



**LEGISLATIVE ASSEMBLY OF THE NORTHERN TERRITORY**

**11th Assembly**

**Standing Committee on Legal and Constitutional Affairs**

# **Towards Northern Territory Statehood: Issues for Consideration**

**COMMITTEE REPORT**

**February 2010**

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# Chair's Preface

In the lead up to the Constitutional Convention in 2011, the campaign for Statehood for the Northern Territory (NT) is entering its next phase with public forums being held throughout the Territory in 2010. It is timely therefore that the Legal and Constitutional Affairs Committee conclude its inquiries into a Bill of Rights for the Northern Territory and Customary Law. For ease of reference, both reports are contained in one volume.

Firstly let's turn to the Bill of Rights inquiry. Strong rights protection is important in any modern democracy. Over the years, civil, political, social and economic rights have extended to include new rights not previously articulated, like the right to a clean and healthy environment. Rights protection can take many forms. A Bill of Rights is one form of legal protection. Would a Bill of Rights in the NT improve and extend our existing rights protection? This is a question Territorians should be asked. Whether the answer is to be sought at the same time the Statehood question is considered, is a separate matter entirely. The two questions are not mutually dependent. A Bill of Rights could be written into the constitutional document of the State of the Northern Territory or be enacted as a separate statute now or once Statehood is achieved. However, would trying to tackle both questions at the same time do a disservice to one or both? Should we consider a Bill of Rights for the NT, while Statehood, which would give Territorians a more constitutionally secure place within Australia, is yet to be achieved?

The Committee believes that priority must be given to the attainment of Statehood.

It is also noted that the National Human Rights Consultation (NHRC) Committee led by Father Frank Brennan SJ handed down its final report in September 2009. The NHRC Committee recommended the enactment of a Federal Human Rights Act as well as a range of other measures including increased and improved education to all Australians on human rights. That Committee also recommended that all measures occur within a national framework of human rights protection containing a stated list of rights and responsibilities to be protected. Given the current status of the NT constitutionally, it would be prudent to wait for the Federal Government response to see how the NT can best respond within the national thinking, either before or at Statehood.

This Standing Committee on Legal and Constitutional Affairs report reflects the research and considerations undertaken and how the Committee arrived at its recommendations through the consideration of issues within the international, national and local contexts. The question of a Bill of Rights for the Northern Territory is a debate which the community must have in earnest, without the issues being entangled in or impeding our progress towards Statehood. Achieving Statehood first, would make clearer the way for a state-wide debate on a Bill of Rights.

Turning to the inquiry into customary law, the Committee acknowledges that the continued existence and practice of customary law in many NT communities is a reflection of the strength and will of Aboriginal and Torres Strait Islanders and cultures. Calls for greater recognition of customary law have largely arisen in reference to criminal justice.

However, in the context of the current move to Statehood, the question before the Committee was to what degree customary law could be acknowledged in the NT. There are positive and negative arguments for this. The many legal questions that arose during the inquiry reflect the level of complexity of the issues for Indigenous and non-Indigenous people and the NT as a whole. Underlying the considerations were the different forms of recognition that are possible and which form could be best for the NT.

The Committee believes that a collaborative and pragmatic approach needs to be taken to further recognise customary law and any approach must not create uncertainties for either customary law or the general law. Any aspects of customary law which might be recognised and the form in which that recognition can take place in our legal system, needs to be driven by societal changes from time to time. The recognition of Indigenous Australians within the Australian Constitution, is being considered and this may be a step worth considering for the NT as it walks closer towards Statehood.

The Statehood forums in 2010 and the subsequent Statehood Constitutional Convention will be significant steps toward Statehood and the future for the NT. It is inevitable that the topics of whether the NT should have a Bill of Rights and issues associated with further acknowledgment of customary law will emerge during the Statehood forums and the Constitutional Convention, but it is important that these issues not detract from or take precedence over, the important goal of achieving Statehood.

I would like to thank the Members of the Committee, past and present for their work on both inquiries and especially for the bi-partisanship shown throughout. I would also like to thank the former Chair of this Committee, the Hon. Malarndirri McCarthy MLA for her work on both inquiries. I would also like to thank the Solicitor-General and Crown Counsel for the Northern Territory for their invaluable advice. My thanks also go to the Committee staff.



**The Honourable Jane Aagaard, MLA**

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**Committee Membership:**

**Standing:** House; Standing Orders; Members' Interests; Legal and Constitutional Affairs  
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**LEGISLATIVE ASSEMBLY OF THE NORTHERN TERRITORY**

**11th Assembly**

**Standing Committee on Legal and Constitutional Affairs**

**Part 1**

# **Bill of Rights**



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# Definitions

Bill of Rights            A law which spells out specific rights and or freedoms that each person has within the law of that country or state. The law is either part of the constitution of the country or state (constitutionally entrenched), or is a law on its own (statute).<sup>1</sup>

# Acronyms and Abbreviations

ABC	Australian Broadcasting Corporation
ABS	Australian Bureau of Statistics
ACT	Australian Capital Territory
AHRC	Australian Human Rights Commission, previously Human Rights and Equal Opportunity Commission (HREOC)
CDU	Charles Darwin University
COE	Council of Europe
CTH	Commonwealth
DCA	United Kingdom's Department of Constitutional Affairs
DFCD	Papua New Guinea Department for Community Development
DOJ	Department of Justice
HORSCLCA	House of Representatives Standing Committee on Legal and Constitutional Affairs
HRC	New Zealand Human Rights Commission
LASCCD	Legislative Assembly Select Committee on Constitutional Development
LCARC	Legislative Assembly of Queensland Legal, Constitutional and Administrative Review Committee
LIAC	Legal Information Access Centre
NAA	National Archives of Australia
NCLC	Northern and Central Land Councils
NHRC	National Human Rights Consultation
NT	Northern Territory
NTER	Northern Territory Emergency Response
OHCHR	Office of the Commissioner for Human Rights
PHA	Parliament House of Australia
PM&C	Prime Minister and Cabinet
SSC	Northern Territory Statehood Steering Committee
SCCD	Northern Territory Sessional Committee on Constitutional Development
SCLJ	New South Wales Legislative Council on Law and Justice
TLRI	Tasmanian Law Reform Institute
VIC	Parliament of Victoria

<sup>1</sup> Northern Territory Statehood Steering Committee, Fact Sheet 29, 'What is a Bill of Rights?', <http://www.statehood.nt.gov.au/publications/factsheets/FactSheet29.pdf>, at 14 September 2009



# **Inquiry Terms of Reference**

Pursuant to the Committee Terms of Reference (1(a)-(e)) (at Appendix A), in November 2008, the Standing Committee on Legal and Constitutional Affairs undertook to inquire into the issues associated with a Bill of Rights for the Northern Territory, and whether the question should be considered separate to or in conjunction with, a grant of Statehood for the NT.



# Executive Summary

This inquiry was undertaken primarily to consider whether the issue of a Bill of Rights should be undertaken as part of, or separate to, the community process towards Statehood for the NT. This arose from a request from the Statehood Steering Committee for a determination as to whether it agreed that the two matters – Statehood and a Bill of Rights – were *not* interdependent. The rationale was that to include consideration of a Bill of Rights in the present community consultation program for Statehood would lead to confusion of both.

In undertaking the inquiry the Committee examined both legal and philosophical questions in relation to whether a Bill of Rights is necessary or advisable. Arguments for and against were considered, as were alternative means of strengthening human rights. These included existing mechanisms in place in other parliaments such as with scrutiny of bills and subordinate legislation processes.

In view of the current National Human Rights Consultation, and the principal importance of achieving Statehood, the Committee has chosen not to make any recommendations at this time on whether the NT should have a Bill of Rights. As well as the need to consult with members of the Northern Territory community as to their views on the question before coming to any conclusion, the debate about a Northern Territory Bill of Rights will be better informed by the outcome of the National Human Rights Consultation and the policy response by the Federal Government.

The second issue influencing the Committee's position that further investigation into the area of the need for and means of human rights strengthening should be deferred is its potential to impact upon the current Statehood process.

The question of whether a Bill of Rights is desirable or not is separate to the question of Statehood and the two are not interdependent. Any consideration of whether the NT should have a Bill of Rights should follow the attainment of Statehood. Issues associated with each matter, that is the attainment of Statehood and the possibility of a Bill of Rights for the NT, are manifold and should be considered in separate processes.

The Statehood process is presently in train and its achievement has stated bipartisan support. Aiming to resolve the questions associated with introducing a Bill of Rights at the same time as attaining Statehood may slow down and unnecessarily confuse the process towards Statehood.

However the rights of its citizens is a question which should be paramount in any jurisdiction and this is unquestionably the case in the Northern Territory. As such, it would be fitting and significant if the one of the first serious debates the Northern Territory has as Australia's newest State is about whether rights protection needs to be strengthened. This would give the very important matter of rights protection the singular focus it requires.

# 1. INTRODUCTION

## Background to the inquiry

In August 2008 the Statehood Steering Committee (SSC), the community-driven body charged with advising the Legal and Constitutional Affairs Committee (LCAC) on matters concerning a grant of Statehood for the Northern Territory, wrote to the LCAC seeking clarification of the standing of the relationship between Statehood and a Bill of Rights for the Northern Territory. It questioned whether the Bill of Rights issue was outside its charter for Statehood and, if the LCAC agreed, seeking a definitive statement to this effect for its forthcoming community forums leading up to the anticipated Constitutional Convention.

The release of 'Constitutional Paths to Statehood' in May 2007 was also a trigger for the LCAC to consider this issue. The SSC discussion paper, drawing on work undertaken by previous parliamentary committees, presented different models for a Northern Territory Constitution in the event that Statehood is achieved and sought community views on a range of matters relating to Statehood. It was thought that public opinion on a Bill of Rights for the NT would also be received through the submission process. That discussion paper also noted that Government could choose to enact a Bill of Rights separate to the constitutional process for Statehood.<sup>2</sup>

The 2003 recommitment of the Northern Territory Government to Statehood is guided by a principle of respect for and recognition of the Territory's Indigenous people.<sup>3</sup> One of the paramount concerns of Territory Indigenous groups is for constitutional recognition and protection of Indigenous rights.<sup>4</sup> This year the Statehood Steering Committee is consulting with the Territory community on Statehood and a constitution for the new State of the NT. It is anticipated that consultation will bring forth points of view from a range of people in the NT, including those of Aboriginal Territorians.

In December 2008, the Federal Attorney-General announced a national consultation to determine Australians' views on ways to improve protection of rights in Australia.

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<sup>2</sup> Northern Territory Statehood Steering Committee (SSC), *Constitutional Paths to Statehood*, May 2007, p.63.

<sup>3</sup> See SSC, *Terms of Reference*, <[statehood.nt.gov.au/publications/pdf/statehood\\_committee\\_tor.pdf](http://statehood.nt.gov.au/publications/pdf/statehood_committee_tor.pdf)>, accessed 7 November 2008. Debate surrounding the Minister for Statehood's Statement on Statehood, 17 September 2008, also refers, <[nt.gov.au/lant/hansard/hansard11.nsf/WebbyDate/BAEC28FAD3C5FB9B692574E80009A2EA](http://nt.gov.au/lant/hansard/hansard11.nsf/WebbyDate/BAEC28FAD3C5FB9B692574E80009A2EA)>, accessed 7 November 2008.

<sup>4</sup> Northern Territory Indigenous Constitutional Convention, *Indigenous Constitutional Strategy Document*, 30 November to 4 December 1998.

The LCAC anticipated that the concurrent inquiries would ensure that the issues relating to bills of rights would be given both a local and national focus.

The Australian Capital Territory (ACT) and Victoria are the only two Australian jurisdictions to have human rights legislation.<sup>5</sup> The Governments of Western Australia and Tasmania are considering the findings of independent reports that recommended enactment of human rights legislation.<sup>6</sup> Both jurisdictions have stated their interest in hearing the outcome of national deliberations on protection of rights before deciding on the next steps towards human rights legislation in their states.<sup>7</sup>

The ACT and Victorian human rights legislation include civil and political rights, omitting economic, social and cultural rights, although the Victorian Charter includes some protection for cultural rights and explicitly protects Aboriginal identity, culture and language.

The ACT and Victorian bills of rights conform to what is known as the 'Commonwealth model':

This means that they are statutory rather than constitutional; they do not give judges power to strike down legislation...and Parliament maintains the right to amend, abolish or alter the bill – so parliamentary sovereignty is maintained.<sup>8</sup>

In comparison, the United States' Bill of Rights is part of the US Constitution and gives judges the power to overturn legislation. Most proponents of an Australian Bill of Rights advocate the Commonwealth model rather than a United States-styled Bill.<sup>9</sup>

There are two types of statute bill or charter of rights:

1. An Act which directly creates legally enforceable rights;

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<sup>5</sup> Australian Capital Territory (ACT), *Human Rights Act 2004*, <legislation.act.gov.au>, accessed 27 July 2008; Parliament of Victoria (VIC), *Charter of Human Rights and Responsibilities Act 2006*, <legislation.vic.gov.au/Domino?Web\_Notes/LDMS/PubStatbook.nsf>, accessed 6 November 2008.

<sup>6</sup> Tasmanian Law Reform Institute (TLRI), *A Charter of Rights for Tasmania?*, Issues Paper No 11, August 2006, <law.utas.edu.au/reform/reports\_publications.htm>, accessed 27 October 2008; Department of the Attorney General, *A WA Human Rights Act: Report of the Consultation Committee for a Proposed WA Human Rights Act*, November 2007, <justice.wa.gov.au/\_files/Human\_Rights\_Final\_Report.pdf>, accessed 11 November 2008.

<sup>7</sup> In Tasmania: Parliament of Tasmania House of Assembly, *Hansard*, 12 March 2008, <parliament.tas.gov.au/HansardHouse>, accessed 27 October 2008. In Western Australia: Department of the Attorney General, 'Human Rights report completed', *News and Media Releases*, 20 December 2007, <justice.wa.gov.au/\_apps/news>, accessed 11 November 2008.

<sup>8</sup> C.Evans, 'State Charters of Human Rights: The Seven Deadly Sins of Statutory Bills of Rights Opponents', *Gilbert + Tobin Centre Conference 2007*, University of New South Wales, 16 February 2007, <gtcentre.unsw.edu.au/publications/papers/docs/2007/153\_CarolynEvans.pdf>, 13 August 2008.

<sup>9</sup> Parliament of Australia Parliamentary Library, *Free Speech and the Constitution*, Research Note no.42 2001-02, p.2, <aph.gov.au/library/pubs/rn/2001-02/02rn42.htm>, accessed 28 July 2008.

2. An Act which professes not to do that, but which requires courts (a) to interpret all other legislation “in a way which is compatible with human rights”; and (b) where that isn’t possible to issue a Declaration of Incompatibility stating that the legislation is contrary to one or more of the enshrined human rights (but without overriding the challenged legislation). This is said to establish a constructive human rights “dialogue” between judiciary and politicians.<sup>10</sup>

The *Human Rights Act 2004* (ACT) and *Charter of Human Rights and Responsibilities Act 2006* (Vic) are versions of the dialogue model.

In Australia, parliamentary scrutiny committees assess prospective legislation against standards that include the effect of legislation on specified individual rights. Most scrutiny committees examine and report on legislation, allowing a Minister responsible for the legislation to respond to any raised concerns. The role of scrutiny committees however does not include requiring that concerns about rights be addressed.

Under the provisions of the ACT’s rights legislation the role of the ACT Legislative Assembly’s scrutiny committee is extended to reporting on human rights issues raised by bills.

The Northern Territory’s governance is established under the *Northern Territory (Self-Government) Act 1978* which includes provisions for:

- representative direct election of members of the Legislative Assembly (Part III);
- freedom of trade, commerce and intercourse between the Territory and the States (s49); and
- just terms for the acquisition of property (s50).

In addition, the Legislative Assembly has passed anti-discrimination legislation,<sup>11</sup> and its Subordinate Legislation and Publications Standing Committee checks whether

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<sup>10</sup>The Australian Innovation Community, ‘Creating a rights culture’, <http://aussieinnovation.com/content/creating-a-rights-culture>, at 19 October 2009

<sup>11</sup>The *Anti-Discrimination Act* sets out

- (a) to promote recognition and acceptance within the community of the principle of the right to equality of opportunity of persons regardless of an attribute;
- (b) to eliminate discrimination against persons on the ground of race, sex, sexuality, age, marital status, pregnancy, parenthood, breastfeeding, impairment, trade union or employer association, religious belief or activity, political opinion, affiliation or activity, irrelevant medical record or irrelevant criminal record in the

proposed subordinate legislation, or regulations, unduly infringe on personal rights or liberties or makes citizens rights or liberties dependent on administrative rather than judicial decisions.<sup>12</sup>

In June 2007 the former Australian Government announced a national emergency response to protect Aboriginal children in the Northern Territory.<sup>13</sup> A range of personal rights issues raised by the legislation were highlighted by the Senate Standing Committee for the Scrutiny of Bills.<sup>14</sup> The Emergency Response was continued, reviewed and slightly modified by the current Australian Government.

In November 2008, the then Aboriginal and Torres Strait Islander Social Justice Commissioner, Tom Calma, in outlining 'a human rights' agenda for the Northern Territory, highlighted specific human rights issues for the Territory's Indigenous and non-Indigenous people raised by the Northern Territory Emergency Response.<sup>15</sup> The Commissioner's views on the human rights implications raised by the National Emergency Response<sup>16</sup> contribute to growing debate on Indigenous rights both in the Territory and nationally.<sup>17</sup>

The issue of the Commonwealth's ability to 'intervene' in the Northern Territory raises wider constitutional issues than human rights legislation. These issues although discussed are not examined extensively in this report. Specific human rights issues raised by the National Emergency Response are discussed in Chapter 5.

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area of work, accommodation or education or in the provision of goods, services and facilities, in the activities of clubs or in insurance and superannuation; and

(c) to eliminate sexual harassment.

<sup>12</sup> Legislative Assembly of the Northern Territory, 'Terms of Reference', *Subordinate Legislation and Publications Committee*, <nt.gov.au/lant/parliament/committees/slp/slp.shtml>, accessed 26 November 2008.

<sup>13</sup> Minister for Families, Community Services and Indigenous Affairs, 'National emergency response to protect children in the NT', *Media Release*, 21 June 2007, <fahcsia.gov.au/internet/minister3.nsf/content/emergency\_21june07.htm>, accessed 25 November 08.

<sup>14</sup> Parliament House of Australia (PHA) Senate Standing Committee for the Scrutiny of Bills, *Alert Digest* No 9 of 2007, 13 August 2007, <aph.gov.au/Senate/committee/scrutiny/alerts/2007/d09.pdf>, accessed 24 November 2008.

<sup>15</sup> T. Calma, 'A human rights agenda for the Northern Territory', The Eric Johnstone lecture, Northern Territory Library, Parliament House, 17 November 2008, <humanrights.gov.au/about/edia/speeches/social\_justice/2008/>, accessed 18 November 2008.

<sup>16</sup> Comprehensively expressed in Aboriginal & Torres Strait Islander Social Justice Commissioner, *Social Justice Report 2007*, Report No 1, 2008, <hrec.gov.au/social\_justice/index.html>, accessed 18 November 2008.

<sup>17</sup> Most recently articulated by Patrick Dodson in the 2008 Sydney Peace Prize Lecture, available at *ABC For*, <abc.net.au/tv/fora/stories/2008/11/14/2405710.htm>, accessed 24 November 2008; an edited extract of the lecture was printed as 'A new beginning for the first people: start with the Constitution', *Sydney Morning Herald*, 6 November 2008.

## **Conduct of the inquiry**

To give focus to the Committee's discussions, background research in relation to the relevant milestones and pertinent issues was undertaken. The Committee then received a briefing from the Solicitor-General and Crown Counsel for the NT on the issues involved. This report incorporates the issues and the advice received from the Solicitor-General and Crown Counsel.

## **The report**

Chapter 2 provides a discussion of what human rights are.

Chapter 3 looks at existing and evolving examples of international protection of rights, either entrenched or in separate statutes.

Chapter 4 looks at the existing legislative protection for human rights in Australia. This includes each State and Territory constitutional inclusion of rights, separate legislative responses and how parliamentary committees scrutinise legislation for possible infringement of rights.

Chapter 5 deals with the specific issues for the Northern Territory, including Indigenous rights, the impact of the Northern Territory Emergency Response, how development of a Bill of Rights sits with constitutional development and the role of the Legislative Assembly's Subordinate Legislation and Publications Standing Committee.

The final Chapter, together with the other chapters, places the context within which the Committee made its considerations and the conclusions arrived at by the Committee.

Appendix B contains information on most often discussed human rights protection legislation of other countries.

Appendix C contains Information about rights protection in other Australian States and the ACT.

Appendix D provides the recommendations of the National Human Rights Consultation Committee.

Appendix E contains information on the impact of the Northern Territory Emergency Response.



## 2. WHAT ARE HUMAN RIGHTS?

Human rights and freedoms as concepts are difficult to define.<sup>18</sup> They refer to the idea that identified aspects of human life are essential and valuable to all human beings and should therefore be guaranteed and protected in all political systems.<sup>19</sup> Mechanisms for human rights protection whether enforceable by law or not, set the standard, largely moral,<sup>20</sup> against which social, political, and economic arrangements are measured and in so doing, provide assurance that such rights and freedoms exist and are safe-guarded. Human rights protection also legitimise and limit the power of governments, businesses and other social institutions in their conduct and provide a mechanism with which to identify and rectify injustice, inequality, suffering and oppression at the individual and systemic level.<sup>21</sup>

Human rights and what rights communities might want protected can be affected by cultural background<sup>22</sup> but the universal nature of most human rights appears undisputed:

Human Rights are rights of individuals in society. Every human being has, or is entitled to have 'rights' – legitimate, valid, justified claims – upon his or her society; claims to various 'goods' and benefits...They are those benefits deemed essential for individual well-being, dignity and fulfilment and that reflect a commonsense of justice, fairness and decency...<sup>23</sup>

There is a distinction also between individual and collective rights. The *Universal Declaration of Human Rights (Universal Declaration)* deals with individual rights. The *Declaration of the Rights of Indigenous People* protects individuals who share those rights with others in a group - collective rights. The rights of Aboriginal and Torres Strait Islanders are collective rights.

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<sup>18</sup> Legal, Constitutional and Administrative Review Committee (LCARC), 1998, *The preservation and enhancement of individuals' rights and freedoms in Queensland: Should Queensland adopt a bill of rights?*, Report No.12, Queensland Parliament.

<sup>19</sup> Campbell, T., 2006, *Human Rights Strategies: An Australian Alternative*, in Campbell, T., Goldsworthy J., & Stone, A., (eds) *Protecting Rights Without a Bill of Rights*, Ch14:319-341 Ashgate Publishing, Hampshire.

<sup>20</sup> Legal, Constitutional and Administrative Review Committee (LCARC), 1998, *The preservation and enhancement of individuals' rights and freedoms in Queensland: Should Queensland adopt a bill of rights?*, Report No.12, Queensland Parliament.

<sup>21</sup> Campbell, T., 2006, *Human Rights Strategies: An Australian Alternative*, in Campbell, T., Goldsworthy J., & Stone, A., (eds) *Protecting Rights Without a Bill of Rights*, Ch14:319-341 Ashgate Publishing, Hampshire.

<sup>22</sup> D.Malcolm, 'The Globalisation of Human Rights Law', *Law in Context*, vol.5 Issue 1, 2007, pp.40-62.

<sup>23</sup> L. Henkin, *The Age of Rights*, Columbia University Press, New York, 1990, p.2, cited in Malcolm, 'The Globalisation of Human Rights Law'.

## Historical context of rights protection

In the English legal tradition, rights protection is usually viewed as starting from the *Magna Carta 1215* and the *Bill of Rights 1688*. Both of these laws gave limited rights to some people against the King, although did not include rights of people who were not members of the aristocracy. The contemporary idea that rights are not created or granted, but rather 'recognised or declared', based on inherent qualities of being human, is derived from 18<sup>th</sup> century Enlightenment and French Revolution ideas of 'natural rights'.<sup>24</sup>

Enactment of the French *Declaration of the Rights of Man and the Citizen* in 1789 and the *Bill of Rights* amendments to the United States Constitution during the 1790s are the basis in law of human rights being universal. The Covenant of the League of Nations<sup>25</sup> had given expression to human rights in 1919 after World War I which led to amongst other things, the creation of the International Labour Organisation.<sup>26</sup> Advancement of international human rights law and treaty obligations occurred as part of the development of the *United Nations Charter* after World War II, with the *Universal Declaration* developed under the Charter.<sup>27</sup>

Legal instruments establishing countries' recognition of human rights were developed following the passage of the *Universal Declaration*.<sup>28</sup> The *Universal Declaration* recognises civil and political rights (the right to life, liberty, free speech and privacy) and economic, social and cultural rights (social security, health and education).<sup>29</sup> In the lead up to the 60<sup>th</sup> anniversary of the adoption of the *Universal Declaration*, it has been acknowledged as '...the umbrella of the modern international human rights system, comprising general and specific human rights treaties at international and regional levels.'<sup>30</sup>

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<sup>24</sup> Legal Information Access Centre (LIAC), 'Origins and Sources of Human Rights Law', *Hot Topics*, <austlii.edu.au/au/other/liac/hot\_topic/hottopic/2001/5/1.html>, accessed 1 December 2008. Natural rights are those rights coming from the natural world rather than those coming from laws.

<sup>25</sup> The Treaty of Peace between the Allied Powers and Germany

<sup>26</sup> Office of the High Commissioner for Human Rights, 'Fact Sheet No.2 (Rev.1), The International Bill of Human Rights', <http://www.ohchr.org/Documents/Publications/FactSheet2Rev.1.en.pdf>, at 18 September 2009

<sup>27</sup> LIAC, 'Origins and Sources of Human Rights Law', pp.1-2.

<sup>28</sup> S. Ryan, 'The case for a Bill of Rights', *Labor eHerald*, 23 May 2008, <eherald.alp.org.au/articles/0508/magopine23=01.php>, accessed 11 August 2008.

<sup>29</sup> Australian Human Rights Commission (AHRC), 'What is the Universal Declaration on Human Rights?', *Universal Declaration of Human Rights 60<sup>th</sup> Anniversary, 2008*, <hreoc.gov.au/human\_rights/UDHR/what\_is\_UDHR.html>, accessed 17 November 2008.

<sup>30</sup> H. Charlsworth, 'Resist attempts to dilute our human rights', Opinion, *The Age*, 2 October 2008, <theage.com.au/opinion/resist-attempts-to-dilute-our-human-rights-20081001-4rzo.html>, accessed 2 October 2008.

## Civil, political, social, economic and cultural rights

The *Universal Declaration* establishes 'a common standard of achievement for all peoples and all nations' with key to this standard being civil, political, economic, social and cultural rights and freedoms to which all human beings are entitled.<sup>31</sup>

One description of civil and political rights is:

...the rights which enable individuals to operate freely within the political system and to be protected from arbitrary action in the administration of the law...<sup>32</sup>

Economic, social and cultural rights are then described as those rights:

...allowing people to own property, work in fair conditions and to be guaranteed an adequate standard of living and facilities for education and the enjoyment of life and of the culture in which they live or have been brought up.<sup>33</sup>

The best known rights, articles 3 to 11 of the *Universal Declaration*, are civil rights that limit power to legal rules and protect individuals. They include:

- the rights to life, liberty and security of person;
- bans on slavery and torture;
- rights to legal recognition, equality before the law and effective remedies for violation of fundamental rights;
- freedom from arbitrary arrest and detention; and
- guarantees of fair criminal procedures, presumption of innocence and principle of non-retroactivity in criminal law.<sup>34</sup>

Articles 12 to 17 cover the rights of people in civil society:

- to be free of arbitrary interference;
- freedom of movement and return;
- the rights to a nationality and to seek and enjoy political asylum;
- the rights to marry, form a family and for society's and State protection; and

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<sup>31</sup> Office of the High Commissioner for Human Rights, *Universal Declaration of Human Rights*, <unhchr.ch/udhr/lang/eng\_print.htm>, 18 November 2008.

<sup>32</sup> P. Bailey, *Human Rights: Australia in an International Context*, Butterworths, Sydney, 1990 cited in G. Williams, *A Charter of Rights for Australia*, UNSW Press, Sydney, 2007, p.15.

<sup>33</sup> *Ibid.*

<sup>34</sup> As expressed in Glendon, 'The Rule of Law', pp.5-6.

- the right to own property.<sup>35</sup>

The *Universal Declaration* outlines what are now popularly recognised as political freedoms in articles 18 to 21. These include:

- freedom of religion and belief;
- freedom of opinion, expression and communication;
- the right to peaceful assembly and association; and
- the right to take part in government and to access public services.<sup>36</sup>

Articles 22 to 27 set out economic, social and cultural rights and include the rights to:

- social security;
- work;
- equal pay for equal work;
- rest and leisure;
- a standard of living adequate for health and well-being;
- education; and to
- participate in the cultural life of the community.<sup>37</sup>

The final three articles (28 to 30) establish that individual rights are balanced with obligations:

States assume obligations and duties under international law to respect and to fulfil human rights. The obligation to respect means that States must refrain from interfering with or curtailing the enjoyment of human rights. The obligation to protect requires States to protect individuals and groups against human rights abuses. The obligation to fulfil means that States must take positive action to facilitate the enjoyment of basic human rights. At the individual level, while we are entitled our human rights, we should also respect the human rights of others.<sup>38</sup>

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<sup>35</sup> As expressed in Glendon, 'The Rule of Law', p.6.

<sup>36</sup> As expressed in Glendon, 'The Rule of Law', p.6 and Office of the Commissioner for Human Rights (OHCHR), 'Fact Sheet No.2, The International Bill of Human Rights', *Fact Sheets*, no page numbers, <ohchr.org/Documents/Publications/FactSheet2Rev.1en.pdf>, accessed 9 December 2008.

<sup>37</sup> OHCHR, 'The International Bill of Rights', npn.

<sup>38</sup> OHCHR, 'What are human rights?', *Your Human Rights*, p.2, <ohchr.org/EN/Issues/Pages/WhatareHumanRights.aspx>, accessed 5 December 2008.

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Victoria's and the ACT's bills of rights protect civil and political rights and are mainly derived from civil and political rights protected in the *Universal Declaration*, with some key economic, social and cultural rights. For example the rights protected in the Victorian Charter include:

- recognition and equality before the law;
- the right to life;
- protection from torture and cruel, inhuman or degrading treatment;
- freedom from forced work;
- freedom of movement;
- privacy and reputation;
- freedom of thought, conscience, religion and belief;
- freedom of expression;
- peaceful assembly and freedom of association;
- protection of families and children;
- taking part in public life;
- cultural rights;
- property rights;
- right to liberty and security of person;
- humane treatment when deprived of liberty;
- children in the criminal process;
- fair hearing;
- rights in criminal proceedings;
- right not to be tried or punished more than once; and
- retrospective criminal law.<sup>39</sup>

Community and government consultation on rights protection in Victoria in 2005 showed that support was the strongest for protecting civil and political rights, while there was less support for including economic, social and cultural rights.<sup>40</sup> In contrast to this however, more recent consultation in Western Australia and Tasmania on rights protection, showed strong support for including a wide range of economic, social and cultural rights in addition to civil and political rights.<sup>41</sup>

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<sup>39</sup> As outlined in Williams, *A Charter of Rights for Australia*, pp.78-9.

<sup>40</sup> Williams, who chaired the Human Rights Consultation Committee, states that 95 per cent of submissions argued for civil and political rights and 41 per cent of submissions argued for including all rights: *A Charter of Rights for Australia*, pp.79-80.

<sup>41</sup> Department of the Attorney-General, *Report of the Consultation Committee*, Chapter 4; TLRI, *A Charter of Rights for Tasmania*, pp.62-5.

## Summary

After the Second World War the United Nations developed a list of internationally acknowledged human rights, contained within the *Universal Declaration of Human Rights*. The *Universal Declaration* contains civil, political, economic, social and cultural rights in addition to recognition of the balancing rights with obligations.

The best known rights that enable people to operate within the political system and to be protected from arbitrary administration of law are the main components of the two bills of rights currently enacted in Victoria and the ACT.

### 3. INTERNATIONAL HUMAN RIGHTS PROTECTION

All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.<sup>42</sup>

Between nations, the standard of human rights protection is set out under a number of internationally accepted mechanisms, the principle of which is the *Universal Declaration*. Australia is party to and endorses a great many of these mechanisms despite not having a Bill of Rights. Australia has been acknowledged as leading the development and acceptance of the *Universal Declaration of Human Rights*.<sup>43</sup>

The preamble of the Universal Declaration states:

This Universal Declaration of Human Rights as a common standard of achievement for all peoples and all nations, to the end that every individual and every organ of society, keeping this Declaration constantly in mind, shall strive by teaching and education to promote respect for these rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance, both among the peoples of Member States themselves and among the peoples of territories under their jurisdiction.<sup>44</sup>

In examining examples of bills of rights in other countries, the most prominent international example of a Bill of Rights is perhaps the United States' Bill which dates back to the 1790s' ideas of universal rights. A broad range of countries have enacted statements on human rights either through separate statute or within their constitutions and which are modelled on the United Nations' *Universal Declaration*. Information on the most often discussed human rights protection legislation of other countries is contained in Appendix B.

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<sup>42</sup> *Universal Declaration of Human Rights* (art. 1), adopted by General Assembly resolution 217 A (III) of 10 December 1948.

<sup>43</sup> This is attributed to the advocacy of the head of the Australia's delegation to the United Nations, Dr HV Evatt, who became the President of the UN General Assembly in 1948, the year the Universal Declaration was adopted: AHRC, 'Australia and the Universal Declaration on Human Rights', *Universal Declaration of Human Rights 60<sup>th</sup> Anniversary, 2008*, <[hrcoc.gov.au/human\\_rights/UDHR/Australia\\_UDHR.html](http://hrcoc.gov.au/human_rights/UDHR/Australia_UDHR.html)>, accessed 12 November 2008.

<sup>44</sup> *Universal Declaration of Human Rights* (Preamble), adopted by General Assembly resolution 217 A (III) of 10 December 1948.

## United Nations

The United Nations was established following the Second World War with aims set out in a Charter which included as the first article: 'promoting respect for human rights and fundamental freedoms for all.' Through the adoption of the *Universal Declaration*, the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights collectively known as the International Bill of Rights, the United Nations is acknowledged as the promoter and monitor of human rights internationally.<sup>45</sup>

Under the United Nations Charter, responsibility for human rights is undertaken by the Human Rights Council, formerly the Human Rights Commission, which is comprised of 47 United Nations' member states. The Council operates through a range of treaty committees to monitor the implementation of human rights treaties.<sup>46</sup>

## International Bill of Rights

The International Bill of Rights consists of:

- *Universal Declaration of Human Rights, 1948*
- *International Covenant on Economic, Social and Cultural Rights, 1976*
- *International Covenant on Civil and Political Rights, 1976*
- *Optional Protocol to the International Covenant on Civil and Political Rights, 1976*
- *Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty, 1991*

For more than 25 years the *Universal Declaration* stood alone internationally as the standard for all nations and peoples. The universal scope of the Universal Declaration preserves human rights for every human being in every part of the world, irrespective of whether their Government has formally accepted the principles contained within it or ratified the Covenants. The Covenants are legally binding upon those countries, to which, have ratified or assented.<sup>47</sup>

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<sup>45</sup> Williams, *A Charter of Rights for Australia*, p.48; Office of the High Commission for Human Rights, 'The Universal Declaration of Human Rights', *Universal Declaration of Human Rights*, <unhchr.com.ch/udhr/miscinfo/carta.htm>, accessed 9 December 2008.

<sup>46</sup> J. von Doussa, *Human Rights in Australia*, Legal Studies Association of NSW State Conference 2008, March 27-28, Rosehill NSW, <hreoc.gov.au/about/media/speeches/speeches\_president/2008>, accessed 1 December 2008.

<sup>47</sup> Office of the High Commissioner for Human Rights, 'Fact Sheet No.2 (Rev.1), The International Bill of Human Rights', <http://www.ohchr.org/Documents/Publications/FactSheet2Rev.1.en.pdf>, at 18 September 2009

## International human rights law to which Australia is a party

The following international statements or treaties are those to which Australia is a signatory:

- the *Universal Declaration*;
- the International Covenant on Civil and Political Rights;
- the International Covenant on Economic, Social and Cultural Rights;
- the Convention on the Rights of the Child;
- the Convention on the Elimination of All Forms of Discrimination against Women;
- the Convention on the Elimination of All Forms of Racial Discrimination;
- the Convention Against Torture; and
- the Convention on the Rights of Persons with Disabilities.

As a party to these agreements, Australia has agreed to give effect to the human rights obligations contained in the documents.<sup>48</sup> Some advocates for an Australian Bill of Rights argue that by ratifying the covenants Australia agreed to make them part of domestic law.<sup>49</sup>

On the 3rd April 2009, the Australian Government formally endorsed the *Declaration on the Rights of Indigenous Peoples* and thereby accepted the document as a framework for recognising and protecting the rights of Indigenous Australians.<sup>50</sup> The Declaration is non-binding but even so Australia cannot retrospectively become a signatory to the document. Support for the Declaration means Australia agrees to pay strong regard to the rights of Indigenous peoples.<sup>51</sup>

## Summary

Examination of some of the most commonly discussed human rights legislation shows that most are based on the rights in the *Universal Declaration* and contain at least the civil and political rights listed in the International Covenant on Civil and

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<sup>48</sup> Attorney-General for Australia, 'Frequently Asked Questions (FAQs)', *Human Rights Consultation*, p.3, <[humanrightsconsultation.gov.au/www/nhrcc](http://humanrightsconsultation.gov.au/www/nhrcc)>, accessed 11 December 2008.

<sup>49</sup> Williams, *A Charter of Rights for Australia*, p.15. This argument is also made by the Australian Human Rights Commission: 'By ratifying an international human rights instrument, countries agree to *respect, protect and fulfil* the rights contained within it.' J. von Doussa, *Human Rights in Australia*, Legal Studies Association of NSW State Conference 2008, March 27-28, Rosehill NSW, <[hreoc.gov.au/about/media/speeches/speeches\\_president/2008](http://hreoc.gov.au/about/media/speeches/speeches_president/2008)>, accessed 1 December 2008.

<sup>50</sup> Reconciliation Australia, 'The United Nations Declaration on the Rights of Indigenous Peoples' <http://www.reconciliation.org.au/home/reconciliation-resources/qa-factsheets/un-declaration-rights-of-indigenous-peoples>, at 3 September 2009

<sup>51</sup> Reconciliation Australia, 'The United Nations Declaration on the Rights of Indigenous Peoples' <http://www.reconciliation.org.au/home/reconciliation-resources/qa-factsheets/un-declaration-rights-of-indigenous-peoples>, at 3 September 2009

Political Rights. Varying levels of enforcement of articulated rights are also included in most charters.

The Canadian, South African and United States legislation is constitutionally entrenched and enforced through either a court devoted to the legislation or through a Supreme Court (United States). The United States' Bills of Rights allow the courts to invalidate laws that are inconsistent with guaranteed rights. The Canadian Charter is constitutionally entrenched and allows for court protection, but Parliament retains the ability to override a court's finding for up to five years. The New Zealand and United Kingdom's acts allow for a process of oversight of legislation, however legislation cannot be overturned.

## 4. CURRENT AUSTRALIAN SITUATION

Human rights protection and promotion in Australia is primarily through its legal system, i.e. its Constitution, legislation, common law, the impact of endorsement of instruments of international law.<sup>52</sup> Australia's Constitution provides directly stated express rights and implied rights as determined by the High Court. Domestic legislation such as the *Human Rights and Equal Opportunity Act 1986* (Cth), and anti-discrimination legislation provide specific human rights protection and go towards reflecting international conventions to which Australia is a signatory.

When people think about rights they usually mention rights like the freedom of speech or right to silence. In Australia these can be implied or written down as law. Calls for a Bill of Rights are based on an understanding that rights need to be written down for certainty and clarity. Our existing Australian system means laws to recognise rights have developed over time.<sup>53</sup>

This chapter explores how human rights are currently protected through Australia's legal system and leads on to the debate about a possible national Bill of Rights. Information about rights protection in other Australian States and the ACT is at Appendix C.

### Federal

The absence of a specific form of rights' protection in the Australian Constitution was 'a deliberate decision' to ensure the Commonwealth's autonomy.<sup>54</sup> There are, however, limited rights protected by the existing Australian Constitution.

These are the right to vote (ss24 and 41), the acquisition of property on just terms (s51 (xxxi)), the right to trial by jury (s80), freedom of religion (s116), freedom of discrimination on the basis of State residence (s117) and freedom of movement between States (s92). In addition, the High Court has found that some rights, although not articulated in the Constitution can nonetheless be implied from it. The High Court's findings in relation to political communication and the inability of

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<sup>52</sup> Williams, G., 2007, *A Charter of Rights for Australia*, UNSW Press.

<sup>53</sup> SSC, 'What is a Bill of Rights?', *Fact Sheet 29*, <statehood.nt.gov.au>, accessed 20 November 2008.

<sup>54</sup> House of Representatives Standing Committee on Legal and Constitutional Affairs (HORSCLCA), *Reforming our Constitution: A roundtable discussion*, June 2008, p.65, <aph.gov.au/House/committee/laca/constitutionalreform/report>, accessed 2 July 2008. It has also been noted that Australia's law and government is deeply embedded in the British tradition, which also historically has no statement of rights in its constitution. Williams, *A Charter of Rights for Australia*, pp.51-3.

Parliament to legislate to bypass courts in imposing punishments for breaches of law remain controversial and the limit of protection provided, contested.<sup>55</sup>

The Commonwealth has the capacity to use its external affairs powers under s51(xxix) of the Constitution to pass laws that reflect agreement to United Nations instruments. Under the external affairs power any State or Territory law that is inconsistent with the Commonwealth law passed under this section can be overridden. One example of passing a law to fulfil agreement to a United Nation's instrument was the passage of the *Human Rights and Equal Opportunities Act 1986*.

Federal legislation that protects human rights include the *Human Rights and Equal Opportunities Act 1986* and a suite of anti-discrimination legislation; the *Racial Discrimination Act 1975*, the *Sex Discrimination Act 1984*, the *Disability Discrimination Act 1992* and the *Age Discrimination Act 2004*. Other relevant federal legislation includes the *Privacy Act 1998*, the *Freedom of Information Act 1982* and the *Criminal Code Act 1995* which outlaws specified crimes against humanity.<sup>56</sup>

The role of parliamentary scrutiny committees is also relevant to discussion of existing legislation protecting human rights. The Australian Senate Scrutiny of Bills Committee assesses prospective legislation against a set of standards that focus on the effect of the legislation on individual rights, liberties and obligations.<sup>57</sup> The Committee publishes its comments on compatibility of introduced bills with rights and also a relevant Minister's response to comments on legislation. It has been noted by some international observers that the Australian Senate Scrutiny Committee system is 'instrumental [in] ensuring that human rights issues are properly debated.'<sup>58</sup> However, the Senate Scrutiny Committee only provides a check of issues through its reports, rather than provide any protection of rights.<sup>59</sup>

During 2008, the Federal Attorney-General moved to ratify a range of international human rights agreements and that the principles contained in the agreements be reflected in domestic legislation.<sup>60</sup> During 2008 Australia:

- ratified the United Nations Convention on the Rights of People with a Disability;

<sup>55</sup> TLRI, *A Charter of Rights for Tasmania*.

<sup>56</sup> Ibid.

<sup>57</sup> PHA, *Senate Scrutiny of Bills Committee*, <[aph.gov.au/Senate/committee/scrutiny/cominfo.htm](http://aph.gov.au/Senate/committee/scrutiny/cominfo.htm)>, accessed 5 November 2008.

<sup>58</sup> Hon. Justice Terence Higgins, 'Opening Address', 9<sup>th</sup> Australasian and Pacific Conference on Delegated Legislation and 6<sup>th</sup> Australasian and Pacific Conference on the Scrutiny of Bills, 2 March 2005, p.3, <[parliament.act.gov.au/scrutiny/opening.pdf](http://parliament.act.gov.au/scrutiny/opening.pdf)>, accessed 30 October 2008.

<sup>59</sup> Higgins, 'Opening Address', p.3.

<sup>60</sup> Attorney-General for Australia, 'Strengthening Human Rights and the Rule of Law'.

- became a party to the Optional Protocol to the United Nations Convention Against Torture;
- proposed that Australia accede to the Optional Protocol to the United Nations Convention on the Elimination of All Forms of Discrimination against Women; and
- issued a standing invitation to United Nations human rights Special Rapporteurs to visit Australia.<sup>61</sup>

## Australian Human Rights Commission

The Australian Human Rights Commission, formerly the Human Rights and Equal Opportunity Commission, works to protect and promote human rights and to educate all sectors of society about human rights.<sup>62</sup> The Australian Human Rights Commission (the Commission) is an independent statutory body established with responsibility to administer the following federal legislation:

- *Age Discrimination Act 2004*;
- *Disability Discrimination Act 1992*;
- *Racial Discrimination Act 1975*;
- *Sex Discrimination Act 1984*; and the
- *Human Rights and Equal Opportunity Commission Act 1986*.<sup>63</sup>

Under the *Human Rights and Equal Opportunity Commission Act*, the Commission is responsible for the following human rights instruments that have been ratified by Australia:

- the International Covenant on Civil and Political Rights;
- Convention Concerning Discrimination in Respect of Employment and Occupation, also known as ILO11;
- Convention on the Rights of the Child;
- Declaration on the Rights of Disable Persons;
- Declaration on the Rights of Mentally Retarded Persons; and
- Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief.<sup>64</sup>

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<sup>61</sup> Attorney-General for Australia, 'Strengthening Human Rights and the Rule of Law', and 'Rudd Government Acts to Promote the Rights of Women in Australia', *Media Release*, 26 August 2008, <[attorneygeneral.gov.au/www/ministers/robertmc.nsf/Page?MediaRelease](http://attorneygeneral.gov.au/www/ministers/robertmc.nsf/Page?MediaRelease)>, accessed 14 November 2008.

<sup>62</sup> J. von Doussa, *Human Rights in Australia*, Legal Studies Association of NSW State Conference 2008, March 27-28, Rosehill NSW, <[hreoc.gov.au/about/media/speeches/speeches\\_president/2008](http://hreoc.gov.au/about/media/speeches/speeches_president/2008)>, accessed 1 December 2008.

<sup>63</sup> AHRC, 'The Australian Human Rights Commission', *About the Australian Human Rights Commission*, <[hreoc.gov.au/about/publications/brochure/info\\_sheet2007.html](http://hreoc.gov.au/about/publications/brochure/info_sheet2007.html)>, accessed 1 December 2008.

<sup>64</sup> AHRC, 'The Australian Human Rights Commission', p.3.

The Commission oversees how the rights contained in the above instruments are recognised in Australia. This, together with the specific measures contained in the above Australian legislation, provides a level of recognition of human rights. In relation to rights contained in treaties that Australia has ratified but are not contained in domestic legislation, people are able to make a complaint to a United Nations treaty committee.

## **Australian Debate about a Human Rights Act**

There is continuing debate in Australia about the need to have a Bill of Rights and/or include in a reformed constitution, protection for the basic rights of Australians.<sup>65</sup> The attempt in 1988 to amend the Australian Constitution to extend freedoms, like religious freedom, recorded the lowest ever affirmative vote in a national referendum.<sup>66</sup>

The emphasis of discussion on a charter of rights at the governance stream of the 2020 Summit was on effective protection of rights and encouragement of the exercise of responsibilities. Amongst the ideas recorded from this stream was:

- 9.75 Introduction of a statutory bill of rights that protects and promotes all civil, political, economic, social and cultural rights and that provides meaningful remedies where rights are violated.<sup>67</sup>

Under the governance stream's theme on constitution, rights and responsibilities, ideas on a charter of rights were articulated as:

- 9.3.1 that Australia is a country where respect and protection of the human rights of all people are maintained and strengthened
- 9.3.2 that a national process is conducted to consult with all Australians as to how best protect human rights

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<sup>65</sup> Recently re-stated: G. Williams 'Bickering aside, we need a rights charter', *The Australian*, 6 August 2008, <[theaustralian.news.com.au/story/0,25197,23480371-17044,00.html](http://theaustralian.news.com.au/story/0,25197,23480371-17044,00.html)>, accessed 11 August 2008.

<sup>66</sup> Parliament of Australia, *The Federal Parliament and the Protection of Human Rights*, Research Paper 20 1989-99, May 1999, <[aph.gov.au/library/pubs/rp/1998-99/99rp20.htm](http://aph.gov.au/library/pubs/rp/1998-99/99rp20.htm)>, accessed 12 August 2008.

<sup>67</sup> Prime Minister & Cabinet, *Australia 2020 Summit-Final Report*, May 2008, p.315, <[australia2020.gov.au/docs/final\\_report/2020\\_summit\\_report\\_full.pdf](http://australia2020.gov.au/docs/final_report/2020_summit_report_full.pdf)>, accessed 1 July 2008.

9.3.3 that there be a statutory charter or Bill of Rights (majority support) or a parliamentary charter of rights or an alternative method (minority support).<sup>68</sup>

Discussion in the Indigenous stream of the summit was on the need to:

Enshrine formal recognition of Australia's Aboriginal and Torres Strait Islander people...as an agreement, pact, treaty, Bill of Rights or constitutional amendment.<sup>69</sup>

There was also support at the 2020 Summit for the government's (then) intended endorsement of the United Nations *Declaration on the Rights of Indigenous Peoples* and that the endorsement be reflected in domestic legislation.<sup>70</sup> Views of the various groups in the Indigenous stream varied on the development of a treaty between Indigenous and non-Indigenous Australians. There was strong support for formal agreement on Indigenous rights in a format that ensures that 'rights cannot be arbitrarily removed.'<sup>71</sup>

The Victorian *Charter of Human Rights and Responsibilities Act* notes the significance of the role of human rights to Indigenous peoples and in section 19 sets out the distinct cultural rights of Aboriginal people. The preamble to the ACT's rights legislation notes the importance of human rights to 'the first owners of this land'.<sup>72</sup>

The Northern Territory has also previously examined developing a Bill of Rights by statute and/or entrenchment in a constitution. In 1993 the Sessional Committee on Constitutional Development released a discussion paper seeking the public's views on including recognition of Aboriginal rights in a constitution.<sup>73</sup> This was followed in 1995 by the Sessional Committee's consideration of options for adopting a Bill of Rights in the Northern Territory.<sup>74</sup> While options for a Bill of Rights are included in the Sessional Committee on Constitutional Development's 1995 discussion paper, issues specific to including Indigenous rights in a constitution are considered more fully in the Sessional Committee's 1993 discussion paper.

<sup>68</sup> PM&C, *Australia 2020 Summit- Final Report*, p.308.

<sup>69</sup> PM&C, *Australia 2020 Summit- Final Report*, pp.224-6.

<sup>70</sup> PM&C, *Australia 2020 Summit-Final Report*, p.238.

<sup>71</sup> PM&C, *Australia 2020 Summit- Final Report*, p.246.

<sup>72</sup> As discussed earlier in this Chapter.

<sup>73</sup> SCCD, *Discussion Paper No.6 Aboriginal Rights and Issues – Options for Entrenchment*.

<sup>74</sup> SCCD, *A Northern Territory Bill of Rights?* Discussion Paper No.8, March 1995.

Arguments in favour of developing a Bill of Rights for Australia advocate human rights legislation as a key component of a democracy and include that:

- Australia's Constitution does not go far enough to protect universal freedoms and rights.
- The common law is no longer an effective protector of human rights and can be over-ridden by statute law.
- Parliament cannot be relied on to defend human rights.
- Australia's human rights record has deteriorated to such an extent that it has been mentioned by all recent United Nations Human Rights Committees;<sup>75</sup>
- A Bill of Rights would give recognition to certain universal rights.<sup>76</sup>
- A Bill of Rights would bring Australia into line with all other democracies in the world.<sup>77</sup>
- A Bill of Rights would meet Australia's obligations to international human rights instruments to which it is a signatory.<sup>78</sup>
- A Bill of Rights would enhance democracy in Australia by providing greater protection to the rights of minorities.<sup>79</sup>
- A Bill of Rights would improve government policy-making and decision making.<sup>80</sup>
- A Bill of Rights would foster a culture of respect, tolerance and understanding for all people in the community.<sup>81</sup>
- Australia as a society has become so diverse that there needs to be a statement of the basic accepted values held in common, the principles at the core of a shared identity in the nation and linked with all human beings.<sup>82</sup>

The arguments against a Bill of Rights centre on concerns about transferring the decision-making power on human rights from an elected parliament to the un-elected judiciary who would be able to override the judgement of parliament<sup>83</sup>, thereby

<sup>75</sup> Australian Broadcasting Corporation (ABC), 'A Human Rights Act for Australia', *Law Report*, 22 August 2006, <[abc.net.au/rn/lawreport/stories/2006/1720788.htm](http://abc.net.au/rn/lawreport/stories/2006/1720788.htm)>, accessed 28 July 2008.

<sup>76</sup> Williams, G., 2000, *A Bill of Rights for Australia*, University of New South Wales Press, cited at [http://arts.anu.edu.au/democraticaudit/papers/200403\\_williams\\_bor.rtf](http://arts.anu.edu.au/democraticaudit/papers/200403_williams_bor.rtf), Accessed 19 March 2009.

<sup>77</sup> Williams, G., 2000, *A Bill of Rights for Australia*, University of New South Wales Press, cited at [http://arts.anu.edu.au/democraticaudit/papers/200403\\_williams\\_bor.rtf](http://arts.anu.edu.au/democraticaudit/papers/200403_williams_bor.rtf), Accessed 19 March 2009.

<sup>78</sup> Williams, G., 2000, *A Bill of Rights for Australia*, University of New South Wales Press, cited at [http://arts.anu.edu.au/democraticaudit/papers/200403\\_williams\\_bor.rtf](http://arts.anu.edu.au/democraticaudit/papers/200403_williams_bor.rtf), Accessed 19 March 2009.

<sup>79</sup> Williams, G., 2000, *A Bill of Rights for Australia*, University of New South Wales Press, cited at [http://arts.anu.edu.au/democraticaudit/papers/200403\\_williams\\_bor.rtf](http://arts.anu.edu.au/democraticaudit/papers/200403_williams_bor.rtf), Accessed 19 March 2009.

<sup>80</sup> Williams, G., 2000, *A Bill of Rights for Australia*, University of New South Wales Press, cited at [http://arts.anu.edu.au/democraticaudit/papers/200403\\_williams\\_bor.rtf](http://arts.anu.edu.au/democraticaudit/papers/200403_williams_bor.rtf), Accessed 19 March 2009.

<sup>81</sup> Williams, G., 2000, *A Bill of Rights for Australia*, University of New South Wales Press, cited at [http://arts.anu.edu.au/democraticaudit/papers/200403\\_williams\\_bor.rtf](http://arts.anu.edu.au/democraticaudit/papers/200403_williams_bor.rtf), Accessed 19 March 2009.

<sup>82</sup> Kirby, M. *The national debate about a charter of rights and responsibilities: answering some of the critics*. Address to President's Luncheon of the Law Institute of Victoria, Melbourne 21 August 2008. Document, 21 August 2008: 20p.

<sup>83</sup> ABC, 'A Human Rights Act for Australia', pp.4-5. Also Evans, 'State Charters of Human Rights'.

breaking the democratic principle of the 'separation of powers'. Other arguments against a Bill of Rights include that:

- A Bill of Rights is unnecessary as the common law and judicial process safeguard rights and freedoms.
- The Australian political and legal system has inbuilt checks and balances for the protection of rights.
- The rights entrenched in a Bill of Rights could quickly become outdated.<sup>84</sup>
- A Bill of Rights has the potential to politicise the judiciary.
- Defining rights through legislation including entrenchment, actually places limits on those rights.
- A statute Bill of Rights can easily be amended or revoked by a parliament and therefore offers no real guarantees and is subject to interpretation by the judiciary.<sup>85</sup>
- A Bill of Rights can not ensure good leadership/ government which is needed above and/or in addition to a Bill of Rights for the protection of human rights e.g. the Soviets and Zimbabwe who each have bills of rights but have poor records in human rights protection.<sup>86</sup>
- 'If society is tolerant and rational it does not need a bill of rights. If it is not [tolerant], no bill of rights will preserve it.'<sup>87</sup>

The National Human Rights Consultation was announced in December 2008<sup>88</sup> and its Committee was asked to consult the Australian community on 'which human rights should be protected and promoted.'<sup>89</sup> This follows the Federal Government's commitment to seek the community's views on human rights protection in Australia and discussion related to a charter of rights at the governance and Indigenous streams of the 2020 Summit.

The key questions asked through the consultation were:

<sup>84</sup> ACT Bill of Rights Consultative Committee, 'Arguments for and against a Bill of Rights', <[jcs.act.gov.au/prd/rights/arguments.html](http://jcs.act.gov.au/prd/rights/arguments.html)>, accessed 13 August 2008.

<sup>85</sup> Williams, G., 2000, *A Bill of Rights for Australia*, University of New South Wales Press, cited at [http://arts.anu.edu.au/democraticaudit/papers/200403\\_williams\\_bor.rtf](http://arts.anu.edu.au/democraticaudit/papers/200403_williams_bor.rtf), Accessed 19 March 2009.

<sup>86</sup> Kirby, M. *The national debate about a charter of rights and responsibilities: answering some of the critics*. Address to President's Luncheon of the Law Institute of Victoria, Melbourne 21 August 2008. Document, 21 August 2008: 20p.

<sup>87</sup> Sir Harry Gibbs quoted in Sydney Morning Herald, 12 December 1984, cited in Leeser, J & Haddrick R, (eds), 'Don't Leave Us with the Bill: The Case Against an Australian Bill of Rights', Menzies Research Centre ACT

<sup>88</sup> Hon. R. McClelland, 'Rudd Government Announces National Human Rights Consultation', *Media Releases*, 10 December 2008, <[attorneygeneral.gov.au/www/ministers/robertmc.nsf/Page/MediaReleases\\_2008\\_](http://attorneygeneral.gov.au/www/ministers/robertmc.nsf/Page/MediaReleases_2008_)>, accessed 11 December 2008.

<sup>89</sup> National Human Rights Consultation, *Terms of Reference*, <[humanrightsconsultation.gov.au/www/nhrcc/nhrcc.nsf/Page/TermsOfReference](http://humanrightsconsultation.gov.au/www/nhrcc/nhrcc.nsf/Page/TermsOfReference)>, accessed 5 February 2009.

1. Which human rights and responsibilities should be protected and promoted?
2. Are human rights sufficiently protected and promoted?
3. How could Australia better protect and promote human rights and responsibilities?

As part of its inquiry, the National Human Rights Consultation Committee (NHRCC) was asked to exclude consideration of a constitutionally entrenched Bill of Rights and look at alternatives including a statute Bill of Rights. The current debate on the Human Rights protection leans toward a statute or charter, rather than the constitutional model exemplified in the American Constitutional Bill of Rights. The Chair of that Committee Father Frank Brennan explained that this did not preclude a constitutional Bill of Rights for Australia in the future because testing of a statutory Bill of Rights for a few years before constitutional entrenchment would be a sensible and pragmatic approach to take.<sup>90</sup> This view may be supported by Australia's record of passing national referenda. Only 8 out of 44 referendums have passed.<sup>91</sup>

The NHRC Committee submitted its final report to the Federal Government on 30 September 2009. Within its 31 recommendations, the NHRC Committee recommended that a statement of compatibility to federally listed human rights be required for all Bills introduced into parliament (NHRC Recommendation 6); international human rights instruments be augmented within the functions of the Australian Human Rights Commission (NHRC Recommendation 13), and the Federal Government adopt a federal Human Rights Act (NHRC Recommendation 18). The full list of NHRC Committee recommendations is at Appendix D. The Federal Government has yet to respond to the NHRC Committee final report.

Proponents of separate human rights legislation argue that a Human Rights Act would provide both parliament and the public with a tool to assess legislation against human rights criteria.<sup>92</sup> Further, it encourages rights-based interpretation of legislation without transferring any legislative power away from parliament. The courts would have the tool with which to draw the attention of legislators to any

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<sup>90</sup> Sky News Sunday Agenda, Transcript, 'Interview with Geoffrey Robertson and Frank Brennan', 5 April 2009

<sup>91</sup> Australian Government Department of Education, Employment and Workplace Relations, 'Civics and citizenship education', <http://www.civicsandcitizenship.edu.au/cce/default.asp?id=9546>, at 3 September 2009

<sup>92</sup> ABC, 'A Human Rights Act for Australia', pp.2-3.

inconsistencies in legislation while parliament retains the final word on the legislation.<sup>93</sup>

A possible constitutional problem of the charter model has been raised in discussion about the Victorian charter model:

It attempts to instruct courts to adopt an artificial interpretation of legislation or to make a declaration of incompatibility having no immediate outcome for the legal rights of the parties.<sup>94</sup>

There is also the question of whether the High Court can hear an appeal of the declaration under s73 of the Constitution.<sup>95</sup> If rights or liabilities are not affected by the declaration, there would be a question whether a declaration can be made by the High Court.<sup>96</sup> Proponents of the charter model argue that in a Federal charter, these problems can be overcome by good drafting.<sup>97</sup> A meeting in April 2009 of human rights lawyers convened by the Australian Human Rights Commission, reached the consensus that the following features would ensure constitutional validity of an Australian Human Rights Act:

1. The Act identifies the human rights to be protected.
2. The Act allow for the limiting of the rights identified in the Act in distinct circumstances, accounting for factors such as the nature of the right and considerations of necessity and proportionality.
3. Bills tabled in the parliament are accompanied by a statement of compatibility.
4. The actions of public authorities be compatible with the rights identified in the Act unless exempt by law.
5. Courts are required to interpret legislation consistently with human rights identified in the Act.

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<sup>93</sup> Kirby, M. *The national debate about a charter of rights and responsibilities: answering some of the critics*. Address to President's Luncheon of the Law Institute of Victoria, Melbourne 21 August 2008. Document, 21 August 2008: 20p.

<sup>94</sup> Kirby, M. *The national debate about a charter of rights and responsibilities: answering some of the critics*. Address to President's Luncheon of the Law Institute of Victoria, Melbourne 21 August 2008. Document, 21 August 2008: 20p, p18.

<sup>95</sup> Pelly, M., 2008, *Brennan foresees constitutional glitch with rights charter*, The Australian, 14 March 2008.

<sup>96</sup> Pelly, M., 2008, *Brennan foresees constitutional glitch with rights charter*, The Australian, 14 March 2008.

<sup>97</sup> Kirby, M. *The national debate about a charter of rights and responsibilities: answering some of the critics*. Address to President's Luncheon of the Law Institute of Victoria, Melbourne 21 August 2008. Document, 21 August 2008: 20p.

6. That Government is required under the Act to respond publicly if a court finds a law is inconsistent with the Act.<sup>98</sup>

Participants of the meeting also noted that there are other models with which to draw experience and that these models also be considered.<sup>99</sup> The Committee took the view that the current national consultation will provide more insight into the range of alternative models available for Australians to consider.

## Summary

The Australian Constitution provides some rights protection including the right to vote, to acquire property on just terms, to trial by jury, freedom of religion, movement between States and freedom from discrimination on the basis of State residence. In addition, High Court judgements have established some implied rights in the Constitution. Australia has also enacted a range of rights protection legislation.

Australia's Human Rights Commission was established with the aim of protecting and promoting human rights by administering Australia's domestic legislation that recognises the human rights instruments to which Australia is party.

The current Australian Government has expressed intent to ratify a number of United Nations human rights declarations and to reflect that endorsement in domestic legislation. The endorsement of the *Declaration on the Rights of Indigenous Peoples* has been one recent move in that direction.

In other jurisdictions across Australia the parliamentary committee system also provides some oversight of proposed legislation's infringement of human rights. The scrutiny function provides parliaments with a check on legislation before enactment to ensure human rights are preserved or are not compromised in future laws.

Two Australian jurisdictions have introduced rights protection legislation by separate statute and two States have independent reports recommending introduction of similarly-styled, 'charter model' rights legislation.

The NHRCC report, with 31 recommendations, was submitted on 30 September 2009. This is still under consideration by the Federal Government.

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<sup>98</sup> Australian Human Rights Commission, *Constitutional Validity of an Australian Human Rights Act*, <http://www.hreoc.gov.au/letstalkaboutrights/roundtable.html>, at 13 May 2009.

<sup>99</sup> Australian Human Rights Commission, *Constitutional Validity of an Australian Human Rights Act*, <http://www.hreoc.gov.au/letstalkaboutrights/roundtable.html>, at 13 May 2009.

## 5. NORTHERN TERRITORY CONTEXT

At the 2007 Charles Darwin University Symposium, legal experts and academics argued for and against a Bill of Rights with a range of views expressed. These ranged between there being adequate protection of Australians' human rights at present, to the alternate view that the current situation does not adequately protect human rights, particularly those of minority groups. It was argued by some that this is evidenced by the growing level of criticism of Australia by international human rights groups.<sup>100</sup>

Since then a number of changes have occurred which affect how people in the Territory view the prospect of a Bill of Rights. One has been the change of Federal Government along with commitments given to further support international mechanisms for rights protection (including support for *Declaration of the Rights of Indigenous People*) and the Prime Minister's National Apology to Indigenous Australians for the impact of past laws and policies (the National Apology).<sup>101</sup>

The Northern Territory has a relatively small population (estimated at 224,800 at 30 June 2009), dispersed in what is geographically the third largest State or Territory.<sup>102</sup> A third of the Northern Territory's population is Indigenous and this proportion is expected to increase in the future. This is the largest proportion of Indigenous people in a State or Territory.<sup>103</sup> Significantly about 80 per cent of the Territory's Indigenous people live in remote or very remote areas.<sup>104</sup> There is acknowledged disadvantage in the Territory's Indigenous population, particularly in health, housing, education and employment.<sup>105</sup> The Northern Territory Emergency Response and

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<sup>100</sup> CDU, 'Human rights in an age of terrorism', *Newsroom*, 15 May 2007, <[cdu.edu.au/newsroom/story.php?nID=1982](http://cdu.edu.au/newsroom/story.php?nID=1982)>, accessed 14 August 2008.

<sup>101</sup> K. Rudd, *Apology to Australia's Indigenous Peoples*, Speech delivered at the House of Representatives, Parliament of Australia, 13 February 2008, <[pm.gov.au/media/Speech/2008\\_0073.cfm](http://pm.gov.au/media/Speech/2008_0073.cfm)>, accessed 6 February 2009.

<sup>102</sup> Australian Bureau of Statistics (ABS), *Australian Demographic Statistics June 2009*, Cat. no. 3101.0, [abs.gov.au/ausstats/abs@nsf/mf/3101.0](http://abs.gov.au/ausstats/abs@nsf/mf/3101.0), accessed 22 February 2010.

<sup>103</sup> The most recent figures state that 30.4 per cent of the Territory's population is Indigenous; ABS, *Experimental Estimates of Aboriginal and Torres Strait Islander Australians, June 2006*, Cat. no. 3238.0.55.001,

<[<sup>104</sup> ABS, \*Population Distribution, Aboriginal and Torres Strait Islander Australians, 2006\*, Cat no.4705.0, 2008, pp.4-5, \[abs.gov.au/AUSSTATS/abs@nsf/ProductsbyCatalogue/14E7A4A075D\]\(http://abs.gov.au/AUSSTATS/abs@nsf/ProductsbyCatalogue/14E7A4A075D\), accessed 20 February 2009.](http://abs.gov.au/ausstats/abs@nsf/Latestproducts/3238.0.55.001Main%20Features1Jun%202006?opendocumnt&tabname=Summary&prodno=3238.0.55.001&issue=Jun%202006&num=&view=></a>>, accessed 9 February 2009.</p></div><div data-bbox=)

<sup>105</sup> Northern Territory Government, *Closing the Gap of Indigenous Disadvantage: Generational Plan of Action*, <[action.nt.gov.au/at\\_a\\_glance](http://action.nt.gov.au/at_a_glance)>, accessed 6 February 2009; Indigenous population and disadvantage are also documented in Australian Human Rights Commission, *Face the Facts: Some Questions and Answers about Indigenous Peoples, Migrants and Refugees and Asylum Seekers*, October 2008, pp.2-9, <[humanrights.gov.au/racial\\_discrimination/face\\_facts/index.html](http://humanrights.gov.au/racial_discrimination/face_facts/index.html)>, accessed 15 December 2008.

national moves towards reconciliation following the National Apology can therefore be expected to significantly affect opinion within the Territory's population.

The other feature of the Territory's political environment is that as part of the terms of self-government in 1978, the Commonwealth retains the ability to overturn NT legislation, a power which the Commonwealth has exercised.<sup>106 107</sup> This circumstance of the laws of a freely elected Parliament able to be overturned has led to a belief that the rights of voters in the Territory are second-class.

## Constitutional Development and Bill of Rights

Previous Select and Sessional Committees have examined the issues surrounding a Bill of Rights, both as part of constitutional development, or by separate legislation.<sup>108</sup> The content of their discussion papers remain relevant and it is not intended to re-examine those issues. A number of more recent issues in relation to human rights and Territorians' views on a Bill of Rights however do need to be examined.

The *Northern Territory (Self-Government) Act 1978* (which serves as the Territory's Constitution) includes some clauses relevant to human rights.<sup>109</sup> These include representative direct election of members of the Legislative Assembly, freedom of trade, commerce and intercourse between the Northern Territory and the States, and acquisition of property to be undertaken on just terms. However, this is balanced by the ability of the Commonwealth to change the provisions by later Commonwealth law.<sup>110</sup> For example, the law enabling the Northern Territory Emergency Response included an exemption to the 'just terms' clause (s50(2)) of the *Self-Government Act 1978* (Cth).<sup>111</sup>

The Legislative Assembly has also enacted laws that relate to human rights, with the *Anti-Discrimination Act 1992* having particular relevance. Again, the Northern Territory Emergency Response legislation includes an exemption to the Act applying to 'prescribed communities' under the Emergency Response.<sup>112</sup>

It has been noted by previous Parliamentary Committees that the development of a constitution as part of the transition of the Northern Territory to a State provides an

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<sup>106</sup> Provision for this is included in section 8-10 of the Self-Government Act.

<sup>107</sup> e.g. *The Rights of the Terminally Ill Act 1995* (NT) was made ineffective by the Commonwealth Government by an amendment to the *Northern Territory (Self-Government) Act 1978* (Cth).

<sup>108</sup> Northern Territory Legislative Assembly Select Committee on Constitutional Development (LASCCD), *Discussion Paper on A Proposed New Constitution for the Northern Territory*, 1987; SCCD, *A Northern Territory Bill of Rights?*; SSC, *Constitutional Paths to Statehood*.

<sup>109</sup> SCCD, *A Northern Territory Bill of Rights?*, p.12.

<sup>110</sup> Ibid.

<sup>111</sup> Sections 60 and 134 of the *National Emergency Response Act 2007*.

<sup>112</sup> Section 133 of the *National Emergency Response Act* also sections of related legislation.

opportunity to examine the desirability of including a Bill of Rights.<sup>113</sup> The LCAC questioned whether combining the issues associated with each matter under the one process would be beneficial in the long term to progress either matter.

A Bill of Rights could be passed as ordinary legislation at any time by the Legislative Assembly – in a similar way to the ACT. If such legislation was passed it is unclear how this would be viewed by the Commonwealth.

The move for recognition of the rights of the Territory's Indigenous peoples has also been discussed in relation to a Bill of Rights and the Constitution.<sup>114</sup> Stressing the importance of the recognition of Indigenous peoples as First Peoples, the then Aboriginal and Torres Strait Islander Social Justice Commissioner, Mr Tom Calma, proposed the adoption of a section in the Northern Territory's Constitution to recognise and affirm existing Aboriginal rights. Another matter of importance to Indigenous people is the appropriate recognition, or acknowledgement of, the Territory's Indigenous peoples' historical role in the development and culture of the Territory.<sup>115</sup>

## The role of legislative scrutiny parliamentary committees

As discussed in Chapter 4, all Australian Parliaments have scrutiny committees that examine proposed legislation against standards that include the effect of the legislation on individual rights. In the Northern Territory, to a limited extent, and only in relation to subordinate legislation, this falls to the Legislative Assembly Subordinate Legislation and Publications Committee (SLPC).

In relation to scrutiny of rights, the SLPC's terms of reference require it to examine whether proposed regulations unduly infringe on personal rights or liberties<sup>116</sup>, or unduly make rights dependent on administrative decisions.<sup>117</sup> The Northern

<sup>113</sup> SCCD, *A Northern Territory Bill of Rights?*, pp.13, 21-7; SSC, *Constitutional Paths to Statehood*, p.65.

<sup>114</sup> Of particular relevance, the SSC has examined in detail each clause of the Indigenous Constitutional Strategy, *Constitutional Paths to Statehood*, pp.23-41. Statements from Indigenous people suggest that the principles underlying a Constitution and or a Bill of Rights are inextricably linked, and used interchangeably: Calma, 'Securing the rights of Indigenous Territorians', p.7.

<sup>115</sup> Northern and Central Land Councils (NCLC), *Indigenous Constitutional Strategy Northern Territory*, undated, released December 1998.

<sup>116</sup> Standing Committee on Subordinate Legislation and Publications, Terms of Reference, s2(b) - 2. The Committee shall, with respect to any instrument of a legislative or administrative character which the Legislative Assembly may disallow or disapprove, consider -(b) whether the instrument trespasses unduly on personal rights or liberties

<sup>117</sup> Standing Committee on Subordinate Legislation and Publications, Terms of Reference, s2(c) - 2. The Committee shall, with respect to any instrument of a legislative or administrative character which the Legislative Assembly may disallow or disapprove, consider - (c) whether the instrument unduly makes rights and liberties of citizens dependent upon administrative and not upon judicial decisions

Territory's scrutiny of regulations is similar to those in South Australia and Tasmania and all are modelled on legislative scrutiny committee functions in other Australian Parliaments.

In Victoria the *Charter of Human Rights and Responsibilities Act* includes a requirement for the Scrutiny of Acts and Regulations Committee to report to Parliament on whether a Bill is compatible with human rights.<sup>118</sup> In New Zealand, the BORA includes provision for inconsistencies in new legislation to be reported to Parliament when legislation is introduced and that draft legislation is presented to Cabinet with certification of its compliance with the BORA. Similarly in the United Kingdom, a statement of human rights compatibility must be made when legislation is introduced, and a Joint Committee works with government to amend Bills to improve human rights protections.<sup>119</sup>

The Solicitor-General, Mr Michael Grant QC advised the Committee in October 2009 that main advantage of the bills of rights in the ACT and Victoria is:

that it makes the public service and ultimately the parliament a lot more careful about the impact of the legislation that it passes, because, as I say, we do not have human rights abuses in the usually recognised sense here and the primary function is that it does lead to better scrutiny of bills. Now that is the argument that is always given for it in the ACT and Victoria.

So far as I can see, in the current Australian context that is really the only positive argument I think in favour of a Bill of Rights.<sup>120</sup>

Using the discussed models, one option for promoting human rights awareness and or enforcement in Northern Territory could be to institute a parliamentary committee to scrutinise bills. During questioning on this possible model, the Solicitor-General for the NT advised the LCAC that:

Now that is something that could be adopted quite easily by the parliament through a committee, without having any sort of statutorily entrenched or constitutionally entrenched charter.<sup>121</sup>

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<sup>118</sup> Section 30 of the *Charter of Human Rights and Responsibilities Act* is an amendment to the *Parliamentary Committees Act 2003* to include the function conferred on the Committee by the Charter. See Chapter 3.

<sup>119</sup> See Chapter 4 for more in-depth discussion of the role of scrutiny committees and their interconnections with human rights legislation both in Australia and elsewhere.

<sup>120</sup> Legal and Constitutional Affairs Committee, Transcript of Official Briefing from the Solicitor-General for the NT and Crown counsel for the NT, 10 September 2009, p6

<sup>121</sup> Legal and Constitutional Affairs Committee, Transcript of Official Briefing from the Solicitor-General for the NT and Crown counsel for the NT, 10 September 2009, p4

Upon further questioning by the Committee in regards strengthening existing mechanisms in the NT, the Solicitor-General for the NT advised:

But it would be easy to insert a mechanism at that point, which would require somebody at the Department of Justice for example to conduct an examination of the compliance with some list of human rights issues that have been identified by the committee.<sup>122</sup>

The Committee considers that this could well be a logical option to be considered.

## Indigenous rights

At the 2007 CDU symposium the Social Justice Commissioner discussed implications of a Bill of Rights for Indigenous people. Commissioner Calma stressed the importance of establishing a culture of respect for rights in the Territory, examined the key features of human rights and proposed options for protecting the rights of Indigenous people in the Territory.<sup>123</sup> Increasingly, Territory Indigenous leaders link support for recognition of rights and moves towards Statehood to tangible improvement in Aboriginal peoples' lives.<sup>124</sup> These views are consistent with earlier statements that any Bill of Rights limited to civil and political rights would add little to overcoming the systemic barriers to enjoyment of economic, social and cultural rights. Rather, a bill that recognises economic, social and cultural rights and that would ensure the improvement of health, housing, nutrition, water and standard of living has been called for.<sup>125</sup>

Any published report on the national consultation may help in gaining a better understanding of the views within the Territory on a Bill of Rights. To date however, other than the submissions to the SSC's discussion paper, it is unclear what the broader Territory community view is on which rights need additional protection.

Submissions to the SSC's discussion paper, *Constitutional Pathways to Statehood*, include eight that relate to a Bill of Rights. Two of these argue that the Northern

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<sup>122</sup> Legal and Constitutional Affairs Committee, Transcript of Official Briefing from the Solicitor-General for the NT and Crown counsel for the NT, 10 September 2009, p5

<sup>123</sup> Calma, 'Securing the rights of Indigenous Territorians'.

<sup>124</sup> Stephanie Bell the Central Australian Aboriginal Congress Director queried how statehood would improve Aboriginal lives: *Centralian Advocate*, 14 November 2006. Martin Mowbray, a Congress Policy Officer queried how statehood would overcome the disparity between Aboriginal and other people in the Territory; Seminar Notice, 'Politics, Statehood and Aboriginal health', CDU Anthropology seminar, 17 November 2006. Both cited by D. Carment, 'History and Statehood in Australia's Northern Territory, 2003-2007', forthcoming in *Journal of Northern Territory History*, 2009.

<sup>125</sup> Calma, 'Securing the rights of Indigenous Territorians', p.9; NCLC, *Indigenous Constitutional Strategy*.

Territory should not have a Bill of Rights, one that said the new State of the Northern Territory should have a Bill of Rights and one called for awareness of human rights standards in any constitutional development. The remaining four submissions refer to specific Indigenous rights that need to be protected: the need for a compromise to be reached with 'Aboriginal interests' on the *Indigenous Constitutional Strategy*; the 'Aboriginal Land Rights Factor in NT Statehood' with an appropriate acknowledgement of the Territory Indigenous peoples as traditional owners; a call for constitutional protection of Aboriginal languages and for protection of all peoples' cultural and religious rights; and the need to guarantee rights on Aboriginal health and self-determination. The rights outlined in these submissions are usually described as social and cultural rights.

The impact of the Northern Territory Emergency Response introduced in June 2007 raises a number of issues in regards to Indigenous rights. For the NT as a whole, the question of Territory rights under the Australian Constitution is an important issue particularly in light of the current community campaign towards Statehood. The Committee notes that the Emergency Response under the current Federal Government was reviewed in 2008, will undoubtedly be subject to further reviews and has a finite life. The impact of the Northern Territory Emergency Response is discussed in Appendix E.

## **Summary**

The Northern Territory's demographic profile and level of Indigenous disadvantage indicate there is particular interest in including economic, social and cultural rights in any human rights law. It is unknown how recent commitments by the Territory and Federal Governments to 'close the gap' of Indigenous disadvantage affects community views of this.

While the Northern Territory Emergency Response has raised a range of human rights issues, the Commonwealth's ability to override the Territory government remains a key rights concern.

## 6. FINAL CONSIDERATIONS

Recommitment to Statehood has bipartisan support in the NT Legislative Assembly. The protection of rights also has bipartisan support including respect for and recognition of the Territory's Indigenous people.

Countries that have introduced bills of rights include at least the civil and political rights that the *Universal Declaration* lists, but vary on levels of human rights protection provided. There is a strong preference for the inclusion of civil and political rights, with fewer countries including the full range of economic, social and cultural rights.

The Australian Constitution and State and Territory constitutions include some protection of rights and High Court interpretations have broadened these statements to include implied rights. The Federal Government has framed human rights consultation around open questions to seek the public's views about human rights and their protection in Australia.

The ACT and Victoria's rights legislation have both adopted separate statutes and include civil and political rights, with Victoria also including some cultural rights. Western Australia and Tasmania have both completed periods of human rights consultation with recommendations for separate statutes and incorporating civil and political rights, and in Western Australia's case the inclusion also of some economic, social and cultural rights.

With this background, the Committee considered the following:

- Should there be a Northern Territory Bill of Rights?
- If so, which rights should be included?
- How should it be administered and rights scrutinised and protected?
- If there is to be a Northern Territory Bill of Rights, when should it be enacted - before achieving Statehood, at the same time as Statehood is achieved, as part of our new Constitution or as separate legislation?
- Are there alternatives to a Bill of Rights (constitutionally entrenched or statute) to strengthen rights protection and can they be applied in the NT now or as a State?
- What position will the Federal Government take following the national consultation and how will it affect the Northern Territory, now or as a State?

- How and when would it be best to raise the debate and discuss all the questions and ideas with the people of the Northern Territory?

## **Timing and Consultation**

Despite some information about which rights need protection, there has been limited community comment on whether people think rights are adequately protected and if so which rights should be protected. The strength of support in the Northern Territory for a preference for either a charter or constitutional model or a Bill of Rights at all, is untested. Most of the questions the Committee asked above need the input and views of the people of the Northern Territory.

Both recent and earlier examinations of issues surrounding a Bill of Rights indicate that the issue is strongly associated with the Northern Territory's move to Statehood. Previous committees and the SSC however both note that a Bill of Rights can be introduced at any time. Given the recommitment of the Northern Territory Government to Statehood and the timing of looking at a Bill of Rights, this association of a Bill of Rights with Statehood can be expected to continue. Community consultation on Statehood in the Northern Territory has begun. It is more than likely that rights issues can be expected to be raised during Statehood community consultations. This would include the protection of Indigenous rights that may be sought under the constitutional document of the new State.

The Northern Territory Emergency Response, the National Apology and statements about 'Closing the Gap' on Indigenous disadvantage have raised a range of human rights issues that can be expected to impact on public views about human rights and their protection. Timing of any consultation on a Bill of Rights is important to consider, and is the question of whether to include consideration of a Bill of Rights for the NT in the current campaign towards Statehood.

## **Alternatives to a Bill of Rights**

The initiation of the current national consultation on human rights protection in Australia might suggest that maintaining the status quo is not an option; that the system of human rights protection in Australia needs change. However, just as views on a charter model of rights are unclear, it is unclear (perhaps more so) to what extent other strategies for human rights protection, alternative or supplementary to either a constitutionally entrenched or charter Bill of Rights interpreted and applied by the courts, are known, understood or considered by the wider community.

The background paper to the National Human Rights Consultation suggests a number of alternatives including:

- Expanding the parliamentary scrutiny process to give Parliamentary Committees power to guide Governments and their staff on human rights issues.
- On presentation of a Bill for debate, Government Ministers be required to state the Bill's compliance with/ adherence to Australia's human rights legislation and obligations.
- Appointing an Australian Government Parliamentary Secretary for Human Rights to give prominence to human rights.<sup>126</sup>

Australia's Race Discrimination Commissioner, Zita Antonios, suggested that a brief statement of human rights values as well as recognition of Indigenous Australians and those drawn from other nations be included in the Preamble of Australia's Constitution:

The people of Australia includes its Indigenous peoples, together with people drawn from many nations and many cultures, living together in a multicultural society. Aboriginal and Torres Strait Islander people have a distinct cultural status as Indigenous peoples with continuous rights by virtue of that status.

Australia is established as a democratic State, subject to the rule of law, and united in an indissoluble Commonwealth. Australia embraces the values of equality, liberty, justice, and the human dignity of all people.

We, the people of Australia, agree to be bound by the provisions of this Constitution.<sup>127</sup>

Although the Race Discrimination Commissioner's suggestion pre-dated the failed 1999 referendum to amend the Constitution with a preamble, the suggested preamble of the 1999 referendum did not mention the protection of human rights or freedoms directly and came with a proviso (attached to another proposal of that same referendum), that the preamble would not have any legal consequence and

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<sup>126</sup> Australian Government, 2008, *National Human Rights Consultation Background Paper*, Commonwealth of Australia.

<sup>127</sup> Antonios, Z, 1997, *A proposed preamble to the Australian Constitution*, Documents of Reconciliation and Constitutional Issues, Australian Reconciliation Convention: Reconciliation in the Community <http://portsea.austlii.edu.au/au/other/IndigLRes/car/1997/3/speeches/seminar3/anton.htm>, Accessed 19 March 2009.

could not be used to interpret the Constitution or any other legislation.<sup>128</sup> The Solicitor-General advised the Committee that legal standing or statutory interpretation implications of a preamble containing aspirational values also depends on the wording of the preamble.<sup>129</sup>

Other alternatives in preference to a constitutional bill for rights, have favoured a set of non-discrimination clauses to be included in the Commonwealth Constitution which would:

... permanently fetter the Commonwealth parliament and government from discriminating against people on the basis of race, gender or sexual orientation...<sup>130</sup>

Developing the idea of scrutiny of legislation committees charged with considering human rights protection in Bills, Professor Tom Campbell<sup>131</sup> advocates the adoption of a 'democratic Bill of Rights'<sup>132</sup> embedded within the Terms of Reference of a Joint Parliamentary Human Rights Committee of the Parliament of Australia.<sup>133</sup> According to Professor Campbell, the proposal draws on the strengths of Australian political tradition being:

1. Bi-partisan role of parliamentary committees;
2. Australia's comparatively good record on human rights legislation e.g. *Racial Discrimination Act*, *Sex Discrimination Act* and *Disability Discrimination Act*; and
3. Historically significant popular support for human rights here and overseas and for fair play generally.<sup>134</sup>

This Committee would be created to scrutinise legislation, hold inquiries, make recommendations and contribute to a greater system of human rights protection where the legal status of human rights legislation is heightened above ordinary

<sup>128</sup> Legal, Constitutional and Administrative Review Committee, 2009, *A Preamble for the Constitution of Queensland-Issues Paper*, Parliament of Queensland.

<sup>129</sup> GET TRANSCRIPT REFERENCE

<sup>130</sup> Frank Brennan, *Legislating Liberty. A Bill of Rights for Australia?*, 1998, University of Queensland Press, p.181.

<sup>131</sup> Professor Tom Campbell, Director of Charles Sturt University Division and Centre for Applied Philosophy and Public Ethics, currently He is currently working under an ARC Discovery Grant on an Australian alternative to Bills of Rights.

<sup>132</sup> As referred to by Prof. Campbell this is a declaration which affirms the basic interests that set down social, political and economic goals.

<sup>133</sup> Campbell, T., 2006, *Human Rights Strategies: An Australian Alternative*, in Campbell, T., Goldsworthy J., & Stone, A., (eds) *Protecting Rights Without a Bill of Rights*, Ch14:319-341 Ashgate Publishing, Hampshire.

<sup>134</sup> Campbell, T., 2006, *Human Rights Strategies: An Australian Alternative*, in Campbell, T., Goldsworthy J., & Stone, A., (eds) *Protecting Rights Without a Bill of Rights*, Ch14:319-341 Ashgate Publishing, Hampshire.

legislation. Such a Committee would need to be a Standing Committee<sup>135</sup> with self-referencing powers. This proposal aims to develop the role and powers of Parliament in the protection and promotion of human rights, at the same time restrain the tendency for courts to assume a legislative role and better preserve the separation of powers.<sup>136</sup>

The option proposed by former High Court judge Justice Michael McHugh would see the Federal Government use its external affairs powers to domestically implement the International Covenant on Civil and Political Rights and International Covenant on Economic, Social and Cultural Rights. This would ensure uniform legislation in the States and Territories through the constitutional requirement for those jurisdictions to legislate consistently with the Constitution of Australia. The legislature would also retain its power.<sup>137</sup>

Alternatives broaden the debate about the best means of enhancing human rights protection in Australia beyond consideration of a bill or charter of rights. The current debate facilitated by the National Human Rights Consultation may reveal other alternatives for enhanced human rights protection in Australia.

## Conclusion

The Committee believes that the need to obtain the views of Territorians on the issue of rights protection, whether that is a Bill of Rights or alternative mechanisms, is an important step. The timing of that consultation as well as the timing of introducing a Bill of Rights, before or after Statehood, if a Bill of Rights is the mechanism supported by community majority, is just as important.

It is likely that the issue of a Bill of Rights for the Northern Territory will emerge during the ongoing Statehood community consultations. Community perceptions often link one matter to the other. However, the Committee believes the two matters should not be seen as part of the one process. The Committee strongly believes that Statehood, which will achieve equal status for the Northern Territory as a State of Australia must be achieved before consideration of a Bill of Rights. The two matters should be considered in separate processes. That would give each matter the community attention that each deserves. The Committee believes that equal status

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<sup>135</sup> A Committee re-appointed at the commencement of each Parliament as opposed to a Select or Sessional Committee which only exist for the term of an Assembly or for the duration of an inquiry.

<sup>136</sup> Campbell, T., 2006, *Human Rights Strategies: An Australian Alternative*, in Campbell, T., Goldsworthy J., & Stone, A., (eds) *Protecting Rights Without a Bill of Rights*, Ch14:319-341 Ashgate Publishing, Hampshire.

<sup>137</sup> Gilbert and Tobin Centre of Public Law, 2009, *A different approach to a charter of rights*, [http://www.apo.org.au/webboard/comment\\_results.html?filename\\_num=271184](http://www.apo.org.au/webboard/comment_results.html?filename_num=271184), Australian Policy Online, Accessed 2 April 2009.

as a State will mean greater certainty of legislation enacted in the State of the Northern Territory, and that would include a Bill of Rights if the Northern Territory is to have one.

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# APPENDICES

## Appendix A: Committee Terms of Reference

**As at 11 September 2008**

The Standing Committee on Legal and Constitutional Affairs shall:

1. Inquire, consider, make recommendations and report to the Assembly from time to time on:
  - (a) any matter concerned with legal or constitutional issues, including law reform, parliamentary reform, administrative law, legislative review and intergovernmental relations;
  - (b) the legal or constitutional relationship between the Northern Territory and Commonwealth;
  - (c) any proposed changes to that legal or constitutional relationship, including the admission of the Northern Territory as a new state of the Commonwealth;
  - (d) any proposed changes to the Commonwealth Constitution that may affect the Northern Territory and/or its residents;
  - (e) with the approval of the Attorney-General, any other matter concerning the relationship between the Northern Territory and the Commonwealth and/or the states in the Australian federation.
2. The Legal and Constitutional Affairs Committee may meet with any other state or Commonwealth parliamentary committees to inquire into matters of mutual concern.
3. The Northern Territory Statehood Steering Committee continues in existence with the same membership and terms of reference adopted by the 9th Assembly on 17 August 2004, and as amended on 24 March 2005.
4. Resolutions or business transacted by the previous Legal and Constitutional Affairs Committee are taken to be the resolutions of this committee, unless otherwise amended.
5. The Committee shall report to the Assembly as soon as possible after 30 June each year on its activities during the preceding financial year.



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## Appendix B: Rights Protection in Other Countries

### Canada

The Canadian Charter of Rights and Freedoms is a constitutionally entrenched charter that sets out individual human rights, mobility and language rights, and protects rights that relate to Canada's Aboriginal peoples.<sup>138</sup> The Charter guarantees the fundamental freedoms of:

- conscience and religion;
- thought, belief, opinion and expression, including freedom of the press and other media of communication;
- peaceful assembly; and
- of association.<sup>139</sup>

Protected rights include:

- the right to vote;
- the right of mobility into, within and out of Canada;
- a full range of legal rights such as the right to life, liberty and security and to not be arbitrarily detained or imprisoned;
- equality before and under the law;
- equal status, rights and privileges for the two official languages of Canada; and
- minority language educational rights.

While the linguistic rights of Canada's Indigenous peoples are included in the Charter, broader Indigenous rights are articulated in s35 of the Canadian Constitution. The inclusion of most Indigenous rights in the Constitution, rather than the Charter, has caused controversy due to the limited nature of the outlined rights.<sup>140</sup>

The Charter provides for enforcement of articulated rights through court action and this avenue has led to a highly litigious rights environment in Canada. While most

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<sup>138</sup> Department of Justice Canada (DOJ), *Canadian Charter of Rights and Freedoms*, Schedule B Constitution Act 1982, s25, <[laws.justice.gc.ca/en/charter/](http://laws.justice.gc.ca/en/charter/)>, accessed 19 December 2008.

<sup>139</sup> DOJ Canada, *Canadian Charter of Rights and Freedoms*, s.2.

<sup>140</sup> J. Debeljak, 'Rights Protection Without Judicial Supremacy: A Review of the Canadian and British Models of Bill of Rights', *Melbourne University Law Review*, Vol. 26, No.2, August 2002, pp.285-324, p.295, footnote 41.

cases have been related to criminal procedure, the courts have also provided interpretation of protection of minority rights and the guarantee of equality.<sup>141</sup>

Under the Charter, courts can declare legislation invalid if it considers the legislation to be inconsistent with Charter rights. Parliament, however, retains an ability to override this and give affect to the legislation for a period of up to five years. As noted by the Tasmania Law Reform Institute:

The aim of this model is to promote the courts' protection of human rights by giving the Charter controlling status with respect to normal statutes while at the same time preserving the ultimate sovereignty of Parliament.<sup>142</sup>

Because it is an enforceable, constitutionally entrenched rights charter and has led to considerable adjudication by the courts, the Canadian model is less favoured as a model in Australia. However, Justice Murray Wilcox noted in his comparative study of the Australian, United States and Canadian rights protections the Canadian charter is highly approved of in Canada, not least because of its impact on changing bureaucratic ideas about rights.<sup>143</sup>

## Europe

Countries in Europe developed the Convention for the Protection of Human Rights and Fundamental Freedoms, known as the European Convention on Human Rights, following the Second World and the establishment of United Nations' *Universal Declaration*. The European Convention comprises three sections with most rights and freedoms articulated in the first section. They are closely modelled on the International Covenant on Civil and Political Rights<sup>144</sup> and include:

- obligation to respect human rights;
- right to life;
- prohibition of torture;
- prohibition of slavery and forced labour;
- right to liberty and security;
- right to a fair trial;
- no punishment without law;

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<sup>141</sup> R. Sharpe, 'The Impact of a Bill of Rights on the Role of the Judiciary: A Canadian Perspective', in P. Alston (ed), *Promoting Human Rights Through Bills of Rights: Comparative Perspectives*, Oxford University Press, 1999, pp.431-453, p.451.

<sup>142</sup> TLRI, *A Charter of Rights for Tasmania*, p.42.

<sup>143</sup> M. Wilcox, *An Australian Charter of Rights?* Law Book Company Limited, 1993, pp.183-5.

<sup>144</sup> A. Byrnes, H. Charlesworth and G. McKinnon, *Bills of Rights in Australia: history, politics and law*, UNSW Press, 2009, p.50.

- right to respect for private and family life;
- freedom of thought, conscience and religion;
- freedom of expression;
- freedom of assembly and association;
- right to marry;
- right to effective remedy;
- prohibition of discrimination;
- derogation of the Convention's obligations in time of emergency;
- restrictions on political activity of aliens;
- prohibition of abuse of rights; and
- a limit on use of restrictions on rights.<sup>145</sup>

The Convention also established a European Court of Human Rights to which member countries' citizens may seek protection of human rights after exhausting legal remedies in their countries.<sup>146</sup> As international law has developed on the premise of states being parties to actions, it is a significant feature of the European Convention as it is the only international human rights agreement that allows individuals' protection.

It has been noted by the New South Wales Parliament's Legislation Review Committee that:

As nearly all European countries are signatories to the Convention, the European Court of Human Rights is one of the most significant sources of human rights law and jurisprudence in the world today. The Court's decisions have often been a point of reference for the Legislation Review Committee when considering the rights implications of bills.<sup>147</sup>

## United Kingdom

The United Kingdom's *Human Rights Act* is an ordinary statute closely modelled on the European Convention on Human Rights<sup>148</sup> and requires that all United Kingdom legislation be interpreted within, and compatible with, the European Convention.<sup>149</sup>

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<sup>145</sup> Council of Europe (COE), *Convention for the Protection of Human Rights and Fundamental Freedoms as amended by Protocol No. 11*, Registry of the European Court of Human Rights, September 2003, <[echr.coe.int/nr/rdonlyres/d5cc24a7-dc13-4318-b457-5c9014916d7a/0/englishanglais.pdf](http://echr.coe.int/nr/rdonlyres/d5cc24a7-dc13-4318-b457-5c9014916d7a/0/englishanglais.pdf)> accessed 27 January 2009.

<sup>146</sup> COE, *Convention for the Protection of Human Rights and Fundamental Freedoms*, Articles 1 to 18.

<sup>147</sup> Parliament of New South Wales Legislation Review Committee, *Study Tour Report: Human Rights and the Law in: South Africa, United Kingdom and the Council of Europe*, Report No.2,

18 February 2005, <[parliament.nsw.gov.au/prod/parliament/committee](http://parliament.nsw.gov.au/prod/parliament/committee)>, accessed 3 November 2008.

<sup>148</sup> For a list of those rights see earlier section in this Chapter on Europe.

Like the European Convention the protected rights are principally civil and political rights, with some economic, social and cultural rights. The Act includes three different types of rights; absolute, limited and qualified. Absolute rights include the right to protection from torture, inhuman and degrading treatment and punishment, the prohibition on slavery and enforced labour and protection from retrospective criminal penalties. Limited rights, e.g. the right to liberty, are those rights that are limited under clearly defined circumstances. Qualified rights include the right to respect private life, religion and belief, freedom of expression, assembly and association and the right to peaceful enjoyment of property. These are examples of rights that can be qualified when three criteria are met; there is a basis in law, the curtailment is needed to secure a permissible aim, and when it is necessary in a democratic society.<sup>150</sup>

The Act's provisions are enforceable in the courts with superior courts empowered to make formal declarations of incompatibility, allowing the Government to amend the legislation or to take no action. When Bills are presented to Parliament, the responsible Minister must make a statement of human rights compatibility or that the government intends to enact a law that is incompatible with human rights.<sup>151</sup>

Pre-enactment scrutiny of legislation is also provided by the parliamentary Joint Committee on Human Rights which is noted for its success in persuading the government to amend Bills to improve human rights protections.<sup>152</sup> In addition to scrutinising bills for compliance with the *Human Rights Act* (UK), the Committee advises on remedial orders subsequently to any court declarations of incompatibility.<sup>153</sup>

In their comparison of various Bills of Rights, Darrow and Aston note the approach of the United Kingdom's *Human Rights Act* of not giving the courts the ability to override legislation means that the final decision about revising legislation remains with Parliament. While it was considered likely in 1999 (a year after the Act was

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<sup>149</sup> TLRI, *A Charter of Rights for Tasmania*, p.42; Department of Constitutional Affairs (DCA), *A Guide to the Human Rights Act 1998*, 3<sup>rd</sup> edition, October 2006, p.7, <dca.gov.uk/peoples-rights/human-rights/index.htm>, accessed 4 February 2009.

<sup>150</sup> DCA, *A Guide to the Human Rights Act 1998*, pp.12-3.

<sup>151</sup> Contained in section 19 of the Human Rights Act; Byrnes, Charlesworth & McKinnon, *Bills of Rights in Australia*, p.50.

<sup>152</sup> TLRI, *A Charter of Rights for Tasmania*, p.40.

<sup>153</sup> M C Tolley, 'Parliamentary Scrutiny of Rights in the United Kingdom: Assessing the Work of the Joint Committee on Human Rights', *Australian Journal of Political Science*, vol 44, No. 1, March 2009, pp.41-55.

introduced) that most cases the courts views would be upheld, the option remained for electoral politics to prevail.<sup>154</sup>

A 2006 review of the implementation of the Act found that it had no significant impact on the criminal law or significantly altered the constitutional balance between the Parliament, the Executive and the Judiciary. However, the review noted that 'damaging myths about human rights' have had a negative impact on how the Act is understood by the public. In light of the review, emphasis has been placed on educating Departments and the public about the Act and European Convention rights.<sup>155</sup>

The Equality and Human Rights Commission also conducted an inquiry into the *Human Rights Act* (UK) and reported in June 2009. The report points out the strengths and weaknesses of the Act after its first 11 years of operation. There have been concerns and criticisms about the way the Act had been interpreted by the courts and the compensation culture the Act has encouraged.<sup>156</sup> To balance the Act, the Government is inquiring into the possibility of introducing a new Bill of Rights and Responsibilities which among other things, would set out obligations and responsibilities to obey the law, pay taxes and to be loyal to the country. Discussion and debate on this issue is still ongoing.<sup>157</sup>

## New Zealand

Two pieces of legislation in New Zealand seek to promote and protect human rights: the *New Zealand Bill of Rights* (BORA) was enacted as ordinary legislation in 1990; and the *Human Rights Act 1993*.

The BORA limits government actions that interfere with the rights of individuals. While the courts do not have the power to override legislation, the Attorney-General is required to justify any limits placed on the BORA's articulated rights, and any inconsistencies in new legislation have to be reported to Parliament when the

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<sup>154</sup> M. Darrow & P. Aston, 'Bills of Rights in Comparative Perspective', in P. Alston (ed), *Promoting Human Rights Through Bills of Rights*, pp.465-524, p.499.

<sup>155</sup> DCA, *Review of the Implementation of the Human Rights Act*, July 2006, pp.1-2, 10-18, 29-34, <[justice.gov.uk/docs/full\\_review.pdf](http://justice.gov.uk/docs/full_review.pdf)>, accessed 4 February 2009.

<sup>156</sup> Mail Online, 'Humiliation as Jack Straw ditches Labour's 'unworkable' Bill of Rights pledge', 23 March 2009, <http://www.dailymail.co.uk/news/article-1164266/Humiliation-Jack-Straw-ditches-Labours-unworkable-Bill-Rights-pledge.html#ixzz0RJrdPWrg> <http://www.dailymail.co.uk/news/article-1164266/Humiliation-Jack-Straw-ditches-Labours-unworkable-Bill-Rights-pledge.html>, at 17 September 2009

<sup>157</sup> Ministry of Justice, 'Human rights inquiry launch', 15 June 2009, <http://www.justice.gov.uk/news/sp150609a.htm>, at 17 September 2009

legislation is introduced.<sup>158</sup> Government process also requires that draft legislation presented to Cabinet be certified as complying with the BORA.<sup>159</sup>

The BORA includes civil and political rights that are understood to be derived from the International Covenant of Civil and Political Rights.<sup>160</sup> Part 2 of the Act sets out the protected civil and political rights included:

- right to life;
- right not to be subjected to torture or cruel treatment;
- right not be subjected to medical or scientific experimentation;
- right to refuse to undergo medical treatment;
- electoral rights;
- freedom of thought, conscience, and religion;
- freedom of expression;
- right to manifest religion and belief;
- freedom of peaceful assembly;
- freedom of association;
- freedom of movement;
- freedom from discrimination;
- rights of minorities;
- right to be secure from unreasonable search and seizure;
- right not to be arbitrarily arrested or detained;
- rights of persons arrested or detained;
- rights of persons charged;
- minimum standards of criminal procedure;
- retroactive penalties and double jeopardy; and
- right to justice.

The *Human Rights Act 1993* makes provision for the Human Rights Commission to advocate and promote respect and appreciation for human rights in New Zealand. The *Human Rights Act* also establishes that the Commission is responsible for resolving disputes about unlawful discrimination.<sup>161</sup>

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<sup>158</sup> Human Rights Commission (HRC), 'New Zealand Bill of Rights Act 1990', *Human Rights Environment*, <[hrc.co.nz/home/hrc/humanrightsenvironment](http://www.hrc.co.nz/home/hrc/humanrightsenvironment)>, accessed 30 January 2009.

<sup>159</sup> Department of Prime Minister and Cabinet, *Cabinet Office Manual*, 1996, cited in TLRI, *A Charter of Rights for Tasmania*, p.41.

<sup>160</sup> The Act starts by affirming New Zealand's commitment to the International Covenant of Civil and Political Rights, New Zealand Government, *New Zealand Bill of Rights Act 1990*, <[legislation.govt.nz/act/public/1990/0109/latest/DLM224792.html](http://legislation.govt.nz/act/public/1990/0109/latest/DLM224792.html)>, accessed 30 January 2009; also noted by Byrnes, Charlesworth & McKinnon, *Bills of Rights in Australia*, p.49.

<sup>161</sup> HRC, 'Human Rights in New Zealand', *Human Rights Environment*, <http://www.hrc.co.nz/home/hrc/humanrightsenvironment>, accessed 30 January 2009.

## Papua New Guinea

Human rights are included in Papua New Guinea's Constitution as a statement of basic rights or 'fundamental rights and freedoms of the individual'. Human rights are defined in the Constitution by reference to the rights included in the *Universal Declaration* and subsequent treaties, covenants and conventions. The constitutionally protected rights include:

- life, liberty, security of the person and the protection of the law;
- the right to participate in political activities;
- freedom from inhuman treatment and forced labour;
- freedom of conscience, of expression, of information and of assembly and association;
- freedom of employment and freedom of movement; and
- protection for the privacy of their homes and other property and from unjust deprivation of property.<sup>162</sup>

The Preamble also defines a set of basic social obligations which include the need to exercise the guaranteed rights contained in the Constitution and to respect the rights and freedoms of others.

The United Nations, however, note that while there is constitutional protection for human rights and Papua New Guinea has ratified a range of international covenants, including the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights, there is low awareness of human rights and little or no national protection system.<sup>163</sup>

The Papua New Guinea Government has acknowledged the need to strengthen and enforce human rights and after a period of consultation on a proposed model in 2008, is considering the best mode for developing a National Human Rights Commission.<sup>164</sup> The Department for Community Development, which led the across government committee and consultation process has moved to include human rights work within its structure.<sup>165</sup>

<sup>162</sup> *Constitution of the Independent State of Papua New Guinea*, Preamble and Part III, Division 3, <paclii/org/pg/legis/consol\_act/cotisopng534/> accessed 2 February 2009.

<sup>163</sup> 'Human Rights Advisers in Papua New Guinea', *Papua New Guinea Homepage*, <ohchr.org/EN/counties/AsiaRegion/Pages/PGIndex.aspx> accessed 2 February 2009.

<sup>164</sup> Papua New Guinea Department for Community Development (DFCD), 'Government to establish human rights commission', *Community Development Nius*, Vol 1, No.1, 2007, p.4 <dfcd.gov.pg/office/files/newsletters >, accessed 2 February 2009; Human Rights Watch, 'Papua New Guinea', *World Report 2009*, <hrw.org/en/node/79347> accessed 2 February 2009.

<sup>165</sup> DFCD, 'Human Rights Commission a step closer', *Community Development Nius*, Vol 1, No.2, 2007, <dfcd.gov.pg/office/files/newsletters >, accessed 2 February 2009.

## South Africa

The South African Bill of Rights are entrenched in Chapter 2 of the South African Constitution which sets out a wide range of inalienable social, economic, political and environment rights including:

- equality before the law;
- rights to human dignity;
- right to life;
- right to freedom and security of the person;
- right to be not subjected to slavery, servitude or forced labour;
- right to privacy;
- freedom of religion, belief and opinion;
- freedom of expression;
- right to demonstrate, and of association;
- full political rights of participation in and the right to vote in fair elections;
- right to a non-harmful environment;
- right to have access to adequate housing;
- right to access health care, food, water and social security;
- rights of children;
- right to basic education and training; and
- right to language and culture.<sup>166</sup>

The South African Bill of Rights is one of only few bills of right to include rights in regard to the environment, development, culture and language.<sup>167</sup> While most social and economic rights are unqualified rights, e.g. the right to basic education, training and healthy environment, other economic and social rights like the right to housing, food and water are limited to what the State can achieve within available resources.<sup>168</sup>

The South African Constitutional Court interprets, protects and enforces the Constitution, including the Bill of Rights. Additionally, section 39(2) of the Bill of Rights establishes the Court's duty in interpreting, developing and promoting human rights law and its application within the common law.<sup>169</sup>

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<sup>166</sup> South African Government, *Constitution of the Republic of South Africa*, sections 7 to 39, <[info.gov.za/documents/constitution/1996/96cons2.htm](http://info.gov.za/documents/constitution/1996/96cons2.htm)> accessed 3 February 2009.

<sup>167</sup> These rights are known as third-generation rights. First generation rights cover civil and political rights; basic rights to life, dignity, equality, privacy. Second-generation rights are freedoms related to democracy; freedom of expression, association, assembly, opinion. Constitutional Court of South Africa, 'The Bill of Rights', *Your Rights*, <[constitutionalcourt.org.za/site/yourrights/thebillofrights.htm](http://constitutionalcourt.org.za/site/yourrights/thebillofrights.htm)>, accessed 3 February 2009.

<sup>168</sup> TLRI, *A Charter of Rights for Tasmania*, p.42.

<sup>169</sup> Constitutional Court of South Africa, 'Role of the Constitutional Court', *About the Court*, <[constitutionalcourt.org.za/site/thecourt/role.htm](http://constitutionalcourt.org.za/site/thecourt/role.htm)>, accessed 3 February 2009.

## United States

The United States' Bill of Rights is constitutionally entrenched legislation that, in effect, amends the Constitution to allow court action to enforce the outlined rights in the Bill. The rights in the Bill are civil and political rights with the Supreme Court of the United States empowered to invalidate any law that is inconsistent with the guaranteed rights in the Bill.<sup>170</sup>

A constitutional amendment is needed to override the Supreme Court rulings. The procedure to amend the United States Constitution requires that the amendment be approved by two-thirds of the State legislatures and the ratification of three-quarters of the State legislatures or State constitutional conventions.<sup>171</sup>

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<sup>170</sup> TLRI, *A Charter of Rights for Tasmania*, pp.42-3; Byrnes, Charlesworth & McKinnon, *Bills of Rights in Australia*, pp.45-6.

<sup>171</sup> Byrnes, Charlesworth & McKinnon, *Bills of Rights in Australia*, p.46.



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## Appendix C: Australian States and the ACT

### Australian Capital Territory

In 2004 the Australian Capital Territory (ACT) became the first Australian jurisdiction to pass human rights legislation. The ACT's *Human Rights Act* defines the civil and political rights protected and promoted by the Act and are sourced from the International Covenant on Civil and Political Rights:

- recognition and equality before the law;
- right to life;
- protection from torture and cruel, inhuman or degrading treatment;
- protection of the family and children;
- right to privacy and reputation;
- freedom of movement;
- freedom of thought, conscience, religion and belief;
- peaceful assembly and freedom of association;
- freedom of expression;
- taking part in public life;
- right to liberty and security of person;
- human treatment when deprived of liberty;
- rights of children in the criminal process;
- fair trial;
- rights in criminal proceedings;
- compensation for wrongful conviction;
- right not to be tried or punished more than once;
- the right not to be subject to retrospective criminal laws;
- freedom from forced work rights of minorities; and
- human rights may be subject to reasonable limits set by laws.<sup>172</sup>

The Act allowed for the establishment of a Human Rights Commissioner and empowered the ACT Supreme Court to make declarations on the compliance of legislation in protecting the defined civil and political rights. In addition, the ACT government has adopted a broad-based community education approach to developing a 'human rights culture' in the ACT.<sup>173</sup> The ACT's approach to human

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<sup>172</sup> ACT, *Human Rights Act 2004*, ss.8-28, <legislation.act.gov.au>, accessed 27 July 2008.

<sup>173</sup> National Archives of Australia (NAA), 'Human Rights Act 2004 (ACT)', *Documenting Democracy*, <foundingdocs.gov.au/item.asp?sdlID=125>, accessed 28 July 2008.

rights legislation has been described as ‘infus[ing] human rights principles into all laws...and legal remedies for breach of these laws.’<sup>174</sup>

The Act’s preamble specifically highlights the relevance of human rights for Indigenous people and section 27 covers the rights of minorities:

Anyone who belongs to an ethnic, religious or linguistic minority must not be denied the right, with other members of the minority, to enjoy his or her culture, to declare and practise his or her religion, or to use his or her language.<sup>175</sup>

Section 38 of the Act requires that the Assembly standing committee responsible for legal issues must report about human rights issues raised by bills presented to the Assembly.

## **New South Wales**

New South Wales does not have a Bill of Rights and rights are not specifically included in the New South Wales Constitution. In October 2001, the New South Wales Parliament’s Standing Committee on Law and Justice reported on an inquiry into whether it was in the public interest to enact a statutory Bill of Rights in New South Wales.<sup>176</sup> The Committee found that it was not ‘in the public interest to enact a statutory Bill of Rights’, however recommended the establishment of a Scrutiny of Legislation committee that would examine and advise on rights.<sup>177</sup>

The *Legislation Review Act 1987* requires the Legislation Review Committee to consider and report on the impact of bills on ‘personal rights and liberties’ or if rights and liberties are ‘unduly dependent’ on inadequately defined administrative powers.<sup>178</sup> As the Act did not define ‘rights and liberties’ section 8A was introduced as the Government’s response to the Committee’s above recommendation following the inquiry into establishing a Bill of Rights.<sup>179</sup> The Legislation Review Committee therefore undertakes its reviews while considering:

<sup>174</sup> Higgins, ‘Opening Address’.

<sup>175</sup> ACT, *Human Rights Act 2004*.

<sup>176</sup> New South Wales Legislative Council Standing Committee on Law and Justice (SCLJ), *A NSW Bill of Rights*, Report 17, October 2001, <parliament.nsw.gov.au/prod/parliament/committee>, accessed 7 October 2008.

<sup>177</sup> SCLJ, *A NSW Bill of Rights*, pp.x, 110-4.

<sup>178</sup> NSW Legislation, *Legislation Review Act 1987 No 165*, s.8A, <legislation.nsw.gov.au/gragview/inforce/act+165+187+pt.3-sec.8a+o+N>, accessed 3 November 2008.

<sup>179</sup> New South Wales Parliament, *“Rights and Liberties” considered by the Legislation Review Committee*, Information Paper, <parliament.nsw.gov.au/prod/PARLAMENT/committee> accessed 3 November 2008.

- Australian law, especially the common law, NSW statute law and the Commonwealth Constitution;
- International human rights law, especially human rights treaties to which Australia is a party; and
- the law and jurisprudence of other jurisdictions.<sup>180</sup>

## Queensland

As in New South Wales, Queensland does not have a Bill of Rights and protection of rights is not specifically included in the Queensland Constitution. In 1998, the Queensland Legislative Assembly's Legal, Constitutional and Administrative Review Committee reported on an inquiry into the preservation and enhancement of individuals' rights and freedoms.<sup>181</sup> Unlike an earlier Electoral and Administrative Review Commission recommendation which advised enacting a Bill of Rights in Queensland,<sup>182</sup> the Committee did not recommend the adoption of a Bill of Rights. It however recommended education programs on existing citizen rights and responsibilities facilitated through a handbook, *Queenslanders' Basic Rights*.

The Queensland Scrutiny of Legislation Committee examines bills against 'fundamental legislative principles', as defined in the *Legislative Standards Act 1992*.<sup>183</sup> The principles include individuals' 'rights and liberties' and whether the legislation 'is consistent with principles of natural justice'.<sup>184</sup> Examination of the Committee's *Alert Digests* show that the Committee follows the practice of New South Wales of interpreting individual 'rights and liberties' as established in Australian and international law and treaties.<sup>185</sup>

The Law, Justice and Safety Committee of Queensland Parliament has developed a draft preamble for insertion into the *Constitution of Queensland 2001*. The preamble reads:

The people of Queensland, free and equal citizens of Australia, subject to no law or authority but that sanctioned by this Constitution and the Constitution of Australia;

<sup>180</sup> New South Wales Parliament, "*Rights and Liberties*", s.8.

<sup>181</sup> Legislative Assembly of Queensland Legal, Constitutional and Administrative Review Committee (LCARC), *The preservation and enhancement of individuals' rights and freedoms in Queensland: Should Queensland adopt a bill of rights?*, Report No.12, November 1998, <parliament.qld.gov.au/view/committees/LCARC.asp?SubArea=other>, accessed 29 October 2008.

<sup>182</sup> LCARC, *Should Queensland adopt a bill of rights?*, pp.2,10.

<sup>183</sup> Queensland Parliament, 'Functions of the Committee', *Scrutiny of Legislation Committee*, <parliament.qld.gov.au/view/committees/SLC.asp>, accessed 3 November 2008.

<sup>184</sup> Queensland Parliament, 'Fundamental Legislative Principles', *Scrutiny of Legislation Committee*, <parliament.qld.gov.au/view/committees/SLC.asp?SubArea+principles>, accessed 3 November 2008.

<sup>185</sup> Queensland Parliament, *Alert Digests, Scrutiny of Legislation Committee*, <parliament.qld.gov.au/view/committees/documents/SLC/alerts/2008/>, accessed 3 November 2008.

- intend through this Constitution, to foster the peace, welfare and good government of Queensland;
- adopt the principle of the sovereignty of the people, under the rule of law, and the system of representative and responsible government, prescribed by this Constitution;
- honour the Aboriginal peoples and Torres Strait Islander peoples, the first Australians, whose lands, winds and waters we all now share; and pay tribute to their unique values, and their ancient and enduring cultures, which deepen and enrich the life of our community;
- determine to protect our unique environment;
- acknowledge the achievements of our forebears, coming from many backgrounds, who together faced and overcame adversity and injustice, and whose efforts bequeathed to us, and future generations, a realistic opportunity to strive for social harmony; and
- resolve on this the 150th anniversary of the establishment of Queensland, to nurture our inheritance, and build a society based on democracy, freedom and peace.<sup>186</sup>

That Committee also recommended that prior to a final decision being made on whether to insert a preamble, an expert legal opinion on any statutory interpretation issues that could arise be obtained. Previously, the Queensland Constitutional Review Commission 1999-2000 proposed the following sentence to be included in Queensland's preamble:

We declare that we respect the equality of all persons under the law, regardless of class, faith, gender, origin or race, and recognise the contribution they make to the State of Queensland.<sup>187</sup>

## South Australia

Similarly, South Australia does not have a Bill of Rights and rights are not specifically included in its Constitution. The South Australian Legislative Review Committee considers proposed regulations against 'principles of scrutiny', one of which is

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<sup>186</sup> Queensland Parliament, Law, Justice and Safety Committee, "A preamble for the *Constitution of Queensland 2001*, Report No. 70. September 2009, p3

<sup>187</sup> Queensland Constitutional Review Commission, 2000, *Report on the possible reform and changes to the Acts and laws that relate to the Queensland Constitution*, cited in Legal, Constitutional and Administrative Review Committee, 2009, *A Preamble for the Constitution of Queensland-Issues Paper*, p.2, Parliament of Queensland.

whether the legislation ‘unduly trespass[es] on rights previously established by law or are inconsistent with the principles of natural justice...’.<sup>188</sup>

## Tasmania

The Tasmanian Constitution includes a guarantee of religious freedom and equality but no charter of rights and/or freedoms. Following a period of inquiry and consultation,<sup>189</sup> in October 2007, the Tasmanian Law Reform Institute recommended the enactment of a Tasmania Charter of Human Rights as an ordinary statute.<sup>190</sup> The previous Premier, Paul Lennon, commented that it was not intended to consider the Government’s response to the Institute’s recommendations until the Federal Attorney-General has determined the national position in relation to human rights protection.<sup>191</sup>

The Tasmanian Subordinate Legislation Committee’s examination of regulations includes special reference to whether the regulation ‘unduly trespasses on personal rights and liberties,’<sup>192</sup> however there is no Scrutiny of Bills Committee in Tasmania.<sup>193</sup>

## Victoria

Victoria became the second Australian jurisdiction to pass human rights legislation with the 2006 passage of the *Charter of Human Rights and Responsibilities Act*. The Charter’s principles are set out in the preamble:

- human rights are essential in a democratic and inclusive society that respects the rule of law, human dignity, equality and freedom;
- human rights belong to all people without discrimination, and the diversity of the people of Victoria enhances our community;
- human rights come with responsibilities and must be exercised in a way that respects the human rights of others;

<sup>188</sup> Parliament of South Australia Legislative Review Committee, *Subordinate Legislation Digest, Fifty-First Parliament Second Session 2008, Items 1 to 300*, pp.4-5, <parliament.sa.gov.au/NR/rdonlyres/BE67E567-207C-4E7C-8CD1-912291B7586E/10444/SLD5121TO300March2008.doc>, accessed 5 November 2005.

<sup>189</sup> The Tasmanian Government asked the TLRI to determine if Tasmania should have a charter of human rights and if so, advice on the best model of human rights protection. The one limit on the scope of the terms of reference was ‘to identify how human right obligations can best be promoted and protected in Tasmania while still preserving the sovereignty of Parliament and the Tasmanian constitutional framework.’ TLRI, *A Charter of Rights for Tasmania?* Issues Paper No 11, p.3.

<sup>190</sup> TLRI, *A Charter of Rights for Tasmania*.

<sup>191</sup> Parliament of Tasmania House of Assembly, *Hansard*, 12 March 2008, <parliament.tas.gov.au/HansardHouse>, accessed 27 October 2008.

<sup>192</sup> Tasmanian Legislation, *Subordinate Legislation Committee Act 1969*, s.8, <thelaw.tas.gov.au>, accessed 5 November 2008.

<sup>193</sup> TLRI, *A Charter of Rights for Tasmania*, p.33.

- human rights have a special importance for the Aboriginal people of Victoria, as descendants of Australia's first people, with their diverse spiritual, social, cultural and economic relationship with their traditional lands and waters.<sup>194</sup>

Like the ACT's *Human Rights Act*, the Charter conforms to what has become known as the 'Commonwealth model';<sup>195</sup> it is an ordinary, non-entrenched Act of Parliament. As described by Justice Michael Kirby this 'charter model':

...does not give courts a power to override or invalidate a law made by Parliament. Its simply encourages courts to interpret laws made by Parliament, in so far as they can, to be consistent with the charter. If an inconsistency exists, this brought to the attention of Parliament. It has the final say.<sup>196</sup>

Victoria's Charter sets out the human rights that are protected and promoted as:

- recognition as a person and equality before the law;
- right to life;
- protection from torture and cruel, inhuman or degrading treatment;
- freedom from forced work;
- freedom of movement;
- privacy and reputation;
- freedom of thought, conscience, religion and belief
- freedom of expression;
- the right to peaceful assembly and freedom of association;
- protection of families and children;
- taking part in public life;
- cultural rights;
- property rights;
- right to liberty and security of person;
- humane treatment when deprived of liberty;
- rights of children in the criminal process;

<sup>194</sup> Parliament of Victoria (VIC), *Charter of Human Rights and Responsibilities Act 2006*, pp.1-2, <legislation.vic.gov.au/Domino/Web\_Notes/LDMS/PubStatbook.nsf>, accessed 6 November 2008.

<sup>195</sup> Discussed by C. Saunders, 'Protecting Rights in Common Law Constitutional Systems: A Framework for a Comparative Study', *Victoria University of Wellington Law Review* 2003, 33(3), cited in Evans, 'State Charters of Human Rights'.

<sup>196</sup> Kirby, M. *The national debate about a charter of rights and responsibilities: answering some of the critics*. Address to President's Luncheon of the Law Institute of Victoria, Melbourne 21 August 2008. Document, 21 August 2008: 20p.

- fair hearing;
- rights in criminal proceedings; and
- right not to be tried or punished more than once or found guilty of retrospective criminal laws.<sup>197</sup>

In addition, the Victorian Charter includes provision for the Scrutiny of Acts and Regulations Committee to report to Parliament as to whether a bill is compatible with human rights.<sup>198</sup>

## Western Australia

Western Australia does not have a Bill of Rights and rights are not specifically included in its Constitution. Three Parliamentary Committees scrutinise legislation in Western Australia, however, only the Joint Standing Committee on Delegated Legislation examines and reports on whether regulations 'unduly [impinge] upon established rights, freedoms or liberties'.<sup>199</sup>

In May 2007 the Western Australian Attorney-General, Jim McGinty, announced a plan to develop a Western Australian human rights act, commencing with a period of public consultation conducted by an independent panel to find out how a human rights act should operate in Western Australia.<sup>200</sup>

Late in 2007 the Attorney-General in welcoming the committee's final report,<sup>201</sup> noted that about 90 per cent of people surveyed believed Western Australia should have human rights legislation.<sup>202</sup> The consultative committee recommended that human rights legislation should:

- maintain Parliamentary sovereignty;
- encourage a human rights culture across Government;
- discourage litigation as a way to resolve human rights issues, rather emphasise conciliatory processes; and
- protect civil, political, social, economic and cultural rights.<sup>203</sup>

<sup>197</sup> VIC, *Charter of Human Rights*, ss7-27.

<sup>198</sup> s.30. The legislation's schedule includes amendment to the *Parliamentary Committees Act 2003* to include the functions conferred on the Committee by the Charter.

<sup>199</sup> Parliament of Western Australia, 'Committee System of the Legislative Council and Legislative Assembly', *Committees*, <parliament.wa.gov.au/web/newwebparl.nsf/iframewebpages/Committees>, accessed 12 November 2008.

<sup>200</sup> Parliament of Western Australia, 'Human Rights on Agenda for WA', *Media Release*, 3 May 2007, <netk.au/Parliament?Media3.asp>, accessed 11 November 2008.

<sup>201</sup> Department of the Attorney General, *A WA Human Rights Act: Report of the Consultation Committee for a Proposed WA Human Rights Act*, November 2007,

<justice.wa.gov.au/\_files/Human\_Rights\_Final\_Report.pdf>, accessed 11 November 2008.

<sup>202</sup> Department of the Attorney General, 'Human Rights report completed', *News and Media Releases*, 20 December 2007, <justice.wa.gov.au/\_apps/news>, accessed 11 November 2008.

<sup>203</sup> *Ibid.*

The WA Attorney-General said that the committee's report, while raising some matters that need further consideration, would assist in national consultation and debate on how best to protect human rights in Australia. Western Australia is awaiting the outcome of the federal consultation process before proceeding further with any possible legislation.<sup>204</sup>

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<sup>204</sup> Ibid.

## **Appendix D: Recommendations of the National Human Rights Consultation Committee**

### **Creating a human rights culture**

#### **Recommendation 1**

The Committee recommends that education be the highest priority for improving and promoting human rights in Australia.

#### **Recommendation 2**

The Committee recommends as follows:

- that the Federal Government develop a national plan to implement a comprehensive framework, supported by specific programs, of education in human rights and responsibilities in schools, universities, the public sector and the community generally
- that human rights education be based on Australia's international human rights obligations, as well as those that have been implemented domestically (whether in a Human Rights Act or otherwise), and the mechanisms for enforcement of those rights
- that the Federal Government publish a readily comprehensible list of Australian rights and responsibilities that can be translated into various community languages
- that any education and awareness campaign incorporate the experiences of Indigenous Australians—with a particular focus on recent and historical examples of human rights concerns
- that the Federal Government collaborate with non-government organisations and the private sector in developing and implementing its national plan for human rights education.

#### **Recommendation 3**

The Committee recommends that its proposed readily comprehensible list of Australian rights and responsibilities include commitments such as the responsibility:

- to respect the rights of others
- to support parliamentary democracy and the rule of law
- to uphold and obey the laws of Australia
- to serve on a jury when required
- to vote and to ensure to the best of our ability that our vote is informed
- to show respect for diversity and the equal worth, dignity and freedom of others
- to promote peaceful means for the resolution of conflict and just outcomes
- to acknowledge and respect the special place of our Indigenous people and acknowledge the need to redress their disadvantage
- to promote and protect the rights of the vulnerable

- to play an active role in monitoring the extent to which governments are protecting the rights of the most vulnerable
- to ensure that we are attentive to the needs of our fellow human beings and contribute according to our means.

## Human rights in policy and legislation

### Recommendation 4

The Committee recommends as follows:

- that the Federal Government conduct an audit of all federal legislation, policies and practices to determine their compliance with Australia's international human rights obligations, regardless of whether a federal Human Rights Act is introduced. The government should then amend legislation, policies and practices as required, so that they become compliant
- that, in the conduct of the audit, the Federal Government give priority to the following areas:
  - anti-discrimination legislation, policies and practices
  - national security legislation, policies and practices
  - immigration legislation, policies and practices
  - policies and practices of Australian agencies that could result in Australians being denied their human rights when outside Australia's jurisdiction.

### Recommendation 5

The Committee recommends that the Federal Government immediately compile an interim list of rights for protection and promotion, regardless of whether a Human Rights Act is introduced. The list should include rights from the International Covenant on Civil and Political Rights as well as the following rights from the International Covenant on Economic, Social and Cultural Rights that were most often raised during the Consultation: the right to an adequate standard of living (including food, clothing and housing); the right to the highest attainable standard of health; and the right to education.

The government should replace the interim list of rights with a definitive list of Australia's international human rights obligations within two years of the publication of the interim list.

### Recommendation 6

The Committee recommends that a statement of compatibility be required for all Bills introduced into the Federal Parliament, all Bills before the third reading (so as to allow scrutiny of amendments) and legislative instruments as defined by the *Legislative Instruments Act 2003* (Cth). The statement should assess the law's compatibility with the proposed interim list of rights and, later, the definitive list of Australia's human rights obligations.

### Recommendation 7

The Committee recommends that a Joint Committee on Human Rights be established to review all Bills and relevant legislative instruments for compliance with the interim list of rights and, later, the definitive list of Australia's human rights obligations.

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## Human rights in practice

### Recommendation 8

The Committee recommends as follows:

- that the Federal Government develop a whole-of-government framework for ensuring that human rights—based either on Australia’s international obligations or on a federal Human Rights Act, or both—are better integrated into public sector policy and legislative development, decision making, service delivery, and practice more generally
- that the Federal Government nominate a Minister responsible for implementation and oversight of the framework and for annual reporting to parliament on the operation of the framework.

### Recommendation 9

The Committee recommends that the Federal Government incorporate human rights compliance in the Australian Public Service Values and Code of Conduct.

### Recommendation 10

The Committee recommends that the Federal Government require federal departments and agencies to develop human rights action plans and report on human rights compliance in their annual reports.

### Recommendation 11

The Committee recommends that the *Administrative Decisions Judicial Review Act 1975* (Cth) be amended in such a way as to make the definitive list of Australia’s international human rights obligations a relevant consideration in government decision making.

### Recommendation 12

The Committee recommends that, in the absence of a federal Human Rights Act, the *Acts Interpretation Act 1901* (Cth) be amended to require that, as far as it is possible to do so consistently with the legislation’s purpose, all federal legislation is to be interpreted consistently with the interim list of rights and, later, the definitive list of Australia’s human rights obligations.

### Recommendation 13

The Committee recommends that the functions of the Australian Human Rights Commission be augmented to include the following:

- to expand the definition of ‘human rights’ in the *Australian Human Rights Commission Act 1986* (Cth) to include the following instruments:
  - the International Covenant on Civil and Political Rights
  - the International Covenant on Economic, Social and Cultural Rights
  - the Convention on the Elimination of All Forms of Racial Discrimination
  - the Convention on the Elimination of All Forms of Discrimination against Women
  - the Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment
  - the Convention on the Rights of the Child
  - the Convention on the Rights of Persons with Disabilities

- the Declaration on the Rights of Indigenous Peoples.
- to examine any Bill at the request of the federal Attorney-General or the proposed Joint Committee on Human Rights for the purpose of ascertaining if any provision in the Bill is inconsistent with or contrary to any human right in the interim list and, later, the definitive list of Australia's human rights obligations
- to inquire into any act or practice of a federal public authority or other entity performing a public function under federal law that might be inconsistent with or contrary to any obligation in the interim list of human rights and, later, the definitive list of Australia's human rights obligations
- to provide the same remedies for complaints of human rights violations and International Labour Organization Convention 111 complaints as for unlawful discrimination, permitting determination by a court when settlement cannot be reached by conciliation—except in relation to complaints of violations of economic, social and cultural rights, in which case there should be no scope to bring court proceedings where conciliation has failed.

The Federal Government should be required to table a response to any Australian Human Rights Commission report on complaints within six months of receiving that report.

#### **Recommendation 14**

The Committee recommends that the Federal Government develop and implement a framework for improving access to justice, in consultation with the legal profession and the non-government sector.

### **Human rights and Indigenous Australians**

#### **Recommendation 15**

The Committee recommends that a 'statement of impact on Aboriginal and Torres Strait Islander peoples' be provided to the Federal Parliament when the intent is to legislate exclusively for those peoples, to suspend the *Racial Discrimination Act 1975* (Cth) or to institute a special measure. The statement should explain the object, purpose and proportionality of the legislation and detail the processes of consultation and the attempts made to obtain informed consent from those concerned.

#### **Recommendation 16**

The Committee recommends that, in partnership with Indigenous communities, the Federal Government develop and implement a framework for self-determination, outlining consultation protocols, roles and responsibilities (so that the communities have meaningful control over their affairs) and strategies for increasing Indigenous Australians' participation in the institutions of democratic government.

### **A Human Rights Act**

#### **Recommendation 17**

The Committee recommends that the Federal Government operate on the assumption that, unless it has entered a formal reservation in relation to a particular right, any right listed in the following seven international human rights treaties should be protected and promoted:

- the International Covenant on Civil and Political Rights

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- the International Covenant on Economic, Social and Cultural Rights
  - the Convention on the Elimination of All Forms of Racial Discrimination
  - the Convention on the Elimination of All Forms of Discrimination against Women
  - the Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment
  - the Convention on the Rights of the Child
  - the Convention on the Rights of Persons with Disabilities.

**Recommendation 18**

The Committee recommends that Australia adopt a federal Human Rights Act.

**Recommendation 19**

The Committee recommends that any federal Human Rights Act be based on the 'dialogue' model.

**Recommendation 20**

The Committee recommends that any federal Human Rights Act protect the rights of human beings only and that the obligation to act in accordance with those rights be imposed only on federal public authorities—including federal Ministers, federal officials, entities established by federal law and performing public functions, and other entities performing public functions under federal law or on behalf of another federal public authority.

**Recommendation 21**

The Committee recommends that any federal Human Rights Act protect the rights of all people in Australia and all people who are overseas but subject to Australian jurisdiction.

**Recommendation 22**

The Committee recommends that, if economic and social rights are listed in a federal Human Rights Act, those rights not be justiciable and that complaints be heard by the Australian Human Rights Commission. Priority should be given to the following:

- the right to an adequate standard of living—including adequate food, clothing and housing
- the right to the enjoyment of the highest attainable standard of physical and mental health
- the right to education.

**Recommendation 23**

The Committee recommends that a limitation clause for derogable civil and political rights, similar to that contained in the Australian Capital Territory and Victorian human rights legislation, be included in any federal Human Rights Act.

**Recommendation 24**

The Committee recommends that the following non-derogable civil and political rights be included in any federal Human Rights Act, without limitation:

- *The right to life.* Every person has the right to life. No one shall be arbitrarily deprived of life. The death penalty may not be imposed for any offence.

- *Protection from torture and cruel, inhuman or degrading treatment.* A person must not be
  - subjected to torture
  - or
  - treated or punished in a cruel, inhuman or degrading way
  - or
  - subjected to medical or scientific experimentation without his or her full, free and informed consent.
- *Freedom from slavery or servitude.* A person must not be held in slavery or servitude.
- *Retrospective criminal laws.*
  - A person must not be found guilty of a criminal offence as a result of conduct that was not a criminal offence when the conduct was engaged in.
  - A penalty imposed on a person for a criminal offence must not be greater than the penalty that applied to the offence when it was committed.
  - If a penalty for an offence is reduced after a person committed the offence but before the person is sentenced for that offence, the reduced penalty should be imposed.
  - Nothing in the foregoing affects the trial or punishment of any person for any act or omission that was a criminal offence under international law at the time the act or omission occurred.
- *Freedom from imprisonment for inability to fulfil a contractual obligation.* A person must not be imprisoned solely on the ground of inability to fulfil a contractual obligation.
- *Freedom from coercion or restraint in relation to religion and belief.* No person will be subject to coercion that would impair his or her freedom to have or to adopt a religion or belief of his or her choice.

The right to a fair trial should also not be limited.

### **Recommendation 25**

The Committee recommends that the following additional civil and political rights be included in any federal Human Rights Act:

- the right to freedom from forced work
- the right to freedom of movement
- the right to privacy and reputation
- the right to vote
- the right to freedom of thought, conscience and belief
- freedom to manifest one's religion or beliefs
- the right to freedom of expression
- the right to peaceful assembly
- the right to freedom of association
- the right to marry and found a family
- the right of children to be protected by family, society and the State

- 
- the right to take part in public life
  - the right to property
  - the right to liberty and security of person
  - the right to humane treatment when deprived of one's liberty
  - the right to due process in criminal proceedings
  - the right not to be tried or punished more than once
  - the right to be compensated for wrongful conviction.

### **Recommendation 26**

The Committee recommends that any federal Human Rights Act require statements of compatibility to be tabled for all Bills introduced into the Federal Parliament, all Bills before the third reading (so as to allow scrutiny of amendments) and legislative instruments as defined by the *Legislative Instruments Act 2003*.

### **Recommendation 27**

The Committee recommends that any federal Human Rights Act empower the proposed Joint Committee on Human Rights to review all Bills and the relevant legislative instruments for compliance with the human rights expressed in the Act.

### **Recommendation 28**

The Committee recommends that any federal Human Rights Act contain an interpretative provision that is more restrictive than the UK provision and that requires federal legislation to be interpreted in a way that is compatible with the human rights expressed in the Act and consistent with parliament's purpose in enacting the legislation. The interpretative provision should not apply in relation to economic, social and cultural rights.

### **Recommendation 29**

The Committee recommends that any federal Human Rights Act extend only to the High Court the power to make a declaration of incompatibility. (Should this recommendation prove impractical, the Committee recommends alternatively that any federal Human Rights Act not extend to courts the formal power to make a declaration of incompatibility.)

### **Recommendation 30**

The Committee recommends that any federal Human Rights Act require Commonwealth public authorities to act in a manner compatible with human rights (other than economic and social rights) and to give proper consideration to relevant human rights (including economic and social rights) when making decisions.

### **Recommendation 31**

The Committee recommends that under any federal Human Rights Act an individual be able to institute an independent cause of action against a federal public authority for breach of human rights and that a court be able to provide the usual suite of remedies—including damages, as is the case under the UK Human Rights Act. The independent cause of action should not be available in relation to economic, social and cultural rights.



## Appendix E: Impact of the Northern Territory Emergency Response

In June 2007 the former Federal Government announced the Northern Territory Emergency Response (NTER) into Northern Territory Aboriginal communities, with aims of protecting children and making communities safe. In August 2007, five pieces of complimentary legislation were passed by the Australian Parliament to bring the Emergency Response into effect. One effect of the legislation was the suspension of the *Racial Discrimination Act 1975* (RDA) and the removal of the Territory's anti-discrimination legislation for the purposes of the Emergency Response.<sup>205</sup>

Other parts of the Emergency Response have a significant impact on how people view rights protection in the Territory.<sup>206</sup> One feature of the Emergency Response that impacts on how Territorians view human rights is the ability of the Commonwealth to 'intervene' in the Northern Territory without negotiation or consultation.

The Emergency Response was introduced in the Northern Territory because it was constitutionally possible for the Commonwealth to make laws for the Territory.<sup>207</sup> The former Social Justice Commissioner, Mr Tom Calma, questioned the compatibility of the Commonwealth's constitutional ability to override 'the doctrine of representative government in the Northern Territory'.<sup>208</sup> Similarly, it has been noted by the constitutional law expert, Professor George Williams, that the Commonwealth's ability to override the Northern Territory Government 'undercuts self-government in the Territory'.<sup>209</sup> The Senate Standing Committee on the Scrutiny of Bills queried the wisdom of the Commonwealth using its 'Territories Power' in this way:

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<sup>205</sup> P.Yu, M.Duncan & B.Gray, *Northern Territory Emergency Response: Report of the NTER Review Board*, October 2008, <nterreview.gov.au/report.htm>, accessed 21 October 2008, pp.9, 62-3.

<sup>206</sup> Amongst these are the removal of access to the RDA and the Territory's *Anti-Discrimination Act* and the suspension of s50(2) of the *Self-Government Act NT* to ensure compensation on just terms that would otherwise be paid for acquired five year leases of Aboriginal land.

<sup>207</sup> The Commonwealth relied on s122 of the Australian Constitution (the 'Territories Power') which allows the Australian Parliament to make laws for any territory. The Commonwealth's power over the Territory is cited as a key feature of the Territory's political context: J. Altman, *Submission to the Northern Territory Emergency Response Review*, CAEPR Topical Issues no.10/2008, Centre for Aboriginal Economic Policy Research, August 2008, <anu.edu.au/caepr/Publications/topical/Altman\_NTER.pdf>, accessed 22 October 2008.

<sup>208</sup> Human Rights and Equal Opportunity Commission, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice Report 2007*, undated ?February 2008, p.219-221, <hreoc.gov.au/social\_justice/sj\_report/sjreport07/index.html> accessed 21 December 2008.

<sup>209</sup> 'Indigenous abuse crackdown earns mixed response', ABC Online 22 June 2007, <abc.net.au/news/stories/2007/06/21/1958547.htm>, accessed 22 November 2007, cited in Social Justice Commissioner, *Social Justice Report 2007*, pp.220-1.

It involves the Commonwealth intervening in the affairs of a self-governing territory to modify or disallow its laws. There are principles that suggest interfering with, and adding layers of complexity to the laws of, a self-governing polity, is inappropriate. Furthermore it can be argued that the legislature (which is answerable to Northern Territorians) should have the freedom to legislate in a particular way. These arguments have been rehearsed with respect to other decisions to override Territory laws, but there is an unusually complex set of issues that the Commonwealth is intervening in through these Bills.<sup>210</sup>

The measures included in the Northern Territory Emergency Response legislation include there being deemed to be 'special measures' under s8 of the RDA, which allows for 'positive discrimination'. The legislation also suspends the operation of Part II of the RDA that makes it unlawful to discriminate on the basis of race. In effect this means that no-one affected by the Emergency Response's measures can bring a complaint under any Australian anti-discrimination legislation.<sup>211</sup> There have been consistent statements calling for these provisions to be removed and for any government actions to respect Australia's human rights obligations.<sup>212</sup>

Under the Northern Territory Emergency Response, income support and family assistance payments have been 'income managed' – half of the welfare payments are held back so that welfare payments will be spent only on food, school nutrition, rent and other essential items.<sup>213</sup> This affects all people who receive welfare benefits and who live in 'prescribed areas', i.e. those Aboriginal communities and town camps included in the Emergency Response. As the population of these areas is more than 90 per cent populated by Aboriginal people and most Aboriginal people in remote areas rely on welfare payments, it specifically affects the Territory's Indigenous people.

<sup>210</sup> Parliamentary Library, 'Northern Territory National Emergency Response Bill', 13 August 2007, Bills Digest, no.28, 2007-2008, p.19, quoted in Social Justice Commissioner, *Social Justice Report 2007*, p.220.

<sup>211</sup> Social Justice Commissioner, *Social Justice Report 2007*, p.218.

<sup>212</sup> Yu et al, *Report of the NTER Review Board*, p.12. Also: Social Justice Commissioner, *Social Justice Report 2007*, pp.215-9; the Senate Committee on Legal and Constitutional Affairs raised concern that the legislation unduly impinged on personal rights and liberties, *Report on Social Security and Other Legislation Amendment (Welfare Payment Reform) Bill 2007 and four related bills concerning the Northern Territory National Emergency Response*, August 2007, <[aph.gov.au/Senate/committee/legcon\\_cte/nt\\_emergency/index.htm](http://aph.gov.au/Senate/committee/legcon_cte/nt_emergency/index.htm)>, accessed 2 December 2008.

<sup>213</sup> Yu et al, *Report of the NTER Review Board*, p.8.

The Northern Territory Emergency Response allows for the grant of five year leases to the Federal Government over certain land in the Northern Territory to ensure secure tenure and access for building and improving infrastructure and housing.<sup>214</sup> Section 31 of the NTER Act disapplies 'just terms' provisions as set out in s50 of the *Northern Territory (Self-Government) Act*.<sup>215</sup> The High Court however has ruled that the Commonwealth's acquisition of land under the NTER Act is valid.<sup>216</sup> Just terms compensation is therefore due to owners of Aboriginal land acquired under the NTER Act. The Federal Government has acknowledged its responsibility in making just terms compensation to affected traditional owners.<sup>217</sup> Native title of the leased land under s31 would be suspended but not extinguished.<sup>218</sup> Section 35(7) of the NTER Act provides for the termination of a lease earlier than five years by the Commonwealth.<sup>219</sup>

An important aspect of the Emergency Response for Territorians in regard to rights is the Commonwealth's ability to override a democratically elected government. None of the features of the Emergency Response would be averted by a Northern Territory Bill of Rights, without the Northern Territory being a State. However, the Northern Territory Emergency Response has raised significant human rights issues that it is expected will be discussed in any consultation on a Bill of Rights.

In calling for a 'reset...relationship between Aboriginal people and the government of the Australia and the Northern Territory', the NTER Review Board noted that:

The relationship must be recalibrated to the principle of racial equality and respect for human rights of all Australian citizens.<sup>220</sup>

<sup>214</sup> Yu et al, *Report of the NTER Review Board*, p.12. The requirement for longer term leases to be agreed to before housing is improved in Indigenous townships is a separate feature of the current Federal Government's response to housing disadvantage.

<sup>215</sup> M. O'Donnell, 'The Emergency Response in NT Aboriginal Communities – the approach by the Rudd Labor Government', *CDU Public Lecture Series*, October 2008, <cdu.edu.au/whatson/documents/cdupls08-odonnell.ppt>, accessed 18 February 2009. and *Wurridjal v The Commonwealth of Australia* [2009] HCA 2 (2 February 2009).

<sup>216</sup> *Wurridjal v The Commonwealth of Australia* [2009] HCA 2 (2 February 2009).

<sup>217</sup> Media Release, 2 February 2009, Minister for Indigenous Affairs, The Hon. Jenny Macklin MP, [http://www.jennymacklin.fahcsia.gov.au/internet/jennymacklin.nsf/content/high\\_court\\_decision\\_02feb09.htm](http://www.jennymacklin.fahcsia.gov.au/internet/jennymacklin.nsf/content/high_court_decision_02feb09.htm), Accessed 9 March 2009.

<sup>218</sup> Media Release, 2 February 2009, Minister for Indigenous Affairs, The Hon. Jenny Macklin MP, [http://www.jennymacklin.fahcsia.gov.au/internet/jennymacklin.nsf/content/high\\_court\\_decision\\_02feb09.htm](http://www.jennymacklin.fahcsia.gov.au/internet/jennymacklin.nsf/content/high_court_decision_02feb09.htm), Accessed 9 March 2009.

<sup>219</sup> Media Release, 2 February 2009, Minister for Indigenous Affairs, The Hon. Jenny Macklin MP, [http://www.jennymacklin.fahcsia.gov.au/internet/jennymacklin.nsf/content/high\\_court\\_decision\\_02feb09.htm](http://www.jennymacklin.fahcsia.gov.au/internet/jennymacklin.nsf/content/high_court_decision_02feb09.htm), Accessed 9 March 2009.

<sup>220</sup> Yu et al, *Report of the NTER Review Board*, p.11.

The expressed views on the Emergency Response of both Indigenous and non-Indigenous people across Australia are that there is support for the many benefits of the Emergency Response's programs. However, any Emergency Response has to respect Australia's human rights obligations and conform with the RDA.<sup>221</sup> Recent commentary surrounding the first anniversary of the National Apology has reaffirmed this view.<sup>222</sup>

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<sup>221</sup> Yu et al, *Report of the NTER Review Board*, pp.9-12.

<sup>222</sup> HRC, 'Itching for action one year on from historic apology', *Media Release*, 13 October 2009, <[humanrights.gov.au/about/media/media\\_releases/2009/7\\_09.html](http://humanrights.gov.au/about/media/media_releases/2009/7_09.html)>, accessed 13 October 2009.



**LEGISLATIVE ASSEMBLY OF THE NORTHERN TERRITORY**

**11th Assembly**

**Standing Committee on Legal and Constitutional Affairs**

**Part 2**

# **Customary Law**



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# Definitions

Aboriginal and Torres Strait Islander

a person who:

- is of Aboriginal and/ or Torres Strait Islander descent;
- identifies himself or herself as being Aboriginal and/ or Torres Strait Islander descent; and
- is recognised by the community as an Aboriginal and/ or Torres Strait Islander person<sup>223</sup>

Throughout this report the words Indigenous and Aboriginal have been used interchangeably when referring to Aboriginal and Torres Strait Islanders.

Aboriginal customary law:

(or simply ‘customary law’ and sometimes ‘traditional law’) refers to ‘a definable body of rules, norms and traditions’ that Aboriginal societies continue to have and accept within their communities.<sup>224</sup>

General law

This expression has been used in this report to refer to the body of law applying to all Australians (or Territorians when specifically in reference to the laws of the Northern Territory).

Recognition:

is used to describe acknowledgement of existence and significance. The word has been used in relation to the recognition of Aboriginal and Torres Strait Islanders as the first inhabitants of Australia, the recognition of Aboriginal customary law for Aboriginal people and in the context of this report, the recognition of Aboriginal customary law as a source of law.

Source of law:

Materials, processes and references from which a body of law, applying to and adhered by a group of people, community, country or state, is derived and validated.

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<sup>223</sup> *Commonwealth v Tasmania* (1983) 158 CLR 1

<sup>224</sup> ALRC, *Summary Report*, 21.

# Acronyms and Abbreviations

ABC	Australian Broadcasting Corporation
ACT	The Australian Capital Territory
ADR	Alternate Dispute Resolution
ALJS	Aboriginal Law and Justice Strategy
ALRA	<i>Aboriginal Land Rights (Northern Territory) Act</i>
ATSIC	Aboriginal and Torres Strait Islander Commission
ALRC	Australian Law Reform Commission
CAR	Council for Aboriginal Reconciliation
CDU	Charles Darwin University
CLC	Central Land Council
CTH	Commonwealth
HORSCLCA	House of Representatives Standing Committee on Legal and Constitutional Affairs
HREOC	Human Rights and Equal Opportunity Commission
IWGIA	International Working Group for Indigenous Affairs
LCAC	Standing Committee on Legal and Constitutional Affairs
LRCWA	Law Reform Commission of Western Australia
NAA	National Archives of Australia
NT	Northern Territory
NTG	Northern Territory Government
NTLA	Northern Territory Legislative Assembly
NTLC	Northern Territory Land Councils
NTLRC	Northern Territory Law Reform Committee
NZH	New Zealand History
PM&C	Department of Prime Minister and Cabinet
RCIADIC	Royal Commission into Aboriginal Deaths in Custody
SCCD	Sessional Committee on Constitutional Development
SSC	Statehood Steering Committee
UNDG	United Nations Development Group
VIC	Parliament of the Government of Victoria

# **Inquiry Terms of Reference**

In respect of references from former Attorneys-General of the Northern Territory, in 2004 and 2007 to previous Legislative Assembly Committees of Legal and Constitutional Affairs, and pursuant to the Committee Terms of Reference (1(a)-(e)) (at Appendix A), in November 2008, the Standing Committee on Legal and Constitutional Affairs undertook to inquire into issues surrounding the acknowledgment of Aboriginal Customary Law in relation to the current move towards Statehood for the Northern Territory.



# Executive Summary

Although acutely aware of the cultural, political and philosophical issues, the inquiry Terms of Reference necessitated a focus on legal questions in relation to the recognition of Aboriginal customary law as a source of law. The Committee felt it necessary to articulate the differences between the recognition of Aboriginal customary law and practice as extant, statutory recognition through legislation or constitutionally and the recognition of Aboriginal customary law as a source of Australian law. The intention was to show as others have previously done, that recognition of Aboriginal customary law does occur in Australia and in Australian law while acknowledging that that there may be room for further recognition.

Aboriginal customary law continues to be lived and practiced in many NT communities. However, Australian law prevails. The legal questions and difficulties that arise out of recognising customary law as a source of law are many and complex. Each question raised during this inquiry raised further legal questions. The pragmatic approach of gradualism is already being undertaken by Aboriginal communities generally, Governments and legislators, and evident in the work of Judges and Magistrates. This was acknowledged by the NT Law Reform Committee report in 2003 from which the reference for this inquiry was derived. Legislators can further assist in advancing that gradualism once it is has been determined, with the participation of Aboriginal people, which aspects of customary law can be recognised and the manner in which that recognition can take place, all within Northern Territory law.

It was agreed that a public consultation phase not be conducted during this inquiry. The Committee is of the view that if a thorough community consultation is to be held, a carefully written document outlining all the issues and implications for all Territorians would need to be circulated prior to views being sought.

Further recognition of customary law and of Aboriginal and Torres Strait Islanders in general can happen but that the approach must be collaborative and pragmatic and not create uncertainties for either NT law or Aboriginal customary law. The Committee is in favour of a more pragmatic approach that considers what aspects of customary law can and should be recognised and what can be achieved before proposing a solution.



# 1. INTRODUCTION

## ***Background to the inquiry***

The current Committee's investigation builds on the findings of former NT Legislative Assembly committees on legal and constitutional matters. Findings from previous relevant inquiries are contained in Appendix B. Previous references mainly derived from the 2003 Northern Territory Law Reform Committee (NTLRC) 'Report on Aboriginal Customary Law'.<sup>1</sup>

In 2004 and 2007, the (then) Attorneys-General for the NT respectively referred consideration of the NTLRC recommendation to the 9<sup>th</sup> and 10<sup>th</sup> Assembly Legal and Constitutional Affairs Committees. The referral letters are at Appendix C.

The issues were also examined by former Sessional and Select Committees and alternate clauses to allow for recognition of customary law as a source of law were included in both the *1996 Final Draft Constitution* and the *1998 Statehood Convention Constitution*. The Indigenous Constitutional Strategy 1998 also sought the recognition of Aboriginal Customary Law as a source of law.

The Law Reform Commission of Western Australia published a report in 2006 on Aboriginal customary law which included consideration of how Aboriginal customary law should be recognised and made recommendations on constitutional recognition.<sup>2</sup> The findings of that report are provided in Appendix B.

In 2007 the Northern Territory Statehood Steering Committee released a Community Discussion Paper that presented different constitutional models for a Northern Territory constitution. Public submissions were sought on all matters raised in the Discussion Paper, including Territorians' views on 'including customary law as a source of law in a future Northern Territory constitution'.<sup>3</sup>

Within the broader Australian context, the extensive work of the Australian Law Reform Commission (ALRC) from 1980 to 1986, examining the issues associated with the question of recognition of Aboriginal customary law remains pertinent to any consideration of the issues, particularly in relation to criminal law.

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<sup>1</sup> Northern Territory Law Reform Committee (NTLRC), *Report of the Committee of Inquiry into Aboriginal Customary Law*, 2003

<sup>2</sup> Law Reform Commission of Western Australia (LRCWA), *Aboriginal Customary Laws: The interaction of Western Australian law with Aboriginal law and culture, Final Report*, Project 94, September 2006, pp.59-74.

<sup>3</sup> Northern Territory Statehood Steering Committee (SSC), *Constitutional Paths to Statehood*, May 2007, p.60.

A timeline of key events relating to the recognition of Aboriginal customary law within the Northern Territory is included in Appendix D.

The Committee anticipates that issues regarding the recognition of Aboriginal customary law generally and as a source of law specifically will no doubt be raised during the Statehood consultations in 2010. Community view points on the issues will no doubt be varied. An accurate picture of the overall public view on recognising Aboriginal customary law as a source of law in the NT has never been formally sought. The Committee believes the objective of obtaining community views is beyond the scope of this inquiry.

### ***Conduct of the inquiry***

A great deal of background research was undertaken and expert briefings sought. It was agreed that a public consultation phase was not be required at this time.

### ***The report***

Chapter 2 deals with the matter of 'recognition' as a concept and as the principle upon which calls for change regarding Aboriginal customary law operating within the Australian legal system are made. It also briefly traces the development of the acknowledgment of Aboriginal and Torres Strait Islanders, their culture and law in Australia's history. The chapter concludes with a look at the level of legal acknowledgment that currently exists in Australia and specifically in the NT.

Chapter 3 poses and discusses the main questions considered by the Committee during the inquiry in trying to understand the meaning and implications of recognising Aboriginal customary law as a source of law. International examples of constitutional recognition of customary law are also provided. The approaches of other Australian Governments to constitutional recognition of Aboriginal customary law and or Indigenous rights are also discussed.

## 2. HISTORICAL CONTEXT

In relation to Aboriginal and Torres Strait Island people, 'recognition' is often used interchangeably with or alongside 'acknowledgement', 'respect', 'acceptance' and 'appreciation'. In relation to Aboriginal and Torres Strait Islanders or customary law, calls for 'recognition' encompass an identified need to preserve culture, the advancement of self-determination, assertion and protection of rights, improved justice and the broader issue of sovereignty. Proponents see recognition as the right and positive step forward in addressing these issues for Aboriginal and Torres Strait Islanders and by so doing, acknowledging and respecting the unique and significant place of Aboriginal and Torres Strait Islanders in Australia.

### ***Different calls for recognition***

Overall, calls for recognition relate to formal acknowledgment and respect for Aboriginal and Torres Strait Islanders, their law and culture and their importance and significance in Australia. However, each aspect or quality, of which recognition is sought, varies in degrees of effect and implication particularly for legal and constitutional matters and therefore should be distinguished in this respect. The ALRC in its 1986 report on the recognition of Aboriginal customary laws also distinguished the differences in the calls for recognition.<sup>1</sup>

### ***Development***

Historically, no acknowledgment was given to Aboriginal methods of social and economic organisation including those of personal affairs like marriage, child rearing, or personal property.<sup>2</sup> The issue of the recognition of customary law arose in the early years of Australian colonial settlement. In 1837 a House of Commons Select Committee examined the status of Aboriginal people in British settlements and asserted that Aboriginal people should be subject to British law. A dispatch to all Australian and New Zealand Governors in 1840 articulated the opinion that English laws should completely displace Aboriginal customary law.<sup>3</sup>

Since settlement, growth in respect for and understanding of Aboriginal and Torres Strait Islanders has been a positive, gradual progression, as has the progress towards

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<sup>1</sup> Australian Law Reform Commission, Report 31, 'The Recognition of Aboriginal Customary Laws', 1986, Chapter 11

<sup>2</sup> Thomas Reuters Legal Online, *The Laws of Australia Encyclopaedia*, 1, 'Aboriginal and Torres Strait Islanders', 1.2.7, Lawbook Company

<sup>3</sup> Thomas Reuters Legal Online, *The Laws of Australia Encyclopaedia*, 1, 'Aboriginal and Torres Strait Islanders', 1.2.1, Lawbook Company

greater recognition of customary law. The significant events, some of which occurred in the NT, that have led Australia to the level of recognition of Aboriginal and Torres Strait Islanders, culture, languages, connection to land and sea and law that exists today. The level of recognition reflects both the strength and determination of people asserting their rights and the openness of the rest of the community to find a common ground on which to meet and co-exist.

## The Bark Petitions

In August 1963, the Yolngu people of north-eastern Arnhem Land petitioned the Commonwealth Parliament to raise objections to the Government's agreement with the mining company Nabalco, that the company's lease of excised land from the Arnhem Land Reserve and to mining on that land without consultation. The petitions, combining bark painting and English and Gumatj texts on two separate bark pieces, sought an inquiry into the views of the Yolngu and included painted designs asserting Yolngu law. The petitions are acknowledged as 'founding documents' being the first documents bridging Commonwealth law and the Indigenous laws of the land.<sup>4</sup> The petitions were 'the first traditional Aboriginal documents recognised by the Commonwealth Parliament and thus the documentary recognition of Indigenous people in Australian law.'<sup>5</sup> The bark petitions are seen as the catalyst for the long process for legislative and constitutional reform in the recognition of Aboriginal and Torres Strait Islanders.<sup>6</sup> The bark petitions are also credited with creating awareness amongst Indigenous people of protection through legislation and that Indigenous rights need to be recognised and protected.<sup>7</sup>

A parliamentary inquiry considered the concerns of the Yolgnu. Evidence was taken at Yirrkala and Darwin. That Committee of inquiry acknowledged the rights of Yolgnu as stated in the petitions and recommended to Parliament that compensation be paid for loss of livelihood, sacred sites be protected and ongoing monitoring of the mining project be implemented. Although the petitions were not successful in achieving constitutional recognition, they contributed to paving the way for eventual recognition of Aboriginal rights in Commonwealth law.<sup>8</sup>

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<sup>4</sup> Australian Government, Culture Portal, 'Bark petitions: Indigenous art and reform for the rights of Indigenous Australians', <http://www.cultureandrecreation.gov.au/articles/indigenous/barkpetitions/>, at 7 December 2009

<sup>5</sup> National Archives of Australia (NAA), 'Yirrkala bark petitions 1963 (Cth)', *Founding Documents*, <foundingdocs.gov.au/item.asp?sdID=100> accessed 25 June 2008.

<sup>6</sup> Australian Government, Culture Portal, 'Bark petitions: Indigenous art and reform for the rights of Indigenous Australians', <http://www.cultureandrecreation.gov.au/articles/indigenous/barkpetitions/>, at 7 December 2009

<sup>7</sup> J. Daly on behalf of G. Yunupingu, 'Northern Territory Statehood and Constitutional protections: issues and implications for future Aboriginal governance', a speech to the Building Effective Governance Conference, Jabiru, 4-7 November 2003.

<sup>8</sup> National Archives of Australia, 'Documenting a democracy', Yirrkala Bark Petitions 1963 (Cth), <http://www.foundingdocs.gov.au/item.asp?dID=104>, at 4 December 2009.

When the Yolngu appeals to the Commonwealth Parliament were unsuccessful, the elders turned to the NT Supreme Court. The Yolgnu were again unsuccessful in the Gove Land Rights Case, *Milirrpum v Nabalco Pty Ltd*. Blackburn J accepted that Yolgnu had been living in Yirrkala for tens of thousands of years and Yolgnu customary law existed:

The evidence shows a subtle and elaborate system highly adapted to the country in which the people led their lives, which provided a stable order of society and was remarkably free from the vagaries of personal whim and influence. If ever a system could be called a “government of laws and not of men”, it is that shown in evidence before me.<sup>9</sup>

However, Australian law could not recognise this connection as property relations and Australian law could not disprove the principle upon which Australian law was established, that Australia was *terra nullius* at the time of colonisation.<sup>10</sup>

## **Treaties, Other Petitions, Bark or Otherwise**

Before 1963, petitions seeking the recognition of Indigenous rights were submitted to Queen Victoria and the colonial governments. Following are some of those petitions.

### **Batman’s Treaty of Melbourne or Douta Galla Treaty 1835**

Also known as the Douta Galla Treaty, this was in fact 2 agreements between John Batman and the Wurundjeri of the Kulin Nation to buy 2,000 km of land around Melbourne and another 400 km around Geelong in exchange for blankets, knives, tomahawks, scissors, looking-glasses, flour, handkerchiefs and shirts.<sup>11</sup> Under British law, the treaties were declared invalid as the land was considered crown land and not owned by the Wurundjeri. The significance of the treaties was that Batman acknowledged the Wurundjeri as the owners of the land.

### **Wybalenna petition presented to Queen Victoria 1847**

George Augustus Robinson was employed by the colonial government in 1829 to oversee the Aboriginal settlement on Bruney Island in Bass Strait. Between 1830 and 1834, with the approval of the government, Robinson conducted the ‘friendly mission’

<sup>9</sup> *Milirrpum v Nabalco Pty Ltd* 1971 17 FLR 141.

<sup>10</sup> National Archives of Australia, ‘Documenting a democracy’, Yirrkala Bark Petitions 1963 (Cth).

<sup>11</sup> Only Melbourne Website, ‘Batman’s Treaty of Melbourne’, [http://www.onlymelbourne.com.au/melbourne\\_details.php?id=5579](http://www.onlymelbourne.com.au/melbourne_details.php?id=5579), at 7 December 2009

to negotiate and encourage the voluntary relocation of remaining Aboriginal groups to resettle on Flinders Islands. Robinson reportedly promised to:

- (a) provide land for their use;
- (b) permit them to occasionally visit their traditional districts;
- (c) respect and not interfere with their customs;
- (d) ensure they would live under the protection of the government; and
- (e) supply provisions for them.<sup>12</sup>

The Aboriginal groups reportedly relocated to Flinders Island on the basis of this understanding. A petition bearing the signatures of eight Aboriginal people living in Wybalenna was presented to Queen Victoria in March 1847 stating that the Aboriginal groups had fulfilled their part of the agreement but the government had not. The question of whether the crown owes a fiduciary duty to those Aboriginal groups remains unresolved.<sup>13</sup>

#### **Coranderrk petitions and letter, 1870s - 1880s**

The Aboriginal Station at Coranderrk was established in 1862. The Aboriginal residents of Coranderrk had been removed from their country. Between the 1870s and 1880s the Aboriginal people of Coranderrk struggled to assert their rights.<sup>14</sup>

Coranderrk was a successful hop farm and because of its success, by 1874, the Aborigines Protection Board with the support of the general community wanted Aboriginal residents to move off Coranderrk. With the support of the station's superintendent, William Barak and others petitioned the colonial government of Victoria including a letter to Queen Victoria. Some of the Aboriginal residents walked the 65 kilometres to Melbourne to personally deliver the petitions and protests to the Victorian Parliament.<sup>15</sup>

Could we have our freedom to go away shearing and harvesting, and come home when we wish, and also to go for the good of our health when we need it; and we aboriginals all wish and hope to have freedom, not to be bound down by the protection of the board". (Petition from the people of Coranderrk, 22 September 1886).<sup>16</sup>

<sup>12</sup>D Sweeney, 'Broken Promises: the Crown's Fiduciary Duty to Aboriginal Peoples', *Aboriginal Law Bulletin*, (1995) 44, <http://www.austlii.edu.au/au/journals/AboriginalLB/1995/44.html>, at 8 December 2009

<sup>13</sup>D Sweeney, 'Broken Promises: the Crown's Fiduciary Duty to Aboriginal Peoples', *Aboriginal Law Bulletin*, (1995) 44, <http://www.austlii.edu.au/au/journals/AboriginalLB/1995/44.html>, at 8 December 2009

<sup>14</sup> Australian Government Culture Portal, 'Australian language, letters and literature', <http://www.cultureandcreation.gov.au/articles/literature/index.htm>, at 9 December 2009

<sup>15</sup> Australian Government Culture Portal, 'Australian language, letters and literature', <http://www.cultureandcreation.gov.au/articles/literature/index.htm>, at 9 December 2009

<sup>16</sup> ABC Website, 'Mission Voices; Coranderrk' <http://www.abc.net.au/missionvoices/coranderrk/default.htm>, at 9 December 2009

The superintendent was eventually forced to resign because of his continued support the Aboriginal residents. During the years of protest, resources were not provided to Corranderrk and the health of residents declined. The residents continued to petition the colonial government of Victoria adding concerns about their management and treatment to their grievances.<sup>17</sup>

In 1924 Corranderrk was closed as an Aboriginal reserve and the community was encouraged to move to Lake Tyers. Nine people did not want to leave and remained at Coranderrk. In 1998, the remaining land of Coranderrk was purchased by the Indigenous Land Corporation and returned to the descendants of the original reserve.<sup>18</sup>

### **Petitions seeking representation in Federal Parliament**

In 1935 and 1937, petitions were presented to the Federal parliament calling for Aboriginal representation in parliament and a national department of Aboriginal affairs as well as State advisory bodies.<sup>19</sup> In 1938, after no response on these petitions had been received, and a day of mourning was held on Australian Day, Aboriginal people from around the country established the National Aboriginal Day of Observance Committee (NADOC) which later became NAIDOC (National Aboriginal and Islander Day of Observance Committee) to include Torres Strait Islanders.<sup>20</sup>

### **More recent petitions**

In 1988 at the Barunga community, a bark petition was presented to then Prime Minister Bob Hawke that called for specific recognition of customary laws in the judicial system and a Treaty that recognises prior Aboriginal ownership and sovereignty.<sup>21</sup> In response to the Barunga Statement, as it came to be known, the Honourable Bob Hawke expressed his wish to enter into a treaty with Aboriginal Australians by 1990. Bob Hawke lost office before he could achieve his wish.<sup>22</sup>

On 23 July 2008 while in Yirrkala accepting a bark petition calling for full recognition of Indigenous rights in the Australian Constitution, the Prime Minister agreed to start a

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<sup>17</sup> ABC Website, 'Mission Voices: Coranderrk Mission History', [http://www.abc.net.au/missionvoices/coranderrk/mission\\_history/default.htm](http://www.abc.net.au/missionvoices/coranderrk/mission_history/default.htm), at December 2009

<sup>18</sup> ABC Website, 'Mission Voices: Coranderrk, Significant Events', [http://www.abc.net.au/missionvoices/coranderrk/significant\\_events/default.htm](http://www.abc.net.au/missionvoices/coranderrk/significant_events/default.htm), at 10 December 2009

<sup>19</sup> Australian Government Culture Portal, 'Bark petitions: Indigenous art and reform for the rights of Indigenous Australians', <http://www.cultureandrecreation.gov.au/articles/indigenous/barkpetitions/>, 10 December 2009

<sup>20</sup> Australian Government Culture Portal, 'NAIDOC Week', <http://www.cultureandrecreation.gov.au/articles/indigenous/naidoc/index.htm>, at December 2009

<sup>21</sup> Australian Government Culture Portal, 'Bark petitions: Indigenous art and reform for the rights of Indigenous Australians', <http://www.cultureandrecreation.gov.au/articles/indigenous/barkpetitions/>,

<sup>22</sup> Australian Government Culture Portal, 'Bark petitions: Indigenous art and reform for the rights of Indigenous Australians', <http://www.cultureandrecreation.gov.au/articles/indigenous/barkpetitions/>, 10 December 2009

consultation process about constitutional recognition of Aboriginal and Torres Strait Islanders.<sup>23</sup>

## 1967 Referendum

The process of establishing NADOC and the 1966 Wave Hill walk-off led to the change heralded in by the result of the 1967 referendum. On the second question of the referendum to determine whether two references in the Australian Constitution discriminating against Aboriginal people should be removed, Australians voted overwhelmingly in favour of change (90.77%).<sup>24</sup> Contrary to popular misconception, the 1967 referendum did not give Aboriginal people the right to vote. This had been achieved first for Commonwealth elections in 1962 and later by the States.<sup>25</sup>

## Aboriginal Land Rights (Northern Territory) Act 1976

In 1966 the Gurindji walked-off the Wave Hill cattle station as a protest against work and wage conditions and demanded recognition of their ownership and therefore return of their traditional land. The seven year fight eventually led to the Commonwealth *Aboriginal Land Rights Act (Northern Territory), 1976* (ALRA).<sup>26</sup> This was the first major positive step towards formal recognition and preservation of Aboriginal connection to land.<sup>27</sup> The ALRA permitted blocks of land to be granted to Aboriginal traditional owners to be held in trust by the land councils created by the Act.<sup>28</sup> The ALRA recognises Aboriginal customary land ownership and practices.<sup>29</sup>

The ALRA recognises customary law as a source of law insofar as it has the ability to affect the application of certain NT law to land vested in an Aboriginal Land Trust. Section 71 provides for traditional owners to enter, use and occupy that land in accordance with Aboriginal tradition pertaining to that land and the people of that land. Section 74 provides for NT law to apply to that land as long as the NT law can operate concurrently with the ALRA. When read together, the application of NT law on Aboriginal land under the ALRA is qualified by 'in accordance with Aboriginal tradition'. The extent to which to enter, use and occupy 'in accordance with Aboriginal tradition'

<sup>23</sup> ABC, *ABC News*, 'PM to consider Indigenous rights recognition in Constitution', <[abc.net.au/news/stories/2008/07/23/2312344.htm](http://abc.net.au/news/stories/2008/07/23/2312344.htm)>, accessed 28 July 2008.

<sup>24</sup> National Archives of Australia, Fact sheet 150 – The 1967 Referendum, <http://www.naa.gov.au/about-us/publications/fact-sheets/fs150.aspx>, at 10 December 2009

<sup>25</sup> National Archives of Australia, Fact sheet 150 – The 1967 Referendum, <http://www.naa.gov.au/about-us/publications/fact-sheets/fs150.aspx>, at 10 December 2009

<sup>26</sup> National Archives of Australia, 'Fact sheet 224 – Wave Hill 'walk-off'', <http://www.naa.gov.au/about-us/publications/fact-sheets/fs224.aspx>, at 10 December 2009

<sup>27</sup> C. Cook, R. Creyke, R. Geddes & D. Hamer (2009), 'Laying Down the Law', Lexis Nexis Butterworths

<sup>28</sup> C. Cook, R. Creyke, R. Geddes & D. Hamer (2009), 'Laying Down the Law', Lexis Nexis Butterworths

<sup>29</sup> NTLRC, *Report on Aboriginal Customary Law*, 10.4-10.7.

could deem NT law inapplicable is difficult to determine because of the imprecise definition of the term 'Aboriginal tradition'.<sup>30</sup>

The High Court of Australia emphasised the impact of recognition of Aboriginal customary law within the ALRA:

When land becomes Aboriginal land, the use or occupation to which an Aboriginal is entitled according to Aboriginal tradition is guaranteed by s71, and the laws of the Northern Territory – including planning laws – are incapable of interfering with that use or occupation.<sup>31</sup>

The ALRA gives freehold title to traditional land to the Aboriginal traditional owners and importantly gives veto power over mining and development on those lands.

Aboriginal traditional owners, through Land Trusts established under the Act, own land as inalienable Aboriginal freehold title. An important feature of the land rights system is the veto which traditional owners have in relation to proposed exploration, mining and other developments on their land.

In addition, under the *Aboriginal Land Act* 1978 (NT), permits are required to enter Aboriginal land, except for a specified group of people, and the Administrator may restrict entry into seas adjoining Aboriginal land.<sup>32</sup>

The previous Chief Executive of the Northern Land Council described Land Councils and the ALRA as 'half-way houses between introduced and the indigenous elements of governance'.<sup>33</sup> The significance of recognition of customary law in relation to land rights was further emphasised:

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<sup>30</sup> NTLRC, *Report on Aboriginal Customary Law*, 10.4-10.5.

<sup>31</sup> *R v Kearney; ex p Northern Land Council* (1984) 158 CLR 365 at 392-93 (Brennan J) cited in NTLRC, *Report on Aboriginal Customary Law*, 10.7.

<sup>32</sup> NTLRC, *Report on Aboriginal Customary Law*, Background Paper 3, 4(i). Note that the Commonwealth Government's intervention into Territory's Indigenous communities has included removing the requirement for permits for people performing functions under Northern Territory and Commonwealth Acts and in respect of common areas.

<sup>33</sup> N. Fry, 'The role of Land Councils and traditional owners in supporting effective Indigenous governance', a speech to the Building Effective Governance Conference, Jabiru, 4-7 November 2003.

At the heart of land rights and native title is the principle of the informed consent of traditional owners. This fundamental tenet is an attempt by Australian law to “see” Aboriginal law in operation, and serves as an important touchstone for all cross-cultural decision-making.<sup>34</sup>

### **Mabo Decision and the Native Title Act**

In 1992 the High Court of Australia found that Australia was not uninhabited or *terra nullius* and recognised the traditional rights to native title of Indigenous people. The following year, the *Native Title Act* was passed by the federal Parliament to recognise the *Mabo* findings and establish a process for native title claims. It recognises the pre-existing (native title) rights to and interests in land for Indigenous people in accordance with their traditional laws and customs. Subsequently, the High Court in its *Wik* decision, found that native title can co-exist with rights of leaseholders or pastoralists. The *Native Title Act* can therefore apply to areas in the Territory not covered by the ALRA.

Submissions to the recent House of Representatives Standing Committee on Legal and Constitutional Affairs commented on the relevance of the *Native Title Act* in the Northern Territory to recognising Indigenous interests in land management:

The *Native Title Act* 1993 provides a framework for the negotiation and resolution of issues concerning exploration and mining grants. The Committee heard that in November 2006, there were around 185 native title claims in the Northern Territory that were yet to be resolved, about half of which were made to secure the right to negotiate over exploration and mining grants...

The Committee heard that while the *Native Title Act* 1993 added an additional layer of bureaucracy to mining related activity, it is now considered an established part of the legal framework and encouraged the practice of cooperation and relationship building through Indigenous Land Use Agreements.<sup>35</sup>

<sup>34</sup> Fry, ‘The role of Land Councils’, p.2.

<sup>35</sup> HORSCLA, *The long road to statehood: Report of the inquiry into the federal implication of statehood for the Northern Territory*, May 2007, 5.15-5.17, <[aph.gov.au/house/committee/laca/ntstatehood/report.htm](http://aph.gov.au/house/committee/laca/ntstatehood/report.htm)>, accessed 2 July 2008.

## **Ngarra (Chamber of Law) Ceremony, Galiwinku**

In 2005, representatives of the NT legal system attended the conclusion of Ngarra of the Dhurili Njaymil clan at the invitation of the clan elders. The invited guests witnessed the conclusion of the sittings of the local Yolgnu parliament, which commenced several months earlier. The clan lawmen had been discussing local parliamentary and legal matters in the context of traditional law. A written document called an 'Introduction to Local Traditional Law', translated into English from the traditional language was formally presented to the Chief Justice of the Northern Territory, Mr Brian Martin. The clan elders hoped that the unique and historical occasion would sow the seeds for greater discussion between representatives of Yolgnu and Westminster parliamentary systems of law about amongst other things, the rule of law and the administration of justice (both Yolgnu and European).<sup>36</sup>

## **Apologies to the Stolen Generations**

In October 2001 the Northern Territory Legislative Assembly moved a motion of apology to the Territory's Stolen Generation of Aboriginal children removed from their families and communities under the authority of the Commonwealth Aboriginal Ordinance. The then Chief Minister of the Northern Territory, the Hon Clare Martin, MLA, sought bipartisan support for the motion's expression of sorrow, compassion and apology '...for past wrongs in order that we can move forward together towards reconciliation.'<sup>37</sup> In passing this motion, the Northern Territory Legislative Assembly joined other State and Territory Parliaments in officially apologising to Indigenous people.<sup>38</sup>

In February 2008, the Prime Minister moved a motion of apology to Australia's Indigenous peoples to 'honour Indigenous peoples of this land...[and to] reflect on past mistreatment.' He said:

The time has come for the nation to turn a new page in Australia's history by righting the wrongs of the past and so moving forward with confidence to the future.<sup>39</sup>

<sup>36</sup> Newsletter of the Northern Territory Anti-Discrimination Commission, Edition 7, October 2005

<sup>37</sup> Northern Territory Legislative Assembly (NTLA), *Debates*, Motion – Stolen Generation, 16 October 2001.

<sup>38</sup> Recommendation 5a of the *Bringing them home* Report recommended that all Australian parliaments acknowledge the responsibility of their predecessors for the laws, policies and practices of forcible removal and officially apologise to Indigenous people. See HREOC, *Bringing them home – Community Guide*, <austlii.edu.au/au/special/rsjproject/rsjlibrary/hreoc/stolen\_summary/>, accessed 29 July 2008. Acting on this, all State and Territory Parliaments, except Queensland and the Northern Territory, passed motions of apology to the Stolen Generations in 1997. The Queensland Parliament passed an apology motion in 1999. See HREOC, *Bringing them home: Apologies by State and Territory Parliaments*, <hreoc.gov.au/social\_justice/bth\_report/apologies\_states.html>, accessed 29 July 2008.

<sup>39</sup> Australian Parliament House of Representatives, *Debates*, 13 February 2008.

The importance of the apology to a national process of reconciliation between Indigenous and non-Indigenous Australians continues to be acknowledged by Indigenous and non-Indigenous leaders. The Prime Minister also made a commitment to consult the Australian community on an appropriate approach to constitutionally recognise Indigenous rights.<sup>40</sup> This follows House of Representatives Standing Committee on Legal and Constitutional Affairs discussion on amending the Australian Constitution, which included considering Indigenous recognition.<sup>41</sup>

## State and Territory Constitutions

All Australian States have Constitutions and both mainland Territories have legislation enabling self-government that effectively serve as their Constitutions. The Australian Capital Territory (ACT) and Victoria have passed rights-based legislation<sup>42</sup> and Tasmania and Western Australia are looking at passing similar legislation.<sup>43</sup> Appendix G sets out current recognition of Aboriginal rights in State and Territory constitutions and/or rights-based legislation. The ACT and Victoria are the only Australian jurisdictions to recognise Indigenous rights or interests in either their Constitutions or separate legislation.

The ACT's *Human Rights Act 2004* aims to 'respect, protect and promote' the civil and political rights it defines and recognises. The Preamble to the Act acknowledges the importance of human rights for Indigenous peoples:

7. Although human rights belong to all individuals, they have special significance for Indigenous people – the first owners of this land, members of its most enduring cultures, and individuals for whom the issue of rights protection has great and continuing importance.<sup>44</sup>

Section 27 of the Act establishes the rights of minorities:

Anyone who belongs to an ethnic, religious or linguistic minority must not be denied the rights, with other members of the minority, to enjoy his or her culture, to

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<sup>40</sup> Australian Broadcasting Commission (ABC), 'PM to consider Indigenous rights recognition in Constitution', 23 July 2008, <[abc.net.au/news/stories/2008/07/23/2312344.htm](http://abc.net.au/news/stories/2008/07/23/2312344.htm)>, accessed 28 July 2008.

<sup>41</sup> HORSCLCA, *Reforming our Constitution*.

<sup>42</sup> *Human Rights Act 2004 (ACT)* and the *Charter of Human Rights and Responsibilities Act 2006 (Vic)*.

<sup>43</sup> ABC, 'A Human Rights Act for Australia?', *Law Report*, 22 August 2006, <[abc.net.au/rn/lawreport/stories/2006/1720788.htm](http://abc.net.au/rn/lawreport/stories/2006/1720788.htm)>, accessed 28 July 2008.

<sup>44</sup> *Human Rights Act*, Preamble, clause 7.

declare and practise his or her religion, or to use his or her language.<sup>45</sup>

The ACT Government's move to incorporate a human rights culture in the ACT is further articulated in the inclusion of the sources of human rights in the International Covenant on Civil and Political Rights in a Schedule to the Act. In addition, four related United Nations instruments are published on the ACT legislation register.<sup>46</sup>

The Victorian *Constitution Act 1975* recognises that Victoria was established without 'proper consultation, recognition or involvement of the Aboriginal people of Victoria' and that the Aboriginal people are the original custodians of the land.

(2) The Parliament recognises that Victoria's Aboriginal people, as the original custodians of the land on which the Colony of Victoria was established-

(a) have a unique status as the descendants of Australia's first people; and

(b) have a spiritual, social, cultural and economic relationship with their traditional lands and waters within Victoria; and

(c) have made a unique and irreplaceable contribution to the identity and well-being of Victoria.

(3) The Parliament does not intend by this section-

(a) to create in any person any legal right or give rise to any civil cause of action; or

(b) to affect in any way the interpretation of this Act or of any other law in force in Victoria.<sup>47</sup>

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<sup>45</sup> *Human Rights Act*, Preamble, clause 27.

<sup>46</sup> NAA, 'Human Rights Act 2004 (ACT)', *Documenting Democracy*, <foundingdocs.gov.au/item.asp?sdlID=125>, accessed 28 July 2008. Other legislation listed by the ACT legislation are the Convention against Torture and other Cruel, Inhuman or Degrading treatment, Convention on the Elimination of all Forms of Discrimination against Women, Convention of the Rights of the Child and the International Convention on the Elimination of all Forms of Racial Discrimination.

<sup>47</sup> Parliament of the Government of Victoria (VIC), *Constitution Act 1975*, s.1A, <[legislation.vic.gov.au/](http://legislation.vic.gov.au/)>, accessed 29 July 2008.

In 2006 the Victorian Parliament passed the *Charter of Human Rights and Responsibilities Act*. The Charter's Preamble recognises that all people are born free and equal in rights and that human rights have a special significance for the Aboriginal people of Victoria as descendants of Australia's first people.<sup>48</sup>

The Charter establishes that Aboriginal people and their community hold distinct cultural rights:

- (a) to enjoy their identity and culture; and
- (b) to maintain and use their language; and
- (c) to maintain their kinship ties; and
- (d) to maintain their distinctive spiritual, material and economic relationship with the land and waters and other resources with which they have a connection under traditional laws and customs.<sup>49</sup>

## Commonwealth Constitutional Reform

The existing Commonwealth Constitution was written late in the nineteenth century in a deliberate move by separate colonies to establish the parameters for forming a federation. The legislation was passed as the *Commonwealth of Australia Constitution Act 1900* by the British Parliament.

The Constitution's preamble contains no reference to Australia's Indigenous people or to values which could guide a relationship between Indigenous and non-Indigenous Australians.<sup>50</sup>

The Constitution, as passed in 1900, also specifically excluded Australia's Indigenous peoples from its definition of Australian citizens. Following a successful referendum in 1967,<sup>51</sup> the two exclusionary references to Indigenous Australians were removed.<sup>52</sup>

It is important to note that it was the referendum itself that is seen as:

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<sup>48</sup> VIC, *Charter of Human Rights and Responsibilities Act 2006*, Preamble, <dms.dpc.vic.gov.au/>, accessed 28 July 2008.

<sup>49</sup> VIC, *Charter of Human Rights*, s.19.

<sup>50</sup> Council for Aboriginal Reconciliation (CAR), *The Position of Indigenous People in National Constitutions*, Conference held Canberra 4-5 June 1993, Conference Report and Papers, <austlii.edu.au/au/special/rsjproject/rsjlibrary/car/>, accessed 7 August 2008.

<sup>51</sup> On 27 May 1967 a Federal referendum was held to ask two questions, one of which was to determine if two discriminatory references to Aboriginal people in the Constitution should be removed. The Yes vote to this question was the highest vote ever recorded in a referendum (92 per cent) and allowed for the removal of the references to s51(xxvi) and the whole of s127. NAA, 'Fact sheet 150 – The 1967 Referendum', <[naa.gov.au/about-us/publications/fact-sheets/fs150.aspx](http://naa.gov.au/about-us/publications/fact-sheets/fs150.aspx)>, accessed 28 July 2008.

<sup>52</sup> HORSCLCA, *Reforming our Constitution*, p.48.

...a landmark in Australian history: it marked the end of an era for indigenous Australians of official invisibility and marked the start of a new political struggle by indigenous people for land rights.<sup>53</sup>

Others have noted it was the referendum that 'focussed ...on the identity of Indigenous Australians and their place as equal members of the national community, rather than the actual constitutional provisions.'<sup>54</sup>

Two sections (25 and 51 (xxvi)) which remain in the Constitution have been identified as racially discriminatory and requiring reform, in addition to the need to address the lack of positive recognition of Indigenous Australians.<sup>55</sup>

The previous and current Prime Ministers of Australia have indicated support for a referendum to amend the constitution to recognise Aboriginal and Torres Strait Islanders in the Constitution preamble.

In June 2008, the House of Representatives Standing Committee on Legal and Constitutional Affairs (HORSCLCA) held a 'roundtable discussion' on reforming the Constitution. In the published summary of that discussion, constitutional reform is emphasised as being a part of the broader issue of Australia's identity and future direction. The unique Indigenous rights that need to be recognised in the Constitution were described by one of the roundtable participants as:

...access to customary law or our rights to engage in our cultural practices and also our traditional laws and restorative justice.<sup>56</sup>

Other participants commented on related issues of a treaty between Indigenous and non-Indigenous Australians and of applying other countries' knowledge and experience in recognising Indigenous rights.<sup>57</sup>

On 23 July 2008 while in Yirrkala accepting a bark petition calling for full recognition of Indigenous rights in the Australian Constitution, the Prime Minister, the Hon Kevin Rudd, MLA agreed to start a consultation process about Aboriginal recognition in the Constitution.<sup>58</sup> The Government in its formal response to the Summit Report

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<sup>53</sup> CAR, *The Position of Indigenous People*.

<sup>54</sup> HORSCLCA, *Reforming our Constitution*, p.48.

<sup>55</sup> HORSLSA, *Reforming our Constitution*, p.48.

<sup>56</sup> HORSLSA, *Reforming our Constitution*, p.52.

<sup>57</sup> HORSLSA, *Reforming our Constitution*, p.52.

<sup>58</sup> ABC, *ABC News*, 'PM to consider Indigenous rights recognition in Constitution', <[abc.net.au/news/stories/2008/07/23/2312344.htm](http://abc.net.au/news/stories/2008/07/23/2312344.htm)>, accessed 28 July 2008.

acknowledged the importance of considering the recognition of Aboriginal and Torres Strait Islanders in the Australian Constitution and gave its commitment to consult the Australian community on this issue as well as a range of other constitutional reforms.<sup>59</sup>

### ***Legal recognition now***

Within the Australian legal system there is no general, formal recognition of Aboriginal customary law.<sup>60</sup> Nevertheless recognition is inferred, and therefore exists in some pieces of legislation. Previous reports including the 1986 ALRC and the 2003 NTLRC reports into customary law fundamentally acknowledge the persistence of customary law in the lives of traditionally oriented Aboriginal people.<sup>61</sup> The *ALRA* recognises Aboriginal customary land ownership and land management systems. The *Mabo* and *Wik* High Court decisions and the *Native Title Act* recognises traditional native title rights. The High Court's Blue Mud Bay decision extended this recognition to the inter-tidal zone and waterways adjoining Indigenous traditional land.<sup>62</sup> Other examples include:

- The scheme of Aboriginal sacred site protection, provided through the *ALRA* and reciprocal Northern Territory legislation (the *Aboriginal Sacred Sites Act*) recognises the Indigenous status of Aboriginal people.<sup>63</sup>
- The *Fisheries Act* protects the traditional fishing rights of Aboriginal people.<sup>64</sup>
- Under section 37 the *Crown Lands Act*, leases that contain a reservation for the Indigenous people of the Northern Territory, allow Aboriginal people who have traditionally used land to enter the land and use its resources for food or ceremonial purposes.<sup>65</sup>
- Under section 38 of the *Pastoral Land Act* land is reserved for Aboriginal people who live on a pastoral lease or who traditionally occupied and used the land, or used its resources. Additional sections allow for land from leases to be excised as community living areas and for access to Aboriginal land by crossing pastoral leases.<sup>66</sup>

Details of legal recognition of customary law in the Territory, including within the criminal law are provided in the Northern Territory Law Reform Committee's 2003

<sup>59</sup> Australian Government, 'Responding to the Australia 2020 Summit', 2009, p61

<sup>60</sup> Thomas Reuters Legal Online, *The Laws of Australia Encyclopaedia*, 1, 'Aboriginal and Torres Strait Islanders', 1.2.4, Lawbook Company

<sup>61</sup> D Mildren RFD, 'Customary law: Is it relevant?', *NT Law Journal*, (2008), 1, 69-78

<sup>62</sup> High Court of Australia, *Northern Territory of Australia v Arnhem Land Aboriginal Land Trust*, HCA 29, 30 July 2008 <austlii.edu.au/au/cases/cth/high\_ct/2008/29.html> , accessed 30 July 2008.

<sup>63</sup> LCAC, *An Examination of Structural Relationships in Indigenous Affairs and Indigenous Governance within the Northern Territory*, Aboriginal Areas Protection Authority, Acting Chief Executive, Dr John Avery - Submission No.0006, pp.2-3.

<sup>64</sup> NTLRC, *Report on Aboriginal Customary Law*, Background Paper 3, p.23.

<sup>65</sup> NTLRC, *Report on Aboriginal Customary Law*, Background Paper 3, p.24.

<sup>66</sup> NTLRC, *Report on Aboriginal Customary Law*, Background Paper 3, p.24.

*Report on Aboriginal Customary Law*.<sup>67</sup> It is therefore not intended to discuss these issues in great detail here except where there have been noteworthy changes to relevant legislation. The following briefly lists and discusses some of the matters considered by the Committee. It is important to note, that where customary law is currently recognised, its incorporation into the legal system, usually as a reference tool, that gives customary law, statutory or common law force, rather than as a legal system with its 'own inherent legal force'.<sup>68</sup>

## Criminal justice

The issue of whether Aboriginal customary law should be recognised within Australian law arose mainly in reference to criminal law. The ALRC identified a number of ways customary law in operation may conflict with the criminal justice system.

1. An offence of the general law by an Aboriginal or Torres Strait person may also provoke a customary law response.
2. Customary law may require an Aboriginal person to take certain action that might be in contravention of the general law.<sup>69</sup>
3. An accused person may contravene customary law yet not have violated the general law.
4. There are some general laws which have no direct customary law equivalents such as dangerous driving but a customary law may still require the Aboriginal person to respond to the customary law e.g. death of person as result of the act of dangerous driving.
5. There may be conflicts between the mental elements and defences of crimes under the general law that do not accord with the patterns or standards of behaviour under customary law.
6. Difficulties with English, and further to that, complex legal language, disadvantage Aboriginal and Torres Strait Islanders during court proceedings and can lead to misunderstanding of the proceedings.
7. The lifestyles, traditional or in response to modern society of some Aboriginal people are not understood by the general law and can lead to certain types of offences e.g. being drunk in a public place or living without visible and lawful means of support.<sup>70</sup>

<sup>67</sup> Background Paper 3, Legal Recognition of Aboriginal Customary Law.

<sup>68</sup> R. McLaughlin, 'Some Problems and Issues in the Recognition of Indigenous Customary Law', *Aboriginal Law Bulletin* 20, 1996, <austlii.edu.au/au/journals/AboriginalLB/1996/45.html>, accessed 19 September 2008.

<sup>69</sup> "For example, in *R v Jagamara* (unreported, NTSC, Muirhead J, 28 May 1984), the accused was obliged under his customary law to spear the deceased, but in doing so he had no intention of causing the death of the deceased. He was convicted of manslaughter and sentenced to the rising of the court (ie a nominal sentence)", in Thomas Reuters Legal Online, *The Laws of Australia Encyclopaedia*, 1, 'Aboriginal and Torres Strait Islanders', 1.2.11, Lawbook Company

<sup>70</sup> Thomas Reuters Legal Online, *The Laws of Australia Encyclopaedia*, 1, 'Aboriginal and Torres Strait Islanders', 1.2.11, Lawbook Company

In the NT, notwithstanding s74 of the ALRA, the *Criminal Code* (NT) applies to land granted under the ALRA.<sup>71</sup> Customary law is not legally binding and enforceable in the NT courts, even on Aboriginal or Torres Strait Islanders who adhere to it. In the case of *Director of Public Prosecutions Reference (No 1 of 1999)* where an traditional elder allegedly assaulted a non Aboriginal person who took photographs of the community and its people without the express permission of the community, it was held that the defendant was not authorised by NT law to enforce traditional law on anyone entering the land regardless of whether the person is an authorised person, Aboriginal person or not.<sup>72</sup>

Although no legislative recognition within the Australian criminal justice system is given to customary law, there is recognition that customary law exists and that it can have relevance in determining criminal liability.<sup>73</sup>

Aboriginal law and culture may give rise to a fact that is significant to the application of Australian criminal law.<sup>74</sup>

State and Territory legislation relating to the use of land and sea resources for food may refer to consequences at law of a person acting according to Aboriginal law, culture and tradition, (read subject to s211 of the *Native Title Act 1993*).<sup>75</sup> A native title holder is not criminally responsible for harvesting natural resources for food or conducting cultural or spiritual activities for personal, domestic or non-commercial community necessities.<sup>76</sup>

Where a discretion<sup>77</sup> is being exercised by the police, prosecution or the judiciary, the fact that a defendant is compelled by Aboriginal law, custom or tradition may be taken into account by the decision-maker. It is not a defence if a person acting in accordance with customary law commits an offence against the general criminal law unless the defence fits within existing criminal defences.<sup>78</sup> In other words:

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<sup>71</sup> Thomas Reuters Legal Online, *The Laws of Australia Encyclopaedia*, 1, 'Aboriginal and Torres Strait Islanders', 1.5.5, Lawbook Company

<sup>72</sup> 10 NTLR 1, 134 NTR 1, 156 FLR 310 [PDF], [2000] NTCA 6

<sup>73</sup> Thomas Reuters Legal Online, *The Laws of Australia Encyclopaedia*, 1, 'Aboriginal and Torres Strait Islanders', 1.2.12, Lawbook Company

<sup>74</sup> Thomas Reuters Legal Online, *The Laws of Australia Encyclopaedia*, 1, 'Aboriginal and Torres Strait Islanders', 1.5.4, Lawbook Company

<sup>75</sup> Thomas Reuters Legal Online, *The Laws of Australia Encyclopaedia*, 1, 'Aboriginal and Torres Strait Islanders', 1.5.5, Lawbook Company

<sup>76</sup> Thomas Reuters Legal Online, *The Laws of Australia Encyclopaedia*, 1, 'Aboriginal and Torres Strait Islanders', 1.5.9, Lawbook Company

<sup>77</sup> "The power or authority of a decision maker to choose between alternatives, or to choose no alternative. Discretion is usually confined by the statute which describes the ambit of decision making power." Butt, P. (ed), *Butterworths Concise Australian Legal Dictionary* (3rd ed, 2004) LexisNexis Butterworths, Sydney, 130

<sup>78</sup> Thomas Reuters Legal Online, *The Laws of Australia Encyclopaedia*, 1, 'Aboriginal and Torres Strait Islanders', 1.2.12, Lawbook Company

Whether or not Aboriginal law exists, the courts can legally ignore it, unless the Criminal Code itself (or another law) says the court has to take Aboriginal law into account.<sup>79</sup>

An Aboriginal defendant may seek excuse of criminal responsibility<sup>80</sup> where:

1. there is an honest claim of right that the property belongs to the defendant under customary law and general law (*Criminal Code* (NT), s30(2));<sup>81</sup>
2. provocation is shown to have led to a defendant's loss of self-control and the action having arisen while self-control was deprived. Customary law, culture or tradition may be of relevance in determining what constitutes provocation. In the NT, the excuse of provocation formerly provided by s 34 was repealed in 2006. Now under s 158 in relation to provocation, only applies partially to reducing a conviction of murder to manslaughter and applies if:

(a) the conduct causing death was the result of the defendant's loss of self-control induced by conduct of the deceased towards or affecting the defendant; and

(b) the conduct of the deceased was such as could have induced an ordinary person to have so far lost self-control as to have formed an intent to kill or cause serious harm to the deceased.<sup>82</sup>

In the NT an ordinary person includes an ordinary Aboriginal person living today in the context of a remote Aboriginal community;<sup>83</sup>

3. duress is involved, that is where the will of an Aboriginal defendant was deprived pursuant to customary law, culture or tradition and led to the criminal act being committed and where a person of ordinary firmness of mind and will might have succumbed to the same threat in the same way (*Criminal Code* (NT), s 40);<sup>84</sup>
4. there is statutory authorisation, where the customary law by which the defendant claims the authorisation of the act is capable of recognition within the general law of the relevant jurisdiction (*Criminal Code* (NT), s 26). In jurisdictions where

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<sup>79</sup> Northern Territory Law Reform Committee (NTLRC), *Report of the Committee of Inquiry into Aboriginal Customary Law*, 2003

<sup>80</sup> Thomas Reuters Legal Online, *The Laws of Australia Encyclopaedia*, 1, 'Aboriginal and Torres Strait Islanders', 1.5.5, Lawbook Company

<sup>81</sup> Thomas Reuters Legal Online, *The Laws of Australia Encyclopaedia*, 1, 'Aboriginal and Torres Strait Islanders', 1.5.6, Lawbook Company

<sup>82</sup>  
<sup>83</sup> Thomas Reuters Legal Online, *The Laws of Australia Encyclopaedia*, 1, 'Aboriginal and Torres Strait Islanders', 1.5.7, Lawbook Company

<sup>84</sup> Thomas Reuters Legal Online, *The Laws of Australia Encyclopaedia*, 1, 'Aboriginal and Torres Strait Islanders', 1.5.8, Lawbook Company

statutory authorisation can be used as a defence, the word 'law' has been held to not include Aboriginal law (includes NT);<sup>85</sup>

5. traditional punishment has been meted out in accordance with customary law with the consent of an Aboriginal victim, an Aboriginal defendant may rely upon this consent. This is not applicable to homicide or grievous bodily harm offences. In assault cases the prosecution must prove the absence of consent of the victim. In regards to other offences such as those involving bodily harm, there is no clear view of the significance of consent in general and consent to the giving out of punishment in line with Aboriginal law and culture.<sup>86</sup>

## Marriages and family

Traditional Aboriginal marriages are not recognised as marriage, neither under common law, nor under the *Marriage Act 1961* (Cth).<sup>87</sup> However, limited legislative recognition of traditional Aboriginal marriages for certain purposes is provided.<sup>88</sup> The *De Facto Relationships Act* recognises Aboriginal or Torres Strait Islander marriages (including polygamous marriages) made 'according to customs and traditions of the particular community of Aboriginals or Torres Strait Islanders with which either person identifies' as *de facto* relationships (s 3(2)(a)).<sup>89</sup>

In relation to compensation paid to a Commonwealth employee who dies, under the *Federal Safety, Rehabilitation and Compensation Act 1988* (Cth), for an Aboriginal or Torres Strait Islander employee, spouse includes a husband or wife under customary law of the tribe or group to which the deceased employee belonged.<sup>90</sup>

In the NT, a traditional Aboriginal marriage is recognised under the *Adoption of Children Act 1994* (NT)<sup>91</sup> for the purposes of adopting children. The Act requires that regard be given to Aboriginal traditions relevant to a child and that optimally, consultation in regard to a child is conducted with people who have responsibility for the welfare of the child according to customary law.<sup>92</sup> Similar type of recognition of traditional Aboriginal marriages is provided for in:

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<sup>85</sup> Thomas Reuters Legal Online, *The Laws of Australia Encyclopaedia*, 1, 'Aboriginal and Torres Strait Islanders', 1.5.11, Lawbook Company.

<sup>86</sup> Thomas Reuters Legal Online, *The Laws of Australia Encyclopaedia*, 1, 'Aboriginal and Torres Strait Islanders', 1.5.12, Lawbook Company.

<sup>87</sup> Thomas Reuters Legal Online, *The Laws of Australia Encyclopaedia*, 1, 'Aboriginal and Torres Strait Islanders', 1.2.8, Lawbook Company

<sup>88</sup> Thomas Reuters Legal Online, *The Laws of Australia Encyclopaedia*, 1, 'Aboriginal and Torres Strait Islanders', 1.2.8, Lawbook Company

<sup>89</sup> NTLRC, *Report on Aboriginal Customary Law*, Background Paper 3, pp.16-7.

<sup>90</sup> Thomas Reuters Legal Online, *The Laws of Australia Encyclopaedia*, 1, 'Aboriginal and Torres Strait Islanders', 1.2.8, Lawbook Company

<sup>91</sup> *Adoption of Children Act 1994* (NT) s 3(1), "spouse" means a person who is married or who is living in a traditional Aboriginal marriage in relation to the man or woman to whom he or she is married or with whom he or she entered into the traditional Aboriginal marriage

<sup>92</sup> NTLRC, *Report on Aboriginal Customary Law*, Background Paper 3, p.18.

- *Administration and Probate Act 1969* (NT), s 6(4). The Act also recognises Aboriginal community customs and traditions in determining claims against Aboriginal intestate estates.<sup>93</sup>
- *Compensation (Fatal Injuries) Act 1974* (NT), s 4(3);
- *Crimes (Victims Assistance) Act 1982* (NT), s 4(2);
- *Criminal Code* (NT), s 1;
- *Family Provision Act 1970* (NT), s 7(1A);
- *Motor Accidents (Compensation) Act 1979* (NT), s 4;
- *Status of Children Act 1979* (NT), s 3; and
- *Work Health Act 1986* (NT), s 49(1).<sup>94</sup>

Although there are no particular difficulties with regards to transfer of property between living people, Australian laws relating to intestacy and notions of family may not fit with Aboriginal ideas of family. In the NT, intestacy laws (*Family Provision Act 1970*) provide for Aboriginal traditions to be taken into account.<sup>95</sup>

In relation to care of children, most State and Territories, either in administration or legislation, recognise Aboriginal family relationships. In the NT, the *Care and Protection of Children Act 2007* (which replaced the *Community Welfare Act* (NT)), provides for a definition of the extended family of child to include

- (a) the relatives of the child; and
- (b) the members of the extended family of the child in accordance with:
  - (i) any customary law or tradition applicable to the child; or
  - (ii) any contemporary custom or practice; and
- (c) anyone who is closely associated with the child or another family member of the child.<sup>96</sup>

## Customary Law and Sentencing in the NT

Aspects of customary law, culture and tradition may be of relevance in sentencing such as the view of the community on an appropriate sentence and the effect of a particular sentence on the community for example if a particular sentence could assist in the alleviation of the situation in the community underlying the offence.<sup>97</sup> The way a

<sup>93</sup> NTLRC, *Report on Aboriginal Customary Law*, Background Paper 3, pp.20-1.

<sup>94</sup> Thomas Reuters Legal Online, *The Laws of Australia Encyclopaedia*, 1, 'Aboriginal and Torres Strait Islanders', 1.2.8, Lawbook Company

<sup>95</sup> Thomas Reuters Legal Online, *The Laws of Australia Encyclopaedia*, 1, 'Aboriginal and Torres Strait Islanders', 1.2.9, Lawbook Company

<sup>96</sup> *Care and Protection of Children Act 2007* (NT), s 19

<sup>97</sup> Thomas Reuters Legal Online, *The Laws of Australia Encyclopaedia*, 1, 'Aboriginal and Torres Strait Islanders', 1.2.9, Lawbook Company

defendant will be or has been dealt with under customary law, culture or tradition for the offending act, may also have relevance to sentencing. This must be based on evidence submitted by the defendant and must be considered by the court at sentencing.<sup>98</sup> A defendant's conduct may be explained by an aspect of customary law, culture or tradition and may be relevant to sentencing. The court may take into account the fact that a defendant was compelled by or permitted to act under customary law may be relevant in sentencing as an explanation for the conduct.<sup>99</sup>

In 2005, the NT Legislative Assembly passed amendments to the *Sentencing Act 1995* (NT) to allow for information on Aboriginal or Torres Strait Island customary law and community views to be received before sentencing about:

- (a) any aspect of customary law, including punishment or restitution under that customary law that may be of relevance to the offender of the offence; or
- (b) views of members of the Aboriginal community of the offender about the offender or the offence

The information must only be received by a party to the proceedings and only submitted for the court to determine the sentence. Notice must be given to all parties on the substance of the information, before a submission is made about the sentencing, giving other parties reasonable opportunity to respond and presented as evidence on oath, affidavit or statutory declaration.<sup>100</sup> Since then, the Commonwealth *NT National Emergency Response Act 2007* has made ineffective, customary law considerations in bail and sentencing determinations under the *Sentencing Act 1995* (NT).<sup>101</sup>

Conversely, with legislation passed in 2003<sup>102</sup> the Northern Territory acted to reinforce the message that customary law in relation to underage marriage was not a defence and that the statutory age – sixteen – applied in all cases, including in relation to traditional marriages.

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<sup>98</sup> Thomas Reuters Legal Online, *The Laws of Australia Encyclopaedia*, 1, 'Aboriginal and Torres Strait Islanders', 1.5.46, Lawbook Company

<sup>99</sup> Thomas Reuters Legal Online, *The Laws of Australia Encyclopaedia*, 1, 'Aboriginal and Torres Strait Islanders', 1.5.47, Lawbook Company

<sup>100</sup> Sentencing Act (NT) s 104 (made ineffective by Commonwealth legislation in 2007)

<sup>101</sup> *Northern Territory National Emergency Response Act 2007*, Part 6, Bail and Sentencing

<sup>102</sup> Debates - Ninth Assembly, First Session - 25/11/2003 - Parliamentary Record No: 16, Second Reading Speech, Criminal Code Amendment Bill (No 2) (serial 165) Sentencing Amendment Bill (No 2) (Serial 166), Dr Peter Toyne,

<http://notes.nt.gov.au/lant/hansard/hansard9.nsf/WebbySubject/5D19F09A46BC736969256E04007E6074?opendocument>, at 22 February 2010

### 3. WHAT IS CUSTOMARY LAW?

#### ***Customary law definition***

There exists no generally accepted definition of what constitutes the body of law called 'Aboriginal customary law'. In general terms, it is understood that in traditional Aboriginal societies, a body of rules, values and traditions, accepted by the people in those societies, establishes standards or procedures that are followed and upheld in those societies.

Aboriginal customary law governs and regulates just about every facet of life for the people who acknowledge, adhere to and participate in those laws, including the social and cultural (including marriages, raising of children and in relation to and interaction with the environment), economic (including exchange, inheritance and marriage), political and legal (including governance). Aboriginal customary law defines who a person is, her or his relationship to everyone else in their clan or language group and his or her relationship to everyone else in the world. This in turn determines a person's rights and responsibilities.<sup>330</sup> Identity therefore is very much related to customary law. Despite being part of the judicial landscape of Aboriginal and Torres Strait Islander lives, customary law can mean different things to different people, even between Aboriginal and Torres Strait Islanders.<sup>331</sup> It has also been recognised that just like common law in Australia, customary law is dynamic and not frozen in time.<sup>332</sup>

Calls for the recognition of Aboriginal customary law and recognition as a source of law are generally based on issues and ideas surrounding:

- the need for greater recognition and respect for Aboriginal and Torres Strait Islanders, their culture and law and importance of this within Australia;
- the need to acknowledge the significance and continuing relevance of customary law to many Aboriginal and Torres Strait Islanders.
- positive steps toward reconciliation;
- recognition of the pre-existence of Aboriginal law before Australian law and any implications for sovereignty;
- protection and survival of culture;
- empowerment, especially self-determination outcomes;

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<sup>330</sup> Northern Territory Law Reform Committee (NTLRC), *Report of the Committee of Inquiry into Aboriginal Customary Law*, 2003, p13

<sup>331</sup> Rosalie Kunuth-Monks cited in ABC Radio National, The Law Report, 'Customary Law', 29 July 2003, <http://www.abc.net.au/rn/talks/8.30/lawrpt/stories/s912416.htm>, at 10 September 2009

<sup>332</sup> Thomas Reuters Legal Online, *The Laws of Australia Encyclopaedia*, 1, 'Aboriginal and Torres Strait Islanders', 1.2.1, Lawbook Company and NTLRC, *Report on Aboriginal Customary Law*, 10.6

- the idea that in some cases non recognition can lead to injustice<sup>333</sup>; and
- to assist with law and justice matters where customary law may be a factor and could be useful in determining appropriate remedies or resolutions.

The arguments in opposition to formal acknowledgment primarily are in relation to the potential for inconsistency and the need for the primacy of Australian law. There is also the potential for a situation where customary law only applied to the particular Aboriginal people who subscribe to the particular law.

Universal recognition would have the potential for divisiveness between Aboriginal communities and the wider community. There is also some concern that formal acknowledgment would have the potential for Indigenous people to lose control of their customary laws.

It has been noted that not having a precise definition of Aboriginal customary law does not preclude recognition by the general Australian legal system and it is likely that the form of recognition will establish the need for an exact definition.<sup>334</sup> It has also been noted that within Aboriginal and Torres Strait Islander populations, there are representatives of each side of the argument, in favour and against, for further recognition of customary law.<sup>335</sup>

### ***What is a source of law?***

As previously stated (see 'Definitions' pg xi), sources of law are materials, processes and references from which a body of law, applying to and adhered by a group of people, community, country or state, is derived and validated. The two main sources of law in Australia are the common law or case law, and statute law (legislation). In addition, instruments of international law ratified, endorsed or reflected in domestic legislation by Australia can be a source of law. Sources of law in the NT are also set out by an Act of Parliament<sup>336</sup> and include English, South Australian and Commonwealth statute law applicable to the periods of administrative responsibility by those jurisdictions for the Northern Territory, laws enacted by the Northern Territory Legislative Assembly and common law.<sup>337</sup>

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<sup>333</sup> D Mildren RFD, 'Customary law: Is it relevant?', NT Law Journal, (2008), 1, 69-78

<sup>334</sup> Thomas Reuters Legal Online, *The Laws of Australia Encyclopaedia*, 1, 'Aboriginal and Torres Strait Islanders', 1.2.8, Lawbook Company

<sup>335</sup> Australian Broadcasting Corporation, Radio National, The Law Report, 'Customary Law', 29 July 2003, <http://www.abc.net.au/rn/lawreport/stories/2003/912416.htm>, at 10 September 2009

<sup>336</sup> *Sources of the Law Act 1985* (NT).

<sup>337</sup> S. Kift, 'Researching Northern Territory Legislation', *Australian Law Librarian* 6(3), September 1998, pp.189-193 and NTLRC, *Report on Aboriginal Customary Law*, Background Paper 2 'The Recognition of Aboriginal Law as Law', p.8.

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### ***Why did NTLRC recommend customary law be recognised a source of law?***

As this inquiry primarily arose out of the NTLRC recommendation that customary law be recognised as a source of law, it was important for the Committee to understand the reasons given by the NTLRC in support of this recommendation and what suggestions were provided on how this recognition could be implemented in the NT.

The Committee formed the view that Recommendation 11 was offered alongside the other recommendations of the report, as part of a broader strategy to make the most of customary law to the benefit the NT and Indigenous Territorians alike. Recommendation 11 appeared to be offered as one of the possible mechanisms for the NT, especially its Indigenous people and communities, to better respond to Indigenous legal and justice issues and perhaps help to reduce the high representation of Aboriginal and Torres Strait Islanders in NT prisons. Through better justice and fostering of greater understanding between cultures and communities in the NT, this change could perhaps have some potential to help ameliorate some of the social and economic disadvantages affecting Aboriginal and Torres Strait Islanders.

No detail was provided in the NTLRC report on how recognition of customary law as a source of law could be implemented, including through direct constitutional recognition, just that it should be implemented. In a briefing to a previous LCAC, Mr Stephen Herne, the (then) Executive Officer to the Law Reform Committee's Report, noted that the Law Reform Committee did not seek opinions about including customary law as a source of law. He advised that any constitutional recognition needed to be precise in what was proposed to be recognised.<sup>338</sup>

The Law Reform Committee recommended that Aboriginal customary law be recognised as a source of law, regardless of whether the Territory becomes a State. The full legal and constitutional implications of appropriate ways to include recognition of customary law in a Northern Territory Constitution, specifically within the current legal framework were not examined. This would be a vital step as the Northern Territory would be the first Australian jurisdiction to include formal legal recognition of customary law, other than as acknowledgement in a constitutional document or by inference in legislation for specific purposes.

The NTLRC in the background papers to its 2003 report referred the ALRC 1986 report in many instances. The ALRC was in favour of recognition of customary law:

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<sup>338</sup> From transcript synopsis, see Appendix E

The Commission concludes that the arguments in favour of recognition establish a case for the appropriate recognition of Aboriginal customary laws by the general legal system. Non-recognition of Aboriginal laws and traditions in the past has been a significant source of injustice to Aboriginal people, and recognition is still desirable to avoid injustice and to acknowledge the reality of Aboriginal traditions and ways of life. The Commission believes that recognition in appropriate ways is fully consistent both with fundamental values of non[-]discrimination and equality for all Australians, and with ensuring basic human rights.<sup>1</sup> Far from contravening basic human rights, appropriate forms of recognition would be an expression of the need to recognise the human rights and cultural identity of Aboriginal people.<sup>2</sup> Special measures for recognition of Aboriginal customary laws will not be racially discriminatory, nor will they involve a denial of equality before the law, or equal protection, provided certain principles are followed.<sup>3</sup> Other more general arguments against recognition are not persuasive.<sup>4</sup> More often than not they are objections to particular forms of recognition than to any form of recognition at all. However, arguments about recognition do impact on the Commission's approach, on the ways in which its proposals are framed, and on the legal forms acknowledgement of Aboriginal customary laws should take.<sup>339</sup>

The principles upon which the ALRC recommendations were founded specified that recognition should be in appropriate ways by the Australian legal system and within the framework of the general law. The ALRC also cautioned against the creation of new or separate legal structures or the exclusion of the general law. Neither codification nor direct enforcement were deemed as inappropriate forms of recognition.<sup>340</sup> It is interesting to note that the ALRC did not specifically recommend that customary law be recognised as source of law.

### ***What would be the legal effect of recognition of customary law as a source of law?***

- If Aboriginal customary law in its entirety is recognised as a source of NT law that would mean Aboriginal customary law can be referenced or used to derive and validate any NT law in just the same way as any of the current sources of law. Customary law would in effect be incorporated into NT law. The Committee

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<sup>339</sup> Australian Law Reform Commission, Report 31, 'The Recognition of Aboriginal Customary Laws', 1986, 194

<sup>340</sup> Northern Territory Law Reform Committee (NTLRC), *Background Paper 3 Legal recognition of Aboriginal Customary Law*, 2003, p5

found that this point underlies the implications of the NTLRC Recommendation 11 and raised more questions than answers that can be clearly or easily provided.

### **Constitutional recognition here and in other countries**

Australia's (then) Social Justice Commissioner, Mr Tom Calma, released a paper that included examination of international approaches to Indigenous rights.<sup>341</sup> Announcements by the Australian Government in 2008 that it is moving to ratify a range of international human rights agreements emphasises the value of learning from similar experiences in the recognition of Indigenous customary law.<sup>342</sup>

International and Australian examples of recognition of customary law in constitutions demonstrate one of two approaches. One form of recognition, usually included in a preamble, acknowledges the special status of Indigenous people. Alternatively or sometimes additionally, a section is included in the body of a constitution that formally recognises Indigenous rights.

The South African Constitution provides the clearest statements on recognition of customary law. Its preamble acknowledges the impact of the past and provides precise directions about what and how customary law is recognised.<sup>343</sup> These forms of recognition are also compatible with the United Nations *Guidelines on Indigenous Peoples' Issues* which emphasise formal recognition of Indigenous peoples' law and processes as fundamental components of the right to self-determination.<sup>344</sup>

There was support at the Australian Government's 2020 Summit for formal recognition of Australia's Indigenous peoples in an amended Australian Constitution with two streams including recommendations in their top ideas at the close of the Summit. The governance stream recommended recognition of Indigenous people as the traditional custodians and the Indigenous stream advocated for a new national, bipartisan discussion leading to formal legal recognition through either an agreement or constitutional amendment.<sup>345</sup>

The House of Representatives Standing Committee on Legal and Constitutional Affairs' roundtable examined some of the constitutional issues raised at the summit. It did not consider in any detail issues related to recognition of customary law,

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<sup>341</sup> As discussed in Chapter 4.

<sup>342</sup> In a speech at the Human Rights Law Resource Centre, the Attorney-General reported on Australia 'becoming a party to a number of key international instruments', in addition to a commitment to conduct community consultations 'on how best to protect the rights and responsibilities of all Australians': 'Strengthening Human Rights and the Rule of Law'.

<sup>343</sup> See Chapter 3.

<sup>344</sup> UNDG, *Guidelines*, p.13.

<sup>345</sup> As discussed in Chapter 4.

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concluding that there was ‘no one answer as to the best way to provide recognition of Indigenous Australians in the Constitution.’<sup>346</sup>

In July 2008, Prime Minister Rudd announced his intention to commence a consultation process on Aboriginal recognition in the Constitution. No further information is available on the intended process or the broader topics or process for consultation.

The House of Representatives Standing Committee on Legal and Constitutional Affairs inquiry into the federal implications of Statehood for the Northern Territory did not look at recognition of customary law. In relation to the broader Aboriginal interests represented in the Kalkaringi and Batchelor statements, the report noted that:

Discussions with the Aboriginal community concerning the constitutional statements and a possible framework agreement...is...a matter for the Northern Territory Government.<sup>347</sup>

There are few existing examples of constitutional recognition of customary law in Australia with Victoria and the Australian Capital Territory the only jurisdictions to recognise Indigenous people in either a constitution or Charter of Rights.

The Australian Capital Territory’s *Human Rights Act* acknowledges the ‘special significance’ of human rights for Indigenous people and establishes the rights of minorities to enjoy their culture, practise their religion and use their language.

The Victorian Constitution acknowledges Aboriginal people as the original custodians of the land and their ‘unique status’ and contribution to Victoria’s identity, but specifically stipulates that the recognition is not intended to create any legal right or affect any existing law. Similar sections to the Victorian Constitution are being considered for inclusion in an amended Western Australian Constitution.<sup>348</sup>

In 2009 Queensland Parliament’s Legal, Constitutional and Administrative Review Committee considered the inclusion of ‘a statement of due recognition to Queensland’s Aboriginal and Torres Strait Islander people’ to be included in a draft preamble to be inserted into Queensland’s constitutional document (*Constitution of*

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<sup>346</sup> HORSCLCA, *Reforming our Constitution*, p.58.

<sup>347</sup> HORSCLCA, *The long road to statehood: Report of the inquiry into the federal implications of statehood for the Northern Territory*, May 2007, Canberra, p.58.

<sup>348</sup> See Chapter 4.

*Queensland 2001*).<sup>349</sup> That Committee recommended that the following words be included in the preamble:

The people of Queensland, free and equal citizens of Australia, subject to no law or authority but that sanctioned by this Constitution and the Constitution of Australia;

... honour the Aboriginal peoples and Torres Strait Islander peoples, the first Australians, whose lands, winds and waters we all now share; and pay tribute to their unique values, and their ancient and enduring cultures, which deepen and enrich the life of our community;<sup>350</sup>

Tom Calma (former Aboriginal and Torres Strait Islander Social Justice Commissioner) proposed the adoption of a section in the Territory's Constitution to recognise and affirm existing Aboriginal rights.<sup>351</sup>

The preamble to the 1996 Final Draft Northern Territory Constitution commenced with:

Before the proclamation of the Colony of New South Wales in 1788 and since time immemorial all or most of the geographical area of Australia that now constitutes the Northern Territory of Australia (the Northern Territory) was occupied by various groups of Aboriginal people under an orderly and mutually recognised system of governance and law by which they lived and defined their relationships between each other, with the land and with their natural and spiritual environment.<sup>352</sup>

The preamble to the 1998 Final Draft Constitution for the Northern Territory proposed a similar form of words as the 1996 Draft, however with different emphasis:

Since time immemorial the land we now call the Northern Territory of Australia (the Northern Territory) was occupied by various groups of Aboriginal people who lived and defined their relationships between each other,

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<sup>349</sup> Queensland Parliament, Law, Justice and Safety Committee, Inquiry Terms of Reference, [http://www.parliament.qld.gov.au/view/committees/LCARC.asp?SubArea=inquiries\\_Preamble2009](http://www.parliament.qld.gov.au/view/committees/LCARC.asp?SubArea=inquiries_Preamble2009), at 9 February 2010

<sup>350</sup> 'A preamble for the Constitution of Queensland 2001'

<sup>351</sup> See Chapter 4.

<sup>352</sup> As discussed in Chapter 2.

with the land and with their natural and spiritual environment under mutually recognised systems of governance and laws.

Since the commencement of the colonisation of Australia in 1788, others have come to this land and together with its Aboriginal occupants have contributed to its development and to the rich cultural diversity of its peoples.<sup>353</sup>

### ***Final considerations***

The Solicitor-General, Mr Michael Grant QC and Crown Counsel of the NT, Ms Sonia Brownhill, advised the Committee:

Perhaps the question that needs to be asked is how do you want to recognise Aboriginal Customary Law? What do you want it to do? How do you want it to interact with existing Common law and Statute Law?

And then once the committee or whoever is making the determination has arrived at the answers to those questions, it would then be a matter for the lawyers to say to the committee “Well you would achieve those objectives by having this sort of constitutional arrangement or this sort of statutory arrangement.” This is the problem when you ask what are the implications, it really depends on what you want to achieve.

...

The question to be asked really is in what respects do you wish to recognise aboriginal customary law, what do you want to achieve in that recognition and what parts of aboriginal customary law do you want not to apply? They are really the fundamental questions.<sup>354</sup>

Guided by this advice, the Committee formed the view that further recognition of customary law is best approached from a pragmatic perspective that avoids conflicts or deals with legal issues as they arise rather than choosing an approach that creates uncertainties for both NT law and Aboriginal customary law from the outset. The information gathered and learnt from this inquiry, particularly the questions raised and still unanswered, led the Committee to believe that the recommendation

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<sup>353</sup> See Chapter 2.

<sup>354</sup> Legislative Assembly of the Northern Territory, Hansard Transcript Official Briefing Solicitor-General for the NT and Crown Counsel for the NT, 10 September 2009, p1 & p 2 (Customary law briefing)

of the NTLRC to recognise Aboriginal customary law as a source of law may not be the best approach for the NT to take at this time.

Constitutional recognition of Aboriginal and Torres Strait Islanders within the preamble of a constitution is an option which the Committee considers achievable. Provided the majority of Territorians are in favour of this option, this could be considered in the lead up to the drafting of the Constitution for the State of the Northern Territory.



## APPENDICES

### ***Appendix A: Committee Terms of Reference***

**As at 11 September 2008**

The Standing Committee on Legal and Constitutional Affairs shall:

6. Inquire, consider, make recommendations and report to the Assembly from time to time on:
  - (f) any matter concerned with legal or constitutional issues, including law reform, parliamentary reform, administrative law, legislative review and intergovernmental relations;
  - (g) the legal or constitutional relationship between the Northern Territory and Commonwealth;
  - (h) any proposed changes to that legal or constitutional relationship, including the admission of the Northern Territory as a new state of the Commonwealth;
  - (i) any proposed changes to the Commonwealth Constitution that may affect the Northern Territory and/or its residents;
  - (j) with the approval of the Attorney-General, any other matter concerning the relationship between the Northern Territory and the Commonwealth and/or the states in the Australian federation.
7. The Legal and Constitutional Affairs Committee may meet with any other state or Commonwealth parliamentary committees to inquire into matters of mutual concern.
8. The Northern Territory Statehood Steering Committee continues in existence with the same membership and terms of reference adopted by the 9th Assembly on 17 August 2004, and as amended on 24 March 2005.
9. Resolutions or business transacted by the previous Legal and Constitutional Affairs Committee are taken to be the resolutions of this committee, unless otherwise amended.
10. The Committee shall report to the Assembly as soon as possible after 30 June each year on its activities during the preceding financial year.



## ***Appendix B: Findings of Previous Inquiries***

### **Report of the Royal Commission into Aboriginal Deaths in Custody 1987-1991**

The Royal Commission into Aboriginal Deaths in Custody in its final report, in looking at all relevant factors relating to deaths in custody, did include some consideration of customary law.<sup>1</sup> The Royal Commission noted that recognition of the significance of customary law and practical steps for its inclusion could be achieved without establishing separate legal systems or creating conflict within existing systems. The Royal Commission noted that:

If the preservation and transmission of Aboriginal values is a genuine concern of Australian non-Aboriginal society, if self-determination means an earnest endeavour to empower Aboriginal people to choose a life style consistent with their own cultural aspirations, then it is essential that the legal system responds with respect and that in turn may compel recognition of customary law.<sup>2</sup>

The Royal Commission recommended that Government account to Aboriginal people on progress in dealing with the ALRC Report on the recognition of customary law. This recommendation was supported by the Commonwealth, the Northern Territory and several States.

### **Sessional Committee on Constitutional Development, Recognition of Aboriginal Customary Law and Aboriginal Rights and Issues – Options for Entrenchment**

The fourth discussion paper of a series released by the Sessional Committee on Constitutional Development as *Recognition of Aboriginal Customary Law*, considers whether Aboriginal customary law should be constitutionally recognised and options to do so. The paper was released in an effort to stimulate discussion and, rather than advocate a particular view, the Sessional Committee sought comments and suggestions on topics raised. The discussion paper includes consideration of:

- the committee's understanding of the nature and role of customary law;

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<sup>1</sup> Royal Commission into Aboriginal Deaths in Custody (RCIADIC), *National Report*, Volume 4, <[austlii.edu.au/au/special/rsjproject/rsjlibrary/rciadic/national/vol4/36](http://austlii.edu.au/au/special/rsjproject/rsjlibrary/rciadic/national/vol4/36)> accessed 15 July 2008.

<sup>2</sup> RCIADIC, *National Report*, Volume 4, p.2.

- existing sources of Northern Territory law;
- the position in relation to customary law elsewhere (both nationally and internationally); and
- options for recognition.<sup>3</sup>

The Sessional Committee noted that it had strong representation from Aboriginal people as part of community consultation and understood that recognition of customary law was particularly important to Aboriginal people. It was noted in the paper that '[o]ne of the arguments in favour of some form of constitutional or legal recognition of customary law within the Northern Territory is that it may well advance the process of reconciliation.'<sup>4</sup>

It was recognised that '...the matter is not just simply one of acknowledging the status of customary law as a source of law.' Options for constitutional recognition of customary law discussed in the paper included a statement in the preamble referring 'to the history and prior occupation of the Territory by Aboriginal people...' and issues in determining a form of recognising customary law as a source of law.<sup>5</sup>

In a later discussion paper, *Aboriginal Rights and Issues – Options for Entrenchment*, issues related to Aboriginal self-determination were considered, including possible ways to constitutionally recognise Indigenous people's right to self-determination and to exercise customary rights and practices.<sup>6</sup>

### **Final Draft Constitution for the Northern Territory**

In 1996 the Sessional Committee on Constitutional Development recommended a draft constitution which included a proposal that Aboriginal customary law be recognised as a source of law in a Northern Territory constitution.<sup>7</sup> Two options were offered on how recognition of customary law could be included:

- one provided that customary law be implemented and enforced where a person considered they were bound by the law; and
- one that did not make provision for enforcement other than where it was enforced as part of common law or the practice of the courts.<sup>8</sup>

<sup>3</sup> Legislative Assembly of the Northern Territory Sessional Committee on Constitutional Development (SCCD), *Discussion Paper No.4 Recognition of Aboriginal Customary Law*, August 1992.

<sup>4</sup> SCCD, *Recognition of Aboriginal Customary Law*, p.15.

<sup>5</sup> SCCD, *Recognition of Aboriginal Customary Law*, pp.43-4. The options are also discussed in more detail in NTLRC, *Report on Aboriginal Customary Law*, Background Paper 3, (c).

<sup>6</sup> SCCD, *Discussion Paper No.6 Aboriginal Rights and Issues – Options for Entrenchment*, July 1993, pp.32-3.

<sup>7</sup> SCCD, *Foundations for a Common Future, The Report on Paragraph 1(a) of the Sessional Committee on Constitutional Development's Terms of Reference on a Final Draft Constitution for the Northern Territory*, Volume 1, November 1996.

<sup>8</sup> SCCD, *Foundations for a Common Future*, Final Draft Constitution for the Northern Territory, 2.1.1.

It was proposed that with either option, existing law and practice would continue and that Northern Territory institutions and officers would only be able to enforce Aboriginal customary law as far as the Constitution, an Organic Law<sup>9</sup> or Act of Parliament permitted.<sup>10</sup> The commentary on the Final Draft provided the background to the Committee's recommended options:

### 3. Aboriginal Customary Law

The Committee was faced, in its hearings and consultations in numerous centres throughout the Northern Territory, and in submissions made to it, with overwhelming support from Aboriginal Territorians for some form of constitutional recognition of Aboriginal customary law. It is quite clear to the Committee that in the Northern Territory, Aboriginal customary law is a living system of law for many Territorians, one that is central to their existence and daily lives. There were frequent concerns expressed about the erosion of customary law in Aboriginal communities and the damage that this was causing to Aboriginal society and to the maintenance of order in that society.

The Committee's discussion paper on the constitutional recognition of aboriginal customary law ... has been well received. There has been no significant opposition to some form of recognition. There are concerns as to particular aspects of customary law which might, on some standards, be seen as objectionable. But in the Committee's view this does not necessitate a view that is opposed to any form of recognition. There is also no constitutional impediment to any such recognition.

The draft Constitution contains a proposal to recognise Aboriginal customary law as a source of Northern Territory law

<sup>9</sup> An organic law is the fundamental law that determines the principles and organisation of government, either written (as in a constitution) or unwritten: *Black's Law Dictionary*, Revised 4<sup>th</sup> edition. Explanatory notes to the 1996 Draft Constitution describe:

...a new concept of Organic Laws, having a superior constitutional status to ordinary Acts but less status than the Constitution itself. They will either be Organic Laws declared by the new Constitution or Acts which are enacted by the Parliament in accordance with special procedures and declared to be Organic Laws...Parliament will therefore decide which laws will become Organic by following this procedure. Subsequent amendments to Organic Laws will be difficult to effect.

SCCD, *Foundations for a Common Future*, Final Draft Constitution for the Northern Territory, 2.1.1, footnote 15.

<sup>10</sup> SCCD, *Foundations for a Common Future*, Final Draft Constitution for the Northern Territory, 2.1.1 footnote 13.

on a par with common law. Both would be subject to any legislation. To some extent, recognition along these lines has already occurred through the courts, both as a result of the *Mabo* decision, and also as a result of the practice of the courts in other areas. The Committee's proposal, expressed in the form of two options, is that the common law and customary law should run in tandem, not as two completely separate systems of law in a discriminatory manner, but in a complimentary [sic] manner as part of the one system of laws for the whole Northern Territory. However, to prevent unfair or undesirable consequences, it is proposed that Aboriginal customary law will not be able to be implemented and enforced through the institutions and officers of government except in so far as the courts are prepared to do so or as Territory legislation so provides. For example, this would prevent the use of practices which may be harsh or unjust on international principles...

In this way, it will be possible to bring the two systems of law into a form of mutuality and reciprocity within a common constitutional framework, a gradual harmonisation of laws, but without unfair or undesirable side effects. Aboriginal people will be subject to their own traditional law as part of the laws of the Northern Territory, as well as being subject to non-indigenous Territory laws, and without being placed in a position of double jeopardy. This should greatly help to strengthen Aboriginal traditional society and meet their demands for recognition of their laws whilst remaining a part of one Territory community. Far from creating two separate systems of law on racial lines, this will largely recognise what already exists, and should facilitate the process of reconciliation and understanding between indigenous and non-indigenous people in the Territory.<sup>11</sup>

### **Northern Territory Attorney-General's Proposals on Recognition of Customary Law**

At a 1996 meeting of the Standing Committee of Attorneys-General, the then Attorney-General of the Northern Territory, the Hon. Steve Hatton MLA, presented a concept paper on the recognition of Aboriginal customary law. Three principles were identified as guiding the recognition of customary law in the Northern Territory:

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<sup>11</sup> SCCD, *Foundations for a Common Future*, 5-6-5.7.

1. The process by which customary law can be recognised involves firstly a recognition of the commonality between the two systems. Once that is achieved sensible negotiation about the differences between the two systems can occur to create a synthesis of both legal systems.
2. The process of recognition of customary law should be driven from the “bottom up” and not the “top down” because the differences between Aboriginal communities and their customary law. The process should incorporate negotiation and decision making, firstly on a clan level and then on a regional level and finally on a Territory level.
3. Those matters that constitute a breach of an International Human Rights Treaty to which Australia is a signatory cannot be condoned by the mainstream legal system.<sup>12</sup>

The previous year, speaking on the same topic at an Indigenous Customary Law Forum, the Attorney-General spoke of his understanding of the relevance and significance of customary law:

Customary law for many people in the Territory is a fact. Whether we recognise it or not, customary law exists and affects the lives of many Aboriginal people. If we do not recognise it...[t]here is potential for injustice to occur.

...[C]ustomary law in the lives of many Aboriginal people in the Northern Territory deals not just with the criminal law and the much talked about payback system including physical punishment and death, but with a whole social, political and judicial structure...[C]ustomary law in the broader sense is already being incorporated in the Northern Territory. Our community government schemes, our civil law and parts of our legal system are models for the effective implementation of customary law.

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<sup>12</sup> S. Hatton, ‘The recognition of Aboriginal customary law: a concept proposal for the Northern Territory’, 1996, p.(i).

...[T]here is a similarity between Aboriginal and non-Aboriginal society that must be recognised...communities in the Northern Territory have their own judicial and legislative processes...They have legal frameworks for title to land, laws of contract, dispute resolution and ...laws of bankruptcy. They have similar criminal laws as well.<sup>13</sup>

### **Alternate Dispute Resolution Subcommittee of the Northern Territory Law Reform Committee**

A report to the Northern Territory Law Reform Committee by members of the ADR Subcommittee was part of the Northern Territory Law Reform Committee's 1997 inquiry into alternate dispute resolution and included discussion of the related issues of recognition of Aboriginal customary laws.

The report prepared for the Subcommittee, on which the final report is based, includes a brief commentary on customary law and notes that recognition of Aboriginal customary law and its incorporation into the general body of law remained unresolved.

The report lists a number of factors that could be considered obstacles to recognising Aboriginal customary law within Australian law, but noted that:

[t]he limited recognition afforded to customary law in the community justice by-laws is simply a reflection of the unresolved debate on the topic. Subject to the usual human rights safeguards...and...exclusion of any customary law which conflicts with existing Northern Territory law; it is intended to...enable and facilitate inclusion...by Aboriginal communities of (additional) customary law(s) within the community justice by-laws.<sup>14</sup>

### **Constitutional Foundations**

The *Constitutional Foundations* conference was held in September 1997 to explore the role of governments and citizens in constitutional development and was the third constitutional or statehood conference held in the Northern Territory. Conference speakers considered many issues relevant to the Northern Territory's moves towards statehood, including two Indigenous Territorians who spoke on constitutional recognition of customary laws and the rights of Indigenous peoples.

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<sup>13</sup> S. Hatton, 'Customary Law in the Northern Territory' in Commonwealth of Australia, *Indigenous Customary Law Forum*, October 1995, AGPS, Canberra, p.43.

<sup>14</sup> Alternate Dispute Resolution Subcommittee (ADR Subcommittee), 'Alternate Dispute Resolution in Aboriginal Communities', undated, p.15.

Mr Gatjil Djerrkura OAM spoke of the importance of respect for and recognition of Indigenous peoples and their rights in common law:

Any Constitution should at least offer a workable framework for government. The rules of the Constitution should obviously deal with the composition and powers of parliament, the government and courts. Modern constitutions include recognition of and guarantees for the rights and freedoms of individuals and groups. The latter we call collective rights [b]ut recognition of the concept of collective rights is particularly important for Indigenous peoples.

...a new Constitution for the NT must go further and set rules for the relationships between Indigenous peoples and government.

...Our rights to maintain our land, law, language, beliefs and systems of authority must ... be entrenched in the Constitution. This is the only way these rights can be protected from governments that might be tempted to make laws against our interests for their own short-term advantage.<sup>15</sup>

The Reverend Dr Djiniyini Gondarra OAM spoke of the Yolngu system of customary law, Maḡayin, which is founded on three principles:

1. **Magaya** the law creates a state of peace and harmony tranquillity true justice for all citizens.
2. **Dharpirrk** the law must perfectly follow the principles of common law, the statutes, and the practices from the constitutional base. Therefore the drafting of law must be consistent.
3. **Wana Lupthun** the law is assented to by citizens in a ceremony that shows that they are all under the discipline, responsibility and protection of the law.

<sup>15</sup> G. Djerrkura, 'Respect and Recognition First: Reconciling a Diversity of Interests in a New Northern Territory Constitution for the 21<sup>st</sup> Century' in Gray, *Constitutional Foundations*, pp.44-9.

No constitution would be recognised as law without these foundational principles being included.<sup>16</sup>

A central Australian lawyer, Ms Annie Keely, raised concerns with the (1996) draft Northern Territory constitution from the perspective of the rights of Indigenous peoples. In particular, she took issue with the Preamble, protection of Aboriginal land and sacred sites, the right to self-determination and Aboriginal self-government.<sup>17</sup>

It was noted that while legal recognition had been given to Aboriginal land rights in Australian statute and common law and sacred sites and objects recognised and protected by law, constitutional recognition of Indigenous rights had not occurred. Particular concern was raised with the process of constitutional development in the Northern Territory which was perceived to have excluded meaningful consultation with Aboriginal people.

Aboriginal people must be properly consulted about the wording of the clause which is to acknowledge their original ownership and governance of this country. This has not been done to date and is an essential part of any constitutional development process in the NT...

Before proceeding any further with a draft constitution for the NT, there needs to be a well resourced community education program carefully developed and implemented to enable a level of informed debate throughout the community about what could or should be contained in a modern constitution. Such a program must also seek to educate the community about the unique rights of indigenous peoples...presented using overseas examples showing them to be constructive and assisting in the stable political and economic development of a region for all its residents.<sup>18</sup>

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<sup>16</sup> D. Gondarra, 'A System of Law' in Gray, *Constitutional Foundations*, pp.50-1.

<sup>17</sup> A. Keely, 'The Rights of Indigenous Peoples and the Draft NT Constitution' in Gray, *Constitutional Foundations*, pp.53-69; similar views were also published by Keely as 'Aboriginal Rights and the Draft NT Constitution', *Indigenous Law Bulletin* 45, 1997.

<sup>18</sup> Keely, 'The Rights of Indigenous Peoples and the Draft NT Constitution', pp.62, 68-9.

## 1998 Northern Territory Statehood Convention

Delegates to the Northern Territory Statehood Convention considered four issues related to Northern Territory statehood including the form of constitution for the Northern Territory if it attained statehood.<sup>19</sup>

Despite the controversy surrounding the Convention,<sup>20</sup> it was resolved to adopt a *Final Draft Constitution for the Northern Territory* that included constitutional recognition of Aboriginal customary law as a source of law. In consultation with Aboriginal people, it was proposed that this recognition would be enacted as written law within five years or as Parliament determined.<sup>21</sup>

The *Final Draft Constitution* also included recognition of the Aboriginal peoples and their systems of governance and laws in a preamble:

Since time immemorial the land we now call the Northern Territory of Australia (the Northern Territory) was occupied by various groups of Aboriginal people who lived and defined their relationships between each other, with the land and with their natural and spiritual environment under mutually recognised systems of governance and laws.<sup>22</sup>

## Kalkaringi Indigenous Constitutional Convention

During August 1998 an Indigenous Constitutional Convention was held at Kalkaringi to discuss statehood issues, the draft constitution endorsed by the Northern Territory Legislative Assembly and the then proposed referendum on Statehood. Due to concerns about the statehood process being rushed, the lack of popularly elected delegates to the Statehood Convention and the legal validity of part of the draft Constitution, the Indigenous Constitutional Convention endorsed a 'No' position to the referendum question.<sup>23</sup>

The statement issued from the Kalkaringi Convention set out the agreed position of delegates regarding issues of statehood, constitutional development and governance under three principles. The second of these was:

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<sup>19</sup> Of the 53 delegates appointed to the Convention, 26 were elected or otherwise chosen by Government-nominated organisations and 27 were appointed, mostly by Government, including the Chair and 2 Deputy Chairs. Legislative Assembly Standing Committee on Legal and Constitutional Affairs (LCAC), *Information Paper No.1 Northern Territory Constitutional Development and Statehood A Chronology of Events*, June 2002, p.10.

<sup>20</sup> Concerns were expressed about the organisation and structure of the Convention because of the method of appointing delegates, its timing and duration and others matters of process. In addition, the Northern and Central Land Councils boycotted the Convention and a number of delegates withdrew. LCAC, *Information Paper No.1*.

<sup>21</sup> Northern Territory Government (NTG), *Statehood Convention Report Volume 1*, April 1998, Appendix A.

<sup>22</sup> NTG, *Statehood Convention Report*, Appendix A.

<sup>23</sup> LCAC, *Information Paper No.1*, p.13.

That we will withhold our consent until there are good faith negotiations between the Northern Territory Government and the freely chosen representatives of the Aboriginal people of the Northern Territory leading to a Constitution based upon equality, co-existence and mutual respect.<sup>24</sup>

The statement also called for constitutional protection of existing and future negotiated common law and statutory rights and for recognition and protection of all rights of Indigenous peoples.

### **Statehood Referendum**

In October 1998 a majority of Northern Territory voters rejected statehood in a Territory wide referendum that asked:

Now that a constitution for a State of the Northern Territory has been recommended by the Statehood Convention and endorsed by the Northern Territory Parliament: DO YOU AGREE that we should become a State?<sup>25</sup>

### **Batchelor Indigenous Constitutional Convention**

Late in 1998, endorsing the Kalkaringi Statement, combined Northern Territory Land Councils released an *Indigenous Constitutional Strategy* calling for recognition of Aboriginal law as a source of law in the Constitution. The *Indigenous Constitutional Strategy Document* called for recognition of the constitutions of the Aboriginal Nations of the Northern Territory 'on a basis of equality, co-existence and mutual respect with any constitution of the Northern Territory.' The Batchelor Convention affirmed '[t]hat Aboriginal law should be recognised as a source of law in the Constitution.'<sup>26</sup>

### **Report into appropriate measures to facilitate Statehood**

Following the failed Territory referendum on statehood, the Standing Committee investigated the reasons for the referendum's failure, tabling its report in April 1999.<sup>27</sup> In relation to constitutional development, the Committee found that there was a lack of information on the process of constitution-making and inadequate community consultation.<sup>28</sup>

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<sup>24</sup> Central Land Council (CLC), *The Kalkaringi Statement*, 17-20 August 1998, <clc.org.au/media/publications/kalkstat.asp> accessed 12 June 2007.

<sup>25</sup> LCAC, *Information Paper No. 1*, p.12.

<sup>26</sup> Northern Territory Indigenous Constitutional Convention, *Indigenous Constitutional Strategy Document*, 30 November to 4 December 1998, p.1.

<sup>27</sup> LCAC, *Report into Appropriate Measures to Facilitate Statehood*, 27 April 1999.

<sup>28</sup> LCAC, *Report into Statehood*, p.3.

Significantly, though, the Standing Committee found there was considerable community support for statehood and that the community wanted the process of constitutional development to continue. It was noted in particular that Aboriginal interests, including protection of rights, had to be seriously addressed if statehood was to be achieved.<sup>29</sup>

### **Law Reform Commission of Western Australia Aboriginal Customary Laws Final Report**

The Law Reform Commission of Western Australia's terms of reference required it to inquire into the interaction between Aboriginal customary laws and the Western Australian legal system.<sup>30</sup>

Among its 131 recommendations, the report calls for the establishment of an independent Indigenous Commission and recognition of the status of Aboriginal peoples in the Western Australian Constitution.

Recommendation 6 of the Report calls for a Bill to amend the existing *Constitution Act 1889 (WA)* to recognise Aboriginal peoples' unique status, acknowledges their prior occupation of Western Australia and their continuing connection to the land and encourages their continuing cultural contribution to the state. It rejects recognition in the preamble because 'recognition should instead be entrenched as a foundational provision of the Constitution.'<sup>31</sup>

The recommended replacement clause to the Constitution, modelled on a similar clause in the *Constitution Act 1975 (Vic)*,<sup>32</sup> reads:

1. **Recognition of Aboriginal peoples**
  - (1) The Parliament acknowledges that the Colony of Western Australia was founded without proper consultation, recognition or involvement of its Aboriginal people or due respect for their laws and customs.
  - (2) The Parliament recognises that Western Australia's Aboriginal peoples, as the original

<sup>29</sup> LCAC, *Report into Statehood*, pp.4-5.

<sup>30</sup> LRCWA, *Aboriginal Customary Laws*.

<sup>31</sup> LRCWA, *Aboriginal Customary Laws*, pp.72-3.

<sup>32</sup> Constitution (Recognition of Aboriginal People) Act 2004 (Vic) amending the *Victorian Constitution Act 1975*, cited in LRCWA, *Aboriginal Customary Laws*, p.72.

custodians of the land on which the Colony of Western Australia was established –

- (a) have a unique status as the descendants of Australia's first people;
  - (b) have a spiritual, social, cultural and economic relationship with their traditional lands and waters within Western Australia; and
  - (c) have made a unique and irreplaceable contribution to the identity and wellbeing of Western Australia.
- (3) The Parliament does not intend by this section –
- (a) to create in any person any legal rights or give rise to any civil case of action; or
  - (b) to affect in any way the interpretation of this Act or of any other law in force in Western Australia.<sup>33</sup>

### **Constitutional Paths to Statehood**

The Northern Territory Statehood Steering Committee Community Discussion Paper *Constitutional Paths to Statehood*, released in 2007, sought the public's views on 'whether Aboriginal customary laws should be recognised within the Northern Territory legal system through its Constitution.'<sup>34</sup>

Within this context the Discussion Paper considered past and current views of the Commonwealth and the Northern Territory in regard to legislative changes and customary law and included discussion of recent statements surrounding the *Sentencing Amendment (Aboriginal Customary Law) Act*. Since the tabling of *Constitutional Paths to Statehood*, the *NT Emergency Response Act 2007* (Cth) has made ineffective, customary law considerations in bail and sentencing determinations under the *Sentencing Act 1995* (NT).

The Discussion Paper noted that the Statehood Convention in 1998 resolved that the new Constitution should provide for Aboriginal customary law to be recognised as a source of law, to be enacted as the law of the State within five years. In addition, the 2003 Northern Territory Law Reform Committee endorsed the Convention resolution that Aboriginal customary law should be recognised 'as a source of law'.

<sup>33</sup> LRCWA, *Aboriginal Customary Laws*, Recommendation 6, p.74.

<sup>34</sup> SSC, *Constitutional Paths to Statehood*, May 2007, p.60.

## Appendix C: Referrals from former Attorneys-General



### MINISTER FOR JUSTICE AND ATTORNEY-GENERAL

PARLIAMENT HOUSE  
DARWIN NT 0800  
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minister.toyne@nt.gov.au

Mr Rick Gray  
Executive Officer  
Standing Committee on Legal  
and Constitutional Affairs  
Legislative Assembly of the Northern Territory  
GPO Box 3721  
DARWIN NT 0801

*Rick*

Dear Mr ~~Gray~~,

On 16 October 2002, I announced in Parliament the Inquiry into Aboriginal Customary Law in the Northern Territory. A Committee ("the Committee of Inquiry") comprising eight Aboriginal representatives from various parts of the Northern Territory, along with eight representatives from the NT Law Reform Committee was subsequently appointed to conduct the Inquiry.

The terms of reference required the Committee to inquire into the strength of Aboriginal Customary Law in the Northern Territory and to report and make recommendations on the capacity of customary law to provide benefits in a range of areas including governance, social well being, law and justice, economic independence, wildlife conservation, land management and scientific knowledge.

The Committee handed its Report to the Northern Territory Government in August 2003 and Government released its response to the recommendations of the Report in November 2003. The issue of Aboriginal Customary Law as a source of law was dealt with in the Report and the following recommendation was made in this regard:

Recommendation 11:

*The NT Statehood Conference resolution that Aboriginal Law be recognised as a "source of law" should be implemented.*

In its response to this recommendation, Government noted that the NT Statehood Conference resolution was made in the context of the development of a constitution for the Northern Territory. It considered that the general statutory recognition of customary law was very complex and that it was unlikely current legal framework for the Northern Territory would support such recognition. Government noted that general recognition could lead to unwarranted interference in some areas of customary law. It was further noted that customary law itself is subject to regional variations and changes in community attitudes.



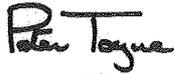
Northern Territory Government

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The Government therefore proposed that the recommendation be referred to the Northern Territory Standing Committee on Legal and Constitutional Affairs for consideration as part of its reference on the examination of appropriate relationships that should exist between Indigenous peoples and communities, the Northern Territory Government, and the wider Territory community.

I request that the recommendation and Government response to it be referred to the Standing Committee for its consideration.

Yours sincerely



PETER TOYNE

0 6 SEP 2004

DOCUMENT

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## MINISTER FOR JUSTICE &amp; ATTORNEY-GENERAL

Parliament House  
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*Ms*  
Ms Pat Hancock  
Executive Officer  
Standing Committee on Legal and Constitutional Affairs  
Legislative Assembly of the Northern Territory  
GPO Box 3721  
DARWIN NT 0801

*Re: 1/2/07*

Dear Ms Hancock

In August 2003 the Northern Territory Law Reform Committee provided a report on its Inquiry into Aboriginal Customary Law. The terms of reference for the inquiry required it to inquire into the strength of Aboriginal Customary Law, and to report and make recommendations on the capacity of customary law to provide benefits in a range of areas including governance, social well being, law and justice, economic independence, wildlife conservation, land management and scientific knowledge.

The Government released its response to the recommendations made in the report on November 2003.

The issue of customary law as a source of law was dealt with in the report and the following recommendation made:

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.

In response to this recommendation, the Government noted that the Northern Territory Statehood Conference resolution was made in the context of the development of a constitution for the Northern Territory. It considered that the general statutory recognition of customary law was very complex and that it was unlikely that the current legal framework would support such recognition. Government also noted that general recognition of customary law might lead to unwarranted interference in some areas of customary law, and that customary law itself is subject to regional variations and changes in community attitudes.

The Government therefore proposed that the recommendation be referred to the Northern Territory Standing Committee on Legal and Constitutional Affairs.



Northern Territory Government

A reference was made by the previous Attorney-General, Dr Peter Toyne, in 2004. However I understand that the Assembly lapsed prior to the Committee reporting to the Parliament and the reference is no longer on foot.

I request that the recommendation and the Government response again be referred to the Standing Committee for consideration.

Yours sincerely

  
SYD STIRLING

30<sup>th</sup> Jan 07

## ***Appendix D: Timeline of Customary Law Recognition***

<b>1963</b>	The Yolngu people petitioned the Commonwealth Parliament to object to the Government's agreement with Nabalco and excision of their land. The bark petitions are the first traditional Aboriginal documents recognised by the Commonwealth Parliament and therefore are also documentary recognition of Indigenous people in Australian law.
<b>1966</b>	The Gurindji people walk-off Wave Hill station and demand a return of their traditional lands.
<b>1971</b>	Justice Blackburn in <i>Milirrpum v Nabalco Pty Ltd</i> finds that a 'rule of law' and not a 'rule of man' operated in Yolngu society.
<b>1976</b>	The <i>Aboriginal Land Rights (Northern Territory) Act</i> recognises Aboriginal traditional land ownership and land management systems and establishes the Northern and Central Land Councils.
<b>1986</b>	The Australian Law Reform Commission in <i>The Recognition of Aboriginal Customary Laws</i> recommends specific forms of recognition of customary law in criminal law, however does not recommend formal recognition.
<b>1988</b>	A statement on bark was presented to the Prime Minister at the annual Barunga cultural and sport festival on behalf of the Indigenous people of Australia. The Barunga Statement called on the Commonwealth to recognise Aboriginal self-determination and self-management and to pass laws to provide a national system of land rights and recognition of customary laws.
<b>1991</b>	The Report of the Royal Commission into Aboriginal Deaths in Custody recommends that the Government report back to Aboriginal people on progress in dealing with the Australian Law Reform Commission Report.
<b>1992</b>	The High Court finds in <i>Mabo v Queensland (No2)</i> that Australia was not uninhabited ('terra nullius') and recognised the traditional rights of native title of Indigenous people.
	Legislative Assembly of the Northern Territory Sessional Committee on Constitutional Development in Recognition of Aboriginal Customary Law considers whether Aboriginal customary law should be constitutionally recognised and options to do so.
<b>1993</b>	The <i>Native Title Act</i> was passed to recognise <i>Mabo</i> findings and establish a process for native title claims.
<b>1996</b>	The High Court in <i>Wik Peoples v Queensland</i> finds that native title can coexist with rights of leaseholders.
	The Northern Territory Attorney-General presents to the Standing Committee of Attorneys-General a paper on 'The recognition of Aboriginal customary law: a concept proposal for the Northern Territory.'

	The Northern Territory Sessional Committee on Constitutional Development releases a Final Draft Constitution for the Northern Territory which including a recommendation to recognise Aboriginal customary law as a source of law.
<b>1997</b>	A report to the Northern Territory Law Reform Committee on 'Alternate Dispute Resolution in Aboriginal Communities' by members of the ADR Subcommittee is part of the Law Reform Committee's inquiry into alternate dispute resolution and included discussion of the related issues of recognition of Aboriginal customary laws.
	The <i>Constitutional Foundations</i> conference is held to explore the role of governments and citizens in constitutional development. Conference speakers consider many issues relevant to the Northern Territory's push for Statehood, including two Indigenous Territorians who speak on constitutional recognition of customary laws and the rights of Indigenous peoples.
<b>1998</b>	Northern Territory Statehood Convention considers a constitution for the Northern Territory if it attained statehood, resolving that Aboriginal customary law be recognised as a source of law in the new State. A draft Constitution includes recognition of the Aboriginal peoples and their systems of governance and laws in the Preamble.
	In October, a majority of Northern Territory voters reject Statehood in a Territory wide referendum.
	In December, the combined Northern Territory Land Councils release an <i>Indigenous Constitutional Strategy</i> calling for recognition of Aboriginal law as a source of law in the Constitution.
<b>2003</b>	The Northern Territory Law Reform Committee's <i>Report of Inquiry into Aboriginal Customary Law</i> recommends that the Northern Territory Statehood Conference resolution that Aboriginal customary law be recognised as a source of law should be implemented and that this should happen regardless of whether the Territory becomes a state.
<b>2004</b>	Enactment of the <i>Sentencing Amendment Act</i> requiring a party to give notice if seeking make submission on customary law, or the views of members of an Aboriginal community regarding an offence, and for that information to be provided by way of sworn evidence, affidavit or statutory declaration.
<b>2005</b>	A discussion paper is released by the Law Reform Commission of Western Australia seeking submissions on 93 proposals to recognise Aboriginal customary law and culture to assist in addressing Aboriginal disadvantage.
<b>2005</b>	Representatives of NT Legal system invited to attend the culmination of the Yolgnu Parliament in Galiwinku, Elcho Island. Chief Justice formally presented with document in English called 'Introduction to Local Traditional Law'.
<b>2006</b>	The Law Reform Commission of Western Australia releases its final report on <i>Aboriginal Customary Laws</i> . Among its 131 recommendations the report calls for the establishment of an independent Indigenous Commission and the recognition of the status of Aboriginal peoples in the Western Australian Constitution.

<b>2007</b>	The Northern Territory Statehood Steering Committee's Community Discussion Paper, <i>Constitutional Paths to Statehood</i> seeks views on including recognition of customary law in a constitution.
	Commencement of NT Emergency Response by the Federal Government in response to the NT <i>Little Children are Sacred</i> report with implications for the recognition of Aboriginal Customary law.
<b>2008</b>	The Yolngu people present a bark petition seeking constitutional recognition of customary law. The Prime Minister announces a process of consultation on constitutional recognition of Indigenous people in an amended Australian Constitution.
	The High Court's <i>Blue Mud Bay</i> decision extends native title rights to the intertidal zones and waterways adjoining Indigenous traditional land.
	The Minister for Statehood announces a period of consulting the Territory community on Statehood and the constitution.
<b>2009</b>	<p>Commencement of National Human Rights Consultation</p> <p>Australian Government formally endorses the United Nations <i>Declaration on the Rights of Indigenous People</i></p> <p>Release of 'Our future in our hands - Creating a sustainable National Representative Body for Aboriginal and Torres Strait Islander peoples' - Proposed model for a new national representative body for Aboriginal and Torres Strait Islander peoples</p>



## **Appendix E: International context**

The Australian Social Justice Commissioner's recently released issues paper on the development of a national Indigenous representative body included examination of the strengths and weaknesses of other countries' approaches to Indigenous rights and representation.<sup>1</sup> Examination of the principles contained in the Articles of the United Nations 2007 *Declaration on the Rights of Indigenous People* are also considered.

In addition to broader understanding of the issues surrounding the constitutional recognition of customary law, examination of international examples acknowledges that Australia has international human rights obligations and commitments.

The UN General Assembly Universal Declaration of Human Rights, *the International Covenant on Civil and Political Rights (ICCPR)*; the *International Convention on the Elimination of All Forms of Racial Discrimination [Racial Discrimination Convention]* and other relevant instruments have all created obligations for Australia at international law. Other international human rights instruments are relevant to the protection of the rights of indigenous peoples, such as conventions against genocide and torture.<sup>2</sup>

The Northern Territory Law Reform Committee's Background Paper 4 discusses in detail how international law and Australian human rights law may affect the recognition of Aboriginal customary law in the Northern Territory. As it does this from the perspective of examining international precedents for their impact on law and justice issues, there is some constitutional relevance.

In this chapter the existing international situation in respect of recognising customary law and Indigenous peoples' rights is examined. Recent examples are examined for their relevance and key points of interest presented for consideration.

### **United Nations Declaration on the Rights of Indigenous People**

The *Declaration on the Rights of Indigenous People*, adopted by the General Assembly in 2007, deals with the rights of Indigenous peoples in areas such as self-

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<sup>1</sup> Human Rights and Equal Opportunity Commission (HREOC), *Building a sustainable National Indigenous Representative Body – Issues for Consideration*, 12 July 2008, <[hreoc.gov.au/about/media/media\\_releases/2008/73\\_08.html](http://hreoc.gov.au/about/media/media_releases/2008/73_08.html)>, accessed 12 July 2008.

<sup>2</sup> NTLRC, *Report on Aboriginal Customary Law*, Background Paper 4, p.4.

determination, language, education, health, employment, land and resources, Indigenous law, intellectual and cultural property and treaties and agreements with government.<sup>3</sup> Importantly for consideration of recognising customary law in a constitution, the Declaration recognises:

...the rights of indigenous peoples on a wide range of issues and provides a universal framework for the international community and States. The Declaration sets out the rights that countries should aspire to recognize, guarantee and implement...the Declaration establishes a framework for discussions and dialogue between indigenous peoples and States.<sup>4</sup>

One of the key rights articulated in the Declaration is the third article:

Indigenous peoples have the right of self determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.<sup>5</sup>

The extent of implications of this article are not fully resolved, with some countries expressing concerns that some demands of Indigenous people under this article may threaten 'territorial integrity'. Indigenous peoples continue to emphasise 'their desire to determine their own development, wellbeing and future in accordance with their ways of life and cultures.'<sup>6</sup> However, two ways that self-determination may be expressed include:

- Formal recognition of indigenous peoples' traditional institutions, internal justice and conflict-resolution systems, and ways of socio-political organization.
- Recognition of the right of indigenous peoples to freely define and pursue their economic, social and cultural development.

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<sup>3</sup> International Work Group for Indigenous Affairs (IWGIA), "Plain language" version of the Declaration, <[iwgia.org/sw1592.asp](http://iwgia.org/sw1592.asp)>, accessed 1 July 2008.

<sup>4</sup> United Nations Development Group (UNDG), *Guidelines on Indigenous Peoples' Issues*, <[ohchr.org/english/issues/indigenous/docs/guidelines.pdf](http://ohchr.org/english/issues/indigenous/docs/guidelines.pdf)>, accessed 1 July 2008.

<sup>5</sup> United Nations General Assembly, *Declaration on the Rights of Indigenous Peoples* <[un.org/esa/socdev/unpfii/documents/DRIPS\\_en.pdf](http://un.org/esa/socdev/unpfii/documents/DRIPS_en.pdf)>, accessed 1 July 2008.

<sup>6</sup> UNDG, *Guidelines*, p.13.

In relation to customary law, it is acknowledged that Indigenous systems of justice can be combined with a country's legal system and offer more appropriate justice. In some countries, 'the state recognizes traditional indigenous...courts and laws.' One of the guiding principles enunciated in relation to recognising customary laws is that Indigenous justice systems can be recognised 'if they are compatible with internationally recognised human rights and can provide guidance on disputes between indigenous peoples and others.'<sup>7</sup>

The guidelines emphasise the fundamental importance of free, prior and informed consent to ensuring Indigenous peoples' participation and inclusion in any consultation process:

Consultation and participation are crucial components of a consent process. Consultation should be undertaken in good faith. The parties should establish a dialogue allowing them to find appropriate solutions in an atmosphere of mutual respect in good faith, and full and equitable participation. Consultation requires time and an effective system for communicating among interest holders. Indigenous peoples should be able to participate through their own freely chosen representatives and customary or other institutions. The inclusion of a gender perspective and the participation of indigenous women is essential, as well as participation of children and youth as appropriate. This process may include the option of withholding consent. Consent to any agreement should be interpreted as indigenous peoples have reasonably understood it.<sup>8</sup>

### **The Māori and the New Zealand Constitution**

The Māori people of New Zealand are often referred to as an exemplar for constitutional recognition of Indigenous rights. The basis for this constitutional recognition is the Treaty of Waitangi, a founding document in New Zealand history that affirms the status of Māori as its indigenous inhabitants.

The Treaty is an agreement between the British Crown and the Māori people and defines the rights of both groups within three articles.<sup>9</sup> The articles establish that the

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<sup>7</sup> UNDG, *Guidelines*, p.19.

<sup>8</sup> UNDG, *Guidelines*, p.28, citing an excerpt from the *Report of the International Workshop on Methodologies Regarding Free Prior and Informed Consent*.

<sup>9</sup> New Zealand History (NZH), *Read the Treaty*, <nzhistory.net.nz/politics/treaty/read-the-treaty/english-text>, accessed 8 July 2008.

Māori ceded sovereignty of New Zealand to the Crown, the Māori gave the Crown the right to buy lands they were willing to sell and, in exchange the Māori were guaranteed full rights of ownership of their lands and resources, while the third article affirms the rights of the Māori as the rights and privileges of British subjects.<sup>10</sup>

Importantly for consideration of issues surrounding the constitutional recognition of Aboriginal customary law, the Treaty was not drafted as a constitution or a statute. Rather, it was a 'broad statement of principles upon which the British officials and Māori chiefs made a political compact or covenant to found a nation state and build a government...'<sup>11</sup>

There is continuing doubt about the effect of the Treaty in New Zealand law and whether it has any constitutional effect. The importance of the Treaty is that New Zealand governments recognise its significance for the Māori people.<sup>12</sup> It has also been noted that 'a special Maori code' operates within government when dealing with Māori matters.<sup>13</sup>

In 1986 a Royal Commission enquired into matters related to the Māori people's interaction with the New Zealand electoral system and its recommendations advocated constitutional reform:

[T]he Maori people's position would be much more secure if our constitutional and political systems were to reflect the diversity in our society and, more particularly, the special position of the Maori.<sup>14</sup>

## Canada's Constitution

After a period of uncertainty when Aboriginal customary rights were determined through litigation, the recognition of the rights of the Aboriginal peoples of Canada were enshrined in the *Constitution Act 1982*. Part II of the Act recognises existing Aboriginal and treaty rights and makes a commitment to hold a constitutional

<sup>10</sup> NZH, *Treaty FAQs*, <nzhhistory.net.nz/politics/treaty/treaty-faqs>, accessed 8 July 2008.

<sup>11</sup> NZH, *Treaty FAQs*, p.1.

<sup>12</sup> NZH, *Treaty FAQs*, p.2. New Zealand Treasury acknowledge both the Crown and the Courts have a moral obligation to apply the Treaty principles to legislation and to resolving conflicts: cited in HREOC, *Building a sustainable National Indigenous Representative Body*, Economic and Financial Overview 2007, <treasury.govt.nz/economy/overview/2007/02.htm>, accessed 25 June 2008; Office of Treaty Settlements (2002) 'Healing the past, Building a future: A guide to Treaty of Waitangi Claims and Negotiations with the Crown', p.12.

<sup>13</sup> A. Sharp, *Justice and the Maori: Maori Claims in New Zealand Political Argument in the 1980s*, Oxford University Press, Auckland, 1990, p.236, cited in LRCWA, *Aboriginal Customary Law in the Context of Western Australian Constitutional Law*, Background Paper No.14, April 2005, p.20.

<sup>14</sup> LRCWA, Background Paper No.14, p.20.

conference that includes Aboriginal peoples' representatives, prior to amending parts of the constitution that relate to the Aboriginal peoples and their rights.<sup>15</sup>

Under section 35(3), the treaty rights affirmed in the Act are established as rights that exist by way of land claim agreements or those that may be acquired. Therefore the constitutional protection extends to treaty rights under any new land claim agreements.<sup>16</sup> Under section 25 of the Act, the rights and freedoms of the Aboriginal peoples of Canada cannot be diminished or disregarded under the Canadian Charter of Rights and Freedoms that applies to all Canadians.<sup>17</sup>

These two sections can operate together to protect Aboriginal rights from being undermined by 'equal rights' type lawsuits, as was attempted in 2002 when a referendum was held in British Columbia seeking agreement that there be no differentiation of law in favour of Indigenous peoples.<sup>18</sup>

While the Canadian *Constitution Act* does not expressly protect Aboriginal customary law, the Canadian Indigenous peoples' agitation over an extended period is credited with raising the international profile of the rights of Indigenous people. This culminated in the successful negotiation of the Convention Concerning Indigenous and Tribal Peoples in Independent Countries (ILO Convention 169) and the *Declaration of the Rights of Indigenous Peoples*.<sup>19</sup>

### **Constitutional Recognition of the Sami People**

The Sami are the Indigenous people of an area that spans from the Kola Peninsula in Russia to the northern parts of Norway, Sweden and Finland. Since 1956 the Sami have been politically organised through the Sami Council which promotes cross-border collaboration between Sami people and promotes Sami traditional modes of living, customs, interests and rights.<sup>20</sup>

Sami Parliaments have also been established in Finland, Norway and Sweden and although the Parliaments formally have only advisory roles, through the Parliaments, the Sami have a central political role within the constitutional system in relation to Sami political questions.<sup>21</sup>

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<sup>15</sup> *Constitutional Act* 1982, Part II, s.35-35.1, <laws.justice.gc.ca/en/const/annex\_e.html>, accessed 8 July 2008.

<sup>16</sup> SCCD, *Recognition of Customary Law*, p.34.

<sup>17</sup> SCCD, *Recognition of Customary Law*, p.34.

<sup>18</sup> LRCWA, Background Paper No.14, p.21.

<sup>19</sup> HREOC, *Building a sustainable National Indigenous Representative Body*, p.51.

<sup>20</sup> A. Sara (ed), 'Regional Characteristics of Sápmi and the Sami People', Presentation at the Conference: 'The Regional Identity of Ethnic Groups in Europe', 13-14 June 2002.

<[http://www.fuen.org/pdfs/20020614Saami\\_Sara.pdf](http://www.fuen.org/pdfs/20020614Saami_Sara.pdf)>, accessed 24 July 2008.

<sup>21</sup> Sara, 'Regional Characteristics of the Sami People', p.21.

Recognition of Samis' Indigenous rights in the various countries' constitutions varies. The Norwegian Constitution was amended in 1988 to include a section affirming the special status of the Sami people:

It is the responsibility of the authorities of the State to create conditions enabling the Sami people to preserve and develop its language, culture and way of life.<sup>22</sup>

Through Norway's signing of the ILO's Convention 169, the Norwegian Supreme Court also accepts that Sami customary law is part of the Norwegian legal system, as a result of Article 8 of the Convention.<sup>23</sup>

Sweden recognised the Sami as an Indigenous people in 1977, however while Sweden recognises the Sami Parliament and the Sami Parliament reports annually to it, the Sami and their Indigenous rights are not recognised in the Swedish Constitution.<sup>24</sup>

The Sami are recognised in the Finnish Constitution as an Indigenous people and are entitled to receive services in their language, however this provision has diminishing practical application. Particularly important for the Sami in Finland is that their land usage and resources rights as Indigenous people are not recognised.<sup>25</sup>

### **Constitution of the Republic of South Africa**

The new constitution of South Africa was negotiated over an extended period following its reunification and the establishment of the Convention for a Democratic South Africa in 1991 and the abandonment of a state of emergency. The Preamble to the South African Constitution includes recognition of past injustices, honours those who have suffered for justice and freedom, respect for those who developed and built the country, while also declaring South Africa united in diversity. The new Constitution establishes it as the ultimate law that will:

<sup>22</sup> Norwegian Constitution, s110 (a); cited in LRCWA, Background Paper No.14, p.23.

<sup>23</sup> LRCWA, Background Paper No.14, p.23. Article 8 of ILO Convention 169 states:

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

Office of the Commissioner for Human Rights, *Convention No. 169) concerning Indigenous and Tribal People in Independent Countries*, <unhchr.ch/html/menu3/b/62.htm>, accessed 24 July 2008.

<sup>24</sup> HREOC, *Building a sustainable National Indigenous Representative Body*, p.55.

<sup>25</sup> Gáldu Resource Centre for the Rights of Indigenous Peoples, *Rights: Finland's Sami Fear Assimilation*, <galdu.org/web/index.php?odas=2686&giella1=eng>, accessed 24 July 2008.

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Heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights...<sup>26</sup>

The Constitution includes: declaration of and protective measures for official languages; a Bill of Rights; co-operative government; and recognition of traditional leadership and customary law. Recognition of customary law is provided by section 211:

1. The institution, status and role of traditional leadership, according to customary law, are recognised, subject to the Constitution.
2. A traditional authority that observes a system of customary law may function subject to any applicable legislation and customs which includes amendments to, or repeal of, that legislation or those customs.
3. The courts must apply customary law when that law is applicable, subject to the Constitution and any legislation that specifically deals with customary law.<sup>27</sup>

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<sup>26</sup> South African Government Information (SAGI), *Constitution*, [info.gov.za/documents/constitution/index.htm](http://info.gov.za/documents/constitution/index.htm), accessed 8 July 2008.

<sup>27</sup> SAGI, *Constitution*.



## **Appendix F: Recognition of Aboriginal Rights in State and Territory Constitutions and or Legislation**

<b>State/ Territory</b>	<b>Legislation</b>	<b>Contents</b>
<b>Australian Capital Territory</b>	<i>Australian Capital Territory (Self-Government) Act 1988</i> (Cwlth)  <i>Human Rights Act 2004</i>	<ul style="list-style-type: none"> <li>• Establishes a 'body politic' and its structure of government.</li> <li>• No recognition of Aboriginal interests</li> <li>• No Bill of Rights or charter of rights/ freedoms</li> <li>• The Act was the first legislation on human rights in Australia and aims to 'respect, protect and promote' the civil and political rights it defines and recognises.</li> <li>• Its Preamble includes mention of the 'special significance for Indigenous people' of human rights: <ul style="list-style-type: none"> <li>○ The first owners of this land, members of its most enduring cultures, and individuals for whom the issue of rights protection has great and continuing importance.</li> </ul> </li> <li>• Section 27 covers the rights of minorities: <ul style="list-style-type: none"> <li>○ Anyone who belongs to an ethnic, religious or linguistic minority must not be denied the right, with other members of the minority, to enjoy his or her culture, to declare and practise his or her religion, or to use his or her language.</li> </ul> </li> </ul>
<b>New South Wales</b>	<i>Constitution Act 1902</i>	<ul style="list-style-type: none"> <li>• Establishes structure of government and judiciary, makes provision for local government.</li> <li>• No recognition of Aboriginal interests.</li> <li>• No Bill of Rights or charter of rights/ freedoms.</li> </ul>
<b>Queensland</b>	<i>Constitution of Queensland 2001</i>	<ul style="list-style-type: none"> <li>• Establishes structure of government and judiciary, makes provision for local government.</li> <li>• No recognition of Aboriginal interests.</li> <li>• No Bill of Rights or charter of rights/ freedoms.</li> </ul>
<b>South Australia</b>	<i>Constitution Act 1934</i>	<ul style="list-style-type: none"> <li>• Establishes structure of government and judiciary, makes provision for local government.</li> <li>• No recognition of Aboriginal interests.</li> <li>• No Bill of Rights or charter of rights/ freedoms.</li> </ul>
<b>Tasmania</b>	<i>Constitution Act 1934</i>	<ul style="list-style-type: none"> <li>• Establishes structure of government and makes provision for local government.</li> <li>• Includes legal guarantee of religious freedom and equality, however contains no charter of rights and freedoms.</li> <li>• No recognition of Aboriginal interests.</li> </ul>
<b>Victoria</b>	<i>Constitution Act 1975</i>	<ul style="list-style-type: none"> <li>• Establishes structure of the government and judiciary, makes provision for local government.</li> <li>• Recognises the Aboriginal people of Victoria as the original custodians of the land and that</li> </ul>

State/ Territory	Legislation	Contents
	<i>Charter of Human Rights and Responsibilities Act 2006</i>	<p>therefore they have:</p> <ul style="list-style-type: none"> <li>○ unique status;</li> <li>○ spiritual, social, cultural and economic; relationship with their lands and waters; and</li> <li>○ have made an irreplaceable contribution to the identity and well-being of Victoria.</li> </ul> <ul style="list-style-type: none"> <li>• A clause is also included to preclude the section as being interpreted as having any legal affect.</li> <li>• The Charter's Preamble recognises that all people are born free and equal in dignity and rights, and that human rights have a special importance for the Aboriginal people of Victoria as descendants of Australia's first people and their relationship with their traditional lands and waters.</li> <li>• Section 19 establishes that Aboriginal people hold distinct cultural rights to: <ul style="list-style-type: none"> <li>○ enjoy their identity and culture;</li> <li>○ maintain and use their language;</li> <li>○ maintain their kinship ties; and</li> <li>○ maintain their distinctive relationships to land, water and other resources with which they are connected under traditional laws and customs.</li> </ul> </li> </ul>
<b>Western Australia</b>	<i>Constitution Act 1889</i>	<ul style="list-style-type: none"> <li>• Establishes structure of government and judiciary, makes provision for local government.</li> <li>• No recognition of Aboriginal interests</li> <li>• No Bill of Rights or charter of rights/ freedoms</li> <li>• Recommendations from a Law Reform Commission into Aboriginal customary laws (to amend the Constitution with wording similar to that recognising Indigenous rights in Victoria) are currently under consideration.</li> </ul>

## ***Appendix G: Summary of Key Findings-From Customary Law Discussion Paper***

<b><i>Aboriginal Land Rights (Northern Territory) Act 1976</i></b>	<ul style="list-style-type: none"> <li>Recognised Aboriginal customary land ownership and land management systems.</li> </ul>
<b>Australian Law Reform Commission Report on Aboriginal Customary Law</b>	<ul style="list-style-type: none"> <li>Endorsed the argument for recognition that Aborigines had a right (recognised in Commonwealth government policy) to choose to live in accordance with their customs and traditions, which implies that the general law will not impose restrictions on the exercise of that right.</li> </ul>
<b>Report of the Royal Commission into Aboriginal Deaths in Custody</b>	<ul style="list-style-type: none"> <li>Endorsed the Australian Law Reform Commission Report on recognition of customary law.</li> </ul>
<b><i>Mabo Decision and the Native Title Act and the Wik Decision</i></b>	<ul style="list-style-type: none"> <li>Recognised traditional native title rights of Indigenous people.</li> <li>Established legal frameworks based on Indigenous people's rights to negotiate over exploration and mining grants and the negotiation of land use agreements.</li> </ul>
<b>Sessional Committee on Constitutional Development Papers</b>	<ul style="list-style-type: none"> <li>Acknowledged the importance to Aboriginal people of recognition of customary law.</li> <li>Noted the importance of recognition of customary law in the Northern Territory in advancing the process of reconciliation.</li> <li>Suggested options for constitutional recognition of customary law included reference to history and prior occupation by Aboriginal people in a preamble, and recognition for Indigenous people's right to self-determination and to exercise customary rights and practices.</li> </ul>
<b>1996 Final Draft Constitution</b>	<ul style="list-style-type: none"> <li>Acknowledged that Aboriginal customary law was a living system of law and was central to Aboriginal peoples' lives.</li> <li>Recommended that Aboriginal customary law be recognised as a source of law on a par with, and complimentary to, the common law, except where practices conflict with existing legislation and international principles.</li> </ul>
<b>Alternate Dispute Resolution Subcommittee of the Northern Territory Law Reform Committee</b>	<ul style="list-style-type: none"> <li>Noted that subject to human rights safeguards and conflicts with Territory law, it intended to facilitate inclusion of additional Aboriginal customary law within community justice by-laws.</li> </ul>
<b><i>Constitutional Foundations Conference</i></b>	<ul style="list-style-type: none"> <li>Mr Gatjil Djerrkura called for Indigenous rights to maintain land, law, language, beliefs and systems of authority to be entrenched in the constitution.</li> <li>Reverend Djiniyini Gondarra described three founding principles of the Yolngu system of customary law and said that no constitution would be recognised without these principles included.</li> </ul> <p>Calls were also made for informed and well resourced consultation with Aboriginal communities on the constitution.</p>

<b>1998 Northern Territory Statehood Convention – Final Draft Constitution</b>	<ul style="list-style-type: none"> <li>Resolved to include constitutional recognition of Aboriginal customary law as a source of law, to be enacted as written law and recognise Aboriginal people and their governance systems in the preamble.</li> </ul>
<b>Kalkaringi and Batchelor Indigenous Constitutional Conventions and the <i>Indigenous Constitutional Strategy</i></b>	<ul style="list-style-type: none"> <li>Resolved to withhold consent to statehood until ‘good faith negotiations’ are held with Aboriginal people on a constitution.</li> <li>Called for constitutional protection for negotiated common law and statutory rights and for recognition and protection of all Indigenous rights and that Aboriginal law be recognised as a source of law in the constitution.</li> </ul>
<b>Report of the Inquiry into Aboriginal Customary Law</b>	<ul style="list-style-type: none"> <li>Recommended that the Northern Territory Statehood Conference resolution that Aboriginal customary law be recognised as a ‘source of law’ should be implemented.</li> <li>Determined that regardless of whether the Northern Territory became a state, the principle that customary law be recognised should be included as a statute.</li> </ul>
<b>Law Reform Commission of Western Australia</b>	<ul style="list-style-type: none"> <li>Called for establishment of an independent Indigenous Commission and the recognition of Aboriginal people in the Western Australian constitution.</li> </ul>
<b>United Nations <i>Declaration on the Rights of Indigenous People</i></b>	<ul style="list-style-type: none"> <li>One of the guiding principles sets out that customary laws can be recognised if the laws are compatible with internationally recognised rights.</li> <li>Guiding principles emphasise the importance of free, prior and informed consent to Indigenous people’s participation and inclusion in consultation processes.</li> </ul>
<b>Canadian Constitution</b>	<ul style="list-style-type: none"> <li>Recognises existing Aboriginal and treaty rights (protection of land claim agreements).</li> </ul>
<b>Sami Peoples’ Rights</b>	<ul style="list-style-type: none"> <li>Sami Parliaments are established in Finland, Norway and Sweden and have a central political role within those countries constitutional system on Sami political questions.</li> <li>Only the Norwegian Constitution affirms the special status of the Sami.</li> </ul>
<b>South African Constitution</b>	<ul style="list-style-type: none"> <li>The preamble includes recognition of past injustices, honours those who have suffered for justice and freedom, respect for those who developed and built the country. It affirms that as the ultimate law it will heal past divisions and provide the basis for a just society based on democratic values and human rights.</li> <li>Recognises customary law through specific provisions in section 211.</li> </ul>
<b>Commonwealth Constitutional Reform</b>	<ul style="list-style-type: none"> <li>Calls continue to remove racially discriminatory sections (25 and 51(xxvi)).</li> <li>There is now bipartisan support for amending Australia’s Constitution to formally recognise its Indigenous peoples.</li> <li>At the 2020 Summit the Australian governance stream recommended the Constitution be amended to include a preamble that formally recognises Australia’s Indigenous peoples and to remove any racially discriminatory language.</li> <li>The Summit’s stream debating options for the future of Indigenous Australia advocated for the need for a new national, bipartisan dialogue leading to formal legal recognition through</li> </ul>

	either an agreement of constitutional amendment.
<b>State and Territories Constitutions</b>	<ul style="list-style-type: none"> <li>• Only the Victorian Constitution includes recognition of the Aboriginal people of Victoria as the original custodians of the land.</li> <li>• The Law Reform Commission of Western Australia, in its report on legal recognition of Aboriginal customary law, recommended amending the Western Australian Constitution to recognise Aboriginal peoples' unique status, in a similar clause to that in the Victorian Constitution.</li> </ul>
<b>Australian Human Rights Acts</b>	<ul style="list-style-type: none"> <li>• The Australian Capital Territory's <i>Human Rights Act</i> acknowledges that human rights have special significance for Indigenous people. The Act establishes that all minorities have rights to enjoy and practice their culture and use their language.</li> <li>• Acknowledgement is given in the preamble to the Victorian <i>Charter of Human Rights and Responsibilities Act</i> that human rights have a special importance for Aboriginal people. The <i>Charter</i> establishes that Aboriginal people hold distinct cultural rights.</li> </ul>
<b>Bill of Rights and Statehood</b>	<ul style="list-style-type: none"> <li>• The advantage of enshrining rights in a Bill of Rights is that it can provide legal protection for the rights of minorities, whose rights can be overlooked in a democracy ruled by majority's rights.</li> <li>• Aboriginal and Torres Strait Islander Social Justice Commissioner has proposed a Northern Territory Bill of Rights that recognises economic, social and cultural rights as a step in overcoming systemic barriers to enjoying those rights. He has also proposed a section in the Northern Territory's constitution to recognise and affirm existing Aboriginal rights.</li> </ul>



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## ***Appendix H: Submissions and Briefings to Previous Standing Committees on Customary Law***

### **Submissions**

#### **An Examination of Structural Relationships in Indigenous Affairs and Indigenous Governance within the Northern Territory (Indigenous Governance) 2002**

In June 2002, the Standing Committee initiated an inquiry into matters relating to Indigenous governance in the Northern Territory. The above named discussion paper was released seeking public comment on appropriate relationships that should exist between Indigenous people and communities, the Northern Territory Government and wider Territory community. Consideration of customary law and its recognition were included in the discussion paper and addressed by a number of the submissions. Some submissions took the form of a briefing to the Standing Committee.

The Director of Public Prosecutions noted that issues surrounding some customary practices and the criminal law were not insurmountable. Australian obligation under international treaties and the 'mainstream' law could accommodate recognition of customary law that meets the needs of Indigenous people. The desired outcome is an application of alternative and customary mechanisms 'in harmony with Northern Territory law.'<sup>416</sup>

There is a considerable history of Parliamentary Committees consulting communities on a Northern Territory constitution and Aboriginal customary law. In addition to the written record, Aboriginal people recall the discussion at specific meetings and the context of their community's responses. This history is an important part of Galiwin'ku representatives recalling their community talking to earlier committees and also of their inability at the time to discuss their expectations of the constitutional recognition of customary law.<sup>417</sup>

Since then, a senior Yolngu elder, Reverend Dr Djiniyini Gondarra, has briefed the Standing Committee on the Yolngu constitution and law and has stressed customary

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<sup>416</sup> LCAC, *An Examination of Structural Relationships in Indigenous Affairs and Indigenous Governance within the Northern Territory (Indigenous Governance)*, Director of Public Prosecutions – Submission No.0001.

<sup>417</sup> LCAC, *Indigenous Governance*, Verbatim Transcript of Oral Presentation from Galiwin'ku Community - Submission No.0002, p.2.

law's continuing relevance and importance to the Yolngu people.<sup>418</sup> When questioned about how Yolngu law could be appropriately recognised, and whether inclusion of a Bill of Rights would meet the community's aspirations, it was acknowledged that there remained a need for broad based community consultation to identify appropriate models of recognition and ways to include customary law.<sup>419</sup>

The Chair of the Standing Committee acknowledged that she understood customary law underpins how culture moves forward and because that step had not occurred, Aboriginal people had ensured that Statehood did not happen. Moves to develop a constitutional response to recognising customary law in the Northern Territory will be flawed if not advanced through customary law processes.<sup>420</sup>

To summarise issues of concern, one Galiwin'ku representative had prepared a short statement, which said in part:

Right now we hold our law in our memory and our heart, our law is written in the land and is brought to life in ceremony, song, dance, painting and sacred objects. But we are changing that and we are working towards putting our law on the table alongside Balanda law...In Yolngu law there are 3 levels of Government, in Balanda law there are 3 levels of Government. Any Constitution for the Northern Territory must act as glue, to bring these 2 laws together...People suffer when they don't have the security provided by the knowledge of their place in the world, many of my people are suffering today. This constitution we are talking about today must be something that will help give their lives back.<sup>421</sup>

The Northern Land Council acknowledged the continuing relevance of the *Indigenous Constitutional Strategy* which was endorsed by all four Land Councils, the Aboriginal and Torres Strait Islander Commission and local communities and published under the authority of the Indigenous Constitutional Convention Committee established at Batchelor.<sup>422</sup> Northern Territory Aboriginal people's position on constitutional issues can also be linked to the Bark Petition of 1963 and the Barunga Statement of 1984.<sup>423</sup>

<sup>418</sup> LCAC, *Indigenous Governance*, Submission No.0002, pp.2-4. See also later in this section for briefings by Rev. Gondarra.

<sup>419</sup> LCAC, *Indigenous Governance*, Submission No.0002, p.7.

<sup>420</sup> LCAC, *Indigenous Governance*, Submission No.0002, p.12.

<sup>421</sup> LCAC, *Indigenous Governance*, Submission No.0002, p.13.

<sup>422</sup> LCAC, *Indigenous Governance*, Northern Land Council - Submission No.0003, p.3.

<sup>423</sup> The Barunga Statement was written on bark and presented in 1984 to the Prime Minister, Bob Hawke, at the annual Barunga cultural and sports festival. It called for Aboriginal self-management; a national system of land rights; compensation for loss of lands; respect for Aboriginal identity; an end to

In addition to noting effective exclusion of the wider Northern Territory public to the Northern Territory Constitutional Convention held in Darwin between 27 March and 9 April 1998, the timing of the referendum, in October 1998, 'pre-empted the process which Aboriginal people had established to respond.'<sup>424</sup>

Of particular relevance to constitutional recognition of Aboriginal customary law, the *Indigenous Constitutional Strategy* states:

1. That a Northern Territory Constitution must recognise Aboriginal law through Aboriginal traditional law holders, and Aboriginal structures of law and governance.
2. That Aboriginal law should be recognised as a source of law in the Constitution.
3. Further resolves to undertake research and discussion by the Aboriginal people of the Northern Territory regarding functional recognition that will reduce the impact of white law on Aboriginal people in such matters as the criminal justice system, social behaviour and family law.

The constitution shall establish a process, involving effective representation of Aboriginal peoples to consider further issues that may arise from time to time involving problems identified by Aboriginal people in the interaction of Aboriginal and non-Aboriginal law and to enact solutions.<sup>425</sup>

The strategy details Indigenous people's expectations on Aboriginal self-determination, self-government, Aboriginal land and other rights.<sup>426</sup>

Queensland academic Professor Peter Jull's submission examines the history of the Canadian Indigenous peoples' relationship with Canada's political system and of how

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discrimination and the granting of full civic, economic, social and cultural rights. The Prime Minister responded by saying that he wanted to conclude a treaty between Aboriginal and other Australians by 1990. See *Encyclopaedia of Aboriginal Australia*; cited at <aiatsis.gov.au/exhibitions/traty/barunga.htm>, accessed 28 August 2008.

<sup>424</sup> LCAC, *Indigenous Governance*, Submission No.0003, p.4.

<sup>425</sup> LCAC, *Indigenous Governance*, Submission No.0003, p.6.

<sup>426</sup> LCAC, *Indigenous Governance*, Submission No.0003, pp.7-9.

both Indian and Inuit peoples negotiated inclusion of Indigenous rights and eventual systemic change.

Indian nations had long realised that constitutional recognition and constitutional changes were both necessary for their security...They believed that their rights existed prior to the White Man's settlement and governance in North America, and that governments today should recognise them...Yukon and NWT [North West Territories] indigenous peoples, like those in Northern Quebec, had been negotiating de facto constitutional change through land claims agreements or treaties. It was not called 'constitutional', but it was that all the same.<sup>427</sup>

Jull describes the Inuit people's decision to gain wider (public) support for their cause through use of the media as instrumental in changing the government's perspective, with the Prime Minister accepting the Inuit people's terms for constitutional consultation.<sup>428</sup> This was added to after the proceedings of a special parliamentary constitutional committee were televised and closely followed by many Canadians.<sup>429</sup>

Between 1983 and 1987 a series of televised Indigenous government (First Ministers) conferences were held and while ultimately unsuccessful in negotiating change in political process, they did elevate Indigenous peoples and rights issues with the public.<sup>430</sup> The long period of consultation and negotiating over the terms of constitutional change culminated in 1995 with the Prime Minister accepting an Indigenous 'inherent right to self-government'.<sup>431</sup>

The Inuit in the long negotiating period (1976-1993) for Indigenous government of the land now known as Nunavut, encountered similar experiences, including the need to educate and persuade new ministers, committees and prime ministers.<sup>432</sup>

...the explicit and implicit negotiation of indigenous rights and interests which went on daily in the press and in

<sup>427</sup> LCAC, *Indigenous Governance*, Professor Peter Jull - Submission No.0004 Part 1, p.18.

<sup>428</sup> LCAC, *Indigenous Governance*, Submission No.0004 Part 1, p.20.

<sup>429</sup> LCAC, *Indigenous Governance*, Submission No.0004 Part 1, pp.20-1.

<sup>430</sup> LCAC, *Indigenous Governance*, Submission No.0004 Part 1, pp.26-7.

<sup>431</sup> LCAC, *Indigenous Governance*, Submission No.0004 Part 1, p.28.

<sup>432</sup> LCAC, *Indigenous Governance*, Submission No.0004 Part 1, pp.30-1.

countless meetings was changing the political culture of Canada.<sup>433</sup>

Jull noted that historic judicial decisions when Indigenous peoples were recognised by the law and the record of governments chastised 'provided moral and legal bedrock of political and constitutional change.'<sup>434</sup>

The Aboriginal and Torres Strait Islander Commission NT (ATSIC) submission referred to and reiterated the *Indigenous Constitutional Strategy* of 1998.<sup>435</sup> While noting that the failed referendum of 1998 'taught the Government lessons about how it relates, in particular, to our peoples', ATSIC also welcomed the Indigenous Governance Inquiry as illustrative of a new relationship between Indigenous peoples and the Territory Government.<sup>436</sup> The submission recommended that the Territory Government recognise the *Indigenous Constitutional Strategy* and implement relevant actions.<sup>437</sup>

The submission listed key social justice issues that would need to be incorporated into Statehood:

- Aboriginal land with the *Aboriginal Land Rights (NT) Act 1976* remaining a Commonwealth law;
- Native Title rights;
- Sea and water rights;
- Rights to minerals and resources;
- Sacred and significant sites and objects;
- Customary law;
- Aboriginal language, social, cultural and religious matters;
- Self-determination; and
- Human and citizenship rights through a Charter of Rights.<sup>438</sup>

On customary law recognition, the submission warns against any 'tokenistic' recognition, advising instead for the 'need to realistically view customary law as a legitimate source of law.'<sup>439</sup>

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<sup>433</sup> LCAC, *Indigenous Governance*, Submission No.0004 Part 1, p.32.

<sup>434</sup> LCAC, *Indigenous Governance*, Submission No.0004 Part 1, p.48.

<sup>435</sup> Also referred to by Submission 3 from the Northern Land Council.

<sup>436</sup> LCAC, *Indigenous Governance*, ATSIC NT - Submission No.0005, p.3.

<sup>437</sup> LCAC, *Indigenous Governance*, Submission No.0005, p.6.

<sup>438</sup> LCAC, *Indigenous Governance*, Submission No.0005, p.6.

<sup>439</sup> LCAC, *Indigenous Governance*, Submission No.0005, p.7.

The submission from the Aboriginal Areas Protection Authority's Acting Chief Executive, Dr John Avery, noted that recognition of sacred sites amounts to recognition of the Indigenous status of Aboriginal people:

Practically, managing the protection of sacred sites provides a means of reconciling Aboriginal traditional interests in land with economic, social and cultural development of all Territorians.<sup>440</sup>

The submission provided a useful interpretation of 'Aboriginal tradition' and how it is interpreted within the Territory:

In essence 'Aboriginal tradition' applies to the distinctive ways of life and cultures of Aboriginal people in the Northern Territory...Aboriginal traditions are represented in the knowledge, opinions and attitudes held within Aboriginal communities and transmitted orally and by participation in distinctively Aboriginal activities, especially in Aboriginal ceremonies. The Aboriginal Areas Protection Authority, with its majority of Aboriginal custodians, is uniquely qualified to consider these difficult matters of Aboriginal tradition and Aboriginal customary law...[The Authority] occupies ground between the authority of the Courts on the one hand and that of the parliamentary political processes on the other. Upon that ground Aboriginal traditions and customary laws mesh with the modern machinery of the governance of the Northern Territory.<sup>441</sup>

The submission also commented on the wider relevance of meaningfully consulting Aboriginal people:

The requirement to consult custodians about activities on land has benefits incidental to the main purposes of the consultations. It serves to inform and engage Aboriginal people at individual, family and community levels in relation to activities in their region, in all parts of

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<sup>440</sup> LCAC, *Indigenous Governance*, Aboriginal Areas Protection Authority - Submission No.0006, p.4.

<sup>441</sup> LCAC, *Indigenous Governance*, Submission No.0006, pp.9-11.

the Territory. Custodians frequently express satisfaction in simply being asked about these issues.<sup>442</sup>

The covering letter to the Central Land Council submission, which reiterates the relevance of the Kalkaringi Statement, the *Indigenous Constitutional Strategy* and the Report on the NT Aboriginal Constitutional Convention, noted:

The principles expressed in [the] documents were developed with broad Aboriginal community input and support, and reflect the cultural, social and political aspirations of Aboriginal people in central Australia.<sup>443</sup>

The covering letter also encouraged the Standing Committee to schedule a program of Aboriginal community meetings over a 12 month period and a series of workshop sessions on key themes and issues that were outlined in the Discussion Paper.<sup>444</sup>

The Department of the Chief Minister's submission noted the strong emphasis made by the previous Chief Minister in her approach to Statehood that community consultation and community involvement will be the principles driving the new process. This was particularly targeted towards Indigenous communities where a process had to be developed and implemented with 'respect for and proper recognition of the Indigenous people of the Territory.'<sup>445</sup>

Discussion was included of the outcomes of the *Building Effective Indigenous Governance Conference*. The outcomes included recommendations relevant to legislative and constitutional reform:

13. The NT *Local Government Act* be harmonised with the *Aboriginal Lands Rights (NT) Act* and *Native Title Act* to support effective Indigenous governance.
14. Reform of the *Local Government Act* include reference to the recognition and protection of the rights and interest of traditional owners in the Northern Territory.

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<sup>442</sup> LCAC, *Indigenous Governance*, Submission No.0006, p.12.

<sup>443</sup> LCAC, *Indigenous Governance*, Central Land Council - Submission No.0007, p.2.

<sup>444</sup> LCAC, *Indigenous Governance*, Submission No.0007, p.2.

<sup>445</sup> LCAC, *Indigenous Governance*, Office of Indigenous Policy, Department of the Chief Minister - Submission No.0009 Part 1, p.5.

17. That Indigenous people, traditional owners, land councils and leaders, have a major input into the process for developing the content of a new NT Constitution.
18. That consideration be given to the inclusion of Aboriginal customary law in a new NT Constitution.<sup>446</sup>

In its submission, the Central Australian Aboriginal Congress stressed the need for a Territory constitution to include comprehensive recognition and enforcement of Indigenous rights.

A new constitution should guarantee equitable services and enshrine the rights and responsibilities of all citizens to fully participate in the social, political and economic life of the country. The constitution should target the elimination of status differences along racial lines.

...The Constitution for a future state could guarantee various rights for Aboriginal people, some around health and the principle of self-determination. Of course, these would need to be enforced.<sup>447</sup>

### **Submissions to the Statehood Steering Committee on Constitutional Pathways to Statehood Discussion Paper - 2007**

The Statehood Steering Committee's discussion paper examined and called for submissions on a range of matters related to the development of a Northern Territory constitution. To date 20 submissions have been received, of which eight include comment related to recognition of customary law and/or Indigenous rights, with only two specifically considering recognition of customary law. Both of these submissions express views against constitutional recognition of customary law.

A number of the submissions suggested using the development of a constitution and the work towards statehood to build reconciliation and the trust of the Indigenous community. Similarly, a couple of submissions advocated for the inclusion of human rights in constitutional development and one called for acknowledgement of Aboriginal peoples' unique position as the traditional owners of much of the Northern Territory.

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<sup>446</sup> LCAC, *Indigenous Governance*, Submission No.0009 Part 1, p.31.

<sup>447</sup> LCAC, *Indigenous Governance*, Central Australian Aboriginal Congress - Submission No.10, pp.17-8.

One common theme to the eight submissions was the need for comprehensive, inclusive consultation with the broader Territory community on constitutional development. One argued for consultation with Indigenous people facilitated through respective community leaders, and one called for reaching a compromise with Aboriginal people on the *Indigenous Constitutional Strategy*.



## ***Appendix I: Briefings***

### **Briefing on the Northern Territory Law Reform Committee recommendation 11 of the Report on Customary Law – December 2004**

Mr Herne<sup>448</sup> reported that the Law Reform Committee was not adequately resourced to comprehensively examine the issue of payback and the criminal law. The Law Reform Committee therefore recommended that government needed a separate inquiry into that issue.<sup>449</sup>

Within the context of recognition of customary law, Mr Herne stressed that it was important that if customary law was to be constitutionally recognised that the recognition be precise. For example, communities could be empowered to decide what part of customary law they wanted to formalise, which could then go to the Attorney-General for determination. The process envisaged in the report was a:

...formal legalistic process, which will take time and use resources. But at the end of the day you will know that in a particular community this is the law on this issue...So my general philosophical approach which would be common to lawyers is that you should be very precise in what you are recognising...That does not stop a policy commitment to recognise customary law or a policy commitment to develop mechanisms to recognise it. But what we say is that you can't say the Constitution recognises customary law because nobody know what that means.<sup>450</sup>

The proposal in the 1998 draft constitution that customary law be recognised with a five year implementation process was seen by Mr Herne as being too short a timeframe for the consultation and negotiation required.

Mr Ryan<sup>451</sup> briefed the Standing Committee on the Aboriginal Law and Justice Strategy, stressing the need for a male and female team to establish and maintain effective communication with Aboriginal communities. Work on Indigenous

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<sup>448</sup> Currently with the Department of Justice and formerly the Executive Officer to the NT Law Reform Committee on the Report on Customary Law.

<sup>449</sup> LCAC, Briefing for the information of Members – Aboriginal Customary Law, Verbatim transcript, Meeting No 23, 3 December 2004.

<sup>450</sup> LCAC, Verbatim transcript, Meeting No 23, 3 December 2004.

<sup>451</sup> Currently with the Department of Justice, formerly with the Department of Community Development, Sport and Cultural Affairs and the Office of Aboriginal Development.

community engagement with safety and justice issues shows that male and females have different perspectives on the relative importance of some issues. In addition, it was noted that there were very different roles for women and men in how communities manage social control that are important to reflect in considering customary law.<sup>452</sup>

Mr Ryan related that consultation with Law and Justice Committees<sup>453</sup> has shown that Aboriginal communities feel ‘there needs to be a formal recognition of customary law.’<sup>454</sup> Planning for law and justice committees gave priority to developing community managed initiatives that accommodated local decision-making processes and ensured that mainstream and customary laws worked together.<sup>455</sup>

Mr Herne noted that Aboriginal law and justice committees should be covered by statute law as legal issues were usually involved. However, in a practical sense the committees operated informally and therefore functioned better without formal legal process.<sup>456</sup>

### **Briefing on Northern Territory Law Reform Committee’s examination of Aboriginal customary law – October 2007**

Mr Herne noted that the Law Reform Committee’s approach was to encourage a coordinated approach to customary law. However, he commented that ‘customary law has been ignored as a matter of law in the Northern Territory...’ It therefore remained ‘a policy matter for government’ and due to the surrounding, complex issues the government would need ‘a relatively comprehensive response or at least a coordinated response to deal with it.’<sup>457</sup>

He then elaborated:

<sup>452</sup> LCAC, Verbatim uncorrected transcript, Meeting No 23, 3 December 2004. Also in the written presentation provided by Mr Ryan to the meeting: ‘An Overview of the Law and Justice Strategy (ALJS) with a focus on the establishment, role and purpose of community safety and justice committees’, pp.3-5.

<sup>453</sup> The ALJS was established in 1995 to respond to recommendations from the RCIADIC and also to emerging safety and justice initiatives on many Territory Aboriginal communities. Participating communities negotiated community safety and justice plans and Community Safety and Justice Committees acted as an interface between government agencies and programs involved in safety and justice. They represented the community view in the justice system and helped to facilitate alternate dispute resolution and worked across mainstream and customary law. The Kurduju Committee represented committees in Ali Curung, Lajamanu and Yuendumu. See Department of Community Development, Sport and Cultural Affairs, *A Model for Social Change: The Northern Territory’s Aboriginal Law and Justice Strategy 1995-2001*.

<sup>454</sup> LCAC, Verbatim uncorrected transcript, Meeting No 23, 3 December 2004. Also ‘The Kurduju Committee Report 2001’, p.12 cited in ‘An Overview of ALJS’, p.14.

<sup>455</sup> LCAC, Verbatim uncorrected transcript, Meeting No 23, 3 December 2004 and ‘An Overview of ALJS’, p.9.

<sup>456</sup> LCAC, Verbatim uncorrected transcript, Meeting No 23, 3 December 2004.

<sup>457</sup> LCAC, Briefing for the information of Members – Aboriginal customary law, draft edited proof of verbatim transcript, Meeting 17, 11 October 2007, pp.1-2.

The Northern Territory Government has legislated specifically with customary law to remove it as a defence under the criminal code and that deals with one issue...The second thing is that it is set out in the Law Reform Committee's report that generally government has been pretty good in recognising customary law in the civil area, compensation for deceased victims and so...The third area is Aboriginal self-government and that is ultimately a political issues about self-determination for Aboriginal communities...They are the three areas across which cross which customary law is traditionally broken down...I think this committee will not have a lot of trouble with civil law issues. It will probably have to grapple with criminal law issues because they are much more dramatic...than self-government issues as a matter of policy.<sup>458</sup>

While the Standing Committee recommended that the Law Reform Committee examine the issue of customary law as a source of law, Mr Herne admitted the Law Reform Committee did not canvas opinions on it. Mr Herne cautioned, though, that a legal structure for customary law has to be very specific:

What we envisaged was that you would empower Aboriginal communities to set up their own dispute mechanisms and the law and justice plans in the report. At least you have got the whole community involved saying what is appropriate and inappropriate.<sup>459</sup>

Mr Herne noted that the Law Reform Committee supported the work of Mr Peter Ryan and the Law and Justice Strategy in Ali Curung and Lajamanu and that the Standing Committee could also make recommendations on continuing or re-establishing the strategy.<sup>460</sup>

Asked by the committee on the possible impact of enacting Northern Territory laws that included customary law on Federal legislation, Mr Herne said:

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<sup>458</sup> LCAC, Briefing, Meeting 17, 11 October 2007, p.2.

<sup>459</sup> LCAC, Briefing, Meeting 17, 11 October 2007, pp.3-4.

<sup>460</sup> LCAC, Briefing, Meeting 17, 11 October 2007, pp.4-5.

Commonwealth legislation sets out human rights standards and the Commonwealth sometimes says its own human rights standards don't apply to actions by the Commonwealth Government, such as the Racial Discrimination Act doesn't apply to that...Ultimately it is a political issue but I think if we can agree that something as a human right that can never be compromised Governments will be very keen to prevent any action that compromises that.<sup>461</sup>

On customary law's intersection with human rights issues, Mr Herne advised that situations like possible conflicts with existing legal standards need to be anticipated and a resolution provided through other legislation.<sup>462</sup>

In relation to customary law and criminal law, particularly in cases where 'payback' is a likely outcome irrespective of the Australian legal process, Australian law would intervene and this would continue, under any system. The reality is that many Aboriginal people in the Territory 'obey two laws and sometimes those laws are in conflict and you can't resolve that problem.'<sup>463</sup>

### **Briefing on Aboriginal customary law from Reverend Dr Djiniyini Gondarra and Mr Richard Trudgen of Aboriginal Resource Development Services – February 2008**

Reverend Gondarra introduced himself by saying that customary law and negotiating ways to find common ground between traditional Aboriginal law and contemporary law had been his 'field for the last 30-40 years.'<sup>464</sup> He noted that the Commonwealth government's apology to the Stolen Generations had created:

...a new outlook, a new trust, a new journey together to find a place where we work together ...we want to find the best way to help each other to build a nation that is strong, a nation that stands under the law not above the law...<sup>465</sup>

Mr Richard Trudgen emphasised that it was important to 'get people talking together' and to recognise that there are elements of law in both cultures that are good and

<sup>461</sup> LCAC, Briefing, Meeting 17, 11 October 2007, p.7.

<sup>462</sup> LCAC, Briefing, Meeting 17, 11 October 2007, pp.8-9.

<sup>463</sup> LCAC, Briefing, Meeting 17, 11 October 2007, p.10.

<sup>464</sup> LCAC, Briefing for the information of Members – Aboriginal customary law, draft edited proof of verbatim transcript, Meeting 18, 18 February 2008, p.16.

<sup>465</sup> LCAC Briefing, Meeting 18, 18 February 2008, p.16.

bad or questionable.<sup>466</sup> He commented that until about 10 years ago Reverend Gondarra believed that mainstream law did not have a system law, rather that it was 'made up', and changed according to whim. On finding out about the *Magna Carta* and its role in English law, his view changed.<sup>467</sup>

Mr Trudgen explained that a written document of the 'ten commandments' of Yolngu law was read for the first time at Galiwin'ku with Chief Justice Brian Martin present. It was read in English and in Yolngu Matha, demonstrating that the two law systems could be complementary. Reverend Gondarra noted that they were still waiting for the opportunity for other Aboriginal groups to meet and create similar documents that present their law.<sup>468</sup>

The word 'Madayin' was used by Mr Trudgen to describe the Yolngu system of law which encompasses the full range of interconnected rights and responsibilities in Yolngu culture or Rom.<sup>469</sup>

Reverend Gondarra described a participative working relationship established through to the Commonwealth Government's Emergency Response in Northern Territory Aboriginal communities in 2007. This relationship had been brokered by Reverend Gondarra through negotiation with nominated senior leaders of all clans of Galiwinku – applying a similar approach to governance processes as practiced in Yolngu law.<sup>470</sup>

In response to queries from the Committee on ways to ensure that the correct senior elders were consulted, Mr Trudgen and Reverend Gondarra recommended that in Arnhem Land, ask to speak to the 'Dalkara Djirrkay'. According to traditional law, this approach is usually made through a third person. A similar system exists in other locations.<sup>471</sup>

Mr Trudgen commented that it was necessary '... to train educators in both Central Australia and Warlpiri and other areas...to get ready for people to talk.' This follows a proposal by Reverend Gondarra at the Constitutional Convention in 1997 that a process begins on how to bring the two systems of law together.<sup>472</sup> It was noted by Mr Trudgen that he and Reverend Gondarra had spoken to previous Committees on

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<sup>466</sup> LCAC Briefing, Meeting 18, 18 February 2008, pp.16-8.

<sup>467</sup> LCAC Briefing, Meeting 18, 18 February 2008, pp.19-20.

<sup>468</sup> LCAC Briefing, Meeting 18, 18 February 2008, pp. 23-4.

<sup>469</sup> LCAC Briefing, Meeting 18, 18 February 2008, p.25.

<sup>470</sup> LCAC Briefing, Meeting 18, 18 February 2008, p.30.

<sup>471</sup> LCAC Briefing, Meeting 18, 18 February 2008, pp.28-31.

<sup>472</sup> LCAC Briefing, Meeting 18, 18 February 2008, pp.31-2.

customary law, to a meeting of national Attorneys-General and to previous Chief Ministers.<sup>473</sup>

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<sup>473</sup> LCAC Briefing, Meeting 18, 18 February 2008, pp.40-1.