refer to the problems caused by conflicts between Aboriginal customary law and the criminal law and to the 'difficulties that have at times emerged in the application of the existing criminal justice system to members of the Aboriginal race'. They require the Commission to investigate 'whether it would be desirable to apply either in whole or in part Aboriginal customary law to Aborigines, either generally or in particular areas or to those living in tribal conditions only'. In particular the Commission is asked whether, and in what manner, existing courts dealing with criminal charges against Aborigines should be empowered to apply Aboriginal customary law and practices in the trial and punishment of Aborigines. In responding to this Reference, a key issue is what is meant by 'Aboriginal customary law'. In *Milirrpum* v *Nabalco Pty Ltd* Justice Blackburn had no difficulty in accepting the existence of a body of Aboriginal law, defined as 'a system of rules of conduct which is felt as obligatory upon them by the members of a definable group of people'[3], but he preferred to avoid any single categorical definition. The Commission agrees. The term is a broad and flexible one, which requires a similarly flexible definition, leaving much to the evidence in each particular case.

5. ***The Non-Recognition of Aboriginal Customary Law.*** The courts decided long ago that Aborigines, including traditionally oriented Aborigines, were subject to the general criminal law. In *R* v *Jack Congo Murrell* in 1836, for example, the court held that it had jurisdiction to try one Aborigine for the murder of another.[4] A year later, the Colonial Office in London directed the Governor of New South Wales to ensure that all Aborigines within his jurisdiction were treated as British

2. Constitution s51(xxvi). It is clear that this is a very wide power. cf *Commonwealth* v *Tasmania* (1983) 46 ALR 625.

3. (1971) 17 FLR 141, 216–7.

4. (1836) 1 Legge 72.

subjects. Aborigines and non-Aborigines were to be governed by the one law.[5] The injustice of this policy was noted at the time. In 1837, the House of Commons Select Committee on Aborigines stated that to require from Aborigines 'the observation of our laws would be absurd and to punish the non-observance of them by severe penalties would be palpably unjust'.[6] These were strong sentiments, but nothing much was done to carry them into practice, either then or later.

6. ***Aborigines and the Criminal Justice System.*** In the 150 years since that decision the impact of European settlement has been severe. So too has the impact of the criminal justice system upon Aborigines. While statistics are still inadequate, it is clear that Aborigines are greatly over-represented at all levels of the criminal justice system, whether in terms of arrest and detention rates, court appearances, appearances before juvenile aid panels, convictions or in prison populations. Constituting a little over one percent of the Australian population, Aborigines make up nearly 30 per cent of the present prison population.[7]

Although these figures are a product of underlying social and economic problems they result in part at least from apparently discriminatory treatment on the part of law-enforcement agencies. The New South Wales Anti-Discrimination Board in a study of street offences by Aborigines found that:

> . . . in 10 NSW towns with high Aboriginal populations, Aborigines charged with minor offences in public places greatly outnumber non-Aborigines. The behaviour resulting in the charges was in the main of a trivial nature, the majority of offences involving the use of unseemly words. Penalties, too, have a more severe impact on Aboriginal people. An appreciable number of those convicted and fined in the 10 towns in this study went to jail rather than pay the fine, even though jail is not a punishment option available under the Offences in Public Places Act.[8]

It is clear that many Aborigines are significantly disadvantaged, if not discriminated against, in their contact with the criminal justice system. These facts, together with:

- the movement away from policies of assimilation and integration towards policies based on self-management or self-determination; and
- the perceived injustice of denying recognition to distinctive and long established Aboriginal ways of belief and action

raise the question whether specific recognition should be given to Aboriginal customary law rules and practices in the criminal law field.

7. ***Equality and the Criminal Law.*** In responding to this question, an initial issue is how provision for the special needs or problems of Aborigines can be reconciled with the values of non-discrimination and equality before the law. The

5. Report by Grey on the Method for Promoting the Civilisation of Aborigines. Correspondence, Lord John Russell to Sir George Gipps, 8 October 1840: *HRA* Series 1, vol xxi, 35.

6. House of Commons Select Committee on Aborigines (British Settlements) *Report* (1837) 84.

7. W. Clifford, 'An Approach to Aboriginal Criminology' (1982) 15 *ANZJ Crim* 3, 8–9. And see ACL RP6, 5–9.

8. NSW Anti-Discrimination Board, *Study of Street Offences by Aborigines* (1982) iv.

principle that (with the exception of temporary and limited 'special measures' in particular fields) the law should not discriminate on account of race is fundamental. But in the Commission's view provisions for the recognition of Aboriginal customary law will not be racially discriminatory, nor involve a denial of equality before the law or equal protection as those concepts are understood in comparable jurisdictions, if these measures:

- are reasonable responses to the special needs of those Aboriginal people affected by the proposals;
- are generally accepted by them; and
- do not deprive individual Aborigines of basic human rights, or of access to the general legal system and its institutions.[9]

A second principle often referred to in this area is the idea that the criminal law should be unitary or uniform in a particular jurisdiction — that is, that there should be 'one law for all'. It is suggested that although this principle is important, it is not overriding. It requires only that a clear case be made out for a differentiation or 'special law'. Aborigines are clearly in a special position. Since 1788 they have been dispersed and in many cases dispossessed, and their traditional way of life and culture destroyed or greatly affected. Considerations of fairness thus powerfully support the case for special measures to deal with the continuing difficulties faced by many Aborigines.

8. ***The Recognition of Aboriginal Customary Law: A Possible Remedy?*** It has been suggested that the recognition of Aboriginal customary law would resolve many of the problems facing more traditional Aborigines in their contact with the criminal justice system. However, the relation between the non-recognition of Aboriginal customary law and high rates of offending is not necessarily direct.

- Even when traditionally oriented Aborigines are involved in criminal charges, the case will frequently involve non-traditional elements (e.g. alcohol).
- The cases where Aborigines have been charged with an act that has been required by Aboriginal customary law are relatively few. It is much more common, even for traditionally oriented Aborigines, for the accused's action to be a violation of both Aboriginal customary law and the general law (or for Aboriginal customary law to be silent in the matter).

Many of the problems faced by Aborigines today require action in the economic, educational and social fields. The problems reflected by high imprisonment rates are not likely to be solved by the recognition of Aboriginal customary law within the substantive criminal law. But the law does have a role to play. Failure to recognise Aboriginal customs and practices in the past has

9. Nor does the existence of immigrant groups in Australia, who may also have special needs or difficulties with the law, preclude appropriate special measures being taken for Aboriginal people. On the available evidence the impact of the criminal justice system on Aborigines is qualitatively different than is the case with any particular ethnic or immigrant group. More fundamentally, the situation of Aborigines as the indigenous people of Australia is clearly different from that of ethnic or immigrant groups. cf Australian Council on Population and Ethnic Affairs, *Multiculturalism for all Australians* (1982) 15, 24, 30–1. This is not to say that the needs of such groups in relation to the legal system should not be addressed, but these questions have not been referred to the ALRC. For further discussion of these arguments see ACL RP9.

resulted in many Aboriginal people being unjustly dealt with by the criminal justice system. Aborigines do not, in the Commission's experience, seek to be excluded from the protections given by the law, nor do they seek the establishment of separate systems of Aboriginal law. But there are other ways of recognising Aboriginal law which may help in reducing conflict. In addition such recognition would acknowledge the right of Aborigines to live their lives in traditional ways.

9. ***Ways in which the Criminal Law may be Adjusted.*** There are several ways in which the criminal law might be changed to take Aboriginal customary law into account and to deal with these areas of conflict.

- ***General Criminal Liability.*** The courts could take account of customary law and values in establishing whether the accused intended to commit the crime or whether a defence was applicable. To some extent this occurs already, but the question is whether it goes far enough or whether some statutory reinforcement is desirable.[10]
- ***Sentencing.*** In cases involving an Aboriginal defendant, members of his local community may have definite views on his punishment and rehabilitation. Sentencing discretions can allow the courts to take account of such views, and of customary law implications of the offence, where these are shown to be relevant. Guidelines could be provided to assist judges in carrying out this task.[11]
- ***Specific Recognition of Aboriginal Customary Law Defences or Offences.*** It can be argued that these provisions do not go far enough and that a specific customary law defence should be created, either exonerating a defendant who acted in accordance with his customary law or reducing the level of liability (e.g. from murder to manslaughter).[12] There is also a question whether breaches of customary law should give rise to special criminal liability.[13]
- ***Procedural Methods.*** Aboriginal customary law and practices could be taken into account to a certain extent by the use of procedural mechanisms, for example, by discretions not to prosecute. One issue is whether such procedural mechanisms should be formalised, e.g. through the use of a judicial voire dire, or by administrative pre-trial hearings.[14]
- ***Local Justice Mechanisms.*** It may be possible for cases involving certain Aboriginal customary law to be diverted from the criminal justice system to be dealt with by members of the relevant Aboriginal community communities. This possibility is implicit in the question referred to the Commission, whether Aborigines should have the power to apply their customary law in dealing with offenders from their own community.[15]

10. See para 10–13.

11. See para 14–20.

12. See para 21–5.

13. See para 28.

14. See para 26–27.

15. cf para 2.

These questions will be discussed in this Paper in the light of existing law and practice. Reform or reinforcement of the law or its application may be desirable, but in this area the courts' experience and sensitivity to the issues provide an essential starting point.

Aboriginal Customary Law and Liability under the General Criminal Law

10. ***Determining Criminal Intent.*** At common law evidence of customary law or traditional influences on an Aboriginal defendant is admissible if it relates to his intent in performing the act in question.[16] If a particular intent is required for an offence, then it is sufficient that the defendant lacked the intent, even if his state of mind was 'extraordinary' or 'unreasonable' judged by other people's standards. To this extent, therefore, the criminal law allows for the influence of customary law or tradition to be taken into account. The position under the Codes (with the partial exception of the Northern Territory Criminal Code) is effectively much the same, and like the common law does not call for reform in the present context.[17]

11. ***General Criminal Law Defences.*** Under the general law it may be a defence (although only a partial defence in some cases) that, for example, the defendant acted under duress, that he was subject to provocation sufficient to deprive an ordinary person of self control, or that he acted in self defence. Conflict can arise when conduct which was not sufficient to amount, for example, to provocation of a non-Aboriginal defendant might be regarded as extremely insulting by Aborigines because of its seriousness under Aboriginal customary law. The courts have minimised such conflict by allowing the customary laws and traditions of the defendant's community to be taken into account in establishing whether a reasonable person would have lost his self-control and thus whether the particular defence should apply.

For example in *R* v *Sydney Williams*[18] the defendant, an initiated Pitjantjatjara man, killed a woman after she disclosed tribal secrets which under local Aboriginal law women were not supposed to know or speak about. Such conduct was regarded as highly insulting. The court held it was sufficient to amount to provocation. In this way, Aboriginal traditional law, while not itself a defence, can be taken into account under the general law of provocation.[19] The question is whether the present position should be reinforced by legislation to provide that Aboriginal customary law should be taken into account in assessing the 'reasonableness' of conduct as part of a defence to criminal liability.[20] The Commission suggests that such legislation is desirable to reinforce the present law and to help ensure that it is applied fairly and consistently. The legislation should provide that Aboriginal customary law and traditions shall be taken into account

16. *Schultz* v *R* 1982 WAR 171, 176 (Burt CJ); *Parker* v *R* (1963) 111 CLR 610, 632 (Dixon CJ). Whether the defendant actually formed the intent is a matter for the jury aided by such evidence.
17. For the NT Criminal Code see para 29.
18. Reported on another point (1976) 14 SASR 1 (Wells J). cf *R* v *Muddarubba* 1956 NTJ 317 (Kriewaldt J).
19. There is no indication that the objective test for duress or self defence differs from that for provocation.
20. Along the lines of the Customs Recognition Act (PNG) s4.

in determining liability under the general criminal law, in particular in determining whether the defendant had the necessary intent and whether his acts were 'reasonable' for the purposes of any general defence.

12. ***Evidence of Traditional Norms and Responses.*** If Aboriginal customary law and traditions are to be taken into account in assessing the reasonableness of acts or excuses, it will be necessary to allow evidence to be given to demonstrate 'that the type of provocation the defendant received was perceived by him as more serious than it would be by a white person and that the way he responded to it was socially sanctioned, that is, that it was in accordance with tribal law.[21] However there is authority that such evidence would not be admissible to prove the likely reaction of an ordinary person in the defendant's circumstances.[22]2 This question has not yet been decided by an Australian appellate court. Since the point is unclear the legislation should specifically provide that such evidence is admissible.

13. ***Intoxication and the Criminal Law.*** Alcohol has been described as 'the greatest present threat to the Aboriginals of the Northern Territory'.[23] Perhaps because it is an introduced problem, perhaps for other reasons, alcohol is not usually regarded by traditionally oriented Aborigines as something which is regulated by their customary law. Attempts to find ways of dealing with it tend not to involve the use of traditional sanctions or dispute settling mechanisms, but involve co-operation with other authorities (licencing courts or commissions, police, etc). Longer term solutions are to be found only through various forms of support for Aboriginal communities and groups in developing methods of prevention and treatment. As Justice Muirhead commented in *R* v *Douglas Wheeler Jabanunga*[24],

> . . . the courts cannot effect a cure or diminution of the incidence of alcohol induced violence, but the situation cries out for community concern, intelligently planned programs and action rather than words. All the courts can do in the meantime is to punish those who kill or injure, but the deterrent value of what we do is, I am afraid, precisely nil.

At common law, intoxication is relevant to show that the defendant lacked the necessary intent.[25] Under the Codes in Queensland, Tasmania and Western Australia[26] voluntary intoxication is irrelevant to what are called 'offences of basic intent' but is relevant to show that the accused lacked 'specific intent' where this is an element of the offence (e.g. in cases of murder). Both at common law and under the Codes the fact of intoxication does not prevent other aspects of the

21. E Eggleston, *Fear, Favour or Affection Aborigines and the Criminal Law in Victoria, South Australia and Western Australia* (ANU Press, Canberra, 1976) 295.
22. *DPP* v *Camplin* 1978 AC 716, 727.
23. House of Representatives, Standing Committee on Aboriginal Affairs, *Alcohol Problems of Aboriginals. Final Report* (PP No 299/1977) iii. See also M Brady & R Morice, *A Study of Drinking in a Remote Aboriginal Community* (Flinders University, Western Desert Project, 1982).
24. Unreported, Northern Territory Supreme Court (16 October 1980) transcript of proceedings, 27–8.
25. *O'Connor* v *R* (1980) 29 ALR 449.
26. Qld s28; Tas s17; WA s28.

situation being considered. Thus under those Codes it is possible for customary law and other aspects of the offence to be taken into account in sentencing even in cases of homicide where alcohol is involved.[27] In view of this, there does not appear any reason, in terms of Aboriginal customary law for preferring the common law to the Codes. Where Aboriginal customary law and traditions are relevant this should be taken into account notwithstanding other factors such as intoxication.[28]

Aboriginal Customary Law and Sentencing of Offenders

14. ***Taking Aboriginal Customary Law into Account in Sentencing.*** The courts have often taken Aboriginal customary law into account in sentencing Aboriginal defendants. The Full Federal Court in *Jadurin's* case outlined the principles which have been applied by the Northern Territory Supreme Court and by some State Supreme Courts. The Court said:

> Once it is accepted, as it must be in the present case, that a court has taken into account the implications for a convicted Aboriginal within his own society, the argument that the offender is being punished twice loses some of its force. It does not disappear completely; the notion still remains, but its extent must be measured by the circumstances of the particular case. It was not suggested on behalf of the appellant that he being an Aboriginal, the court should in any way abdicate its function of dealing with him. It was submitted that the court should arrive at a penalty which reflected matters in mitigation arising from the appellant's personal situation and which recognized the structure and operation of Aboriginal society. This would avoid a situation in which the appellant was punished twice for what he had done, thereby producing in him resentment against a system of law of which he had little understanding . . .
>
> In the context of Aboriginal customary or tribal law questions will arise as to the likelihood of punishment by an offender's own community and the nature and extent of that punishment. It is sometimes said that a court should not be seen to be giving its sanction to forms of punishment, particularly the infliction of physical harm, which it does not recognize itself. But to acknowledge that some form of retribution may be exacted by an offender's own community is not to sanction that retribution; it is to recognize certain facts which exist only by reason of that offender's membership of a particular group. That is not to say that in a particular case questions will not arise as to the extent to which the court should have regard to such facts or as to the evidence that should be presented if it is to be asked to take those facts into account.[29]

15. ***The Relevance of 'Traditional Punishments'.*** As the Full Court was clearly aware, the use of the term 'punishment' in this context can be misleading. It should not be assumed that 'traditional punishments' are only a response to 'wrongful' acts, that they are closely regulated by rules, or that they are activated by some more or less collective decision, i.e. by a person or body authorized to act in the name of the community. Aboriginal 'punishment' may be one of a range of possible outcomes of a dynamic process of dispute-settlement, with little or no resemblance to the impartial, impersonal application of defined sanctions in accordance with general rules which is assumed by Anglo-Australian law. It does not follow that Aboriginal customary punishments (and dispute-resolving machinery generally) are not the product of something properly called 'law', or that they should be ignored because they do not reflect a particular conception of the administration of justice. But it does follow that the 'recognition' of such punishments is likely to be a difficult matter, given the different assumptions behind the 'two laws'.

16. ***Judicial Responses to Traditional Punishments.*** An examination of the cases suggests a number of propositions for which there is a good deal of support:

1. The attitude of members of the defendant's local community to him and to the offence is of particular relevance in sentencing, especially where the offence was committed within that community and where the victim was from that community.
2. That the defendant has been subjected to some form of local dispute resolution, even if this involves some traditional response under Aboriginal customary law, is relevant in sentencing him, especially where members of his local community are thereby reconciled.
3. However, the fact that the dispute has been resolved, though relevant, does not preclude further punishment by the court. The general Australian community has an interest in the maintenance of law and order in Aboriginal communities.
4. The fact that the defendant may be subject to some 'traditional punishment' or response within his local community in the future is also relevant in sentencing.
5. A court should not prevent a defendant from returning to his own community (with the possibility that the defendant will face some form of traditional punishment) if he wishes to do so, and if the other conditions for his release are met.
6. A court cannot order or impose 'traditional punishment' not lawful under the general law, and should not give the impression of having done so, thereby condoning (or even possibly producing) actions which are both unlawful and outside the court's control.

17. ***The Legality of Traditional Punishment.*** Where a particular form of traditional response (e.g. banishment from the local community for a time) is lawful (in the sense that it could be made a condition of a bond, for example)[30], there is no special problem with a court incorporating it in its sentencing order. However difficulties arise with traditional responses such as spearing which the general law considers unlawful. There have been suggestions that the general law relating to consensual assaults could encompass spearing, which would be legal provided that it was consented to. Under the common law principle that consent negates assault, the law has been able to accommodate quite severe forms of

27. The position under the Northern Territory Criminal Code 1983 is rather different. Section 7 creates a presumption of intent (and thus of murder) in such cases.

28. For the Northern Territory Code, which presents special problems in this respect, see para 29.

29. *Jadurin* v *R* (1982) 44 ALR 424, 428–9 (St John, Toohey, Fisher JJ) citing *Neal* v *R* (1982) 42 ALR 609 (Brennan J).

30. See e.g. *Moses Mamarika* v *R* (1982) 42 ALR 94.

deliberate violence on the ground that the victim has consented to the risk or infliction of harm — for example, injuries received in boxing or football. However, it may not always be a satisfactory solution to categorise spearing as a consensual assault, and in any case the extent of traditional punishment may go beyond anything that could be justified solely on the basis of the victim's consent.[31] On the other hand consent is clearly relevant, in relation to bail, in sentencing, and in prosecution policy. The Commission has been informed of the policy of the South Australian police in relation to 'spearing' as a form of tribal punishment:

> Providing the spearing relates to strict tribal custom and no complaint is made to police by the victim, a prosecution is not pursued.[32]

In particular cases this seems an appropriate way of dealing with the matter. The Commission is not aware of prosecutions of traditionally-oriented Aborigines for imposing a punishment such as spearing which did not lead to the death or significant injury of the victim, either in South Australia or elsewhere. The inference is that the process leading to such punishment is substantially a voluntary one, and that complaints to the police in such cases are not made or pursued.

18. ***Traditional Punishment and Human Rights.*** It has been argued that certain forms of traditional punishment or retaliation constitute cruel, inhuman or degrading treatment within Article 7 of the International Covenant on Civil and Political Rights of 1966 (the ICCPR) and that therefore the courts should not take account of such punishments in sentencing. The Commission's Terms of Reference specify that 'special regard' is to be given 'to the need to ensure that no person should be subject to any treatment, conduct or punishment which is cruel or inhumane'. In its Discussion Paper 17 the Commission suggested that the judically-ordered or legally-imposed spearing would constitute 'cruel, inhuman or degrading treatment or punishment' under Article 7.[33] This is, however, not the context in which the problem arises. Except in Western Australia[34], no Australian court now has the authority to impose corporal punishments of any kind, including traditional punishments such as spearing. But problems of taking traditional punishments into account continue to arise. Nothing in the ICCPR prevents a court from taking such punishments into account, for example in sentencing, along the lines suggested in para 16.[35]

19. ***The Need for Sentencing Guidelines.*** The Commission tentatively concludes that the principles established by the courts[36] are consistent with international standards of human rights and are desirable to help ensure the right of Aborigines to retain their traditional ways of life. Aboriginal customary law should be taken into account by prosecuting authorities and courts in accordance with those principles. The question is whether some form of guidance is needed for prosecuting authorities and courts in this difficult area, or whether existing unstructured discretions are adequate. If guidance is necessary, what form should it take? Legislation might be inflexible and may appear to contravene the principle of equality before the law.[37] On the other hand leaving the matter to existing discretions may mean that the principles which should govern will be applied inconsistently or not at all. On balance the Commission believes that the need for consistency and for providing guidance to courts justifies legislation to the effect that Aboriginal customary law and tradition are to be taken into account in the sentencing of Aboriginal offenders.[38]

20. ***Mandatory Life Sentences.*** A particular problem arises where there is no sentencing discretion, a problem which is particularly relevant in murder cases.[39] What the general law regards as murder may, because of customary law considerations, be substantially less culpable than other cases of murder, yet (except in New South Wales) no judicial discretion is available in such cases. This was one reason why the Papua New Guinea Parliament established a sentencing discretion in murder cases. It was also a major reason why, until 1983, the law of the Northern Territory provided a sentencing discretion in murder cases in respect of Aboriginal defendants, and required 'relevant native law or custom' to be taken into account in determining penalty.[40] These provisions were repealed by the Criminal Code Act (NT) (in force 1 January 1984), which provides no such discretion.

The question is whether it is desirable to create a special sentencing discretion in murder cases to allow Aboriginal customary law to be taken into account. In answering this question three options seem to be available:

- the creation of a special discretion (in cases where otherwise no discretion exists) to enable Aboriginal customary law to be taken into account[41];
- the creation of a partial customary law defence (reducing cases of murder to manslaughter and thus attracting a sentencing discretion);
- making no recommendation for legislation but leaving the matter to the executive.[42]

The question whether a special sentencing discretion should be created in cases where Aboriginal customary law and tradition are involved, cannot be answered in isolation from the other options, although support for a sentencing discretion need not involve the rejection of those other options.

31. cf *Attorney-General's Reference No 6 of 1980* [1981] 1 QB 715.
32. Acting Commissioner of Police, SA Police Department, Submission 245 (24 September 1982).
33. ALRC DP17, *Aboriginal Customary Law — Recognition?* (1980) 92.
34. Criminal Code (WA) s18, currently the subject of review.
35. See further ACL RP10 for discussion of the human rights issues.
36. See para14–16.
37. But see para7.
38. cf the Commission's proposals for sentencing guidelines and the establishment of a Sentencing Council: ALRC 15, *Sentencing of Federal Offenders. Interim Report* (AGPS 1980) para 409–55.
39. For the restricted discretion in NSW see Crimes Act 1900 s19 (inserted 1982); cf *R* v *Murray* 1982 1 NSWLR 740; *R* v *Burke* 1982 2 NSWLR 93. This is the only such provision in Australia.
40. Criminal Law Consolidation Act (NT) s6(1C), 6A. cf *R* v *Herbert, Sampson & Wurrawilya* (1983) 23 NTR 22, 24–5, 30–1 (O'Leary J).
41. To recommend a general discretion to apply to all Australians would exceed the Commmission's Terms of Reference. It would also be beyond the powers of the Commonwealth.
42. e.g. through decisions as to prosecution or parole.

In almost all the Australian homicide cases over the last ten years where Aboriginal customary law was claimed to be relevant, at least a partial ordinary defence has been available (e.g. provocation, self-defence, lack of specific intent through intoxication).[43] Provided that these general defences continue to be available and to allow courts and juries to take Aboriginal customary law into account in assessing the defendant's culpability, it can be argued that no special discretion is required.[44] Alternatively it can be argued that a partial customary law defence is a better method of ensuring such a discretion.[45] On balance the Commission's tentative view is that, even if such a partial defence is created, it remains important that flexibility should exist at the sentencing level to enable fairness in individual cases to be achieved. Whether or not the evidence in particular cases would reach the level required to reduce the offence of murder to manslaughter under such a partial defence, it is clear that the impact of Aboriginal customary law and tradition can be a most significant factor affecting culpability at the sentencing level. For these reasons the Commission tentatively supports the creation of a sentencing discretion to enable Aboriginal customary law and tradition to be taken into account even in cases where there is otherwise no discretion.

Specific Incorporation of Aboriginal Customary Law: Customary Law Defences and Offences

21. ***A Customary Law Defence?*** At present it is not a defence under Australian law to establish that under his customary law the defendant was required to do the act in question. The question is whether it is desirable to add to the existing range of defences under Australian law a general customary law defence. Such a defence would apply in cases such as *R* v *Isobel Phillips*[46] where the defendant, a woman from the Warramunga tribe, was required by her customary law to fight any woman involved with her husband. Warramunga law also set limits to the fight, which were not exceeded in this case. The charges were dismissed on the grounds that the defence of duress applied. A customary law defence, had it been available, would have produced a similar result.

22. ***Arguments for a Customary Law Defence.*** The Commission is not aware of any country which has accepted a general customary law defence in its criminal law. The Papua New Guinea Law Reform Commission has recommended an absolute customary law defence in respect of offences other than homicide and certain serious assaults, a new offence of diminished responsibility for killing in certain homicides and a reduced penalty by reason of diminished responsibility for offences endangering life and health.[47] No action has yet been taken to implement these recommendations.

43. Of the homicide cases collected in RP6A only one resulted in a murder conviction.

44. For the difficulties with the NT Criminal Code see para 29.

45. cf para 25.

46. Unreported, Northern Territory Court of Summary Jurisdiction (Mr JM Murphy, SM) 19 September 1983. cf *R* v *Old Barney Jungala*, unreported, Northern Territory Supreme Court (Muirhead J) 8 February 1978; *R* v *Melville Wurrumurra*, unreported, Northern Territory Court of Summary Jurisdiction (Mr G Galvin, CSM) 8–9 December 1981.

47. The defence would apply only to persons 'living in similar circumstances or . . . subject to similar social, employment, or other experience as ... members of the defendant's customary social group': PNGLRC Report No 7, *The Role of Customary Law in the Legal System* (1977). See also ACL RP6, 30–2.

In Australia, the Laverton Royal Commission recommended the creation of a customary law defence to apply until a decision could be made to incorporate certain areas of customary law into statutory law.[48] The preliminary report of the South Australian Aboriginal Customary Law Committee also recommended that further consideration should be given to the defence of customary law, whether as a complete defence, a partial defence, or a factor in mitigation of penalty.[49]

It can be argued that a customary law defence would be the clearest as well as the most direct way of linking criminal responsibility under the general law with Aboriginal customary law. As Brady and Morice comment: 'the true dilemma of Aboriginal versus Australian law lies in the situation whereby an action which may conform to Aboriginal law comes to be adjudicated upon by Australian law as an illegitimate act'.[50]

At the level of substantive law, only a customary law defence can directly and completely deal with this dilemma. A customary law defence would not prevent such cases from coming before the courts. However it would enable the defendant to avoid conviction provided he showed that his conduct was justified under his customary law. Other forms of recognition in this context are indirect and therefore may not cover all the cases that can arise. To the extent that they rely on exercises of discretion they are inherently unreliable.

23. ***Arguments Against a Customary Law Defence.*** On the other hand it has been argued that a complete customary law defence should not be available in cases of tribal killing because that would involve specifically endorsing actions such as pay back killings. Proponents of this view suggest that Aboriginal customary law can be taken into account sufficiently through the existing criminal law, in sentencing, or through the exercise of other discretions (e.g. discretions not to prosecute).

A related argument is that a substantive customary law defence would deprive persons (including the Aboriginal victims of offences, and especially women) of legal protection. It could be argued that a complete defence would materially affect the level of protection afforded to victims. The defence thus raises problems of 'equal protection under the law'.[51]

Thirdly, on the information presently available it is doubtful whether the creation of a customary law defence is necessary. In practice, cases of direct conflict between the two laws rarely come before the courts. It is rarer still for defendants to be actually punished in cases where a customary law defence would apply.[52] It can be argued that there is little justification for creating a controversial and possibly complex defence, to cover a very small number of cases.

48. *Report of Laverton Royal Commission* (Royal Commissioners: GD Clarkson, CF Bridge, EF Johnston QC, Perth, 1976) 212.

49. SA, *Preliminary Report of the Aboriginal Customary Law Committee* (Chairman Judge Lewis, 1979) 56–7. See also Judge J Lewis, Submission 193 (5 May 1981) 6.

50. M Brady & R Morice, *Aboriginal Adolescent Offending Behaviour. A Study of a Remote Community* (Flinders University of SA, Western Desert Project, 1982) 180.

51. cf ACL RP9, 41–2. And see para 7.

52. e.g. *R* v *Claude Mamarika, Raymond Mamarika and Andy Mamarika*, unreported, Northern Territory Supreme Court (Nader J) 17–19 August 1982.

24. ***The Commission's Tentative Views.*** An initial difficulty with a customary law defence is that it does not fit well with the operation of an informal customary law system. In Aboriginal communities traditional methods of resolving disputes are finely balanced mechanisms for the resolution of conflict through threats and demonstrations of limited violence. While for more serious offences actual violence may occur, argument and discussion (often heated and angry) are used to settle disputes. Discussion may go on at intervals for weeks or longer. Traditional methods of resolving disputes seek — not always successfully — to maintain social cohesion within the community. A strictly formulated defence would not necessarily correspond with the reality of traditional ways of resolving disputes.

Another problem is that a customary law defence might tend to involve a searching analysis, definition and testing of customary law by the courts. Putting customary law under the microscope in this manner risks several negative consequences. It detracts from the continuing flexibility of customary law and from Aboriginal control over their laws and traditions. Aborigines have commented on the risks and dangers involved in revealing aspects of Aboriginal law or tradition in the courts. A less searching or intrusive examination is necessary at the sentencing or procedural levels. Given the recommendations made in para 9–20 for other forms of recognition of Aboriginal customary law in the criminal law, and in the absence of any clear evidence of need, the Commission's tentative view is that a general customary law defence is not desirable.[53]

25. ***A Partial Customary Law Defence?*** Nonetheless it may be that a partial customary law defence would provide a way of reducing conflicts with Aboriginal customary law. This would be similar to the defence of diminished responsibility, reducing a charge of murder to manslaughter. Such a partial defence is not as vulnerable to the arguments outlined in para 23–4. It would not deprive a victim of legal protection or the right to redress. It would not endorse pay-back killings (which would remain unlawful) but it would acknowledge the conflicts that can occur. It has the added advantage that it could operate as an adjunct to the sentencing discretion recommended in para 20, which would also involve the jury.[54] For these reasons, and although in most cases the same result can be achieved through other defences or sentencing and procedural discretions, the Commission is inclined tentatively to support such a defence.

26. ***Procedural Alternatives.*** It has already been pointed out that these questions cannot be discussed in isolation. They are directly affected by the interplay of various policing and administrative decisions, substantive law and sentencing discretions. To a large extent these determine how the criminal justice system will respond to cases where Aboriginal customary law is relevant. Apart from the exercise of sentencing discretions, the most important way in which informal recognition has been extended to Aboriginal customary law in the criminal law has been through the exercise of administrative or procedural powers. Procedural alternatives include:

- non-prosecution for certain offences[55];

53. cf Eggleston, 300.

54. On juries see also para 38.

55. cf para 15.

- prosecution for a lesser offence (e.g. to allow the matter to be dealt with locally by the magistrate rather than in a distant centre by the Supreme Court or a District Court);
- the entering of a *nolle prosequi* by the Crown (e.g. on a no bill application);
- decisions by the court to discharge absolutely or not to record a conviction (these powers may only be available to lower courts).

These procedures are exercised in some jurisdictions and they could be developed further. It may not be appropriate to include detailed provisions in legislative form but they are an appropriate subject for prosecution guidelines.[56]

27. ***Diversion and Local Resolution of Disputes.*** There is also potential for the informal recognition of customary law in the development of diversion mechanisms that would allow cases, with the defendant's consent, to be dealt with within the Aboriginal communities concerned. This scheme could allow Aboriginal groups to resolve their disputes through a customary law process without the matter coming before the courts as a criminal prosecution. At the same time it would not exclude police action to prevent imminent violence.

Various procedures could be developed to divert such cases from the general court system. Two options have been suggested to the Commission. They reflect the view that if there is to be diversion of cases involving customary law, it may be undesirable to do so by amendment to the substantive law or by leaving the selection of cases to be excluded to ordinary law enforcement officers. The first would involve the establishment of a special panel with expertise and experience in customary law matters to whom decisions on prosecution would be referred by the police, and which would, after investigating the facts, recommend to the Attorney-General whether a prosecution should follow or whether the matter should be dealt with under customary law.[57] A second option would be for the trial judge himself to be given power, at any stage of the trial, to adjourn or even to terminate the hearing if it became clear that the matter had been satisfactorily resolved under Aboriginal customary law and that the public interest would not be served by continuation of the case.[58]

Compared with the problems of substantive liability and of sentencing, these procedural methods for dealing with conflict between the general system and Aboriginal customary practices have rarely been raised in submissions or evidence to the Commission. The Commission would welcome views as to the adequacy of existing procedural mechanisms, the appropriateness of exclusion or diversion mechanisms and ways in which such mechanisms could be developed. To a large extent these matters arise for consideration under Part (b) of the reference, which

56. ALRC 15, para 103. See generally id, para99–109.

57. Justice WAN Wells, Submission 13A (28 March 1977) 4–12. Another version of such a scheme would involve a 'no bill' application to the Attorney-General that a prosecution should not proceed in the public interest. Nader J in *R v Claude Mamarika, Raymond Mamarika and Andy Mamarika* expressed the view that a no bill application was a better vehicle for deciding such matters than a decision of the court, since it could be made squarely on the basis of public policy.

58. There may be practical difficulties in spelling out exactly how and when these powers should be exercised, but these could presumably be overcome if the basic principle was accepted.

requires the Commission to consider to what extent Aboriginal communities should have power to apply their customary law to Aboriginal offenders.[59]

28. ***Aboriginal Customary Law as a Ground for Criminal Liability.*** In certain cases the 'incorporation' of Aboriginal customary law as the basis of a particular offence may be desirable. To some extent this occurs already in the provisions of land rights and sacred sites legislation. But it has sometimes been suggested that there should be some more general incorporation of customary law offences such as the uttering of offensive words (e.g. the use of a dead person's name) or revealing secrets. One difficulty with such suggestions is that incorporation would involve non-Aborigines in defining customary offences, the circumstances in which they occur and the appropriate penalties. It is suggested that meddling with customary law in this manner would not, in the end, be acceptable to many Aborigines who fear that a general incorporation of customary law would deprive them of control over their law. Rather than the general adoption of customary law as a ground of criminal liability, it is better to incorporate only aspects of it which require such action in order to protect communities from identified external harm.

Other Criminal Law Issues

29. ***The Northern Territory Criminal Code.*** The present Reference deals with the whole of Australia and accordingly attention has not been focused on individual States or Territories. However, the Northern Territory is in a somewhat special position: it has a high Aboriginal population[60] which includes a relatively large number of traditionally-oriented Aborigines. It has a large Aboriginal prison population.[61] Against this background the new Northern Territory Criminal Code contains a number of provisions which are likely to make it more difficult for the criminal law to take account of Aboriginal customs and traditions. In particular the Code is in several respects inconsistent with the tentative conclusions outlined in this Discussion Paper.[62] These include:

- the abolition of unsworn statements (Code s360)[63];
- the reversal of the onus of proof in cases of intoxication (Code s7: where the defendant was intoxicated it is presumed that the intoxication was voluntary and that the defendant foresaw and intended the natural and probable consequences of his conduct);
- the mandatory life sentence in murder cases involving Aborigines (Code s164).

Apart from particular arguments on these questions, their combined operation has the potential to convert many Aboriginal homicides into murder, thus depriving courts of any sentencing discretion in such cases. It is unfortunately true that many such cases are associated with intoxication. The effect of s7 in such cases appears to be to throw the onus on the defendant to disprove intention. Aboriginal defendants as witnesses are often significantly disadvantaged, and this disadvantage will be made worse through the abolition of unsworn statements. Where (as is quite often the case in the Northern Territory) elements of customary law underlie an alcohol-related offence and help to explain the defendant's intent, the onus will in effect be cast on him to prove this or be convicted of murder. The abolition of a special sentencing discretion in murder, when combined with the other provisions of the Code, is likely to reduce the power of the courts to deal appropriately with homicide cases.[64]

Questions of Evidence and Procedure

30. ***The Importance of Procedure.*** While there are ways in which the criminal law may be adjusted to take account of Aboriginal customary law, procedural and evidentiary rules may also require modification or reinforcement to protect Aborigines whose comprehension of the criminal justice system is slight or non-existent, and whose perceptions of authority and of traditional procedures may create real difficulties within the adversary process.[65]

31. ***Interrogation of Aboriginal Suspects.*** The present rules regulating the interrogation of persons by the police are inadequate to protect the rights of most Aboriginal suspects, many of whom are hampered by language and by different concepts of time, distance and deference to authority. It has been argued that there is a clear need for interrogation guidelines for Aborigines, especially traditionally-oriented Aborigines, similar to the Anunga rules which operate in the Northern Territory.[66] Special rules do exist for the interrogation of Aborigines in the case of the Australian Federal Police and in the Northern Territory, South Australia and Queensland, but in each case there is room for improvement. Government inquiries and reports, both State and federal, have recommended the introduction of special rules but none have yet been fully implemented.[67]

32. ***Content and Scope of the Interrogation Rules.***

- Notification: The nearest Aboriginal legal service should be notified whenever an Aborigine is arrested, at least for more serious offences.
- Prisoner's Friend: An Aborigine should not be interrogated unless a 'prisoner's friend' is present. The prisoner should be able to select a prisoner's friend, and should be entitled to waive the requirement. The prisoner's friend should be someone in whom the prisoner has confidence and who has the capacity to be of assistance (e.g. a Legal Service field officer). The essential purpose of a prisoner's friend is 'to enhance the suspect's ability to choose freely whether to speak or to be silent'.[68] If the

59. See para 2.
60. 24.5%. cf the Australian average Aboriginal population of about 1%.
61. 60.7% Aboriginal, 39.3% non-Aboriginal as at 30 June 1983: Northern Territory, Department of Correctional Services (unpublished figures).
62. In other respects the Code is consistent with the Commission's tentative views on recognition of Aboriginal customary law: e.g. the recognition of traditional marriage for the purposes of the Code (see s1, definition of 'husband' etc). See ALRC DP18, 7–10.
63. See para 34.
64. In a letter of 6 December 1983 to the ALRC the Chief Minister of the Northern Territory denied that the Code would have this effect and commented that executive action would be taken to remedy any injustices arising from the operation of the Code.
65. See further ACL RP13.
66. *R v Anunga* (1976) 11 ALR 412 (Forster J).
67. See e.g. ALRC 2, *Criminal Investigation* (1976) 118–23. And see Criminal Investigation Bill 1981 (Cth) cl26.
68. *Collins v R* (1980) 31 ALR 257, 322 (Brennan J, dissenting).

police are uncertain as to the suitability of the prisoner's friend for this purpose, they should be required to select an available person from an agreed list.[69]

- Interpreters: An interpreter should be used if there are doubts as to the Aboriginal's person's comprehension of English (assuming this is the language in which the interrogation is conducted). It is preferable that the role of interpreter and prisoner's friend not be performed by the same person, although in certain cases it may be that the prisoner's choice of a friend is the only person able to act as interpreter.

The proposals should not be limited to traditionally oriented Aborigines. They should extend to all those Aborigines who by reason of their 'level of education and understanding' are 'at a disadvantage in respect of police interrogation, in comparison with members of the Australian community generally'.[70]

33. ***Status and Enforcement of the Rules.*** In view of recent decisions the Commission believes there should be a legislative endorsement of these rules, to assist in ensuring compliance with them. Non-compliance with the interrogation rules should result in any evidence obtained being inadmissible unless the court decides that the admission of such evidence would specifically and substantially benefit the public interest without unduly derogating from the individual's rights.[71]

In addition, it is an important incident to compliance with the rules to require tape recording of any interview between the police and an Aboriginal accused. This requirement together with the legislative endorsement of the interrogation guidelines set out above would represent a considerably higher degree of protection than that presently afforded.[72]

34. ***Unsworn Statements.*** The difficulties in giving evidence experienced by many Aborigines (and by other persons with poor comprehension of English) are powerful reasons for not abolishing the right to make an unsworn statement. But more traditional Aborigines have special problems with cross-examination, which is inconsistent with Aboriginal procedures of investigation and dispute resolution.

69. In a recent case the Federal Court held that the function of a prisoner's friend was merely to act as a friend or supporter of the prisoner, and that the choice of a friend should be 'left entirely to the person about to be interviewed': *Gudabi* v *R* (Full Federal Court, 10 February 1984) transcript, 27. It is suggested that the presence of a friend who is just as overborne and incapable of independent intervention during the interrogation as the prisoner, does not 'enhance the suspect's ability to choose freely whether to speak or to be silent', but may well mislead the court into thinking that this was the case.

70. cf Criminal Investigation Bill 1981 (Cth) cl26(4).

71. The burden of satisfying the court that such evidence should be admitted would rest with the party seeking to have it admitted.

72. It has been argued that the difficulty of obtaining reliable and voluntary confessions from Aboriginal suspects is so great that *all* confessions by Aborigines should be inadmissible. This was previously the position in some parts of Australia (e.g. Native Welfare Act 1963 (WA) s31(1) (replaced by a discretion to exclude confessions: Aboriginal Affairs Planning Authority Act 1972 (WA) s49)). On this basis arguments as to the need for legislative endorsement of the Anunga rules and questions of admissibility of confessions would not arise. But such a proposal would raise difficulties of demarcation and definition as well as unduly hindering the investigation of offences.

It is therefore regrettable that the Northern Territory, where these problems occur with some frequency, has abolished unsworn statements in the new Criminal Code.[73] The Commission's work on its Evidence Reference[74] supports the retention of the right, although various changes in the law are desirable to prevent abuse. Illiterate or semi-literate persons should be able to receive assistance in the preparation of the statement and if necessary have the statement read on their behalf.[75]

35. ***Fitness to Plead.***

> It is no doubt, a question of high legislative policy whether tribal Aboriginals, who are unable to understand the concepts of the ordinary law, ought to be tried under that law.[76]

At present persons found to be unfit to plead due to physical or mental disability may be detained indefinitely without regard to the merits of the case against them, and without having been tried. Clearly it is not appropriate to detain an Aborigine incapable of comprehending proceedings, but not clinically insane, for an indefinite time or until it is considered that he will be capable of understanding the proceedings and so to stand trial. If fitness to plead is to be argued in relation to tribal Aborigines (other than on grounds of insanity) appropriate alternative procedures should be introduced to deal with them. The Commission would welcome comment on the following options:

- The existing law should remain unchanged but efforts made to ensure that facilities are provided so that Aborigines are better able to comprehend legal proceedings, e.g. interpreters, tuition in the legal system.
- If no change is made to the law relating to fitness to plead, some procedural improvements could be made. Certain safeguards must be provided so that a person found unfit to plead is not incarcerated indefinitely without regular provision for review. It seems that the empanelling of a jury to determine the issue is unnecessary.
- A variation of a proposal made by the Criminal Law and Penal Methods Reform Committee of South Australia might be introduced so that, for example, an Aborigine who was unfit to plead would have his trial adjourned for six months to provide time for the defendant to acquire some comprehension of the nature of the court proceedings. If still unable to plead, he would have a plea of not guilty entered and would be tried in the usual way, with the jury being informed of the fact and of his inability adequately to instruct counsel.[77]
- When an Aborigine is unfit to plead and there is evidence that customary law may have been the reason for the offence, a pre-trial hearing could perhaps be used to determine whether the case should be heard in the normal way.

73. See para 29.

74. L Re & TH Smith, ALRC Evidence RP6, *Sworn and Unsworn Evidence* (1982) 95.

75. id, 111.

76. *Ngatayi* v *R* (1980) 54 ALJR 401, 405 (Gibbs, Mason and Wilson JJ).

77. Criminal Law and Penal Methods Reform Committee of South Australia, Third Report, *Court Procedure and Evidence* (1975) 36–8.

- Greater use could be made of the nolle prosequi.

The Commission tentatively believes that the third proposal, that of the South Australian Committee, is desirable and should be adopted.

36. ***Dying Declarations.*** In order to clarify the present law it may be desirable to legislate to declare that dying declarations made by Aborigines should not, by reason of adherence to traditional beliefs, be held to be inadmissible on grounds of any lack of belief in a religious sanction or supernatural judgment.[78]

37. ***Compellability of Aboriginal Traditional Spouses.*** It seems appropriate that the parties to an Aboriginal traditional marriage should only be compellable to give evidence for and against each other in criminal cases to the same extent as persons married under the general law.[79] The suggestion has also been made that the categories of non-compellability be extended to cover other persons about whom it is improper under Aboriginal customary law for a witness to speak. In practice this situation may not arise often, but a discretion to excuse a witness in such cases may perhaps be desirable.

38. ***Aborigines and Juries.*** Although in some Australian jurisdictions Aborigines were previously tried by judge alone rather than by judge and jury, these provisions have long been repealed. No strong arguments have been put to the Commission for abolition of jury trial, nor is there any clear evidence of injustices occurring as a result of traditionally-oriented Aborigines being subjected to jury trial. In cases where prejudice on the part of jurors is feared in a particular locality, a change of venue may be ordered by the court to resolve the difficulty. It would seem that, with one possible exception, no changes are needed in this area. The exception is the suggestion that the court should have power to empanel a jury composed entirely of one sex, on application by the defendant where sacred/secret matters are to be raised in court which under Aboriginal customary law are restricted to members of that sex.[80]

There is a strong argument that the multi-racial society of modern Australia should be better reflected in the composition of juries. Certainly increased efforts are necessary to increase the number of Aborigines on jury rolls. But it is not proposed that there be a requirement for representation of Aborigines on juries in cases involving an Aboriginal defendant.

39. ***Interpreters.*** At present the court has a discretion to allow an interpreter: there is no right on the part of an accused person or a witness to give evidence through an interpreter. It is suggested that the law in this regard is inadequate, not only as it applies to many Aborigines but as it applies to other Australians whose command of English is limited or non-existent. A number of proposals for reforms of the present law on interpreters have been made by the Commission in its Evidence Reference.[81] These proposals if implemented would go part of the way to resolving some of the problems faced by traditionally-oriented Aborigines in the courts. However it appears that the problem is much more related to resources than the law. Guaranteeing rights to translation will achieve little if there are no competent interpreters available. Some steps have been taken in this direction but it remains an urgent need. Existing programs for the training and accreditation of Aboriginal interpreters should be supported and extended.

78. See ACL RP13, 52–7.

79. cf ALRC DP18, 11.

80. This result was achieved in *R* v *Sydney Williams* (see para 11) by agreement between the prosecution and the defence and with the judge's approval.

81. See Evidence RP8, 90–8. cf also ACL RP13, 77–82.

Proof of Aboriginal Customary Law

40. ***Problems of Proving Aboriginal Customary Law.*** Existing rules of evidence have the potential to create difficulties for the proof of Aboriginal customary law. These difficulties have been dealt with in some overseas countries by discarding the rules of evidence entirely and allowing the courts to take judicial notice of custom and to play a more active role in its application. Such developments are not necessarily appropriate for Australia. They assume that the courts can identify with and assist in developing customary law. In a country such as Australia, where the customary law is that of a small indigenous minority, this assumption may not apply. It is better that Aboriginal customary law be proved in particular cases, and that Aborigines themselves be able to play an active role in this process. Where rules of evidence preclude this, specific reforms may be necessary. A number of areas require consideration.

- Qualification as an expert: It is not clear whether formal academic qualifications are essential to qualify someone as an expert. In practice the courts have heard evidence on customary law matters from persons qualified by 'habit and experience' in traditional Aboriginal custom and law. Care should be taken in such cases that the scope of expertise is defined and not exaggerated, but no specific change appears necessary for this purpose.[82]
- Ultimate issue rule: Where an ultimate issue in a case is a question of Aboriginal customary law the ultimate issue rule if applied would impose undue constraints on giving opinion evidence of such a rule. The Commission is not aware of any case in which the rule has been so applied. An objection based on rather similar grounds was rejected in *Milirrpum* v *Nabalco Pty Ltd.*[83] It may well be that evidence of customary law in such cases is 'necessary' and therefore not restricted by the rule.
- Opinion of Aboriginal customary law based in part on hearsay: It seems likely that the present Australian law on this topic draws a distinction between the mere repetition of hearsay, which is inadmissible, and the expression of an opinion by a qualified expert based in part on hearsay, which is admissible.[84] This avoids the need for specific reform, as it makes admissible any expert opinion relevant to the issue, leaving the tribunal to determine the weight to be accorded to it.[85]

41. ***Aboriginal Evidence.*** There are, potentially, legal (as well as practical) difficulties in calling Aboriginal evidence of Aboriginal customary law, where that evidence goes beyond statements of immediate experience to broader propositions about custom and tradition. In *Milirrpum's* case Justice Blackburn

82. cf para 43.

83. (1971) 17 FLR 141, 164–5.

84. id, 151, and see *Alyawarra and Kaititja Land Claim* (1979) para 58.

85. cf I Freckelton, ALRC Evidence RP13, *Opinion Evidence* (1983) 256–7.

concluded that such evidence was admissible as reputation evidence under an exception to the hearsay rule, but this was only possible because the witnesses there were called to prove the historical continuity of customary law-holdings. Aboriginal evidence of customary law followed now by Aborigines would normally be inadmissible opinion evidence or hearsay.

It is not satisfactory that the evidence of Aborigines about their customary law and tradition should be inadmissible unless it can be forced into one of the limited exceptions to the hearsay and opinion evidence rules. (At present such evidence is admitted in practice by concession of the court or counsel.) Nor is it satisfactory that such evidence should be admissible where the custom is a generation old (reputation evidence) but inadmissible where the custom is modern and possibly different. What is relevant in such cases is the customary law of the community at the time the dispute or event occurred. It is suggested that the problem be remedied by a provision to the effect that when the court has to form an opinion upon a matter of Aboriginal customary law or tradition, the opinions upon that matter of persons having special knowledge of that matter are admissible. Such evidence should be admissible although the witness is not formally qualified as an expert in Aboriginal customary law, and even if the question of Aboriginal customary law is the ultimate or a substantial issue in the case.

As a number of the land claims show, the weight of Aboriginal evidence may well be greater if it is given together with a group of persons who by their presence and demeanour (and perhaps by discussions among themselves) confirm what is said. The Commission would welcome views as to whether legislative provision is required to provide for such 'group evidence'.

42. ***Other Methods of Proof.*** Dissatisfaction with the adversary system in cases involving indigenous customary law has often led to proposals for modifications or alternatives to that system. These include:

- court experts;
- assessors;
- pre-sentence and similar reports;
- judicial notice;
- codification or other forms of recording of customary law.

For various reasons the last two are of little or no value in the Australian context. The first three have been used to a limited extent in Australia and elsewhere, but there have been difficulties with each of them. The Commission welcomes comment on the appropriateness of their use in cases involving Aboriginal customary law.

END