INTERNATIONAL UNION OF ANTHROPOLOGICAL AND ETHNOLOGICAL SCIENCES

COMMISSION ON CONTEMPORARY FOLK LAW

SYMPOSIUM, BELLAGIO, ITALY, 21-25 SEPTEMBER 1981

AUSTRALIAN ABORIGINAL CUSTOMARY LAW : PROGRESS REPORT

The Hon. Mr. Justice M.D. Kirby *
Chairman of the Australian Law Reform Commission
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CUSTOMARY LAW IN AUSTRALIA

According to the last Australian census (in 1976) there are nearly 161,000 Aborigines in Australia, constituting 1.2 per cent of the total population of the Australian continent. Only in one part of the country (the Northern Territory) is the Aboriginal population numerically significant (24 per cent). Evidence exists that Aborigines were living in Australia for more than 40,000 years before the commencement of British settlement in 1788. They lived in small groups as nomads, without an overall political organisation. They were therefore specially vulnerable to the impact of European cultures. Because it was considered that Australia had been acquired by settlement and not by conquest, little respect was shown for the laws and customary rules of Aborigines in Australia. There were no treaties signed equivalent to those negotiated with the indigenous people in Canada, the United States and New Zealand. This legal state of affairs remained virtually unquestioned until the 1950s.

In 1967 one of the few referenda carried to amend the Australian Federal Constitution removed certain discriminatory provisions from the Constitution and empowered the Federal Parliament to make special laws for Aborigines. This legal change encouraged others. Bipartisan government policies at a federal level in Australia resulted in greater support for cultural, racial and linguistic diversity. Legislation was enacted to provide

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* I am indebted to Mr Peter Hennessy, Senior Law Reform Officer, for the material on the principal themes emerging during the public hearings of the Australian Law Reform Commission 17 March 1981 — 21 May 1981.

for land rights for Aborigines in the Northern Territory. Coinciding with these legal moves on the part of the majority community has been a growth of political awareness and cultural pride on the part of Aborigines themselves. A representative body, the National Aboriginal Conference has been created as a forum in which Aboriginal views may be expressed at a national and State level particularly in relation to the goals and objectives that should be pursued in Aboriginal affairs. An Institute of Aboriginal Studies has been created, an Aboriginal Land Commissioner has been appointed. Aboriginal Land Councils have been established. It was against this background that in 1977 the Federal Attorney-General in Australia asked the Australian Law Reform Commission (ALRC) to report on the recognition of Aboriginal customary laws.

INQUIRY BY THE LAW REFORM COMMISSION

The reference to the ALRC posed two essential questions:

* the extent to which Australian law should accommodate Aboriginal customary law;
* the extent to which Aboriginal communities should be able themselves to apply traditional laws and punishments.

The Commission assembled a team of consultants to help it in its task. They included anthropologists, police representatives, administrators, Aboriginal activists and representatives of Aboriginal communities ranging from the traditional to the assimilated. After a great deal of consultation and several field visits, a discussion paper was issued in November 1980 titled Aboriginal Customary Law — Recognition? (ALRC DP 17). That discussion paper canvassed the history of the current approach to Aboriginal customary laws in Australia, the arguments for and against recognition, a description of the current justice system applicable to Aboriginal communities and the problems faced by them in Australian courts. An examination was made of Aboriginal police relations and of certain constitutional problems that exist in changing the status quo. The paper canvassed a number of options for reform. These included:

* recognition of some aspects of Aboriginal customary law in Australian courts;
* special provisions for the composition and procedures of courts sitting in predominantly Aboriginal districts;
* the provision of Aboriginal courts with Aborigines sitting as justices of the peace and exercising jurisdiction in minor breaches of the peace and small civil disputes;

* the use of traditional authorities to resolve disputes by means of community established law councils, at least in some remote Aboriginal communities;
* improvement in the relations between Aborigines and the police.

Between mid March and the end of May 1981 the Commissioner in charge of the Law Reform Commission's project (Mr Bruce Debelle) and a male and female staff officer of the Commission (Mr Peter Hennessy and Ms Ainslie Sowden) toured districts in all parts of Australia ranging from capital cities to remote outback towns. The purpose of the tour was to permit a thorough-going consultation with both white and Aboriginal Australians. The focus of the consultation was the Commission's discussion paper. Transcripts of evidence and submissions running into thousands of pages have been collected and are now being studied. No final decisions have yet been made by the Australian Law Reform Commission. Everywhere, the Commission was told that there would be advantage in allowing plenty of time for the traditional processes of the Aboriginal communities to work so that the business of consultation was not superficial or unduly hurried. Furthermore, so far as the majority community is concerned, the notion of breaking down the single, unitary nature of Australian laws and institutions is a radical one. There are few countries with such a polyglot society as Australia now is. The implications of legal diversity for such a society are far reaching. Nevertheless, the Australian Law Reform Commission will proceed, in symbiosis with its consultants to produce a final report with draft legislation for the Australian Federal Parliament. This report may not be expected before late 1982. This paper represents a progress report. It summarises some of the chief points to emerge during the recent circuit of public hearings and consultation in all parts of Australia.

A UNIQUE CIRCUIT

The ALRC is a permanent authority established by the Australian Federal Parliament to report to Parliament on areas of federal law referred to it by the Federal Attorney-General in Australia. The Commission was established in 1975. Though it has small resources, it has produced nearly 20 reports. Many of the reports have been followed by legislation both at a Federal and State level in Australia.

The procedures of public consultation involving the issue of a discussion paper and the conduct of public seminars and public hearings are the settled methodology of the Commission. Nevertheless, the hearings conducted into the subject of Aboriginal customary laws were the most extensive that have been held on any reference given to the Commission since its inception. During the nine weeks before 21 May 1981, hearings concerned with this topic had been held at over 30 venues in all States of Australia and in the two Territories. Normally, the ALRC sits only in capital cities. The nature of its terms of reference on Aboriginal customary laws demanded that it should consult most closely the people to whom the recommendations would directly apply. Accordingly it was necessary to go beyond the capital cities into numerous country towns and cities in remote areas of Australia, especially those where there was a significant Aboriginal community. Public hearings into Aboriginal customary laws were unique for a number of other reasons. Many of the hearings took the form of public meetings. Few if any prepared submissions were presented. The Commission's tentative proposals were presented to the meetings and comments were sought on each one. Some meetings were held with the aid of interpreters because the people in positions of authority within the community could speak no English or inadequate English. On a number of occasions separate meetings were held for men and women. Sometimes this was necessary because some aspects of customary law could not be discussed with both men and women present. At other times it was done to ascertain the particular views of Aboriginal women. Meetings were held in diverse venues including community halls, under trees, on river banks and in the middle of a red-dust football oval.

A summary of the Commission's discussion paper, giving the gist of the proposals had been prepared. This ran to only six pages. Copies were sent to all Aboriginal communities of any size in Australia. Separate copies of the tape for men and women were sent to regional offices of Aboriginal Affairs in remote areas and to the Aboriginal Legal Service in remote areas. The simple English version was translated into three Aboriginal languages, Pitjantjatjara, Warlbiri, and Gupapuyngu, and sent to communities in those language groups. Communities to whom cassette tapes were sent were invited to send a tape back to the Commission outlining their views if they were unable to send representatives to the public hearing in their area.

Discussion ranged widely during the public hearings. All aspects of the Commission's tentative proposals came under scrutiny. Some issues were raised which had not been dealt with in the Discussion Paper. Other matters brought to the Commission's attention fell outside its Terms of Reference. Unfortunately, no clear cut solutions emerged although there was general, if sometimes qualified, support for the majority of the Commission's proposals. The reference is difficult and complex, a fact which was regularly commented on at the hearings.

This review will concentrate on the main issues put forward in the Discussion Paper and the comments received on those issues at the various hearings. The main issues are:

- existence of customary law;
- manifestations of customary law;
- Aborigines and the criminal justice system;
- justice mechanisms in Aboriginal communities;
- Aborigines in Australian courts;
- Aborigines and the police.

EXISTENCE OF CUSTOMARY LAW

The Commission in its research on Aboriginal customary law has looked for certain features of Aboriginal lifestyle which evidence the existence of customary law. These include language, initiation rites, kinship rules, traditional authority structures, traditional punishments and marriage rules. The approach of looking at these indicators of the existence of customary law comes through clearly in the Discussion Paper. These more obvious manifestations of customary law are most evident in the more remote Aboriginal communities in central and northern Australia.

This approach and the conclusion of the Commission was challenged at a number of hearings. It was submitted at hearings in each of the capital cities that customary law did exist in the urban environment. In Perth a family feud, involving 2 brothers who were leading footballers, which had been going on for some years, was pointed to as a manifestation of customary law. In Adelaide it was stated that a definite Aboriginal sub-culture existed in the city. Kinship, the extended family and the concept of sharing were pointed to as the important features of Aboriginal customary law in urban environments. It was argued that the customary law which existed in urban situations, while different to that existing in central Australia, still came within the Commission's Terms of Reference. A submission by the Victorian Aboriginal Legal Service at the Melbourne hearing conceded that customary law in a strict sense was no longer in existence in Victoria but that certain aspects of Aboriginal lifestyle and outlook could lead to problems with the legal system and the Commission should take this into account. Submissions made in Launceston and in Canberra argued that the Commission had fallen into an anthropological approach to customary law and that it had concentrated on communities which were isolated from the mainstream of white society because such communities were distinctive and had a life of their own. This it was said, ignored the majority of Aborigines in Australia who lived in communities which had developed practices and laws to accommodate white society, but who nonetheless had distinctive 'custom' and 'laws' of their own, breach of which were regarded most seriously.

MANIFESTATIONS OF ABORIGINAL CUSTOMARY LAW

The manifestations of customary law mentioned above were discussed in depth during the course of the hearings. Enormous variation exists in the extent to which traditional customary law operates in Aboriginal communities throughout Australia. There are even great differences in the tribal law which operates among different tribal groups. This feature of customary law was mentioned by the Bardi community at One Arm Point, Western Australia. Many witnesses pointed to the erosion and the changes occurring in traditional customary law and looked for support to bolster it. Some thought change was inevitable but wished to retain certain aspects of Aboriginal law. In communities where significant features of Aboriginal customary law were still retained there was a determination to maintain it. Some communities sought to revive aspects of Aboriginal law because they saw it as a 'strong' law along side the 'weak' white man's law.

1. Traditional Punishments

In its Discussion Paper the Commission had proposed that any recognition of customary law should not include the traditional punishments of killing, spearing and other forms of wounding. At the hearings there was an almost unanimous rejection of the recognition of payback killing. However, there were divergent views on the question of spearing and other physical punishments. Spearing has disappeared from many communities and few of these communities sought its return. One exception was Mr Harry Wilson, President of the Council of Peppimenarti (N.T.), who sought the revival of spearing as the only way to maintain order among young people in the community. He pointed to long delays which occurred in getting police to come to sort out trouble and the ineffectiveness of sending people to gaol. People returned to the community and considered themselves 'big time gaolbirds' and were continual re-offenders. Similar sentiments were expressed by persons in other remote communities. These communities viewed the Australian legal system and the punishments used as irrelevant and inappropriate. They considered that the advantages of the more traditional punishments was their immediacy. Not all of these, however, necessarily sought to use spearing or physical punishments.

Communities where spearings were still carried out stated that this would continue regardless of what the Law Reform Commission recommended. In some communities the police were often aware that a spearing has or was going to take place but did not intervene, apparently out of respect for Aboriginal customs but possibly in defiance of their obligations under Australia law. At the hearing in Adelaide a police officer stated that he was aware of spearings having occurred in the North West reserve of South Australia but had never had a complaint. This was the basic reason why no action had ever been taken. At Yuendumu (N.T.) it was proposed that spearings should occur in the presence of police and health officers before the defendant was handed over to the police. The risk of double jeopardy was not seen as a problem at Yuendumu or at other centres.

The inevitability of spearing and other physical punishments continuing was one argument for recognition presented at the hearings. Others argued that it was an integral part of the Aboriginal law and order system. Any recognition should be of all customary law as it currently operates and parts should not be selectively deleted. On a number of occasions it was mentioned that for a tribal Aborigine spearing was a much more humane punishment than being sent to gaol.

A strong argument put forward against spearing was that it often was involved with pay-back following inter-personal disputes. This sometimes led to feuds which carried on over long periods of time erupting usually when persons had consumed too much alcohol. Most witnesses objected to spearings in these situations because of the community problems which resulted. While pay-back spearing was a means of social regulation and control in some communities it should be contrasted with spearing as a punishment carried out with community approval.

Some communities mentioned that alternatives to spearing and physical punishments have developed. At Maningrida (N.T.) it was said that spearing was disappearing and a system of compensation was developing in its place. The Warrabri community (N.T.) have come to an arrangement where there is still a confrontation with spears but no actual spearing takes place.This development can compare with ceremonial stoning for adultery which followed the advent of British rule in Northern Nigeria. The form was retained for public humiliation but the cruel element was removed from the reality.

The prevalence both of spearing and physical punishments appears to be diminishing principally because of the intrusion of the Australian criminal law and the presence of white police. The Commission is however confronted with a dilemma over whether such traditional punishments should be recognised and, if so, how it can be achieved?

Other punishments, some of which are non-traditional, do not raise the same problems for recognition. These include banishment from the community, being sent to bush camps for a period of time, community work schemes, social ridicule, and fines. Some communities also sought to have a small gaol at the community. This was envisaged as being somewhere to put people who were drunk and causing trouble.

Many communities use banishment as a punishment. This usually involves removal from the community for a set period of time. With young offenders it may involve being sent to bush camps to be educated in Aboriginal law and culture. At Fitzroy Crossing (W.A.) this is well organised and called the Aboriginal Training Centre. Bush camps are generally related to the initiation of young men. Occasionally, offenders are sent to other communities, the removal from family and friends being seen as the greatest hardship.

Communities throughout Australia have developed unique punishments. For example, at the Looma Community near Derby, Western Australia an offender is made to sit in the sun all day and watch a tobacco tin of water evaporate in front of them. While this is happening, the offender is not allowed to touch it or have a drink.

2. Marriages Rules

The marriage rules of Aboriginal customary law were widely discussed at the public hearings. The Commission's Discussion Paper had suggested that courts should have regard to tribal marriages in such matters as claims by spouses against the estate of a deceased Aborigine, the status of children, and the payment of damage to the spouse of a deceased Aboriginal pursuant to either workers' compensation legislation or legislation relating to compensation to victims of motor accidents. Generally, the recognition of tribal marriages was supported on equity grounds. In more remote communities, the recognition of tribal marriages was not perceived to be a major problem. Occasionally social welfare problems arose. One particular example mentioned was when marriages broke up or when partners changed and relatives became involved in caring for children. Grandparents often took over the care of children and had problems in obtaining the social welfare benefits to assist them. Another example, which was not common, was when a man had more than one wife and each of the wives had children. The social welfare problems of tribal marriages would appear to be fairly easily overcome.

In more traditional communities promised marriages still occur. However, it seemed that the number of these was diminishing and the practice may be dying out in those communities where it still occurs. The main factor put forward for this charge was that young people refused to participate and the community had few ways to force them to do so. A witness at the hearing at Nhulunbuy (N.T.) stated that communities in the area distinguished between love marriages and promised marriages. Marriage for love is becoming more prevalent and often involved substantial negotiation. It was not uncommon for compensation to be paid by one family to another.

While the number of promised marriages occurring in many Aboriginal communities was declining these same communities were very strict about ensuring that people married the right skin groups. This was regarded as a matter of primary importance. Mr Morris Luther representing the Lajamanu community at Hooker Creek (N.T.) made a detailed submission at the Alice Springs hearing for the recognition of certain aspects of customary law. This included the recognition of a number of marriage and kinship rules with substantial penalties for non-compliance. A similar submission was received from the Roper River (N.T.) community at the Darwin hearing. The Moiyunda Association on Mornington Island (Qld) sought power for the elders to proscribe that 'young people must not have sex, or live together as man and wife, unless they are straight skin for one another, and both their families have agreed'. A contrasting view was presented by the Kowanyama community (Qld) which stated that it was now too late to try to enforce traditional kinship rules for marriage.

There was strong support for the Commission's tentative proposal that the marriages rules of Aboriginal customary law be recognised. It should be noted, however, that very few opinions on promised marriages were given by young people, the people directly affected by such recognition. Attitudes to traditional marriage are changing and communities are adopting their own solutions to the problems which arise. The hearings seemed to confirm that the Commission should not interfere with this area of customary law apart from recognising tribal marriages for the purposes recommended in the Discussion Paper.

3. Aboriginal Lifestyle

Three features relating to Aboriginal lifestyle emerged during the course of the public hearings which were not discussed in the Discussion Paper. These problems related particularly to Aborigines living in a non-traditional environment. The first was the hunting or fishing for traditional food, the second tribal doctors and the third, funerals.

Traditional Food. At nearly all the hearings in Queensland it was mentioned that there were restrictions on Aborigines catching their traditional food. In particular, mention was made of turtle and dugong which are protected species pursuant to State legislation. An Aborigine who lives on a reserve in Queensland is exempted from the provisions of the Act prohibiting the catching of these protected species. This was resented by those Aborigines who no longer lived on reserves. A similar problem was mentioned at the hearing in Port Augusta (S.A.), where Aborigines 'living in a traditional manner' are exempted from the provisions requiring a hunting licence. At the Lismore hearing (N.S.W.) it was stated that recently two young Aborigines had been charged with killing fauna (shooting a wallaby). In all of these cases it was suggested that Australian law took no account of Aboriginal lifestyle and that these were clear cases where it should.

Tribal Doctors. Hearings at Doomadgee and Cairns (Qld.) both sought the registration or licensing of tribal doctors. It was mentioned in Cairns that a tribal doctor had been brought to the Cairns base hospital to treat a number of Aboriginal people when all other medical treatment had failed. It was considered that a registration system would protect both the doctor and patient.

Funerals. The requirement for coronial inquiries was cited as a cause of great distress in some communities if during a period of mourning a body was taken away for examination. It was also of concern if it was feared that a death resulted from sorcery.

Aborigines and the Criminal Justice System

1. Alcohol

Alcohol is the major reason for Aboriginal involvement in the Australian criminal justice system. It causes most law and order problems in Aboriginal communities. It has been a major factor in the breakdown of traditional Aboriginal lifestyle.

As a means of countering the ravaging affect that alcohol has had many communities have prohibited alcohol. Others are seeking prohibition. This appears to have alleviated problems in many communities. On the other hand, opinions were expressed at the hearings that it was impossible to exclude alcohol in the long run and Aborigines should learn to live with it. Moreover, those who wished to drink would leave the community to drink elsewhere often resulting in contact with the police in another place.

In communities in which alcohol was prohibited, problems still arose because people attempted to bring alcohol in. A particular problem which was mentioned at hearings in the Northern Territory and Queensland, which raised great resentment among the Aboriginal people, was that in prohibited areas white people were either allowed to bring in alcohol or there was no enforcement of the prohibition. The consensus was that the same law should apply to everyone.

In other communities attempts have been made to restrict the quantity of alcohol that can either be bought or consumed. These rationing systems usually take the form of a limit on the number of cans of beer an individual can buy each day, a prohibition on take away sales or a limit on the opening hours of the canteen. One problem which has resulted from this system is that persons insist on getting their full quota and perhaps that of their spouse and drinking all of it at one sitting.

In the Northern Territory instances were given of people being prepared to drive hundreds of miles in order to obtain alcohol. The ease of mobility lessens the effect of restrictions on alcohol. 'Dry' communities could however point to significant improvements in the number of law and order problems. Few solutions for the problems caused by alcohol were put forward at the hearings. At the Sydney hearing the effect of the decriminalisation of drunkenness as an offence in New South Wales was discussed. The legislation enables a police officer to detain a person in protective custody for up to eight hours if there are reasonable grounds for believing that the person is intoxicated. It was stated that while this prevented alcoholics being brought before the court it created an additional problem in that there was no redress if a person was wrongfully detained. It was claimed that this was happening to many Aboriginal people. The problem with the police still being involved in the administration of the legislation was pointed to as a major weakness. It was suggested that support facilities were necessary before any such legislation could work. There was little information given at the hearings in the Northern Territory on the effect of similar legislation there.

2. Juveniles

The growing number of Aboriginal juveniles coming before the courts was discussed at many hearings. In more remote communities the western education system was often named as a cause of juvenile problems. This intrusion made it difficult if not impossible for traditional authority structures to operate. Some communities (e.g. Strelley have set up their own education systems (with a strong emphasis on the local Aboriginal language and culture) in order to counter this effect.

Some juvenile crime results from the over-use of alcohol and also petrol and glue sniffing. The latter has become a significant social problem in some communities. Communities have attempted to find their own solutions. In some cases this has involved putting young people through initiation rites and sending them into the bush with an elder for bush education. Major problems remain.

The prevalence of institutionalisation of young Aboriginal offenders was mentioned at several hearings. A submission at the Sydney hearing urged that the Aboriginal extended family be used as an alternative for a young Aboriginal offender. The Aboriginal community was prepared to try such a scheme as a better alternative to sending young people to institutions. The location of institutions was pointed to as a major cause of concern. The distances usually required for people to travel meant it was often impossible for parents to visit their children placed in institutions. This was mentioned at hearings in Lismore, Moree and in Sydney. Identical problems were also mentioned at hearings in the Northern Territory where the distances and lack of facilities were even greater. In the Northern Territory it was mentioned that sending young people off to institutions was an alienating factor and that often young people never recovered. They went on to become habitual trouble-makers.

In nearly all cases the solutions sought were for young offenders to be able to remain within either the Aboriginal community or the extended Aboriginal family network. It was recommended that changes should be made to the law to make these alternatives possible. It was suggested that this was a form of recognition of the existence of customary law.

3. Justice Mechanisms in Aboriginal Communities

Great interest was expressed at the public hearings into the concept of special Aboriginal courts. The Discussion Paper proposed that Aboriginal communities be given a limited jurisdiction to deal with minor law and order problems. This jurisdiction would be similar to that exercised by justices of the peace. Communities in general supported the idea and were prepared to leave major offences such as murder, rape and assaults to the Australian court system. Most felt that the Aboriginal court should have authority to deal with all persons, black and white, within a defined area. There was a divergence of views as to the law which should be applied and also the punishments. Most sought the incorporation of some aspects of customary law.

The communities from Lajamanu (Hooker Creek, N.T.), Roper River (N.T.), Mornington Island (Qld.) and Kowanyama (Qld.) presented submissions setting out the laws and the punishments they sought to apply through some form of community justice mechanism. Mornington Island for example sought to make crimes apply to people living on Mornington Island whether they were committed on Mornington Island or on the mainland. These crimes included many aspects of Aboriginal customary law. They included crimes relating to magic and poori poori business, spreading lies and gossip that may cause harm to someone, making a loud noise that will make other people in the community unhappy and laws relating to food taboos. Some of the punishments which the community sought to use included fining people money, putting people off the beer canteen list, making people do council work, banishing men to Forsythe Island or to the mainland for a period of time, making young men defend themselves with a fighting stick against an elder (but no blows to be delivered to the body) and sending people to gaol.

An alternative community justice scheme which is discussed in the Discussion Paper under the heading of the Yirrkala proposal also received support at the hearings. This is an Aboriginal court relying on traditional authority structures. Unfortunately refinements to the Yirrkala proposal were unable to be discussed with the Yirrkala community (N.T.) because an important lawman had died the night before the Commission arrived and the community had gone into mourning. The Yirrkala scheme, or variations of it, was supported during the hearings as a viable proposition for many Aboriginal communities.

Existing justice mechanisms in Aboriginal communities were presented at the hearings. At Strelley (W.A.) the whole community meets to determine what action should be taken against offenders. The community selects what is called the ten man committee which is given authority by the community to apprehend and bring wrongdoers to the community for punishment. This often involves picking people up in Port Hedland which is about 30 miles from Strelley. It has been done on many occasions with the support of the local police. After wrongdoers are brought back to the community they come before a public meeting. Punishment may involve admonishment, ridicule, a fine, banishment from the community (usually to one of the neighbouring communities) and community work. In very rare cases physical punishments are administered ('a little bit of a hiding') but the community does not approve of spearing.

At Beswick station (N.T.), the elected community council takes responsibility for minor law and order problems. Mr Tom Lewis, President of the Beswick community, said at the Darwin hearing that the community council at Beswick was able to handle most minor problems but that if matters got out of hand then the police were called. He considered that the system worked satisfactorily. The community was uncertain about establishing an Aboriginal court. The cassette tapes setting out the Law Reform Commission's proposals had been played to the young people at the school and Mr Lewis stated that it was their views which were important because it was their future. The young people had to be consulted before a decision could be made.

Community justice at Yuendumu (N.T.) is determined by a tribal council which has 24 members, 3 representatives from each of the eight skin groups. The tribal council determines matters of customary law and punishment. Magistrates and the police often consult with the tribal council when dealing with offenders from the community. At Warrabri (N.T.) a meeting of Elders resolves disputes and determines punishments.

There were several opinions expressing reservations about establishing Aboriginal courts. Mr Bob Collins, a Member of the Northern Territory Legislative Assembly, had grave doubts about the success of an Aboriginal court in a community such as Maningrida which had a large number of tribal groups. He considered that one tribe would not accept a magistrate belonging to another tribe imposing penalties upon them. In such a small community there were many advantages in having an independent white magistrate administering justice. He supported the idea of the magistrate being advised on aspects of customary law by members of the community. Mr Collins' conclusion was that there should be facilities to enable greater understanding of Aboriginal culture in Australian law rather than try and incorporate aspects of customary law.

What emerges from the public hearings on the question of the establishment of Aboriginal courts is that any model proposed by the ALRC would have to be very flexible. Communities have different ideas on both the law which the court should have the power to use, the range of crimes which it should have authority over and also the punishments which it should be able to impose on offenders. Many aspects of Aboriginal crime have a social or family ingredient. From a white view point they would be regarded as being moral rather than legal problems. This came through clearly at the hearings where many examples were given of family disputes and social problems which people sought to have resolved by either the Aboriginal council or on Queensland reserves, the Aboriginal court.

It was generally accepted at the public hearings that Aboriginal courts could only operate within a defined area which contained a predominantly Aboriginal population namely, Aboriginal reserves or more remote Aboriginal communities.

Aborigines attending the hearings in urban areas and large country towns were more interested in increasing Aboriginal involvement in the administration of the Australian legal system than in setting up separate courts. Submissions were made seeking the creation of Aboriginal justices of the peace and magistrates. It was suggested that Aboriginal justices of the peace and magistrates should sit alongside white magistrates (at least initially) in all cases which involved Aborigines. This was regarded as a way for Aborigines to see the legal system as more evenly balanced than many do at present. There should also, it was submitted, be greater encouragement for Aborigines to become lawyers and hold other positions within the legal system. Improved education opportunities was seen as a vital factor. Some requests were made for Aborigines to have the right to be tried before a jury of Aboriginal people.

ABORIGINES IN AUSTRALIAN COURTS

The recognition of Aboriginal customary law by the Australian legal system involves a number of questions on which submissions were made at the hearings. The initial question which usually arose was 'who is an Aborigine?' This question is of importance if a person asks a court to have regard to elements of customary law involved in an offence with which he has been charged. The Commission in its Discussion Paper analyses the various definitions which have been used and suggests that if a person can establish his descent as an Aborigine then this may be sufficient criteria.

Some opinions were expressed at a number of hearings that the question of 'who is an Aborigine?' should be left to the Aborigines themselves to determine. Detailed submissions on this question were put forward by the Tasmanian Aboriginal Conference at the hearing in Launceston. Views were expressed at Lismore that it was important for Aboriginal self determination for Aborigines to define themselves. One participant objected to the idea of having to prove that she was an Aborigine. At other hearings it was suggested that if a definition was necessary then it should be as wide as possible.

At Alice Springs, Mr Milton Liddle a justice of the peace and legal aid counsellor, supported the recognition of customary law but only in Aboriginal areas. It was, he said, only in Aboriginal areas where Aborigines lived who he defined as 'black people that can speak Aboriginal language and live with them and know the culture'.

The mechanics for the recognition of Aboriginal customary law by Australian law received little comment during the public hearings. There was much support for the idea of recognition but very few views were expressed as to how this could be done. The Commission's Discussion Paper suggested that recognition could be effected by, inter alia:

(i) extending existing defences in the criminal law to take account of aspects of customary law which might affect the degree of guilt;
(ii) adjusting the rules of evidence in the manner of conducting trials to cope with problems confronting Aborigines during the trial; and
(iii) permitting judges to have regard to aspects of customary law when imposing sentence upon convicted Aborigines.

Of these three proposals there was most discussion and support for the idea of judges taking customary law into account when sentencing Aborigines. Several comments were made about the problems for Aborigines in comprehending the white legal system. One possible solution suggested for this was to simplify procedures and amend the rules of evidence in order to make the court system more understandable for Aborigines. Several participants at the hearings called for better training for magistrates and justices of the peace so that they would be better acquainted with Aboriginal lifestyle and customary law.

One idea which received widespread support was the appointment of a customary law advisor or assessor. Such a person would be in a position to advise a magistrate or judge of the relevance of customary law to a particular offence. Judge McGuire of the Queensland District Court presented a detailed submission calling for the creation of an Aboriginal Assistant to the court. The function of the Aboriginal Assistant would include explaining to the litigant the nature of the proceedings and his legal rights, helping illiterate or backward litigants to better express themselves, asking questions of witnesses on matters relevant to customary law, advising the magistrate or judge on matters of customary law relevant to the case and also advising on the relevance of customary law before sentence was passed. The Tasmanian Aboriginal Conference at the Launceston hearing also supported the idea of customary law advisors. It also proposed that the practice of some magistrates in the Northern Territory of consulting with Aboriginal communities before sentencing offenders should be formalised in some way.

ABORIGINES AND THE POLICE

The issue of Aboriginal-police relations came up regularly during the course of the public hearings. At times it was put forward as the major problem for Aborigines in their involvement with the criminal justice system. Many of the statements made at the hearings confirmed the problem areas specified in the Discussion Paper. There was much discussion of the present state of Aboriginal-police relations and the ways this could be improved. This varied a great deal between the communities, towns and cities visited throughout Australia but was generally seen as an area where significant improvements could be made. Specific aspects of the issue of Aboriginal-police relations also arose, such as the role of Aboriginal police officers, the training of police officers, alternative policing methods and the police interrogation of Aborigines.

1. Aboriginal — Police Relations

The Discussion Paper suggested that one way of improving relations between Aborigines and the police was by establishing a liaison committee whereby senior police officers and representatives of Aboriginal communities and organisations met on a regular basis to discuss common problems. Such committees already exist in S.A. and W.A. At the Adelaide hearing Sergeant Warner who is a member of the S.A. police force on the S.A. Liaison committee expressed the view that generally it worked reasonably well. A solicitor from the Aboriginal Legal Rights Movement while agreeing with the basic concept and acknowledging that the committee had previously produced initiatives, pointed out that a particular problem at the moment was that the police did not regard the liaison committee as an appropriate forum for the airing or solution of complaints whereas Aboriginal people regarded this to be the primary function.

Throughout Australia the idea of an Aboriginal-police liaison committee received strong support. It was envisaged that this would need to be done on a regional basis. The Aboriginal people living in the Kimberley region of W.A., perhaps rightly, saw no relevance for themselves of a committee established in Perth. In Cairns, it was suggested that police representatives on such a committee would need to be of a high rank in order to ensure some action would be taken. A formal committee was seen as a good idea by some people because it meant regular access to the police to enable problems to be discussed. At the Lismore (N.S.W.) hearing, an Aboriginal representative from Taree stated that repeated attempts to discuss matters with the local police had been rejected and that a committee meeting regularly was a way around that problem.

2. Aboriginal Police

Discussion at the public hearings under this heading brought up 2 separate issues. The first was Aborigines joining the regular State or Territory police forces. The second was the establishment of an Aboriginal police force with responsibility restricted to a particular community or area.

The number of Aborigines in the State and Territory Police forces is very low. At the public hearings it was stated that there were only 3 Aborigines in the police force S.A. and in North Queensland there were none. Many participants, particularly those in the cities both urban and country, pointed to the poor relations between Aborigines and the police as the principal reluctance by Aboriginal people to join the police force. Some felt there was ingrained racism within police forces. Others felt that despite the barriers that exist more Aborigines should be encouraged to join (e.g. Mt. Isa). Mr. Lyall Munro, an National Aboriginal Conference representative from Moree (N.S.W.), proposed that special entrance provisions into the police force should apply to Aborigines. This could have a two-fold effect. It would change existing police attitudes to Aborigines and also change the attitude of the Aboriginal community to the police. Another view was expressed that the position would only improve when Aborigines were in positions of authority within the police force (Mr. Paul Coe, Sydney). Some opposition was expressed to the concept of Aboriginal police because they were regarded as 'Uncle Toms'.

On Aboriginal reserves and in more remote Aboriginal communities there was some support for the concept of Aboriginal police having jurisdiction within a limited area. Such is already the case in Queensland which has Aboriginal police on reserves, S.A. which has Aboriginal police wardens and the N.T. and W.A. which have police aides. Communities which supported the idea of Aboriginal police included Davenport reserve (Pt. Augusta, S.A.), Yandearra (W.A.), Derby (W.A.), Junjawa (Fitzroy Crossing, W.A.), Numbulwar (N.T.), and Amata (S.A.). The Queensland communties visited, which already have Aboriginal police, generally favoured retention. Nearly every community which supported a system of Aboriginal police considered that the Aboriginal policemen should have the same status as a white policemen (including uniforms and badges) and should be able to work side by side with him and not be subservient. Some training may be necessary before this could be achieved.

A particular problem that arose for Aboriginal police in some communities related to the kinship system and particular avoidance relationships. This came to the fore if an Aboriginal policeman was expected to arrrest a relation. In several communities, including Bayulu (Fitzroy Crossing, W.A.), Yuendumu (N.T.), Doomadgee (Qld.), Aurukun (Qld) and Palm Island (Qld) this was mentioned as a particular problem. Some of these considered it was a bar to the successful operation of an Aboriginal police force. These communities favoured a white police presence. Most Aboriginal communities which already have a white police presence supported retention. Other communities stated that they had requested the posting of white police. (Mornington Is., Weipa South in Queensland).

During the Public Hearings various policing methods which have been adopted by communities themselves were mentioned. At Beswick station (N.T.) the elected Council performs a policing role and the community is happy with the way this operates. The Bayulu community at Fitzroy Crossing (W.A.) supported this method of policing because it prevented people in the community becoming resentful of someone being given arbitrary police powers.

At Roper River (N.T.) the community uses, what are called security men, one from each of the different skin groups (4), to police the community. This method has been adopted at other Aboriginal communities in the N.T. (Lajamanu). The Strelley community has its elected Ten Man Committee, mentioned previously, which carries out a policing responsibility in the community.

3. Interrogation of Aborigines by the Police

In its first project the Australian Law Reform Commission was asked to report upon the rules that should govern criminal investigations by Federal police. Its report Criminal Investigation (ALRC 2, 1975) included specific proposals for the protection of particular classes of suspects when undergoing interrogation. These classes included young persons, persons not fluent in the English language and Aborigines. Precautions such as the provision of tape recording, the presence of a lawyer, a prisoner's friend or a member of the Aboriginal Legal Service (in the case of Aborigines) were recommended. These recommendations were, in substance, adopted by the Australian Government in the

Criminal Investigation Bill 1977. That Bill is being redrafted and is to be reintroduced. Meanwhile an Aboriginal Senator, Senator Neville Bonner (Qld) has introduced a Private Members Bill into the Australian Senate designed to introduce similar rules for the interrogations of Aborigines and Torres Strait Islanders whether by Federal or State police. To some extent the courts and Police Commissioners in Australia have already taken the issue in hand. Even in advance of legislation, precautions have been insisted upon for the assurance of the reliability of police interrogations and confessions and admissions by Aborigines to police.

In South Australia and the Northern Territory there are guidelines prescribing the method by which police are to interrogate Aborigines. In South Australia the requirements were set out in Police Circular No. 354 and in the Northern Territory they were specified by the Supreme Court in Anunga's Case (1976) 11 ALR 412. Sergeant Warner of the S.A. Police force stated at the Adelaide hearing that generally there were no problems in complying with the requirements.

There was support for these requirements throughout Australia, particularly for the presence of a 'prisoner's friend' during an interrogation. A participant at the Cairns hearing urged the adoption of a uniform scheme to apply to Aborigines in each State and the Territories. One of the few dissentients was the legal officer from the Tasmanian Police, Mr. Stephen Carey. He stated that there was no need for such guidelines in Tasmania. The police treated all members of the public alike and there was no justification for positive discrimination in favour of Aborigines.

4. Police Training

At the Sydney hearing, Mr. Paul Coe, President of the Aboriginal Legal Service, Redfern, stated 'The police in their training courses have got to be introduced to Aboriginal culture, Aboriginal lifestyles and Aboriginal aspects of law'. Similar sentiments were expressed at venues throughout Australia. Many Aborigines perceive that many of the problems they have with the police are caused by lack of police understanding, much of which could be alleviated by an education process. This was seen as equally important for police working in either urban and rural areas.

More and improved training was also sought for existing Aboriginal police and police aides. This was a recurring point made at many of the Queensland hearings. It was suggested at a number of venues that this could be one way of reducing the high turnover rate.

OTHER MATTERS RAISED AT THE PUBLIC HEARINGS

1. Land Rights

The significance of land rights for Aboriginal people was raised at almost every hearing held. The Law Reform Commission had acknowledged the importance of land rights but had taken the view that the matter has been dealt with fully by earlier reports (by Mr Justice Woodward) and by federal legislation applicable to the Northern Territory, namely, the Aboriginal Land Rights (Northern Territory) Act 1976. Because of these moves and the somewhat different focus of its terms of reference, the Commission has not duplicated proposals on this issue. During the public hearings the Commission did, however, raise the question of the recognition and protection of sacred sites.

2. Sacred Sites

As with all other issues raised for discussion at the public hearing the opinions concerning the best means of protecting sacred sites varied both throughout Australia and within individual communities. Some communities had no objection to sacred sites being mapped as they saw this as a means of giving them protection in the long run. One argument was put forward that if sites are mapped or signs are put up which forbid entry this may have the opposite effect to that desired, arousing curiousity and unwanted intrusions. In other communities secrecy was regarded as an important element and the community was not prepared to let the sacred sites be mapped. Another suggestion was that before any mining could take place within an Aboriginal area the elders or the council responsible for that area should be consulted. No clear consensus emerged as to the most appropriate solution.

A problem raised by the Roper River community at the Darwin hearing was police intrusions onto sacred ground. The community requested a prohibition on police being allowed to visit sacred ground especially during ceremonies. The elders were prepared to take responsibility for an offender who was on sacred ground and hand them over to the police.

3. Aboriginal Women

Throughout the hearings, Aboriginal women proved as interested in the Commission's inquiry as did men. Groups of women from Warrabri and Tennant Creek travelled huge distances to attend the Alice Springs hearing. Women typically expressed definite views on such matters as:

- the strength of kin ties and family relationships;
- the importance of land;
- the role of police in their communities;
- problems with alcohol and young people;
- prisons and the type of punishment which should be meted out to offenders;
- aspects of traditional law which should be strengthened by Australian law.

Let no one doubt the strength of Aboriginal customary laws. At Weipa South, a community where many aspects of traditional law are no longer in existence, one male council member described his relationship with a female council member:

> Yes. I can't even sit alongside her. Somebody else has to sit there. If I see her coming along towards me, I have to go around — say 20 feet from where she walks. Some of us keep our customs.

The public hearings were not all plain sailing. Criticism was voiced concerning:

- the lack of ALRC treatment of land rights, which was asserted to be an integral part of customary laws;
- the adequacy of translation of the discussion paper;
- the distinction drawn between 'urban' and 'traditional' Aborigines.

At the sitting in Launceston, Mr. Justice Neasey was told by Mr. Michael Mansell, former State Secretary of the Tasmanian Aboriginal Centre, that the ALRC had wrongly assumed that 'real' Aborigines were all in the Northern Territory:

> The Commission has completely ignored the possibilities of Aboriginal laws existing within Aboriginal communities which exist in the cities and in rural areas in the Southern parts of Australia.

The ALRC is now sifting through thousands of pages of transcript and other submissions. Further field visits will be needed. Everywhere, the ALRC was urged to allow adequate time for consultation, and consideration and for viewpoints to be expressed.

4. Views of Non-Aborigines

One feature of the public hearings and consultation process which is a source for concern was the apparent unwillingness of many non-Aborigines hostile to the approach of the discussion paper, to come forward and express criticisms. It would be quite unsafe to assume that lack of submissions from non-Aborigines in Australia is because of a general concurrence in the Australian community that there should be recognition for Aboriginal customary laws and differing laws applicable to Aborigines and not to non-Aborigines. Arguments against recognition of Aboriginal customary laws in any way were summarised in the discussion paper. They include the fact that, to many Australians, some aspects of the customary laws of the Aboriginal people are unnecessarily harsh by the standards of modern Western communities. Furthermore, some people simply oppose legal pluralism on the grounds that it is unnecessarily complicated and necessitates machinery for resolving conflicts of laws and is destructive of the 'equality' under the law which is a feature of most polities. Furthermore, some critics, including distinguished anthropologists well familiar with Australian Aboriginal conditions, have suggested that traditional Aboriginal customs and laws have already fallen victim to the impact of Western civilisation. In these circumstances, so they say, attempts to revive respect for them are misguided and misdirected. They will lead, it is suggested, not to a revival of Aboriginality but to a synthetic law which provides a 'legal no man's land', removing legal protection from those who may most need it, viz. fellow, vulnerable members of the Aboriginal communities.

Some of these points were made during the public hearings. In Melbourne a teacher appeared to express doubts about the suggested recognition of Aboriginal laws. He laid emphasis, as did many non-Aboriginal witnesses, upon the difficulty of defining precisely who is an 'Aborigine'. He also pointed out that with the ease of modern travel, Aborigines may be scattered all over the country. The notion of their taking with them their own personal legal system would create grave difficulties for effective and just law enforcement. It must be frankly acknowledged that many non-Aborigines in Australia regard the notion of a latter day respect for Aboriginal laws as misguided efforts to turn back the clock of 'civilisation'. On the other hand, many Aborigines, both in the public hearings and outside the public hearings have questioned the right of non-Aboriginal Australians to determine or even investigate the application of Aboriginal customary laws. It is their assertion that any answer given by non-Aborigines, however well-intentioned, is bound to fall victim to the 'ethnocentricity' by which each culture is hostage to its own history and attitudes and unable fully to appreciate the perspective of the other.

CONCLUSION : ASKING FUNDAMENTAL QUESTIONS

The Australian Law Reform Commission has received from successive governments a series of very difficult, controversial, sensitive projects upon which to investigate and report proposals for the reform of federal laws. No project has been more complex, sensitive and controversial than the inquiry into Aboriginal customary laws. The task was assigned to the Commission as part of the mosaic of efforts by Australian Governments to establish a new accord with the Aboriginal people of Australia. Though small in total numbers, Aborigines are scattered throughout the country, are increasingly vocal and the subject of news and other comments. Furthermore they are increasing in numbers and assertiveness. The inquiry by the Australian Law Reform Commission is therefore well timed. The public debates which have accompanied the publication of the discussion paper and the conduct of the public hearings and consultation have focused Australian attention upon a number of difficult moral, philosophical and legal questions. Although other like countries have faced these problems in earlier times, many of them are being faced now in Australia for the first time. The Law Reform Commission does not have the luxury of concluding that the problems are too hard and must be answered by others, whether white or Aborigine. It must get on with the job of completing its inquiry, delivering its report and drafting any legislation it proposes. That process will be concluded, probably by the end of 1982. In examining the role and function of Aboriginal customary laws and in responding to this task, the Australian Law Reform Commission must examine fundamental questions about the purposes of law in society and the best institutions to ensure harmony and justice in the community. In examining issues of Aboriginal customary laws, the Australian legal system may, in the process, discover a few things about itself.