REPORT OF THE COMMITTEE OF INQUIRY INTO ABORIGINAL CUSTOMARY LAW

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That Judges, Magistrates, Court officials and other appropriate persons should receive cross cultural training in Aboriginal affairs.

Recommendation 2: Video conferencing.

It is recommended that Communities have access to video conferencing facilities to avoid the need of Community elders and witnesses travelling often to Court hearings.

Recommendation 3: A whole of government approach.

That government take into account the relevance of Aboriginal customary law in the delivery of services to Aboriginal communities and any strategy to recognise traditional law should not cut across other government services or programs on Aboriginal communities.

Recommendation 4: Law and justice plans.

Aboriginal communities should be assisted by government to develop law and justice plans which appropriately incorporate or recognise Aboriginal customary law as a method in dealing with issues of concern to the community or to assist or enhance the application of Australian law within the community.

Recommendation 5: Responding to promised marriages.

That so far as the concept of "promised brides" exists in Aboriginal communities, the government sets up a system of consultation and communication with such communities to explain and clarify government policy in this area.

Recommendation 6: Inquiry into the issue of payback.

The Committee recommends to government that it establish an inquiry into the extent to which the traditional law punishment of payback is a fact of life on Aboriginal communities, and develop policy options for government to respond to the issue.

Recommendation 7: A community sentencing model.

The Committee recommends a model allowing for community input into the sentencing of offenders, for adoption by Aboriginal communities and the courts.

Recommendation 8: A pilot project.

The Committee recommends government proceed to assist Aboriginal communities to implement law and justice plans, by making resources available for several pilot programs.

Recommendation 9: Increased participation of Aboriginal people in the justice system.

The Committee recommends government develop strategies to increase Aboriginal participation in the justice system.

Recommendation 10: Law reform strategy.

The Committee recommends government adopt a policy of ensuring the application of the general law of the Northern Territory does not work injustice in situations where Aboriginal people are subject to rights and responsibilities under traditional law, and that statute law should in appropriate occasions recognise this.

Recommendation 11: Aboriginal customary law as a source of law.

The Northern Territory Statehood Conference resolution that Aboriginal customary law be recognised as a "source of law" should be implemented.

Recommendation 12: Transfer to Aboriginal members.

That such of the present Aboriginal members of this Committee who consent to do so, should remain as a Consultative Committee to the Attorney General about the operation of these recommendations with the Attorney General having the discretion to appoint further Aboriginal members.

1 SUMMARY OF RECOMMENDATIONS

BACKGROUND

1.1 Australian law does not recognise traditional law *as "law"*. Traditional law can be recognised by judges and government decision makers where relevant *as long as it does not conflict with Australian law*.

1.2 Aboriginal customary law is at its most important in Aboriginal communities because the institutions of traditional law exist and operate in a way that is relatively undisturbed by the external Australian law.

1.3 The inquiry has identified some *specific issues* where the recognition of traditional law may help Aboriginal communities to deal with *those issues*. The inquiry has also identified some *processes* that might be helpful. The issues facing each Aboriginal community are different. The traditional law of each Aboriginal community is different. These are not one-size-fits-all problems or solutions.

THE MAJOR RECOMMENDATIONS

1.4 **Government should adopt a whole of government approach**: This recommendation means that any strategy to recognise traditional law should not cut across other government services or programs. It also means that services can support or complement each other.

1.5 **Government should assist Aboriginal communities to develop law and justice plans**: The general recommendation is that each Aboriginal community should be assisted to develop its own plan to incorporate traditional law into the community *in anyway that the community thinks appropriate.* The inquiry's general view is that *each Aboriginal community will define its own problems and solutions*. Models may deal with alternative dispute resolution, family law issues, civil law, criminal law, or with relationships between Aboriginal communities and government officers/private contractors while in Aboriginal communities, and so on. This Committee does not wish to limit the matters appropriate for inclusion. Government must adequately resource this process, and may find it useful to fund pilot programs.

2 BACKGROUND TO REFERENCE

2.1 The Attorney General has set up "An Inquiry into Aboriginal Customary Law in the Northern Territory". The Terms of Reference are set out in Appendix A. The Committee on customary law consists of Aboriginal members appointed by the Attorney General and several members of the Northern Territory Law Reform Committee.

FIRST MEETING OF THE COMMITTEE

2.2 On 6 February 2003 Aboriginal members (with the exception of Yananymul Mununggurr who had not then been appointed), and several members of the Northern Territory Law Reform Committee met together as the Committee on customary law and discussed preliminary matters. At that meeting three district sub-committees consisting of Aboriginal members in areas reasonably close together were formed and agreed to report back on the questions of Aboriginal customary law, its application to their communities and how such customary or traditional law could be recognised and applied within the general legal framework of Northern Territory law: see Appendix B.

2.3 Since the Terms of Reference contemplate that the Committee shall have regard (inter alia) to public submissions, an advertisement seeking such submissions was required. As submissions arrived, copies were sent out to all members. A list of all those who made written submissions appears at Appendix C. Subsequently, members of the Committee interviewed a number of people knowledgeable about Aboriginal customary law. A list of all those who were interviewed appears at Appendix D.

SUBSEQUENT DEVELOPMENTS

2.4 These interviews usually took place between 12:30 – 13:30 at the office of Austin Asche. This was generally the most convenient time for busy people to attend. Because of commitments (and particularly in the case of Aboriginal members, distance from Darwin), not all members of the Committee attended every meeting. All members were advised of meetings and asked to attend if they could, but it was understood that distance and commitments made it impracticable for members, particularly Aboriginal members, to attend. However, some interviews took place at Alice Springs, Gangan, Santa Teresa, Katherine, Yirrkala and Ali Curung. The Committee was aware of the difficulties of attendance at meetings and made every effort to keep all members as fully informed as possible of meetings and of other issues related to the Committee's progress.

2.5 While freely acknowledging these difficulties and limitations, the following points should be noted:

- Most of the people interviewed were extremely busy people, who, although they gave generously of their time, would have found it extremely difficult to be present other than during a lunch hour on a weekday and any other alternatives may have only meant that they could not come at all.

- The persons so interviewed were, because of their varied experience, knowledge and background, in a position to put forward extremely useful and valuable views and comments, which they might not otherwise have been enabled to make because of their own time and distance commitments.
- Interviews such as these are best conducted in small groups. Larger groups may seem intimidating to the person being interviewed or may cause that person to be more cautious and less frank than he or she might otherwise be.
- Summaries of those interviews, where permission was given by those interviewed, were sent to all members.

2.6 All those interviewed expanded on themes already familiar to people interested in Aboriginal customary law and its place in the community. The overall knowledge and understanding of the Committee as a whole was thereby augmented.

2.7 Those who were interviewed were usually prepared, even if they could not spare the time for further interviews, to be consulted further and, if practicable make comments on any draft Report of the Committee. The Committee therefore had a reservoir of knowledge and experience upon which it could draw and which might not otherwise have been open to it.

2.8 To indicate the wide cross-section of the community consulted, the Committee sets out (Appendix D) the names of those interviewed, but with the following comments. While it is hoped that the ultimate Report of the Committee will be generally approved by those who were interviewed, no suggestion is made that the Report represents the views of any of those interviewed and it would be impertinent of the Committee to attribute to any of these persons, views which they might not have, or might have, but subject to such conditions and exceptions as would make the attribution inaccurate or misleading.

2.9 However, the above proviso does not operate where the views of a particular person have, with his or her consent, been quoted in this Report. In any event, the Committee acknowledges with gratitude those who have contributed of their knowledge and experience.

2.10 Furthermore, the Committee records the goodwill of those who were interviewed, and their hope that the Committee would act for the benefit of all indigenous and non-indigenous people of the Territory. This is of the utmost importance. From all sides the Committee received careful and balanced views expressed without bitterness or rancour. The enormous problems facing Aboriginal communities were freely expressed and acknowledged. But the emphasis was invariably about what could now be done. Certainly, disappointment was rightly expressed about failures to honour earlier apparent promises, and of the many persons undoubtedly of goodwill, who had visited Aboriginal communities and returned proclaiming that "something must be done", without effectual follow up. Be it remembered that those who spoke to the Committee or made submissions are, as a glance at Appendix C and D will demonstrate, people with profound practical knowledge who have devoted many years of their lives to working with Aboriginals, or are Aboriginals themselves, who have worked steadfastly for the good of their people. This enormous reservoir of people of goodwill has never been sufficiently

acknowledged, should be properly recognised, and from it should be drawn the strengths to move forward.

2.11 This goodwill, of course, extends beyond aspects of traditional law and into the equally vital areas of health, housing and education, which is beyond the scope of this Inquiry, but should march forward with it. The hope is that, where traditional law is strengthened and recognised to the extent suggested in this Report, a community may become more confident to grapple with these other issues.

2.12 A corollary is, however, that the limited but practical recommendations contained in this Report should be implemented, rather than becoming "just another Report".

2.13 The Committee emphasises the goodwill it received.

OUTLINE OF THE REPORT

2.14 The Committee makes its recommendations to the Attorney General in a concise form. This Report will deal with the main recommendations made, and provide the context for those recommendations. At the same time, the Principal Legal Consultant to the Committee, has prepared a series of Background Papers that deal with the legal and traditional law issues that form the background to this Report.

2.15 **Background Paper 1: Aboriginal communities and Aboriginal law in the Northern Territory**

This paper provides a social snapshot of the Aboriginal communities in the Northern Territory and general introduction to Aboriginal customary law in those communities.

2.16 **Background Paper 2: The recognition of Aboriginal law as law**

This paper sets out the extent to which general Australian law recognises Aboriginal customary law as law.

2.17 **Background Paper 3: Legal recognition of Aboriginal customary law**

This paper sets out how the common law and legislation of the Northern Territory (and elsewhere in Australia where relevant) recognises Aboriginal customary law, and identifies issues for consideration by government with respect to reform of legislation.

2.18 **Background Paper 4: International law, human rights and Aboriginal customary law**

This paper discusses the way international law and international human rights obligations affect the recognition of Aboriginal customary law.

3 ABORIGINAL CUSTOMARY LAW

3.1 The Terms of Reference speak of an "Inquiry into Aboriginal Customary Law". Two matters of definition need to be considered: "Aboriginal" and "Customary Law".

"ABORIGINAL"

3.2 It is not the purpose of this Inquiry to embark upon a detailed study of the term "Aboriginal". This has already been done by the Australian Law Reform Commission (ALRC) in its comprehensive Report in1986[1] at paragraphs 86-95. The ALRC considered that it was "not necessary to spell out a detailed definition of who is an Aboriginal and that there are distinct advantages in leaving the application of the definition to be worked out so far as is necessary on a case by case basis".[2]

3.3 We respectfully adopt that view and, for the practical purposes of this Inquiry, we consider it sufficient to adopt the broad definition that an Aboriginal is a person of Aboriginal descent who identifies as an Aboriginal and is accepted as such by the community in which he lives (paragraph 91 of ALRC Report).

"CUSTOMARY LAW"

3.4 The expression "the general law" will be used here and subsequently to denote the body of law imported into Australia upon European settlement. By Acts of the British Parliament it was provided that the settlers were governed by the common and statute law of England.[3] As the colonies attained self-government they enacted their own statutes and their courts developed their own common law, although, in the latter case, the development closely paralleled the English common law system, particularly because for over 150 years, the ultimate Court of Appeal was the Judicial Committee of the Privy Council in London.[4]

3.5 A conspicuous feature of the general law was that it covered the field for all practical purposes, leaving little scope for recognition of Aboriginal customary law until the Commonwealth and Territory governments enacted land rights

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[1] The Australian Law Reform Commission, The Recognition of Aboriginal Customary Laws, Report No. 31 (3 volumes) (Canberra: AGPS, 1986) (ALRC Report).
[2] Paragraph 95 of ALRC Report.
[3] The Australian Courts Act 1828 (Imp) (9 Geo IV c 83), section 24 stated that all English common law and legislation in force at the date of the Act (25 July 1828) was to be applied: "all laws and statutes in force within the realm of England at the time of the passing of it, shall be applied in the administration of justice in the courts of NSW so far as the same can be applied within the said colony and as often as any doubt shall arise as to the application of any such laws, the Governor, with the advice of the Legislative Council, may by ordinance declare whether such laws or statutes should be deemed to extend to such colony, and be in force within the same, with such limitations and modifications as may be deemed expedient; provided that in the meantime, and before such ordinances shall be actually made, it shall be the duty of the Supreme Court as often as any such doubts shall arise upon the trial of any information or action to adjudge and decide as to the application of any such law or statute in the said colony."
[4] Graham Nicholson "Self Government in the Northern Territory" (1985) 59 A LJ 698.

legislation in the 1970s[5] and the High Court in the *Mabo* decision reversed the doctrine of *"terra nullius"*, leading to the recognition of native title.[6]

3.6 There is now a wider recognition of the claim by Aboriginal groups to have Aboriginal customary law become, in some way, part of the general law in Australia.

3.7 At the Conference set up by the Northern Territory Government in 1998 to consider a Constitution for the Northern Territory if it attained Statehood, it was resolved that Aboriginal customary law be recognised as a source of law in the new State. Although the draft Constitution prepared by this Conference was rejected by a majority of voters and the case for Statehood was not approved, it may still be regarded as significant that the delegates at the Conference approved a provision which went further than any State had included in its Constitution.

3.8 Under the general law, the term "customary law" is a contradiction. "Custom" and "law" are regarded as two distinct concepts and never the twain shall meet unless and until "custom" is converted into a law by statute; in which case it ceases to be "custom". Certainly both "custom" and "law" have their sanctions but one is social and the other legal. However, many would regard social ostracism as far more severe a penalty than a penalty for some minor breach of the traffic regulations.

3.9 Such a distinction is unknown to Aboriginal society. Aboriginal members of the Committee and many others who have expressed their views, have emphasised Aboriginal tradition as an indivisible body of rules laid down over thousands of years and governing all aspects of life, with specific sanctions if disobeyed. The expression "customary law" is therefore correct, as containing both concepts in the one expression.

3.10 Herein lies a difficulty if one attempts to incorporate Aboriginal customary law into the Australian legal system. The difficulty is this: if one regards these provisions as law, then they must be written down, defined and given specific boundaries. This in turn allows for argument as to what those boundaries are and for legal refinement as to the original definitions. This brings in the lawyers. Now the members of the Northern Territory Law Reform Committee are mostly lawyers. We in no way wish to denigrate lawyers or the legal system. But it must be accepted that lawyers have a duty to seek to refine and define the written law in the way most favourable to their clients.

3.11 In our view this would defeat the "customary" part of Aboriginal customary law by drawing it into the general body of legislation and taking away from the Aboriginals their own interpretations which may very well be very different from what the lawyers would say. The whole body of Aboriginal customary law would then be subsumed into the general law and, while this may seem one way of dealing with the question, it may not be satisfactory for those for whom those very laws are enacted. To write it is to lose it.

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[5] Aboriginal Land Rights (Northern Territory) Act 1976 (Cwth).

[6] This is discussed in more detail in Background Paper 2: The recognition of Aboriginal law as law.

3.12 Customary law is too general, too much dependent on interpretations foreign to lawyers, and too much dependent on specific local conditions to be frozen into the statute book. Furthermore, Aboriginal customary law contains matters which can only be known to certain specified groups in Aboriginal communities, and to write it down for all to read would be a serious infringement of confidentiality and of the custom itself.

3.13 It is therefore better, in our view, to leave the interpretation of Aboriginal customary law to the Aboriginal people themselves who have had centuries of knowledge and practice behind them, of which others can have very little concept.

3.14 If this view is accepted a way must be found of transferring power to Aboriginal persons to deal with these matters themselves. This entails certain procedures which we will later mention, but it also entails certain limitations. These are specifically mentioned in the Terms of Reference which state that Aboriginal customary law should be recognised "consistent with universally recognised human rights and fundamental freedoms" and that "the Northern Territory Government does not condone any of the crimes in that (Criminal) Code".

3.15 This is not to suggest that Aboriginal people will not recognise universal human rights, but that, to the extent traditional law may authorise acts contrary to the human rights obligations provided for in Commonwealth, State or Territory legislation, some elements of traditional law must be at least modified. There are indications that this can be done without damage to the true spirit of the traditions. For example, the much used term "payback" which carries with it the conception of bodily harm is only one of a group of remedies which includes many other non-harmful but effective measures and might more accurately be termed "compensation" or "social adjustment".

4 THE UNIQUE POSITION OF THE NORTHERN TERRITORY

4.1 The Northern Territory is the only part of Australia where the Aboriginal population constitutes a substantial minority. In the Northern Territory, Aboriginal people constitute 28.8% of the total population. But this can be put in more dramatic terms. Out of a total population of approximately 200,000, more than half of that number live in the cities of Darwin, Palmerston and Alice Springs and their environs, and the proportion of the Aboriginal population in these areas is relatively small. It follows that, outside those areas, and in the balance of the huge land mass that constitutes the Northern Territory, the Aboriginal population exceeds that of the non-Aboriginal inhabitants, although this may escape the notice of visitors who confine themselves to urban centres. Background Paper 1 sets out the relevant statistical information.

4.2 The Aboriginal population is spread out throughout the Northern Territory in various communities each with their own customary laws and traditions; though all take the view that there is a common bond of Aboriginal custom and tradition which rules, and has ruled, all communities over thousands of years. This may well be true in the broad sense but it remains also correct that there are many local variations from the main theme, and accepted practices in one group would not necessarily be the same in another group.

4.3 The important factor is that it appears to many Aboriginal people that traditions and customs recognised and applied by Aboriginal people over thousands of years have not been sufficiently or properly recognised by non-Aboriginals, and particularly by those concerned with making and administering the laws of the Northern Territory. Yet the belief is strong that a proper recognition and application of Aboriginal customary law would go a long way to dealing with issues which presently are of concern to many communities. This strong belief has been expressed by many Aboriginals during interviews with the Committee.

4.4 Aboriginal customary law is a fact of life for most Aboriginal people in the Northern Territory, not just those in Aboriginal communities. This is because it defines a person's rights and responsibilities, it defines who a person is, and it defines that person's relationships to everybody else in the world.[7] However in terms of giving rise to rights and responsibilities which may conflict with Australian law, not all Aboriginal people will be affected to the same degree as those on Aboriginal communities where the institutions of traditional law are strong and in place. Generally speaking, a person must go through the traditional law in the proper way before he or she acquires the relevant rights and responsibilities.

4.5 Regrettably, some Aboriginal communities have become dysfunctional, in the sense that *neither* Australian law nor traditional law is properly observed. The reasons for this lie in a whole host of economic and social factors. Concern was also expressed that in these communities the authority of the elders was being challenged and their numbers diminishing. Fears were expressed that the traditions were not being passed on to the new generations because of this. This

[7] AP Elkin, The Australian Aborigines (Sydney: Angus and Robertson, 1954) Chapter 6.

represents an extraordinarily difficult problem which cannot be immediately resolved. But it is hoped that the recommendations in this Report may go some way to addressing these issues.

4.6 The problem is far less in the stronger Aboriginal communities, and here, efforts are being made by way of various strategies, such as night patrols and community justice centres, and the efforts of Aboriginal leaders, to ensure respect, knowledge and pride in traditional ways. Aboriginal communities, and particularly strong Aboriginal communities, will welcome the opportunity to strengthen Aboriginal customary law, and it is hoped that such moves may assist them to deal with specific problems in their community.

4.7 Not all Aboriginal people in the Territory may be actively affected by the rights and responsibilities required by traditional law. For instance, there are many Aboriginal people who live and work in an urban environment, particularly Darwin and Palmerston, together with other people in a thriving and polyglot community, and cherish and take pride in their Aboriginal descent. They are fully involved in the Australian community life: their families mix with the general community and they take part in the social, political and sporting activities in the town life. They contribute in a very significant way to that merging of many races, proud of their origins and proud of being Australian. Generally, these people, though properly honouring their Aboriginal traditions, live their lives within the general law and outside the specifics of Aboriginal customary law. However, such Aboriginal people might see the recognition of traditional law as part of a process of respect for the Aboriginal legal system.

4.8 There are some Aboriginal people who choose not to live their lives in accordance with traditional law, but do not fully live in accordance with Australian law. These Aboriginal people inevitably have to make a choice to live within the general law, or to live within the traditional law rules of their communities. Either choice will have its problems and it is not suggested that there is any role that the recognition of Aboriginal customary law, as recommended by the Committee, can play with respect to this issue. This may sound pessimistic but it is also, realistic.

4.9 For these reasons the recommendations in this Report concentrate on matters affecting Aboriginal communities.

5 GENERAL APPROACH AND GENERAL RECOMMENDATIONS

AUSTRALIAN LAW CANNOT BE COMPLETELY EXCLUDED

5.1 Australian law deals with many things that traditional law does not (eg: consumer protection laws relating to unsafe toys or faulty motor vehicles; workers' compensation law, sale of goods, commercial contracts and so on) - so, for practical purposes, the option of *only* traditional law applying in an Aboriginal community denies some legal rights to Aboriginal people. Submissions to the Committee proposed models for "two laws working together".[8]

BETTER DISPUTE RESOLUTION ON ABORIGINAL COMMUNITIES

5.2 Traditional law can sometimes be better than Australian law at solving disputes in Aboriginal communities. The Committee agrees that at least some disputes may be better dealt with under traditional law. However, sometimes, Australian law may be better suited. In particular, representatives of many communities have voiced concerns about the perceived danger that the general law may abdicate its responsibility in the area of family violence. There are concerns that the reintroduction of customary law may in practice mean increased control by male elders who may themselves be perpetrators of violence, or have kinship obligations to perpetrators. Nevertheless, the Committee recognises that traditional law may still be appropriate for many purposes. The Northern Territory Law Reform Committee has previously recommended support for alternative dispute mechanisms in Aboriginal communities.[9]

CROSS CULTURAL TRAINING

5.3 Views were expressed to the Committee that some judicial officers and court officials were insensitive, or at least, failed to understand many of the problems confronting tribal Aboriginals in a court situation. The Family Court has, for some years, instituted a program of cultural awareness. It recognises that such programs should be more comprehensive than merely lectures and seminars. The aim has been to "sit down" with Aboriginal people and discuss problems in an informal way. The South Australian Court program also emphasises informality. People attending such programs have endorsed them and spoken of a considerably increased comprehension, which has been of great assistance in subsequent proceedings.

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[8] ATSIC written submission page 4; discussions with Ali Curung community; Central Australian Aboriginal Congress Incorporated; Gangan community, clan leaders at Yirrkala; Dr Djiniyini Gondarra and Richard Trudgen in Nhulunbuy; William Tilmouth and Tangentyere Council; Richard Gandhuwuy; supported by Mr Ward SM in discussions; ATSIC (Katherine Regional Office). There was a recognition that in some cases, the Australian general law was considered more appropriate, particularly with respect to alcohol and family violence: Ngaanyatjarra Pitjantjatjara Yankunytjatjara ("NPY") Women's Council oral submissions: "When it comes to offences that involve alcohol, drugs and violence that are brought in by those substances, that is when we are saying that the white mans law should only apply".

[9] Northern Territory Law Reform Committee, Report on Alternative Dispute Resolution in Aboriginal Communities (Report 17c,1997).

5.4 The Committee is in no doubt that a carefully planned and culturally sensitive program, with the assistance and presence of Aboriginal people, would benefit all those involved in court processes.

5.5 Similarly, the reverse approach can be adopted, in that effort needs to be made by government to explain to Aboriginal people, the general law system. This approach was recommended in oral submissions to the Committee.[10] The Committee considers this process will assist the mutual understanding of the role traditional law can play in the justice system.

Recommendation 1 – Cross cultural training.

That Judges, Magistrates, Court officials and other appropriate persons should receive cross cultural training in Aboriginal affairs.

MODERN TECHNOLOGY

5.6 The Committee notes that the increasing use of modern technology can assist the way government delivers its justice and other services to Aboriginal communities. As such, it can assist courts and other bodies to understand the relevance, if any, of traditional law to the matter at hand. Without this facility such information may not be available.

Recommendation 2 – Video conferencing.

It is recommended that Communities have access to video conferencing facilities to avoid the need of Community elders and witnesses travelling often to Court hearings.

BETTER DELIVERY OF NT GOVERNMENT SERVICES TO ABORIGINAL COMMUNITIES

5.7 The issue here is that the recognition of traditional law may assist the Commonwealth and Northern Territory governments to deliver services to community members. The Committee received a number of submissions to this effect from government service providers. The essential services of government may be said to be: community safety, health, education and infra-structure, but they also extend to family and community support services, as well as the general social security system. Government strategies that can incorporate relevant traditional law will be more successful than those that don't.

[10] For example, the meetings at Gangan and with Dr Djiniyini Gondarra and Richard Trudgen, expressing the view that many young Aboriginal people could see they were bound by traditional law, but, seeing the absence of similar rules in towns, felt that there was "no law" in town, and they could therefore do anything.

BETTER DELIVERY OF SERVICES BY ABORIGINAL COMMUNITIES

5.8 Aboriginal communities are to a great extent like local government entities. They deliver a range of services and regulate some activities. Recognition of traditional law may assist a particular Aboriginal community to deliver its services to community members. This is a matter to be dealt with by specific Aboriginal communities. To the extent such an approach may be part of a more general law and justice plan (see later) it is covered by the Committee's recommendations.

AUSTRALIAN LAWS WHICH FAIL TO ACCOMMODATE TRADITIONAL LAW (WHERE THIS IS RELEVANT) MAY BE UNJUST IN THEIR APPLICATION TO ABORIGINAL PEOPLE

5.9 This issue is that Australian law should recognise traditional law if a failure to recognise traditional law would be *unjust*, and of course, opinions will differ about what is *unjust* in any specific situation.

5.10 This aspect covers all areas of law: family law, civil law and criminal law. A lot of law reforms have been made in the family law area (eg adoption) and civil law areas. This issue is discussed in Background Paper 3, where the issues requiring a policy decision on reform by government are identified.

5.11 Reform of criminal law, in its application to situations governed by traditional law, is a difficult issue and raises problems of double jeopardy, synthetic law (law that is *neither* Australian law nor traditional law), human rights, two laws, payback and so on. The submissions to the Committee included proposals that, in some cases, traditional law should completely displace Australian law. This may be too drastic but, the Committee deals with these issues in the context of law and justice plans by Aboriginal communities.

5.12 The Committee's general view is that initiatives to recognise Aboriginal customary law should not impede or adversely affect the delivery of other government services or programs in Aboriginal communities, such as health, education or policing services. Such initiatives should be developed or delivered in a co-ordinated way with existing local justice plans or other programs or Committees.

Recommendation 3 - A whole of government approach.

That government take into account the relevance of Aboriginal customary law in the delivery of services to Aboriginal communities and any strategy to recognise traditional law should not cut across other government services or programs on Aboriginal communities.

5.13 Further to Recommendation 3, a number of strong representations were made to the Committee about the necessity and importance of interpreters. Standards of Australian justice require that a non-English speaking litigant should understand

the case against him or her. This is particularly important where, not only does the language barrier exist, but wide cultural differences are apparent between the prevalent judicial system and the Aboriginal litigant. Interpretation services should continue and expand.

LIMITATIONS OF REPORT

5.14 The Terms of Reference (Appendix A) contain, inter alia, a request that the Committee:

> report and make recommendations on the capacity of Aboriginal Customary Law to provide benefits to the Northern Territory in areas including but not limited to governance, social well being, law and justice, economic independence, wildlife conservation, land management and scientific knowledge.

5.15 From its consultations the Committee is able to conclude that Aboriginal customary law is being widely practised in the Northern Territory. However, the strength of Aboriginal customary law does vary between communities.

5.16 The primary recommendations of the Committee relate to the ability of the traditional law to assist with law and justice issues on Aboriginal communities. The ability of Aboriginal customary law to assist positive outcomes with respect to social well being is also recognised, through its role in assisting with the resolution of disputes, and enhancing the respect for Aboriginal traditions and culture.

5.17 The recommendations are aimed at strengthening traditional Aboriginal law and thereby instilling self-confidence. To that extent it can be hoped that Aboriginals, more secure in their own ways, will more readily assist in the matters referred to above. But otherwise the Report is aimed more at legal consequences and arrangements rather than a detailed examination of scientific, sociological and economic aspects of Aboriginal life in the Northern Territory, which are inquiries beyond the expertise of the present members.

6 EQUALITY BEFORE THE LAW

6.1 The Preamble to the Terms of Reference contains this statement:

> It is the view of the Northern Territory Government that, in accordance with Australian and international law, Aboriginal Customary Law should be recognised consistent with universally recognised human rights and fundamental freedoms.[11]

The boundaries set out by such phrases as "consistent with universally recognised human rights and fundamental freedoms", apply as much to the general law as to Aboriginal customary law.

6.2 But to "recognise" Aboriginal customary law in the sense of putting it into precise statutory form as applying to all citizens of the Northern Territory is impracticable for the two reasons already given, namely:

(i) to put it in statutory form is, in effect, ultimately to destroy it[12];
(ii) it has never applied to non-Aboriginal citizens and, in practical terms, it does not now apply to some groups of Aboriginals.

6.3 These considerations, however, by no means exhaust the application of the term "recognised". Some Aboriginal members of the Committee strongly assert, that Aboriginal customary law has never disappeared, has never changed, and exists to a greater or lesser extent in most if not all of the Aboriginal communities in the Territory. What will now assist those communities is that a statutory recognition can and should be given to Aboriginal customary law to those communities who seek such recognition.

6.4 Under the Community Government scheme in the *Local Government Act* (NT), communities may apply to the Minister for approval of the election of a Community Government Council, which under the Act will have powers as decided by the community, but which may extend over health, housing, water supply, welfare and relatively broad range of other matters. The Community Government Council also has the power to make by-laws to cover the sale, possession and consumption of liquor, and the sale, display, possession, and use of firearms or offensive weapons. The Committee notes that it may be a vehicle for the recognition of Aboriginal customary law.

6.5 One form of statutory recognition could be somewhat in these terms:

> That upon application to the Attorney-General an Aboriginal community may apply for recognition, within the community, and by those who consent to it, of such Aboriginal customs and traditions as the community sees fit and which shall therefore be recognised as lawful and binding upon those who accept it, provided that such customs and traditions do not transgress

[11] See Appendix A.
[12] Contra views expressed by Mr Ward DCM who believes it is important to have Aboriginal customary law in writing so that it can be properly considered.

> the general laws of the Northern Territory or universal human rights and fundamental freedoms.[13]

6.6 For reasons already given it is not suggested that these customs and traditions be precisely defined. It should be sufficient that the broad boundaries of what is sought can be discussed with the Attorney General or his representative and agreement reached on these broad terms. This may offend legal purists but, does not seem too difficult and in fact is what already prevails in many communities. The statutory recognition may, however, strengthen and assist the community, and demonstrate a confidence, previously lacking, that a community has the right and responsibility to govern its own affairs as it wishes but within the general law.

6.7 We do not shrink from the realisation that there may be difficulties on the boundaries of these agreements, and, for that reason, we recommend that a group in the office of the most appropriate government agency be set up to deal with such matters. Obviously this division should be staffed by those familiar with Aboriginal customs and traditions and with a practical knowledge of the general law.

6.8 It is emphasised that the whole concept must be based on voluntariness and no person should be forced into the compact against his or her will. On the other hand the communities should have the right, which in many cases they already exercise, of expelling a person who does not wish to be bound by the compact or at least denying to that person the advantages of belonging to the community. This is not as drastic as it sounds, because it appears that many Aboriginals in most communities would wish to conduct their affairs within the traditional law, and there is no reason why an Aboriginal person who does *not* wish to be so bound should expect to receive the rights and responsibilities under traditional law. There is a free choice and the option to merge into the more general society of the Territory should carry with it the responsibility of accepting that free choice. No doubt there will be some who will wish to move within both worlds and that should be a matter for the community to the extent to which they are prepared to accept such a situation.

6.9 The objection will no doubt be raised that this is setting up two systems of law in a society which is dedicated to equality within the law. But this is not a valid objection, firstly, because the choice is voluntary and can at any time be changed with the consent of the community, secondly, because the general law applies overall and thirdly, because the situation is akin to Local Government where the various local Councils within the Territory, and indeed throughout Australia, have the right, within the jurisdiction given to them, to make by-laws consistent with local conditions and differing from by-laws of other Councils.

6.10 It can readily be recognised that such plans may seek to have the effect of law. In the absence of a specific Aboriginal community proposing a specific plan, it is not appropriate for the Committee to offer generalisations. If an Aboriginal community seeks a change in the general law this will be a policy matter for government. If such proposals seek to affect fundamental laws or human rights,

[13] This a common form of recognition of customary law: eg WC Ekow Daniels, "The interaction of English Law with customary law in West Africa" (1964) 18 ICLQ 547.

this is again a policy matter for government response. As a general policy position, the Committee accepts and endorses the view that such plans should not infringe human rights. [14]

6.11 The Committee's general view is that *each Aboriginal community will define its own problems and solutions*. [15] Models may deal with family law, civil law, criminal law, or with relationships between Aboriginal communities and government officers, private contractors while in Aboriginal communities, and so on. There should be no limit on the issues that Aboriginal communities can use traditional law for. While it is ultimately a matter for a specific community to propose a specific plan to the Attorney-General or government, and for the government to respond to the policy issues raised in that plan, the Committee does not support the development of plans that infringe on basic human rights and freedoms.

6.12 Models to deal with general community issues or disputes, not involving interaction with the Australian legal system, are often likely to be the most important issues facing Aboriginal communities.

6.13 These models may deal with matters such as alternate dispute resolution processes, a structured system of police caution protocols, a panel of experts to assist magistrates on issues of customary law and so on. They are part of the community developing its own strategies. By way of example, the Committee envisages a situation where an Aboriginal community (resourced for this purpose) develops, in consultation with Police, a protocol with respect to cautioning of juvenile offenders. This will be a formal agreement between the community and the relevant government agency, not having the force of law. All such arrangements will be subject to the general law. Similarly it may be appropriate to develop protocols with the Department of Health and Community Services with respect to enhanced dispute resolution in family matters.

6.14 To the extent that such plans do not raise issues of Australian law, nothing further need be said. These plans are subject to the general Australian law. To the extent that such plans are to be embodied in Aboriginal community by-laws, issues of policy for the government may be raised. In practice, by-laws will create new legal duties. Plans that involve the interaction with Australian law are also likely to raise legal policy issues for government.

6.15 There is general recognition by the Committee that the process by which these models and plans are developed must be carefully planned, developed and adequately resourced. In assisting Aboriginal communities to develop plans,

[14] NPY Women's Council written submission: "NPYWC therefore supports the NT Government's view that the recognition of ACL should be limited by international conventions on human rights and fundamental freedoms and that the NT Criminal Code should apply to all NT citizens without exception". NPY Women's Council notes of interview dated 15 May 2003: "We feel strongly that there shouldn't be two standards applied and the same standard should be applied to Indigenous people where matters that come under the Criminal Code are dealt with."

[15] This reflects submissions by the Aboriginal and Torres Strait Islander ('ATSI') Social Justice Commissioner of the Human Rights and Equal Opportunity Commission ('HREOC'); and all discussions that the Committee had with interested people.

government should ensure that the process is transparent and involves genuine input from all members of the community likely to be affected.

6.16 Processes must ensure that the voices of Aboriginal women, young people and less dominant groups are heard and taken into account. Their rights to equal protection under the Australian law must not be compromised.[16] The Committee recognises that properly expressed, Aboriginal customary law can, and in some communities does, fully represent the rights of women. This can be because senior women have fought hard to preserve their rights and have been supported. Some members of the Committee also acknowledge that this aspect of customary law can break down – often through alcohol abuse and other negative influences. If this possibility is not fully addressed, it will lead to a lack of confidence in these proposals.

6.17 The Committee generally agrees with the approach adopted by the ALRC:

> the need for consistency with fundamental values of non-discrimination, equality and other basic human rights does not preclude the recognition of Aboriginal customary laws. On the contrary, these values themselves support appropriate forms of recognition of the cultural identity of Aboriginal people.[17]

6.18 In its report, Alternative Dispute Resolution in Aboriginal Communities[18] the Northern Territory Law Reform Committee made 17 recommendations with respect to alternative dispute models and community justice plans. The report contains a discussion of the options available in this area. Government is yet to respond to these recommendations. The Northern Territory's Aboriginal Law and Justice Strategy, [19] which commenced in 1995, outlines the work that has been done in the Northern Territory with respect to community law and justice plans.

Recommendation 4 – Law and justice plans.

Aboriginal communities should be assisted by government to develop law and justice plans which appropriately incorporate or recognise Aboriginal customary law as a method in dealing with issues of concern to the community or to assist or enhance the application of Australian law within the community.

[16] Interviews and written submissions: Dr Nanette Rogers, Alexis Fraser, NPY Women's Council, ATSI Social Justice Commissioner of HREOC; Submission of the Sex Discrimination Commissioner on behalf of HREOC.
[17] ALRC 31, Summary Report at para 37.
[18] op cit.
[19] Northern Territory Government (Department of Community Development. Sport and Cultural Affairs), A Model for Social Change: The Northern Territory's Aboriginal Law and Justice Strategy 1995-2001).

6.19 The Committee wishes to identify two particular areas that raise substantial policy issues for government in terms of their potential to affect human rights: promised marriages and payback.

Promised marriages

6.20 Polygamy is recognised under traditional law. The practice of arranged marriages, in which (usually) an infant girl is promised to an adult male, is also recognised under traditional law. It should be noted that such arrangements are not universal in Aboriginal communities, and many communities no longer have such a practice.

6.21 Some Aboriginal members of the Committee propose that, with respect to promised marriages, all disputes concerning such marriages should be resolved *wholly* in accordance with traditional law, rather than Australian law.

6.22 Ultimately, any form of recognition of such marriages will be a matter for decision for both the Northern Territory and the Commonwealth, as it will require a modification to the general Territory and Commonwealth law. However several issues are raised.

6.23 In Aboriginal customary law, marriages may be agreed between the prospective husband and the persons responsible for a young girl.[20] This is a contract to which the child is not a party. The contract imposes material obligations on the prospective husband with respect to the child and her family; and obligations on the parents and child with respect to the prospective husband.

6.24 Generally speaking, the child is expected to understand the nature of the contract when she reaches puberty (say 12 or 13). There is then a process by which the child and her family affirm the contract and the girl goes to live with the family of the husband, but not usually with the husband at first. Sometime thereafter the girl goes to live with the husband as his wife. The girl can choose not to comply with the marriage agreement at any time prior to living with the husband. However it should be noted that the social expectations of all the families involved are that the marriage would normally proceed. Love marriages are recognised as a fact of life for the girl, her family and the community and thus the process for the girl and her family repaying benefits received in anticipation of marriage is also dealt with under traditional law.

6.25 Additionally, as the relationships involved are usually between senior men and girls under 16 this raises policy issues of fully informed consent and an imbalance of power relationships.

6.26 Australian law does not, as a matter of general policy, recognise such contracts in anticipation of marriage. Australian law generally provides a fixed age of consent for marriage of 18, in some cases 16.[21] The Australian law does not take into

[20] A Glass, Into Another World: A Glimpse of the Culture of the Ngaanyatjarra People (Alice Springs: Institute for Aboriginal Development, 1990).

[21] Marriage Act 1961 (Cwth) s. 11 states: "Subject to section 12, a person is of marriageable age if the person has attained the age of 18 years". Section 12(1) provides: "A person who has attained the age of

account the physical or social maturity of the individual. Many countries recognise a more flexible process to determine the age of consent. While the age of marriage is a matter governed by Commonwealth legislation, sexual relationships between persons where one may be under 16 is a matter for State or Territory law.

6.27 Additionally the Convention on the Rights of the Child and the Convention on the Elimination of all Forms of Discrimination Against Women will raise issues about the extent to which recognition of promised marriages can be accommodated.

6.28 It is highly unlikely that Australian general legal policy can or should recognise the validity of contracts providing for promised brides. However, it is clearly a matter of concern in some Aboriginal communities.

6.29 The stated issue of concern by at least one Aboriginal group was the allegedly arbitrary way in which the government agency acted in a case where the promised bride was taken away by the authorities. On the other hand the authority concerned denied this, and said that it had acted appropriately in all the circumstances and particularly with the welfare of the child in mind. The Committee is in no position to resolve this argument but merely emphasises that it should be made clear that such contracts are not recognised by Australian law and that authorities are bound to act to protect the child whatever may be the expectation of the community. Clearly, this is a matter for communication and consultation between Aboriginal communities and government authorities. The Committee endorses the view, that in all such situations, the welfare of the child is the paramount concern of the law and does not see a need to modify this fundamental principle.

Recommendation 5 – Responding to promised marriages.

That so far as the concept of "promised brides" exists in Aboriginal communities, the government sets up a system of consultation and communication with such communities to explain and clarify government policy in this area.

16 years but has not attained the age of 18 years may apply to a Judge or magistrate in a State or Territory for an order authorising him or her to marry a particular person of marriageable age despite the fact that the applicant has not attained the age of 18 years."

Payback (Spearing)

6.30 The problem of double punishments is well known in the Northern Territory. A person who commits a serious offence, such as murder/manslaughter, is liable to imprisonment under Australian law and punishment under traditional law.[22]

6.31 The term "payback" is often used in general discussion either to describe all punishments for offences under traditional law, or to imply that spearing is the appropriate punishment for offences under traditional law. This is not strictly accurate. Spearing is not a general penalty.

6.32 For the offence of murder, the appropriate penalty under traditional law almost always includes spearing in the thigh. However there may exist mitigating circumstances whereby spearing is not imposed. The spearing protocol is agreed to by the families of the offender and victim, or failing agreement, by the community at large, and often negotiated by a relevant lawman. The process is carried out in public, by authorised persons, pursuant to the agreed protocol, and overseen by agreed adjudicators, whose function it is to moderate the process, to make sure the protocol is observed, and intervene if necessary. This process, of course, leads to wounds that may result in permanent physical injury. It should *not* lead to death, because it is not a death penalty under traditional law. If a person dies because of payback, those who carried out payback are guilty of murder or manslaughter under traditional law, and they must, accordingly, undergo payback as a penalty for their wrongdoing. Under traditional law, payback settles the matter.[23]

6.33 While the death penalty has been recognised as the appropriate punishment for some offences under traditional law, and while such penalties have been carried out in the Northern Territory within living memory, submissions to the Committee and general knowledge indicates that the death penalty is no longer imposed under traditional law, primarily because Aboriginal communities recognise it is unlawful under Australian law, and the policy of Australian law is that persons authorised under traditional law to carry out the death penalty are charged for offences under Australian law, and, if convicted, imprisoned as a result.

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[22] Submission from William Tilmouth; Council for Aboriginal Reconciliation, National Strategy to Promote Recognition of Torres Strait Islander Rights (2000) para 4(iii) traditional law.

[23] See the sentencing remarks of Bailey J in SCC No 20214130 R v Webb (unreported): "The deceased's sister, AB, signed a victim impact statement, exhibit P6, on behalf of the deceased's family. Ms B refers to the anger, sorrow felt by family members at the deceased's senseless death at the hands of the prisoner. She also refers to the prisoner and his family visiting Nyirrpi and the prisoner receiving payback. Ms B expresses the family's contentment with the payback and states that, insofar as the deceased's family is concerned, the matter is now settled …. At Nyirrpi, the prisoner was speared three times in one leg and twice in the other. He received stab wounds to the arm and back. His head was split open with a blunt instrument, causing a wound that required 17 stitches. Mr M gave evidence that the prisoner withstood his punishment like a man. The deceased's family does not consider that the prisoner should serve further time in imprisonment. ….I acknowledge the deceased's family considers that the matter has been settled and that the prisoner need not spend further time in prison. However, I would be failing in my duty if I were not to require the prisoner to spend a considerable period behind bars. There needs to be a strong element of both general and personal deterrence in the prisoner's sentence. The deceased's family may regard this episode as closed, but the interests of the wider community demand the prisoner be punished by the loss of his liberty."

6.34 It should be noted that some Aboriginal communities do not impose payback or do not impose it for all classes of murder. For example, in Amadjarra, we are told it is not imposed where there is no Aboriginal eyewitness to the murder.

6.35 As the law presently stands, in some Australian jurisdictions, if a person is convicted of murder, and has undergone payback, that is a relevant factor that the court can take into account in reducing the penalty.[24] However under the Northern Territory Criminal Code ("Criminal Code") the penalty for murder is mandatory life imprisonment, and this penalty cannot be reduced to take account of payback.

6.36 The Committee's Terms of Reference indicate that the government does not wish to entertain options for reform of the law that are contrary to the Criminal Code. Section 26(3) of the Criminal Code prohibits a person from authorising "another to kill him … or to cause him *grievous bodily harm*". It could be anticipated that payback (as described here) will envisage grievous bodily harm. Payback amounting to grievous bodily harm is therefore presently *unlawful*. Any change to the law would require an amendment to the Criminal Code.

6.37 Additionally under traditional law, if the offender is not able to undergo payback members of his family would be expected to undergo the process, or there would be an expectation that when the offender is released on bail he would undergo payback.[25] A substantial term of imprisonment, leading to an inability to carry out payback, has sometimes resulted in disruption or other social tensions within a community.[26]

6.38 In the case of "payback" there is clear potential for a profound conflict between the operation of the general criminal law and Aboriginal customary law.

6.39 From the general law perspective, to the extent payback involves the infliction of any bodily harm the person inflicting it is potentially exposed to criminal liability for assault or worse. That exposure exists independently of the victims consent to the procedure (section 26(3) of the Criminal Code). On the other hand, from the Aboriginal perspective, the mechanisms by which customary law responds to transgressions must be followed if the wrong is to be righted. These imperatives operate not only upon the affected community, but also upon those charged with carrying out the punishment.

6.40 Even if the Terms of Reference contemplated reforms to the criminal law, it is doubtful that workable reforms could be formulated, let alone implemented in this area. Nevertheless the issue has been a major concern in the Northern Territory for over 50 years and the Committee identifies it as a matter necessitating a

[24] This is discussed in Background Paper 3: Legal Recognition of Aboriginal customary law.

[25] See transcript Court of Summary Jurisdiction 20214130 (Police and Webb) bail application before Mr Ward SM, 3 October 2002. The case was also referred to by Mr Bamber in discussions of 15 May; and in discussions with the Tangentyere Council on 28 May. See also SCC No 20214130 sentencing remarks: "Mr Bamber emphasised that at the time he was bailed the prisoner was facing a murder charge and a potential mandatory life sentence. Nevertheless, the prisoner felt obliged to undergo traditional punishment, regardless of his personal situation, in order to avoid continuing trouble between his own family and that of the deceased."

[26] Submission of Mr Ward SM, Gottlieb Tom Svikart and discussions with David Bamber.

government response. The nature of that response is a matter for government, however, it appears to the Committee that any substantial progress towards an accommodation is unlikely unless it involves a meeting of senior Aboriginal law people and their 'counterparts' in the general law system.

Recommendation 6 – Inquiry into the issue of payback.

The Committee recommends to government that it establish an inquiry into the extent to which the traditional law punishment of payback is a fact of life on Aboriginal communities, and develop policy options for government to respond to the issue.

7 A TRADITIONAL COMMITTEE

7. 1 Much has been said and said frequently of the immense problems facing many Aboriginal people in a non-Aboriginal society, and on Aboriginal communities. There is no point in denying or evading the fact that drunkenness (grog culture), drugs and violence play a large part in some Aboriginal communities and among those who have ceased to belong to a community but have not merged into non-Aboriginal society. The reasons are many and various and we do not desire to discuss again what has already been explored in full. We do however point to one fact which is often overlooked that the proportion of non-drinkers amongst Aboriginals is higher than the proportion in non-Aboriginal society and that much of the statistics relate to a group of repeat offenders.

7.2 We have no magic solutions but we do consider that greater participation by Aboriginal leaders in the court process may assist. In stating this we are aware that Magistrates and Judges do in fact, and generally on an *ad hoc* basis, seek assistance from Aboriginal people. We would recommend taking this a step further.

7.3 We recommend that, on application by an Aboriginal community and in consultation with them, the Attorney General or his representative establish a Consultative Committee which may appear in court when a member of that community is charged with an offence. The Committee should be chosen after consultation with the Attorney General or his representative to ensure appropriate representation. [27] In cases which they think appropriate, and where the Court has found the offender guilty of the offence, the Consultative Committee or its representative may request the Court to let the community deal with it. If the Court consents, it may adjourn the case and refer the matter to the community and record that this has been done. [28]

7.4 While certain traditional punishments, contrary to the general law, *cannot* be permitted, there is no reason why other traditional procedures should not be undertaken particularly those in which a process of mediation, involving usually a representation of all aggrieved parties, can be arrived at. We have been assured by many persons that such a process is more understood and accepted by the community and by the offender than the Court procedures which can be mystifying or not fully understood. The process must be entirely voluntary, that is, the offender and all those affected by his acts must consent to it, and the Court must have the discretion to allow it. There will certainly be some cases where the community will prefer that the offender be dealt with by the Courts, but equally there will be cases where that person can be dealt with in a way he or she better understands and can rely on the support of the community if he/she makes what they consider proper reparation.

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[27] NPY Women's Council and Top End Women's Legal Service (TEWLS); Sex Discrimination Commissioner submitted that it was important that the women's voice be heard.

[28] Mr Ward SM described the operation of such a Committee in Gove in discussion on 15 May. He noted that the underlying cause relating to the criminal conduct might be known, or better understood, by the Committee and this information might only come out with such a Committee. In such a case the decision of the court might help resolve the dispute.

7.5 At the adjourned hearing the Court may take whatever action it thinks appropriate upon being told what resolution has been arrived at by the community. In this way it is hoped that those with good prospects of rehabilitation might be spared the likelihood of a gaol sentence. We also emphasise that if the matter goes to the community, no legal representation should be allowed. We do not consider that the procedure should become just another form of court hearing and, in any event, it would show a lack of confidence in the community's capacity to settle their affairs without interference.

7.6 One objection raised to this process is that certain families strong in the community would, as it were, "stand-over" the others and ensure that their relatives received no real punishment or admonishment. To this there can be two replies. Firstly, that it would be hoped that the community, and indeed the "strong" families themselves, would wish for the process to succeed and would eschew favouritism. Secondly, such a practice would be a factor persuading the Court to refuse the application in future. In this respect we would expect the Police to play a pivotal role in bringing to the attention of the Court such matters for or against the application as they would know from their own knowledge.

7.7 We are also aware that it casts a special duty on the legal representative of the accused, whose duty is naturally to do the best for their client, to ensure that the client knows of the alternatives open to the client, and particularly that the client's legal representative could not appear for him or her at the community process. However, we have no doubt that the legal representative would discharge that duty adequately bearing in mind the advantages to the client for the alternative procedure if that was appropriate.

7.8 We are also well aware that in many cases there are several communities in the same area. We do not consider it too difficult to set up separate Committees to deal with the particular members of the community for which the community wishes to take responsibility. That last word "responsibility" is important. What we are suggesting is a transfer to those who seek it, of the power and responsibility to deal with their own matters. We believe each Committee will realise that this will be a test of their capacity and we believe they will fulfil that test. Many Aboriginals must resent suggestions that they have not the capacity to manage their own affairs and we believe it would be a step forward to recognise their own trusteeship of their own affairs.

7.9 In this respect we refer to the principles stated in the MIWATJ Provincial Governing Council (Version 2) Draft Customary Law Policy (February 2003) and particularly to the statement at p.5 that:

> In the Miwatj Region Yolngu wish to gain recognition of their own systems of law while at the same time acknowledging that they are subject to the laws of the Commonwealth and the Northern Territory. In this context Yolngu are not advocating "two laws" that are in conflict with each other.

7.10 It should be emphasised that the procedures suggested here are entirely voluntary. No Aboriginal community need feel forced or pressured to adopt them, but if they

desire to do so, they may do so on such terms as may be agreed between them and the representative of the Attorney General and the courts. At all times they should be at liberty to depart from the scheme if they so desire, or to discuss such variations of the scheme as shall seem appropriate after the scheme has been put in place.

7.11 The main advantage of the scheme is its flexibility and the fact that it is entirely voluntary and no pressure is put on any community to accept it. Being flexible, it would not be too difficult to vary the scheme if it was not initially proving successful; or to advance further, if success were being achieved. The important factor here is that traditional law is known only to the community, or more particularly community leaders, familiar with all its delicate subtle and local variations. The Court is thereby the better assisted rather than having the traditional law "interpreted" by lawyers who, with the best of intentions, may miss the real significance of the procedures. One commentator has used the term "half-baked" in referring to these lawyerly attempts at interpretation of a complicated theme.

7.12 Without limiting the generality of choice, the Committee puts forward as an example, one possible scenario (emphasising that there can be many others).

1. Accused is charged and appears in Court.

2. The Consultative Committee representing the community of the accused submits to the Court that the accused could more properly be dealt with in accordance with traditional law.

3. A Judge or Magistrate inquires of the accused whether he/she consents to this course.

4. Accused (after consulting with his/her legal adviser) consents.

5. Court asks opinion of prosecutor, police, victim or any other person Court may consider relevant (e.g. probation officer).

6. Court agrees to remit the matter to the community and adjourns to a fixed date.

7. On adjourned date, Consultative Committee reports to Court that the matter has been dealt with to the satisfaction of the community.

8. Court may then dismiss the charge or make such other order or sentence having regard to the fact that the accused has been before his/her own community for action deemed appropriate by that community.

Recommendation 7 – A community sentencing model.

The Committee recommends a model allowing for community input into the sentencing of offenders, for adoption by Aboriginal communities and the courts.

7.13 As a first step the scheme should be set up in one or two communities which express a wish to act thus on a trial basis and appropriate resources should be made available for this purpose.

7.14 Organisations like the Aboriginal Legal Aid Services[29] and NT Legal Aid Commission need to be adequately funded for the purpose of the extra obligations imposed on them by a traditional committee. There may also be funding implications for the DPP, Police and the Courts themselves.

7.15 The Committee considers that a process of independent review or audit, after a suitable period, such as 12 months, be undertaken to report back to government, on the effectiveness of any such traditional committee. This will provide valuable information for the development of similar committees.

Recommendation 8 – A pilot project.

The Committee recommends government proceed to assist Aboriginal communities to implement law and justice plans, by making resources available for several pilot programs.

7.16 However, reference should here be made to the question of domestic violence.

7.17 The Committee has received very strong submissions by Aboriginal and non-Aboriginal people, particularly people involved in assisting Aboriginal women to protection from family violence. They adamantly maintain that to refer such cases to communities would not necessarily be a sufficient protection for the women who have been threatened or assaulted. It is true that some oral submissions to the Committee express a belief that such cases can be adequately and appropriately dealt with by traditional law, and that domestic violence was not a problem in traditional societies. Whatever may have been the position in the past, the present situation in some communities indicates that they cannot adequately guarantee protection.[30]

7.18 While it is not suggested that the general law system of restraining and protection orders and proceedings for breach of such orders and for assaults always carries

[29] North Australian Aboriginal Legal Aid Service Incorporated (NAALAS); the Central Australian Aboriginal Legal Aid Service Incorporated (CAALAS); the Katherine Regional Aboriginal Legal Aid Service Incorporated (KRALAS).

[30] Submissions: NPY Women's Council speaking of the Western Desert area; Alexis Fraser; Top End Women's Legal Service (TEWLS).

greater protection, the onus should be on those who submit that the case can be better dealt with by traditional methods, to establish that proposition, and the court should only allow such an application, if it is satisfied that the victim has given informed consent to that course, and only then after consulting with legal advisers.

8 ABORIGINAL JPs AND GREATER ABORIGINAL PARTICIPATION IN THE JUSTICE SYSTEM

8.1 We understand that it is the policy of government to encourage more Aboriginal Justices of the Peace. We suggest that this can also be utilised by setting up courts composed of Aboriginal JPs to deal with minor criminal matters in communities. This may not strictly be a matter under Aboriginal customary law except in the sense that the Bench might understand more fully some of the background to various offences. The real advantage would be the obvious one of including more fully and more conspicuously Aboriginals into the general law system.

8.2 It is not suggested that in this case there be any variation from the procedures and principles of the general law. The court should operate as a court with appearances for both sides, admission of evidence and proper attention paid to the appropriate standards of proof. Courts composed of JPs have accomplished this task adequately in the past and there is no reason why they should not do it again.

8.3 But it is not suggested that a separate court system be set up. That would lead to an unnecessary duplication of personnel. The situation can be adequately handled under the *Justices Act* by providing that on court days the Magistrate may delegate to a Bench of JPs such matters as he thinks suitable. The Bench would sit separately but using the same court officers. For convenience it would be preferable if the JP's Court were held at different times from the Magistrates Court unless there were sufficient court officers and police prosecutors to handle two courts at the same time.

8.4 Appeals would be handled in the same way as with Magistrates Courts i.e. to the Supreme Court. While there may be some appeals occasioned by lack of legal knowledge of the JPs, these would not be many because the JPs would be dealing with minor matters with a limited range of fining and other sanctions.

8.5 Within limited jurisdictions JPs will usually make up in common sense what they lack in legal training and the Committee believes the results would not generate an excessive number of appeals.

8.6 We repeat that this situation is not really under the category of Aboriginal customary law and indeed the JPs would be in error if they saw their jurisdiction as being that. As with the Magistrates Courts, an Aboriginal Committee could apply to have the case handed over to them. But it would be an expression of confidence to give this jurisdiction to Aboriginal JPs in particular districts.

8.7 In addition to greater participation by JPs, serious efforts should be made to increase Aboriginal participation generally in the law, particularly in the Police Force and among court staff. Comments have been made to the Committee about the perspective of an Aboriginal appearing in a court where none of the officials are Aboriginal. This tends to increase the feeling of isolation from the process.

Recommendation 9 – Increased participation of Aboriginal people in the justice system.

The Committee recommends government develop strategies to increase Aboriginal participation in the justice system.

9 APPLICATIONS TO INDIVIDUAL STATUTES

9.1 Northern Territory legislation deals with family law, civil law and criminal law matters that may affect Aboriginal people in ways that conflict with their rights and responsibilities under traditional law. For example, as indicated in Background Paper 3, traditional law may provide rules about who is entitled to adopt a child consistently with traditional law. Adoption legislation may provide other rules. This would be an example of the general law not taking into account relevant factors in how the application of the general law may adversely affect people bound by traditional law.

9.2 Background Paper 3 identifies a series of specific issues with respect to reform of legislation as it affects Aboriginal people. The basis of reform of the law should be that the law should not work injustice. Within its timeframe, the Committee has not been able to develop policy options for reform in these diverse areas. The general process of law reform in areas of common law and legislation is to develop policy options on specific issues in consultation with the whole community. It is clearly unrealistic for this Committee to develop options on every aspect of the interaction between the entire corpus of legislation and traditional law. This must be done on a topic by topic basis. But the process we suggest is not complicated. From time to time, and as various statutes come up for review, and where for example in those statutes the court is directed to take certain matters into account, consideration should be given to including in those matters a phrase such as "the view of Aboriginals in a particular community and the effect the decision will have in that community when it appears to the court that this is a relevant matter to be taken into account".

Recommendation 10 – Law reform strategy.

The Committee recommends government adopt a policy of ensuring the application of the general law of the Northern Territory does not work injustice in situations where Aboriginal people are subject to rights and responsibilities under traditional law, and that statute law should on appropriate occasions recognise this.

9.3 The recognition of customary laws may also bring about an increase in the knowledge and recollections of customs and traditions. This process would help empower Aboriginal people to use such customs and traditions to deal with local issues of concern, raising the self-esteem and self-respect of members of the communities who might be likely to offend against traditional law or Australian law.

9.4 Additionally, the process of recognising customs and traditions, provides an opportunity for Aboriginal culture to grapple better with problems arising in contemporary society. The Committee, in its consultations, heard that there are now much fewer Aboriginal people in the Northern Territory who could be called elders and who, as such, have authority over the community.[31] Also fewer younger members of the community are going through ceremony and acquiring the requisite knowledge of the law. The Committee acknowledges the seriousness of the position and hopes that its recommendations will assist those who wish to do so to revive and strengthen traditional ways and self confidence.

[31] Discussions with ATSIC (Katherine Regional office).

10 ABORIGINAL CUSTOMARY LAW AS A SOURCE OF LAW

10.1 At the Northern Territory Statehood Conference a resolution was unanimously passed that Aboriginal customary law be recognised as a source of law in the new State Constitution. Although there is, as yet, no separate State of the Northern Territory, there is no reason why government could not incorporate that principle as a statute.

10.2 The Committee notes that this issue is properly one of the constitutional relationship between Aboriginal communities and the Northern Territory. The Northern Territory presently has a process examining this issue.[32]

10.3 It is, however, the view of the Committee that, in the event of any legislative reform dealing with this issue, whether or not the Northern Territory becomes a State, the resolution of the Northern Territory Statehood Conference should be implemented.

10.4 The *Aboriginal Land Rights (Northern Territory) Act* 1976 already recognises Aboriginal customary law as a source of law, in the sense that it has the ability to affect the application of certain Northern Territory law to land vested in an Aboriginal Land Trust. This is because of the way ss 71 and 74 of the Act must be read together. The rights of Aborigines to use and occupy the land vested in the Land Trusts are set out in s 71(1) which provides:

> Subject to this section, an Aboriginal or a group of Aboriginals is entitled to enter upon Aboriginal land and use or occupy that land to the extent that that entry, occupation or use is in accordance with Aboriginal tradition governing the rights of that Aboriginal or group of Aboriginals with respect to that land, whether or not those rights are qualified as to place, time, circumstances, purpose, permission or any other factor.

Section 74 provides:

> This Act does not affect the application to Aboriginal land of a law of the Northern Territory to the extent that that law is capable of operating concurrently with this Act.

10.5 By reading ss 71 and 74 together, the effect of s 74 is qualified by any occupation or use on Aboriginal land "in accordance with Aboriginal tradition". Predicting the extent to which Territory laws will ultimately be found to be inapplicable is difficult because of the imprecision surrounding the term "Aboriginal tradition".

[32] Media Release, 22 May 2003, "Chief Minister announces New Territory Statehood Move". The Standing Committee on Legal and Constitutional Affairs of the NT Legislative Assembly will facilitate and provide resources during a five-year timetable, including the drafting of a new Constitution, which will be examined by an elected Constitutional Convention, the process to be completed by 1 July 2008.

> The definition of "Aboriginal tradition" in section 3 is not specific enough to be of much use.[33]

10.6 Various Aboriginal Land Commissioners have noted that tradition is not frozen:[34]

> So it will not always be easy to postulate when a particular legislative measure will conflict with the rights of entry, occupation and use preserved by s 71(1). Running a herd of cattle or other livestock for subsistence reasons might conceivably become a traditional use in some places - if it has not already done so. Compulsory destocking in those circumstances becomes somewhat doubtful.

10.7 The High Court emphasised the effect of s 71 when it said:[35]

> When land becomes Aboriginal land, the use or occupation to which an Aboriginal is entitled according to Aboriginal tradition is guaranteed by s 71, and the laws of the Northern Territory - including planning laws - are incapable of interfering with that use or occupation.

Recommendation 11 – Aboriginal customary law as a source of law.

The Northern Territory Statehood Conference resolution that Aboriginal customary law be recognised as a "source of law" should be implemented.

[33] "*Aboriginal tradition* means the body of traditions, observances, customs and beliefs of Aboriginals or of a community or group of Aboriginals, and includes those traditions, observances, customs and beliefs as applied in relation to particular persons, sites, areas of land, things or relationships"
[34] Aboriginal Land Commissioner (Maurice J), Warumungu Land Claim (Canberra: AGPS, 1988) at 187.
[35] R v Kearney; ex p Northern Land Council (1984) 158 CLR 365 at 392-93 (Brennan J).

11 A PRAGMATIC APPROACH

11.1 It should be obvious that this Report is confined to practical steps which can be taken immediately. In other words it seeks to work from the bottom up rather than from the top down. For those who seek wider solutions it may seem a policy of unwelcome gradualism. But the view taken in this Report is that it is better to do things that can be done effectively, and which, if successful, may lead onto further attainable goals. Much of what is suggested here is already emerging from the efforts of Aboriginal communities generally. It is also evident in the work of Judges and Magistrates, to give proper recognition to Aboriginal customary law in cases where it can be seen as relevant, and in government initiatives with respect to the establishment of special courts in Victoria, South Australia and Queensland. The aim therefore is to build up from these examples.

11.2 Further, the Northern Territory Law Reform Committee is not a statutory body like the Law Reform Commissions of the various States and the Commonwealth which have wider resources and permanent staff. These bodies do excellent work producing significant reports based on wide research, and this Report in no way denigrates their efforts. The far-reaching goals of the Western Australian Law Reform Commission in its present enterprise to study the whole field of Aboriginal customary law will certainly have important and useful results which will assist all governments and no doubt the government of the Northern Territory will find much useful material therein. So, likewise, the Australian Law Reform Commission's comprehensive report has greatly assisted, as has the Royal Commission into Aboriginal Deaths in Custody.

11.3 But the Northern Territory Law Reform Committee is a voluntary organisation of busy people, who have their own work to do and are necessarily limited in the time they voluntarily give to law reform. Apart from the officials delegated by the Department of Justice (ie. the Principal Legal Consultant, the Executive Officer and an administrative assistant), no other member of the Committee is employed or remunerated by the government for the purpose of this Report.

11.4 This is not to be taken in any way as propaganda to persuade the government of the Northern Territory to set up a more permanent Commission with greater resources. The Committee is well aware and accepts that this may be too great a demand on the government, at least at this stage. The Committee hopes and believes that, with its present Constitution, it can and does assist the government on such matters as the Attorney General delegates to it. But necessarily its Reports tend to be more pragmatic and based on immediate remedies than those produced by a body of professional researchers. Hence the practical approach of the present Report.

11.5 In the same way, the Aboriginal members of the Committee which the Attorney General has set up are not permanent public servants and have many other claims on their time.

11.6 It is in this light that some complaints and dissatisfaction with the preparation of the Report may be expected. These complaints would no doubt be that there has

not been enough time for various interested bodies to put in the sort of detailed submissions they would wish to prepare and that not sufficient research has been, or can be, carried out in the time allocated.

11.7 The answer to these concerns is given by reference to what has already been stated, namely that what is sought to be presented are some immediate practical steps which appear obvious from what is taking place already and which are recognised by many of those who have been interviewed. Indeed most of those people have expressed general agreement with the course proposed.

11.8 As to the necessity for further research, the Committee has drawn upon what has already been exhaustively covered in such reports as the Australian Law Reform Commission, and the Royal Commission into Aboriginal Deaths in Custody. While, no doubt, further research might be useful, the short answer is that the Committee does not have the resources, nor is it necessary for the practical steps proposed, and because the field has already been explored by the reports mentioned. The Committee, however, also recognised with gratitude the preliminary papers prepared by Ken Brown.

11.9 The Committee has strongly discouraged heightened expectations. Several Aboriginals have already expressed their disappointment when officials, as people of authority, have made, or at least appeared to have made, promises of actions which do not then eventuate. Not surprisingly, this has led to suspicion and cynicism. It is better to encourage one achievable step forward (which thereby leads on to the next) than to promise one hundred steps and trip over the first.

12 TRANSFER TO ABORIGINAL MEMBERS

12.1 It is the view of the members of the Committee that after consultation with the Aboriginal members and after presentation of this Report, the members of the Northern Territory Law Reform Committee should withdraw, and leave any further discussions or recommendations to the Aboriginal members, augmented if the Attorney General thinks necessary by other Aboriginal appointees. As has already been made clear, the interpretation and application of Aboriginal customary law is, and should be, a matter for Aboriginals themselves since it is unlikely that any non-Aboriginal will have anything like a full grasp of its depth and significance. At the most, the members of the Committee can set the stage of recommendations that can be made and implemented within the general law. It is for the Aboriginal members, in such way as they wish, to expand upon this Report and make further recommendations.

12.2 Achievement of the objects of this Report can be referred to either the Aboriginal members of the Committee, or a wider reference group. Whatever form further consultation takes, the Committee believes it is of fundamental importance that government fully consult Aboriginal people in the development and implementation of any reforms.

12.3 The desirability of Aboriginal people taking control of their own destiny has been recently emphasised by Commissioner Alison Anderson of ATSIC. At the Family Law Conference at Alice Springs (24 – 26 July 2003) and speaking of the problem of family violence in Aboriginal communities she said:

> I am confident that if Aboriginal Communities and people are given a real opportunity to drive and direct processes, we will be able to add cultural perspectives that do aid the healing of our families.

The full text of Commissioner Anderson's address is set out in Appendix E.

12.4 In this respect the members of the Committee refer particularly to the ATSIC submission which sets out much broader aims than can be dealt with in the scope of the present Report. Reference is made particularly to the final ATSIC recommendation (recommendation 12) which states: "The consultation period should be extended to enable a much more comprehensive consultation with local Indigenous communities regarding Customary Law". This seems to be in line with what is stated in this Report and underlines the suggestion that further consultation should be directed and managed by the Aboriginal people themselves. On the presentation of this Report the Law Reform Committee members withdraw, leaving to the Aboriginals the field that is rightly theirs.

Recommendation 12 – Transfer to Aboriginal members.

That such of the present Aboriginal members of this Committee who consent to do so, should remain as a Consultative Committee to the Attorney General about the operation of these recommendations with the Attorney General having the discretion to appoint further Aboriginal members.

APPENDIX A

TOWARDS MUTUAL BENEFIT:
AN INQUIRY INTO ABORIGINAL CUSTOMARY LAW
IN THE NORTHERN TERRITORY
A sub-Committee of the Northern Territory Law Reform Committee

Preamble

There are many parts of the statutory and common law in Northern Territory, as well as in other State, Territory and Commonwealth jurisdictions, that incorporate or take into account elements of Aboriginal Customary Law.[36]

Aboriginal Law is commonly misunderstood as relating primarily to issues of punishment and payback and its interface with the Northern Territory Criminal Code. This is simply untrue. Aboriginal Law encompasses an extremely broad and complex set of rules and unwritten legislation governing social relationships, economic rights, land ownership, wildlife conservation, land management and intellectual property rights.

It is the view of the Northern Territory Government that, in accordance with Australian and international law, Aboriginal Customary Law should be recognised ***consistent with universally recognised human rights and fundamental freedoms***.[37]

It is for this reason, that the Northern Territory Government affirms that the Northern Territory Criminal Code applies to all citizens of the Northern Territory without exception.[38] This means that the Northern Territory Government **does not condone** any of the crimes in that Code, including but not limited to murder, manslaughter, dangerous act, rape, incest, carnal knowledge, kidnap, assault and theft.[39]

The Northern Territory Government believes there is much value in supporting and sustaining Aboriginal Customary Law, and that the knowledge contained in Aboriginal Customary Law can be of mutual benefit to all citizens of the Northern Territory as well as its custodians.

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[36] For example, the Anunga rules from R v. Anunga (1976) 11 ALR 412 govern the questioning Aboriginal people in custody, particularly where English is not their first language. See also the Evidence Act, the Community Welfare Act, the Adoption of Children Act, the Crimes (Victims Assistance) Act, the Compensation (Fatal Injuries) Act, the Status of Children Act, the Administration and Probate Act, and the Mental Health and Related Services Act as well as various Community Government Schemes. Traditional punishment has long been taken into account in sentencing: Jadurin v. R (1982) 44 ALR 424 at 429.

[37] Milirrpum v Nabalco (1971) 17FLR at 266-267); Yarmirr & Ors v The Northern Territory & Ors (1998) 771 FCA (6 July 1998); International Covenant on Civil and Political Rights, Article 27; Draft Universal Declaration on the Rights of Indigenous Peoples, Article 24

[38] Mason J on Customary Law and the criminal law, Walker v NSW, (1994) ALJR at 112

[39] Compare with the so-called Seven Major Crimes Act 1885, United States, Title 18, Part 1, Chapter 53, S.1153. Page 2.

Terms of Reference

To inquire into the strength of Aboriginal Customary Law in the Northern Territory.

To report and make recommendations on the capacity of Aboriginal Customary Law to provide benefits to the Northern Territory in areas including but not limited to governance, social well being, law and justice, economic independence, wildlife conservation, land management and scientific knowledge.

To report and make recommendations as to what extent Aboriginal Customary Law might achieve formal or informal recognition within the Northern Territory.

In conducting this Inquiry, the sub-Committee should have regard to the following:

- the views of Aboriginal people in the Northern Territory, particularly those who are custodians of Aboriginal Customary Law;
- the extent of existing arrangements accommodating Aboriginal Customary Law in the Northern Territory and other jurisdictions;
- previous reports and research into Aboriginal Customary Law, including the reports of the Statehood Committee (NT), the Australian Law Reform Commission (1986) and the Royal Commission into Aboriginal Deaths in Custody;
- other public submissions.

The Committee is to report to Government by 30 June 2003.

APPENDIX B

Pursuant to the Terms of Reference the Attorney General appointed the following persons as Aboriginal representatives on the Committee of Inquiry on Customary Law. On the 21 February 2003 the Attorney General appointed Yananymul Mununggurr as Co-Chair of the Committee. The Attorney General also accepted the following members of the NT Law Reform Committee as members of that Committee.

The three district sub-committees are:-

Central Region
Robert Hoosan
Agnes Palmer

Arnhem and Gulf Region
Roy Hammer
Mary Yarmirr
Galarrwuy Yunupingu AM

Kurduju Walpiri (and Tennant Creek and Western Desert) Region
Gwen Brown
Marjorie Limbiari
Warren Williams

An Executive Committee was also set up consisting of the two Co-Chairs and one representative from each of the three district sub-committees. The role of the Executive Committee was to discuss policy and the general direction of the Report.

Unfortunately, although a date was set for a meeting of this Committee and agreed to by its members, and the co-chair Austin Asche and other members travelled to Alice Springs to meet with the other members on the specified date, various circumstances prevented the other members from meeting on that date. This problem was partly ameliorated by sending to all members of the full Committee Aboriginal and non-Aboriginal the initial draft report and asking for their comments.

APPENDIX C

Written Submissions

Individuals

Alexis Fraser
Bruce Reyburn
Dr Nanette Rogers
Michael Ward SM
Gottlieb Tom Svikart

Organisations

Aboriginal and Torres Strait Islander Commission (ATSIC)
Aboriginal and Torres Strait Islander Social Justice Commissioner of the Human Rights and Equal Opportunity Commission
Ali Curung Community
Central Australian Women's Legal Service (CAWLS)
MIWATJ Aboriginal Legal Service Aboriginal Corporation
MIWATJ Provincial Governing Council
NHMRC Research Project on Injury Prevention (Presented by Jeff Hulcombe, Researcher)
Ngaanyatjarra Pitjantjatjara Yankunytjatjara ('NPY') Women's Council
Sex Discrimination Commissioner on behalf of the Human Rights and Equal Opportunity Commission
Tiwi Land Council

APPENDIX D

List of Interviewees

Hon John Ah Kit MLA
Jackie Antoun
Dr John Avery
David Bamber
Hugh Bradley, Chief Magistrate
Nigel Browne
Bob Collins
Eddie Cubillo
John Duguid
Tony Fitzgerald, Anti Discrimination Commissioner
Richard Gandhuwuy
Ellen Gaykamangu
James Gaykamangu
Denise Goodfellow
Rev Dr Djiniyini Gondarra
Fiona Hussin
Rosalie Kunoth-Monks
David Loadman SM
Veronica McClintic
Chips MacKinolty
Brett Midena
Tom Pauling QC, Solicitor General
Tom Redstone
Christine Robinson
Peter Ryan
Graeme Sawyer
Marion Scrymgour, MLA
Greg Shanahan, Public Trustee
Hon Justice Sally Thomas
Richard Trudgen
Michael Ward, Deputy Chief Magistrate
Bruce Wernham, Deputy Commissioner, Northern Territory Police
Rex Wild QC, Director of Public Prosecutions

Aboriginal and Torres Strait Islander Commission, Katherine Regional Council members
Ali Curung Community meeting: Aboriginal representatives from Ali Curung, Lajamanu, Willowra and Yuendumu
Central Australian Aboriginal Congress Incorporated members
Central Women's Legal Service Inc. (CAWLS): Lisa Briscoe, Vanessa Lethlean
Centrelink Katherine: Andrea Read, Tammy Spence, Bino Toby
Department of Health and Community Services (FACS): Rose Nean, Valerie Rowland, Garry Scapin, Gary Sherman
Family Court Counselling Service, Darwin: Stephen Ralph, Patricia Raymond

Family Court Counselling Service, Alice Springs: Maureen Abbott, Heather Bunting and Michael Petterson
Gangan Community Members: Elder and leader of Gangan, Gawirrin Gumana, Waturr Gumana, Manman Wirrpanda, Yumitjin Wunungmurra
NAALAS Council members: Natalie Hunter, Kimberley Hunter, Jefferey May, Steven Raymond, Felix Bunduck, William Noinba Pius Tipungwatti, Gordon Machibirrbirr
NAALAS Lawyers and Client Service Officers (Field Officers): Stephen Barlow, Deborah Hepburn, Veronica McClintic, Shahleena Musk, Greg Smith, Peter Tiffin, Shirley Rowe, David Woodroffe
Ngaanyatjarra Pitjantjatjara Yankunytjatjara ('NPY') Women's Council: Mary Anderson, Jane Lloyd
Top End Women's Legal Service: Patricia Brennan, Angela Dowling, Julie Franz

APPENDIX E

Commissioner Alison Anderson.

Address to the Family Court of Australia, Alice Springs, Northern Territory
on 26 July 2003.

Good Morning… I acknowledge the Traditional Owners of this country and I commend the Family Court of Australia, for arranging opportunities for Judges to participate in discussion with members of the Aboriginal Community. This was recommendation 96 of the Aboriginal Deaths in Custody Report. An important document for Aboriginal people and it is cause for regret that not all governments, their agencies or institutions have been as attentive to implementing its recommendations as Justice Nicholson.

Consider for a moment if all of the Deaths in Custody recommendations had been embraced and implemented over a decade ago – would I have to be here to talk about family violence? I think a very real opportunity was lost.

Nevertheless, having attended the meeting with the Prime Minister this week, I am cautiously optimistic that his leadership and commitment to local Indigenous solutions will enable a grass-roots mobilisation to tackle family violence and substance misuse that is devastating our Communities.

Indigenous people are statistically over-represented in victim statistics. Recent research shows that Aboriginal and Torres Strait Islander people are four and a half times more likely to be victims of violent crime and that three quarters of those victims are women. Research also shows that Indigenous Women from rural and remote Communities are one and a half times more likely to be a victim of domestic violence than those living in metropolitan regions.

These statistics are appalling but sadly it is not surprising – they clearly demonstrate how systematic discrimination has led to a lack of power, low status and low self-esteem in too many Indigenous people.

However, this acknowledgment of social oppression does not provide a valid excuse for family violence. Family violence is not part of Aboriginal culture. It is learned behaviour – and victims often grow up to be perpetrators – it is a cycle that we must stop.

Historically, family violence has been denied by most cultures. Shame, embarrassment and ignorance contributed to this denial. These motivators have been even more prevalent in the Aboriginal community, due to negative stereotypes of Aboriginal people portrayed by the media.

We have to get over the fear of ‘airing dirty linen in public’, because we must have these discussions for ourselves, it’s dangerous to keep these issues under wraps. They need to be aired, so we can be informed by them and respond effectively to them.

We need to provide forums in which these discussions can occur in safety.
I am confident that if Aboriginal Communities and people are given a real opportunity to drive and direct processes, we will be able to add cultural perspectives that do aid the healing of our families.

There are a number of local initiatives already that are very promising, the Rheleke program at Ntaria and the inter-generational school and family well-being program at Tangentyere. These programs are being developed and run by Aboriginal people themselves. This is extremely important because we cannot afford to allow our lives to be directed by non-Indigenous people, no matter how well-meaning, because this ultimately results in nothing more than a continuation of our dependence…and the cycle of violence and substance misuse will continue.

Further, in encouraging grass-roots solutions to family violence, we have to ensure that programs do not infringe on the rights of people, and at the same time make sure we don't stifle Community initiative.

I think that this can be achieved by adopting as parameters the seven R's developed by Dr Sudarkasa from her work with black families in the southern states of the US. The seven R principles have a beautiful simplicity, that can be applied at the family, Community, Institutional and broader society level and I encourage the Family Court, which is currently reviewing their family violence policy to assess its policy against the following principles:-

Respect
We must learn how to communicate with each other with respect.

Responsibility
We must take responsibility for ourselves and also the less fortunate in our extended families and communities.

Reciprocity
We must give back to our families and Communities.

Restraint
We must sacrifice for the benefit of the entire Community.

Reverence
We must revere our law and our culture – the oldest culture in the world.

Reason
We must learn and teach the art of reason and compromise in our families, Communities.

Reconciliation
We must remember the importance of forgiveness to achieve reconciliation.

I think the seven R's are something we can all aspire to and if ATSIC can assist Indigenous communities to have these principles underpinning family violence

initiatives then locally based community solutions will become the bywords for success in addressing domestic violence.

Thank You.