CHAPTER 4

Discussion Paper No. 4

Recognition of Aboriginal Customary Law

LEGISLATIVE ASSEMBLY OF THE NORTHERN TERRITORY

Sessional Committee on Constitutional Development

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A paper issued for public comment by
the Select Committee on Constitutional Development

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A. EXECUTIVE SUMMARY

(a) This paper considers the question of whether Aboriginal Customary Law should constitutionally be recognised in some way in the Northern Territory and the option for doing this.

(b) The Committee stresses that it does not wish at this stage to advocate any particular view on the constitutional recognition of Aboriginal customary law. The purpose of this paper is to stimulate debate and invite comments and suggestions.

(c) Particular issues on which comment and suggestions are sought, and which are discussed in more detail in Item H below, include:

(i) Should Aboriginal customary law be legally recognised in the Northern Territory?

(ii) Should any such recognition be given constitutional force in a new Northern Territory constitution?

(iii) Should the recognition be by way of a non-enforceable preamble to that constitution?

(iv) Alternatively, should any such recognition be in the form of an enforceable source of law?

(v) If recognised as an enforceable source of law, should there be an exclusion of customary law that is inconsistent with fundamental human rights?

(vi) Should any recognition be limited to Aboriginal people who still have a traditional lifestyle?

(vii) Should any recognition be limited geographically to areas under the jurisdiction or control of appropriate Aboriginal institutions?

(viii) Should any recognition be subject to any overriding Territory statute law? If so, should it be subject to appropriate constitutional guarantees of customary rights?

(ix) If customary law is recognised, how should it be applied and enforced? - By the existing general courts, by a new system of Aboriginal courts or by some other flexible scheme designed in consultation with each Aboriginal community? Alternatively should it be left to traditional methods of enforcement?

(x) Whether or not customary law generally is recognised, should there be some ongoing study to consider further legislative incorporation of selected aspects of customary law by reference, or the adjustment of the general law to take into account selected aspects of customary law?

(d) The Committee would welcome comments and suggestions on any other matters relevant to customary law that any person may wish to make.

B. INTRODUCTION

1. Terms of Reference

On 28 August 1985, the Legislative Assembly of the Northern Territory of Australia by resolution established the Select Committee on Constitutional Development. Amendments to the Committee's term of reference were made when the Committee was reconstituted on 28 April 1987. On 30 November 1989, the Legislative Assembly further resolved to amend the terms of reference by changing the Committee's status to a sessional committee. On 4 December 1990 the Committee was again reconstituted with no further change to its terms and references.

The original resolutions were passed in conjunction with proposals then being developed in the Northern Territory for a grant of Statehood to the Territory within the Australian federal system. The terms of reference include, as a major aspect of the work of the Committee, a consideration of matters connected with a new State constitution. This discussion paper forms part of that consideration and is issued for public comment.

The primary terms of reference of the Sessional Committee are as follows:

> "(1) ... a committee to be known as the Sessional Committee on Constitutional Development, be established to inquire into, report and make recommendations to the Legislative Assembly on:
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> (a) a constitution for the new State and the principles upon which it should be drawn, including:
>
> (i) legislative powers;
>
> (ii) executive powers;
>
> (iii) judicial powers; and
>
> (iv) the method to be adopted to have a draft new State constitution approved by or on behalf of the people of the Northern Territory; and
>
> (b) the issues, conditions and procedures pertinent to the entry of the Northern Territory into the Federation as a new State; and
>
> (c) such other constitutional and legal matters as may be referred to it by:
>
> (i) relevant Ministers, or
>
> (ii) resolution of the Assembly.

(2) the Committee undertake a role in promoting the awareness of constitutional issues to the Northern Territory and Australian populations."

2. Membership

The membership of the Committee presently comprises equal numbers of Government and Opposition members and includes one Aboriginal member of the Legislative Assembly from a traditional background.

3. Discussion Papers

(a) The Committee has already issued a number of papers, including three discussion papers for public comment, as follows:

- A Discussion Paper on a "Proposed New State Constitution for the Northern Territory"
- A Discussion Paper on "Representation in a Territory Constitutional Convention"
- Discussion Paper No.3 on "Citizens' Initiated Referendums".

The purpose of these papers was to invite public comment with a view to assisting the Committee to make recommendations on a new State constitution and the procedure for adopting it.

(b) This Discussion Paper constitutes the fourth in the series, and deals with the question whether the new State constitution should recognise in any way any aspect of Aboriginal customary law as practised in the Northern Territory; that is, whether that customary law should be constitutionally recognised as one of the sources of new State law, at least amongst those Aboriginal citizens of the new State who already accept it as binding on them. As a corollary, further questions as to the manner in which that customary law, if so recognised, could be enforced, and the extent to which any methods of enforcement of that customary law could be specified in a new State constitution, are also dealt with in this Paper.

(c) The Committee does not wish to engage in a detailed examination of particular aspects of Aboriginal customary law in this paper and exactly how they could be recognised by or incorporated into the general law. Rather it is more concerned with the more limited question of possible constitutional recognition of customary law as a source of law.

(d) It is of course a fundamental principle that the citizen should be able to ascertain with some degree of certainty what are the laws that are applicable to that citizen within a given community. The rule of law is premised upon this principle. It is not unreasonable to expect that a new written constitution might, in general terms at least, specify the sources of law applying to the community which is to be subject to that constitution.

(e) As will be seen below, except in certain specific situations, Aboriginal customary law does not presently constitute a source of law recognised as such in the Northern Territory.

(f) The Committee recognises that the subject of customary law cannot realistically be divorced from the other issues affecting Aboriginal people in the Northern Territory. There are a number of inter-related issues presently the subject of considerable discussion and debate in national and international forums and in various publications. This includes issues concerning the grant of land rights, the protection of sacred sites and matters of self-management.

(g) The Committee has, however, had strong representations made to it in the course of its community consultations (see below) that the matter of recognition of customary law is of particular importance to Aboriginal people in the Territory. Accordingly, it has decided to deal with this subject by way of this separate Discussion Paper. This paper will not at this stage deal specifically with the matters of Aboriginal land rights and sacred sites, even though these matters raise aspects of customary law. This is because of the special nature of these topics and the particular issues arising from the existing land rights legislation. This is not to suggest that these other issues of concern to Aboriginal people are unimportant. It is noted that the Australian Law Reform Commission, in its Report on the Recognition of Aboriginal Customary Law, took a similar approach (Vol. I, paras 212-3).

(h) The Committee has already briefly considered the question of the constitutional recognition of Aboriginal rights in its Discussion Paper on a Proposed New State Constitution for the Northern Territory of October 1987. Apart from land rights, that Paper raised the question of recognising the pre-existing circumstances of Aboriginal citizens of the new State, including as to their language, social, cultural and religious customs and practices. A copy of Part S of that Paper entitled "Aboriginal Rights" is set out in Appendix I to this Paper.

(i) The matter of Aboriginal rights was further dealt with in the Committee's illustrated booklet "Proposals for a New State Constitution for the Northern Territory" at pages 10 and 11.

(j) However, none of the Committee's previous publications have specifically dealt in detail with the recognition of Aboriginal customary law.

(k) This Paper is issued for public comment and does not represent the Committee's final views on this subject. The purpose of the Paper is to raise options and stimulate debate, in the hope that members of the public, both Aboriginal and non-Aboriginal, will take the opportunity to provide comments to the Committee and assist it in it's task.

4. Committee Procedure

(a) The Committee has adopted, as a fundamental aspect of its procedure in actioning its terms of reference, the conduct of a comprehensive program of community consultations within the Northern Territory on matters that could be dealt with in a new State constitution.

(b) To this end, the Committee has already held a number of community visits and public hearings at various locations throughout the Territory. Many of these visits were to Territory Aboriginal communities. The Committee has also invited public submissions on its terms of reference and received a large number of both written and oral submissions. The procedures are set out in more detail in the Committee's latest Annual Report for 1990/91. These consultations will continue into the future as circumstances permit.

(c) In the course of its public hearings at various communities, the Committee received a large number of oral submissions on the need for recognition of customary law. Some of these submissions were made in an Aboriginal language. In many cases, they have since been translated into English. All of these submissions stressed the importance of customary law to Aboriginal people in support of their traditional lifestyles. All of them stressed the unchanging nature of customary law. Many submissions stressed the parallel nature of customary law and "white" law, each being complementary to the other.

(d) A typical oral submission was as follows:

> *"Because the Balanda (white people) don't understand Yolgnu (Aboriginal) law and we Yolgnu need to understand Balanda Law, we need to make the law work for everybody. Let's put our both laws, Yolgnu and Balanda in the Territory constitution but our law must exist and be recognised."*
>
> (Translation of evidence in Djapu language from Arnhem land given by Mr Wakuratjpi at a public hearing, Yirrkala, 8 May 1989)

(e) Excerpts of written submissions to the Committee raised on the subject of recognition of customary law are as follows:

> *"This is an exceedingly difficult question in practice, if not in theory. The major political parties of Australia take different (and seemingly changing) views and Aborigines themselves have different views (or at least in my perception they do.) I am assuming from the outset that all basic "Human Rights", ... are totally accepted as being the rights of Aborigines as well as non-Aborigines, all being Australian citizens. Should there be positive discrimination of any kind? Some people would argue "No", yet all major political parties in Australia seem to accept that there should be some, even if they differ substantially in what form it should take, how it should be implemented."*
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> **(Submission No: 35 - Mr R G Kimber, Alice Springs)**
>
> *"Aboriginal traditional law draws on a body of experience with life in Australia which extends back "40,000" years and possibly longer.... I suggest that, given the respective standing of the two traditions, the question should be properly put by seeking to determine how Anglo-Australian law fits in with the*

tried and tested law of the land (Traditional Aboriginal law) rather than vice versa."

(Submission No: 49 - Mr B Reyburn, Tennant Creek)

"The new Constitution should contain a statement, in general terms, recognising the special position of the Aboriginal people in the history, culture and development of the Territory and, in particular, recognising prior occupation of the Northern Territory. Such a statement could possibly form a part of the preamble to the Constitution. However,the writer is not persuaded that any such statement should of itself be justiciable."

(Submission No: 19 - Mr P McNab, Darwin)

(f) A list of persons who have made oral and written submissions is set out in Appendix II to this Paper.

(g) Committee has considered all of these submissions. It has also had the advantage of a growing body of literature on the subject. Individual members of the Committee have drawn upon their own knowledge and experience on this subject and have shared that with fellow members. The Committee offers this Paper, with its options and tentative views, not in the sense of some scholarly work with definite proposals, but as a means of stimulating interest and debate. The Committee's work can only be enhanced by constructive feedback from the public on this and related subjects.

C. ABORIGINAL BACKGROUND

1. Aboriginal History

(a) The study of Aboriginal history was until recently a somewhat neglected area, but work in this field has intensified in the last few decades. The origins of the Aboriginal people of Australia continue to attract considerable research and debate, but it is now generally accepted that their settlement of the Continent predates European settlement by some 50,000 to 100,000 years. Knowledge of the detail of this history continues to be limited, although archaeological discoveries, dreaming stories and rock art sites have provided valuable insights.

(b) Given such a lengthy period of occupation, and the physical isolation of the Australian Continent from the Asian mainland for most of that time, it is hardly surprising that the Aboriginal people developed unique cultures and societies. In regions where those cultures and societies survive today, mainly in the north and outback of Australia, their uniqueness and the degree of their distinctness from European culture and society is striking.

(c) As part of those traditional cultures and societies, the Aboriginal people developed sophisticated and intricate legal, social and religious rules and customs, generally regarded as being obligatory on the people affected, and in which there was an integral relationship between law, morality, religion and society generally. A strong spiritual

element was evident throughout these systems and which governed the relationships between Aboriginals and the land.

(d) There was and still is considerable diversity between these rules and customs in different parts of Australia, accompanied by a great diversity of languages. Although they were well-developed local and regional relations among groups, we have no knowledge of wider political or administrative structures as found in nation-states today. However, there were and are similarities in traditions, customs and practices.

(e) Aboriginal cultures and societies were profoundly affected by European settlement and development. The degree of impact varied considerably among regions and groups. Much new research is illustrating this complicated cross-cultural history. The consequences of European settlement have now been widely documented and need not be examined in detail in this paper. There is no hiding the fact that a legacy of mistrust remains in many places.

(f) European-derived culture and society, together with other influences, generally predominates in Australia, even in many areas of the north. Aboriginal lifestyles also continue to flourish, especially in rural and remote areas, and including in a number of areas of the Northern Territory where there are Aboriginal communities. There is also an urban Aboriginal experience that is emerging. Non-western culture and lifestyles are often invisible or are undetected by outsiders. But even in those areas where Aboriginal lifestyles continue, Western law and society has had a considerable impact.

(g) The number of Aboriginal people who still largely adhere to traditional lifestyles is relatively small in comparison to the total Australian population, and they are scattered over a vast area of land. Many of them reside in land in the Northern Territory which is now Aboriginal land vested in Land Trusts in fee simple on behalf of the traditional owners, although the land remains within the boundaries of the Self-governing Northern Territory and is subject to most Northern Territory laws made by the Territory Legislative Assembly. Other areas occupied by Aboriginals are under claim by them or are held on Crown leasehold tenure, or are part of national parks or comprise smaller community living areas. Some traditional Aboriginals reside on pastoral leases owned by others or live in or near towns. Many urban Aboriginals continue to value, and increasingly seek to strengthen, their ties with their unique cultures and heritage.

(h) The Committee concludes that there are in the Northern Territory a sizeable number of Aboriginal people to whom their Aboriginal history and heritage are proud facts of life and provide a frame of reference for their daily activities. Any successful resolution of future constitutional arrangements for the Territory must take this into account. The Territory is a multi-cultural community, and Aboriginal societies and cultures contribute a most valuable element of diversity to that community. Such pluralism is not inconsistent with the existence and unity of the Australian nation as a whole or with that of the Self-governing Northern Territory. Emerging conventions and practices suggest that Aboriginal cultures, as the indigenous cultures of Australia, have a particular status that demands some consideration. This view of the Committee accords with basic principles of human rights (see Item C.4 below).

2. Nature and Role of Customary Law

(a) Aboriginal customary law is an integral part of traditional Aboriginal society. It follows that in so far as that traditional society continues to function as a living system in the Northern Territory, then so must Aboriginal customary law. In such a situation, despite the fact that European-derived law does not generally recognise Aboriginal rules and customs as part of the law of the land (see Item C.2 (g) below), those rules and customs in a real sense can be said to be part of the "law" in relation to those Aboriginal people who still respect them.

(b) There is a question whether Aboriginal customary law is correctly classified as a form of law at all. In the Gove Land Rights case (Milirrpum v Nabalco Pty Ltd (1971) 17 FLR 141), Justice Blackburn considered the nature of Aboriginal traditional society at Gove in the Northern Territory in some detail, and concluded that the evidence showed a recognisable system of law, even though he considered that in accordance with the common law it did not provide for any recognisable form of proprietary interest in the land. This latter qualification may no longer be supported in view of the decision in Mabo v Queensland, High Court, 3 June 1992, in which a majority of the Court recognised indigenous customary title to land of the Torres Strait people under certain conditions. It is still of interest, however, that in reaching this conclusion as to Aboriginal law generally, Justice Blackburn adopted a concept of law by reference to "a system of rules and conduct which is felt as obligatory upon them by the members of a definable group of people" (Gove Land Rights Case @ 266).

(c) Subsequent to this decision, Justice Woodward was entrusted by way of Royal Commission with the task of inquiring into the appropriate means of recognising and establishing the traditional rights and interest of Aborigines to and in relation to the land in the Territory. He pointed to the difference between Aboriginal concepts relating to land ownership and European legal concepts and the difficulty of expressing Aboriginal ideas and arrangements in English terms, Notwithstanding this, in his Report he in effect accepted without debate the existence of Aboriginal traditional rights to land and hence a form of Aboriginal customary law.

(d) It is said that customary law is perceived by Aboriginal people as a wider system of social control than non-Aboriginal Australians would normallyconceive law to be. Aboriginal customary law includes elements which could normally be described as "private law"(eg: interpersonal relations and dispute resolution), "public law" (community government), and religious beliefs and practices. These aspects of social control are inextricably mixed in a traditional Aboriginal community (Preliminary Report of the SA Aboriginal Customary Law Committee 1979 @ pp15-16).

(e) Many aspects of Aboriginal customary law are inaccessible to others, for a variety of reasons.These include the fact that the law varies from community to community, that it is usually not recorded in writing, that some of it is secret or confidential, that it can usually only be learnt orally in the relevant Aboriginal language, and that it is based on ideas and concepts radically different from "Western" ideas and concepts. However, research over the last few decades has recorded and analysed great deal of information about Aboriginal society in the Northern Territory. Much is now known about such

rules and customs as apply to kinship and marriage, to the role of different people in that society (including that of women), to hunting, fishing and gathering rights and practices, to rights and duties in respect of land, sacred sites and objects, to spiritual beliefs and practices, and to concepts of authority and responsibility and methods of conflict resolution and punishment. Some of this information has come from research undertaken in preparation for land claims. It is clear that Aboriginal customary law is complex and extends well beyond matters of land rights, although aspects are often connected to land issues.

(f) A number of Northern Territory court decisions have recognised the existence of Aboriginal law for particular purposes, in part in reliance on earlier Territory legislation. For example, the now repealed Criminal Law Amendment Ordinance 1939 required a court, upon a conviction of murder, to hear evidence "as to any relevant native law or custom" (see R v Anderson [1954] NTJ 240 per Justice Kriewaldt @ 248 and see the Law Reform Commission Report No.31, Recognition of Aboriginal Customary Laws, Vol 1 @ para 52). In other cases, the courts have found themselves able to have some regard to customary law in particular situations without recourse to legislation. Thus, for example, the motivation under tribal law for committing a criminal offence, or the likely penalty under customary law, have been taken into account by courts in relation to the penalty to be imposed by the court, although not as a defence to a criminal charge (for example, that the victim had broken tribal law and that the offender acted on the orders of tribal elders; see R v Mulparinga [1953] NTJ 205, 219). In some cases, Territory courts have taken a defendant's Aboriginality into account in determining provocation. Cases where Aboriginal customary law have been taken into account by the courts in sentencing offenders are collected in the Report of the Law Reform Commission on the Recognition of Aboriginal Customary Law, Vol.1, Chapter 21. Recent N.T. Supreme Court decisions of relevance include R v. Minor (1992 - Court of Criminal Appeal) as to whether "pay back" can be taken into account in sentencing and Mungatopi v. R (1991 - Court of Criminal Appeal) as to the relevance of custom and acceptable conduct in Aboriginal society in deciding whether there was provocation.

(g) On occasions, Northern Territory stipendiary magistrates sitting as the Court of Summary Jurisdiction have sat with Aboriginal Justices of the Peace in the Territory and have been assisted with explanations of Aboriginal customary law and social practices by way of background to the case.

(h) Northern Territory courts have taken Aboriginal customary law into account in a variety of other contexts. For example, in the protection of secret Aboriginal ceremonies from disclosure by publication (Foster v Mountford and Rigby [1976] 14 ALR 71), in the immunity of confidentiality information about Aboriginal sacred sites from use in evidence (Aboriginal Sacred Sites Protection Authority v Maurice (1986) 65 ALR 247), in taking into account Aboriginal traditional status and the ability to participate in ceremonies in determining damages for injuries (Roberts v Devereux, NT Supreme Court, 22 April 1982) and in one unreported case in having regard to tribal marriages for purposes of adoption.

(i) The current legislation in the Northern Territory also allows reference to Aboriginal customary law in the Northern Territory in specific matters. For example, the

Aboriginal Land Rights (Northern Territory) Act 1976 of the Commonwealth allows claims to be made by Aboriginals as to Crown land in the Northern Territory in accordance with traditional concepts of ownership The Northern Territory Aboriginal Sacred Sites Act provides protection for Aboriginal sacred sites in the Territory and the Heritage Conservation Act provides protection for archaeological places or objects, including objects sacred according to Aboriginal tradition (see also the Aboriginal and Torres Strait Islander Heritage Protection Act 1984 of the Commonwealth). Traditional use of land and water by Aboriginals is protected by section 122 of the Territory Parks and Wildlife Conservation Act, sections 24(2) and 37(b) of the Crown Lands Act and section 53 of the Fisheries Act. Aboriginal tribal marriages are recognised in a number of Territory Acts, including the Administration and Probate Act (sections 6(1) and (4), 67A and 96), Adoption of Children Act (section 6(3)), Criminal Code (section 1, definition of "husband" and "wife"), Family Provision Act (section 7(1A)), Motor Accidents (Compensation) Act (section 4, definition of "spouse" paragraph (e)), Status of Children Act (section 3, definition of "marriage" paragraph (b)) and the Work Health Act (section 49(1), definitions of "family" and "spouse"). Special provision is made for Aboriginal child welfare, including the need to have regard to Aboriginal customary law in determining the welfare of the child (Community Welfare Act, Part IX). Special provision is made for the distribution of the estate of an Aboriginal dying intestate, having regard to the traditions of the community (Administration and Probate Act Division 4A).

(j) Apart from the matter of indigenous customary title to land, now dealt with in the recent High Court decision in Mabo v Commonwealth, there has so far been no general recognition of Aboriginal customary law in the Northern Territory as a source of law enforceable by the courts, or otherwise cognisable by those in authority. Aboriginal customary law does not, for example, have a status similar to the common law inherited from England (compare the Sources of Law Act 1985 of the Northern Territory, section 2). Unless a particular aspect of customary law can be taken into account in one of the ways described in the preceding paragraphs, then as far as the law in force in the Northern Territory is concerned, it merely represents a form of private belief, custom or practice.

(k) Notwithstanding this non-recognition, the Committee is satisfied that there are a significant number of Aboriginal people resident in the Northern Territory who strongly regard their customary laws as being applicable to them in a binding way and who have a desire to preserve that application.

3. Proposals for Reconciliation and Self-determination

(a) The Aboriginal people of the Northern Territory comprise in excess of one quarter of the population of the Territory. While all of these people may not live according to traditional lifestyle, the number that do is still significant in percentage terms. It may be thought desirable that there be some form of recognition of their role within the wider Northern Territory society with a view to establishing and maintaining harmonious relations between Aboriginal and non-Aboriginal people in the Territory as equals.

(b) Historically, as has been discussed above, relations between Aboriginal and non-Aboriginals have not always been good. The Northern Territory was treated by its first European settlers as if it was uninhabited apart from the few nomadic indigenous peoples. These peoples were frequently regarded as being inferior and their laws and customs were generally ignored. Some of the new immigrants thought them to be a race of people who would gradually die out.

(c) In more recent times, various policies have been devised to seek some form of accommodation with the Aboriginal people, including by way of assimilationist policies (from about 1937) and integrationist policies (from about 1962). These policies tended against any discussion of the possible recognition of customary law.

(d) A significant change in thinking occurred around the time of the passage of the 1967 national referendum, giving the Commonwealth Parliament concurrent power with the States to enact special laws for the people of any race (Constitution, section 51(xxvi)). This gave rise to new legislation and a series of programs, federal and State/Territory, designed to provide assistance to Aboriginal people, although the referendum made no difference to the Commonwealth's plenary powers in the Northern Territory. It did not give Aboriginal people and their laws any form of constitutional recognition.

(e) The difficulty in designing such programs is to find a balance between genuine assistance to ameliorate the disadvantages still experienced by many Aboriginal people and intrusion or dependency-creation. The concerns in this regard have lead to increasing demands by the Aboriginal people themselves for greater consultation and participation in the design and management of programs.

(f) At a federal level new approaches are being sought which stress consultation and greater participation by Aborigines. While most Australians may agree with this in principle, further discussions and practical outcomes has only just begun. It is not appropriate in this paper to enter into detailed discussion of these matters.

(g) At a community level in the Territory, the experience of the Committee is that there is frequently a desire for local Aboriginal self-management within the framework of the wider community, wherever possible based on links with the traditional tribal lands, and with preservation of customary law and traditional society.

(h) This approach has been complemented by efforts seeking to increase that involvement of Aboriginal people in the wider community. There have, for example, been extensive efforts to encourage Aboriginal communities to incorporate as community government councils under the Local Government Act of the Territory. However, some communities have preferred to use the medium of the Aboriginal Councils and Associations Act of the Commonwealth or to remain as an incorporated association.

(i) Apart from local government, and the special provision made for the role of Territory land councils under federal legislation and complementary Territory legislation, Aboriginal residents of the self-governing Northern Territory have generally been expected to use the same channels as other Territorians in order to participate in Territory decision-making processes within the wider community.

(j) No special provision has been made by the Commonwealth for the representation in Parliament of Aboriginals at either federal or Territory level. Under the Northern Territory (Self-Government) Act 1978, the single member electorates for the Territory Legislative Assembly are to be distributed in accordance with a 20% quota rule (section 13(5)), without regard to race.

(k) The two main Aboriginal Land Councils in the Northern Territory, established under the Aboriginal Land Rights (Northern Territory) Act 1976 of the Commonwealth, have taken a leading role in pushing for greater Aboriginal control in various matters, including as to land. Land Council support was given to a Conference in Alice Springs in June 1989 on the Future of Government for Aborigines in Central and Northern Australia. That Conference advocated autonomous Aboriginal local and regional self-government with direct links with the Commonwealth, and not as part of the Northern Territory.

(l) The concepts of Aboriginal self-management and self-sufficiency are explicitly stated to underlie the Aboriginal and Torres Strait Islander Commission Act 1989 (see in particular section 3), or "ATSIC" for short.

(m) Proposals for self-government or self-determination have generally been concerned more with enclave forms of separate development of Aboriginals as a distinct group. They are not so much concerned just with the preservation of traditional society within and as part of the wider State or Territory community. These broader proposals raise issues going beyond this Committee's terms of reference. In any event, the Committee, although not of a final view on the matter, does not consider that any recognition of customary law is an appropriate method for achieving Aboriginal self-government or self-determination. The issues concerning possible self-government or self-determination are much broader. The full range of problems experienced by Aboriginal people generally in the Northern Territory in their contact with the wider constitutional and legal system will not be solved just by recognition of customary law.

(n) Alongside the development of concepts of self-government, self-determination or self-management, the concept of a "Makaratta" or treaty between Aboriginal and non-Aboriginal Australians has developed in recent years. This originated in the late 1970's with calls by Dr HC Coombs, Judith Wright, Stuart Harris and others. The concept was to use such a mechanism to recognise the historic rights of Aboriginal people to the Continent, and to work towards reconciliation between the two groups. It could include provision for the maintenance of tribal laws.

(o) This call was supported in 1983 by the Senate Standing Committee on Constitutional and Legal Affairs when it called for a constitutional amendment to provide for a treaty. This approach was subsequently endorsed by the Advisory Committee in its Report on Individual and Democratic Rights 1987, but not accepted by the Constitutional Commission in its Final Report of 1988 until such time as an agreement with Aboriginal people had been negotiated. A referendum for this purpose has not so far resulted.

(p) In 1988, Prime Minister Hawke announced in the Barunga Statement that there would be a treaty negotiated between the Aboriginal people and the Commonwealth Government on behalf of all the people of Australia.

(q) The current federal Minister for Aboriginal Affairs has stated that there will be an instrument of reconciliation, which should be achieved by the Centenary of Federation, 1 January 2001. The Commonwealth Parliament has enacted the Council for Aboriginal Reconciliation Act 1991 to promote the process of reconciliation, including a consideration of whether it would be advanced by a formal document or documents of reconciliation. The Act ceases to operate on 1 January 2001.

(r) The 1991 Constitutional Centenary Conference, in its concluding statement, resolved that there should be a process of reconciliation between the Aboriginal and Torres Strait Islander peoples of Australia and the wider Australian community, aiming to achieve some agreed outcomes by the Centenary. It said that this process should among other things, seek to identify what rights these peoples have and should have as the indigenous peoples of Australia, and how best to secure those rights, including through constitutional change. As part of that reconciliation process, the Commonwealth Constitution should recognise these peoples as the indigenous peoples of Australia.

(s) The Committee does not wish to comment on the proposals for reconciliation at a national level, as this is outside its terms of reference. It is, however, concerned with the issue of reconciliation between the Aboriginal and non-Aboriginal residents of the Northern Territory and in particular how that might be assisted by the adoption of a new constitution for the Territory. It would seem to be in the interests of all Territorians to work towards a harmonious and tolerant society. There may be considerable merit in the comments in the 1991 Report of the Royal Commission on Aboriginal Deaths in Custody (Vol 5) that reconciliation should be an ongoing process which must have bi-partisan support, and which should not be limited to the concept of a single instrument of agreement (however called). It is clearly not just a matter for the Commonwealth.

(t) One of the arguments in favour of some form of constitutional or legal recognition of Aboriginal customary law within the Territory is that it may well advance the process of reconciliation. The question of whether any such recognition could or should take place, and the options for same, including by way of provisions in a new Northern Territory constitution, are dealt with in Item H below.

4. International developments

(a) In recent years there have been significant developments at an international level seeking to specifically recognise the rights of indigenous peoples throughout the World. The Aboriginal people of Australia have played a prominent part in these events.

(b) Initial moves to recognise such rights internationally with specific reference to indigenous people were advanced through the International Labour Organisation. This culminated in the ILO Convention No.107, concerning the protection and integration

of indigenous and other tribal and semi-tribal populations in independent countries. The emphasis in this Convention was on the protection of such peoples in the course of integrating them into the wider community. Article 7 provided that regard had to be had to their customary laws. These peoples were to be entitled to retain their customs and institutions where not incompatible with national legal systems or the objectives of integration programs. Other articles dealt with the application of custom to criminal offences and traditional rights of land ownership.

(c) In the Report of the Meeting of Experts on the revision of ILO Convention No.107 dated September 1986, which advocated the revision of that Convention, it was said as follows:

"96. The discussion on this Article bore essentially on the relation between national law and the customary laws and procedures of indigenous and tribal peoples. A distinction was drawn between the positive laws of nations, as expressed in their constitutions and other forms of legislation, and the largely uncodified laws of the indigenous and tribal peoples. There was a wide measure of agreement that significant weight has to be given to these customary laws and procedures, but that in cases of conflicts the national laws should prevail. Procedures should be established to resolve conflicts between customary and national laws, and consideration should be given to the customary laws and procedures as far as possible. Examples were given of some countries in which such procedures had already been established and where a great deal of attention had been paid to how to resolve the conflicts which inevitably arose. The exact procedures which should be established could easily be left to the various countries.

97. The point was also made that individuals should have the right to appeal to the national legal system if they did not wish to be governed only by customary laws and procedures. The expert representing the World Council of Indigenous Peoples pointed out that customary law was not static, and that it might therefore be preferable to refer to laws decided according to traditional methods by the indigenous or tribal peoples themselves.

98. Some of the participants, in particular the observers from indigenous organisations, stated that the imposition of national laws on their peoples often caused great hardship and was sometimes in sharp conflict with their own desires and institutions. These participants felt that only their own rules should govern the various kinds of relationships among themselves."

(d) This Convention has since been replaced by ILO Convention No.169 of 1989 concerning Indigenous and Tribal Peoples in independent countries. Article 8 of this Convention is in somewhat similar terms to Article 7 of ILO Convention No.107. In applying national laws and regulations to the peoples concerned , due regard is to be had to their customs or customary laws. The right to retain the customs and institutions of indigenous peoples is to apply except where not incompatible with fundamental rights defined by the national legal system and with other internationally recognised human rights. Procedures are to be established, whenever necessary, to

resolve conflicts which may arise in the application of this principle. Other Articles deal with criminal matters and traditional rights of land ownership and use.

(e) In 1988 the UN Working Group on Indigenous Rights produced a draft Universal Declaration on Indigenous Rights. This included the right of indigenous peoples to have their specific characteristics duly respected in the legal systems and political institutions of a country, including full recognition of indigenous law and custom. This draft has since been further revised, but has not yet been adopted by the UN General Assembly.

(f) Work is proceeding in various international forums seeking further recognition of indigenous rights. No doubt, this work will be furthered as part of the 1993 International Year of the World's Indigenous Peoples.

D. SITUATION IN THE NORTHERN TERRITORY

1. Northern Territory sources of law and federal considerations

(a) The Northern Territory was formerly part of the Province of South Australia up to federation in 1901. It then became part of the State of South Australia until the end of 1910. With effect from the beginning of 1911, it was surrendered by South Australia and accepted by the Commonwealth as a Commonwealth territory.

(b) The Northern Territory continues to have the status of a Commonwealth territory notwithstanding the grant of Self-government effected by the Northern Territory (Self-Government) Act 1978. As such, the constitutional division of legislative powers applicable as between the Commonwealth and the States does not apply to the Northern Territory. The Commonwealth Parliament may therefore legislate, and does legislate, for the Territory under section 122 of the Constitution, virtually without any constitutional limitations.

(c) In fact, the Commonwealth Parliament, by its own legislation, has conferred a substantial grant of self-governing powers on the new Northern Territory body politic established by the Northern Territory (Self-Government) Act 1978 through the Territory's own institutions of government - legislative, executive and judicial. The Committee understands that this grant of legislative powers to the Territory Legislative Assembly is wide enough to include the making of laws on matters of recognition of Aboriginal customary law in the Territory. This is subject to there being no inconsistency with or repugnancy to existing Commonwealth legislation on specific matters. For example, it may not be possible for the Territory Legislative Assembly to legislate to convert tribal marriages into legal marriages for all purposes, having regard to the Commonwealth Marriage Act.

(d) The recognised sources of law at present in the Northern Territory basically comprise the common law, inherited from England (plus a few old English statutes), a few items of old South Australian legislation enacted prior to 1911 that are still in force in the Territory, Commonwealth legislation enacted since 1901 and still applicable in the

Northern Territory and Northern Territory legislation enacted since 1911 and still in force.

(e) The common law of England, as introduced upon the European settlement of Australia, still continues as a source of law throughout Australia, including in the Northern Territory, but as modified by Commonwealth, State and territory legislation and as affected by later Australian judicial decisions.

(f) As the common law presently stands in Australia, apart from indigenous customary title to land, it does not yet recognise or adopt Aboriginal customary law, either as it existed at the time of European settlement or since, as part of Australian law. Whether the High Court of Australia will continue to take this approach into the future is uncertain.

(g) Further, it has so far been held that the whole of Australia had the status of a settled colony upon European settlement, as distinct from one that was conquered. Arguably this has the consequence that the pre-existing Aboriginal customary laws (other than as to land ownership) did not survive European settlement of their own force as a part of Australian law. The High Court in Mabo has, however, rejected the view that Australia was "terra nullius" at European settlement, that is, vacant land without occupants. In doing so, the Court has recognised the historical facts.

(h) Should the Northern Territory become a new state in the federation, then unless otherwise provided in any terms and conditions that may be imposed by the Commonwealth Parliament upon the grant of Statehood, these basic sources of law will not necessarily change. Subject to any such terms and conditions and to any applicable Commonwealth legislation it would be open for the new State constitution to define the sources of law for the new State. Alternatively, the new State Parliament could legislate on this topic following the grant of Statehood, providing it did so consistently with any Commonwealth legislation and the new State constitution.

(i) The Committee is satisfied that, subject to the qualifications mentioned in the last paragraph, there are no constitutional impediments to the recognition of Aboriginal customary law in the Northern Territory. That is so, whether that recognition results from a Territory law enacted prior to the grant of Statehood, or from the provisions of a new State constitution or if it is contained in legislation enacted by the new State Parliament after Statehood.

(j) The Committee is not aware of any general impediments to any such recognition as a result of existing Commonwealth legislation. The Committee is satisfied that such recognition would not offend against the Racial Discrimination Act 1975 of the Commonwealth. Under that Act, any "acts" of discrimination (but not legislative "Acts") based on race are unlawful, and in the case of persons of a particular race who enjoy some right by reason of race under any legislation, a similar right is conferred by that Act on others. These provisions are subject to "special measures" taken under the Convention on the Elimination of all forms of Racial Discrimination of 1965 for the sole purpose of securing the adequate advancement of particular racial or ethnic groups. The High Court in Gerhardy's case has held that State legislative measures for the protection of particular Aboriginal people are capable of constituting such "special

measures" and hence are not in breach of this Act. The Committee thinks it likely that any recognition of Aboriginal customary law in the Territory would not infringe against this Act, either because it would constitute such a "special measure", or because the "right" to the recognition of customary law is not a general right, but is a right that is only capable of applying to indigenous people and would not be of a discriminatory nature.

(k) The Committee notes that it may be possible for the Commonwealth Parliament to legislate to override any Territory recognition of Aboriginal customary law, particularly if that occurred by way of ordinary Territory legislation rather than in a new Territory constitution. Such Commonwealth legislation could be passed either under section 122 of the Constitution while the Territory remains a Commonwealth territory, or under the "race" power in section 51(xxvi) of the Constitution should the Territory become a new State. Just because the Commonwealth may have such legislative capacity, this may not be a sufficient reason in itself for not taking action that may otherwise be thought to be necessary or desirable.

2. Northern Territory views and initiatives

(a) The particular experience of the Northern Territory in relation to Aboriginal people and their customary laws, and the initiatives proposed or taken in the Territory, are of interest in determining whether those laws should now be recognised by legislative or constitutional provisions in any way.

(b) One of the early proposals for the modification of the law to meet Aboriginal customs in the Territory included a suggestion in 1931 by the Commonwealth Minister for Home Affairs, A Blakely, in which he proposed that there be a simple tribunal to sift Aboriginal evidence free of technicalities, and staffed by persons with a thorough knowledge of native customs.

(c) In 1932, Sir Hubert Murray advised the new Commonwealth Minister for the Interior that there should be some changes in the Territory to ensure that evidence of native custom could properly come before the court in matters of sentencing and in determining criminal intent. He proposed regular court sittings in various Territory centres and the abolition of juries for offences by Aboriginals.

(d) In 1933, the Criminal Procedures Ordinance was enacted to abolish juries in the Northern Territory for all indictable offences except those punishable by death. This provision was repealed in 1961. In 1934 the Crimes Ordinance was amended to give courts a discretion not to impose the death penalty for an Aborigine convicted of murder, and in determining the sentence the Courts could take into account relevant native law and customs. The effect of this provision was subsequently carried forward by the Criminal Law Amendment Ordinance 1939 which repealed the Crimes Ordinance. It ceased with the enactment of the Criminal Code in 1983, although the death penalty had already been abolished by the Death Penalty Abolition Act 1973 of the Commonwealth.

(e) In 1939, the Evidence Ordinance was amended to remove the requirement for Aborigines to take an oath before giving evidence, and to enable an Aborigine's

evidence to be taken though an interpreter, reduced in writing, and used in later proceedings without further appearance. This provision continued up to 1967.

(f) In the late 1930's, discussions took place as to the establishment of Aboriginal (native) courts. In 1940, the Native Administration Ordinance was enacted to provide for the establishment of such courts to deal with disputes between Aborigines and between the Northern Territory Administration and Aborigines. However, the Ordinance was not commenced due to the War and hence no such courts were established.

(g) Professor Strehlow, a recognised scholar of Central Australian Aboriginal society, became well aware, through his work, of the special significance of customary law to Centralian Aboriginal peoples. Although the Committee does not necessarily adopt his views, he had no doubt that it was too late (if it ever was possible) to recognise and enforce this traditional law. He saw the secrecy and the apparently harsh legal punishments, tailored to meet the rigours of a nomadic desert life, as mitigating against such recognition. He warned against some modern, syncretic form of recognition which could have the effect of allowing persons to flaunt established authority and avoid proper punishment in the name of a well-meaning attempt to secure respect for Aboriginal people, their traditions and institutions. Customary law and its effectiveness depended upon strict religious views and ceremonies and unquestioned authority to tribal elders. Once these were undermined by European-derived influences, then in his opinion so was the value of customary law.

(h) Following the War, AP Elkin wrote in favour of the establishment of native courts, at least on an experimental basis. A similar view was later expressed by E Eggleston writing in 1976.

(i) Justice Kriewaldt of the Northern Territory Supreme Court, in an article published posthumously in 1960, expressed the view that Aborigines were entitled to the protection of the law and should be dealt with by the criminal law in the same way as others. He thought that the only case where serious discussion was required of the influence of tribal law is that of an Aborigine whose contact with "white" civilisation had been small and who acted in conformity with tribal custom. He disagreed with the views in favour of establishing special courts or tribunals to deal with Aboriginal offenders, although he was prepared to accept that for the trial of serious crimes, the Judge should sit with two assessors drawn from a panel of persons who have had substantial experience of Aborigines. He favoured the Supreme Court sitting near the scene of the crime.

(j) In three Reports commissioned by the Commonwealth on the criminal justice system in the Northern Territory in 1973-4 GJ Hawkins and RL Misner advocated the decentralisation of justice to enable elected councils on settlements and missions to deal with "street offences" by both Aborigines and non-Aborigines, with an appeal to a magistrate. However, the Reports did not deal with the matter in detail.

(k) In 1976, Justice Forster, in the case of R v Anunga handed down guidelines to be observed by police in the interrogation of Aborigines. This followed the Report of the Australian Law Reform Commission on Criminal Investigation (1975) and a number of other cases involving police interrogation. The guidelines require an interpreter to be

present if the suspect is not fluent in English, the presence of a prisoner's friend, care in administering the caution to ensure it is understood, basic refreshments and substitute clothing (if needed), limits on questioning when the person in custody is not able to deal with them and reasonable steps to be taken to obtain legal assistance. These Rules have since been applied in cases coming before Northern Territory courts.

(l) In 1978, amendments to the Local Government Act (NT) introduced the concept of "community government". This was a simplified form of local government, not limited to Aboriginal communities, but clearly designed for those communities. It enabled an elected community government to make by-laws on a range of matters, including liquor and firearms, with monetary penalties for breach. A number of Aboriginal communities have adopted this form of government.

(m) On various occasions in more recent times, stipendiary magistrates in the Northern Territory have sat in courts held in Aboriginal communities in the presence of Aboriginal elders in order to obtain advice and assistance, especially in sentencing matters. Some prominent Aboriginal elders have been appointed as Justices of the Peace and sat with magistrates.

(n) A particular experiment along these lines was tried at Galiwinku (Elcho Island), using clan elders to sit with magistrates. The pilot scheme also involved the use of an employed anthropologist to provide a background report on the offender and to obtain local information and views. One aim of the pilot scheme was to try to resolve disputes in traditional ways in consultations held before the matter came up in court. The defendant's family and social control groups were directly involved in seeking appropriate methods of traditional control and rehabilitation. However, little change was made to the court procedure as such. The scheme was also tried in other Territory communities. It is difficult to assess their success, and the scheme is not presently functioning anywhere in the Territory. A review of the scheme was recently recommended in the Report of the Royal Commission into Aboriginal Deaths in Custody.

(o) One proposal of interest, developed by Dr HC Coombs and others, was to establish a system for the control of law and order at Yirrkala. The object was to use traditional ways of settling disputes and restoring order within the wider framework of the legal system. Consensual solutions would be sought where possible, using senior Aboriginal members appointed by the Aboriginal Council as a "community court". In cases coming before magistrates or a judge, the community court would hold a preliminary hearing and would report to the magistrate or judge. The community court could order a range of penalties including compensation, fines, community work and overnight imprisonment. The proposal is discussed in the Australian Law Reform Commission's Report on Aboriginal Customary Law, Vol 2 @ 83-88. It was not implemented.

(p) Other programs have involved attempts to use Aboriginal officers to a greater extent in various aspects of the justice system, for example, as police aides or as community correction officers in relation to probation, parole and community service orders. Other programs currently in operation include community policing patrols in several centres organised by Aboriginal Councils to attend disturbances. Police do not

intervene unless requested by the Council patrol. Complainants are encouraged to seek resolution of their complaints in the community rather than go to the Police.

E. POSITION ELSEWHERE IN AUSTRALIA

1. The Commonwealth and the States

(a) None of the constitutions of the Australian States contain provisions dealing with the position of the Aboriginal inhabitants of those States, or their laws or customs. A provision amounting to a standing appropriation of Government funds for the welfare of "Aboriginal natives" was at one time contained in the WA Constitution Act 1889, but was later repealed.

(b) The original Royal Letters Patent that established the Province (now State) of South Australia of 1836 contained a proviso to the effect that nothing in that document was to affect or be construed to affect the rights of any Aboriginal Natives of the Province to the actual occupation and enjoyment in their own persons or their descendants of any lands then actually occupied and enjoyed by those Natives. This proviso was given a narrow legal interpretation by Justice Blackburn in the Gove Land Rights case (1971). In any event it never applied to the Northern Territory. The Letters Patent have since been replaced.

(c) The Commonwealth Constitution contains no provisions dealing with the position of the Aboriginal inhabitants of Australia. The Commonwealth Parliament has power to enact special laws for the people of any race, including, since the 1967 referendum, people of the Aboriginal race (section 51(xxvi)).

(d) The Commonwealth has not so far enacted any laws to recognise Aboriginal customary law in any comprehensive way. However, some Commonwealth legislation operates by reference to customary principles. For example, claims to Crown land in the Northern Territory under the Aboriginal Land Rights (Northern Territory) Act 1976 of the Commonwealth are based on "traditional Aboriginal ownership", that latter concept involving common spiritual affiliations to a site on the land, plus a traditional right to forage over the land. Under the Aboriginal Councils and Associations Act 1976 of the Commonwealth, an Aboriginal Council incorporated under that Act may make rules on a variety of matters, which may be based on Aboriginal customs (section@23).

(e) The Aboriginal and Torres Strait Islander Commission Act 1989 of the Commonwealth, despite its broad objects in section 3 which include the development of self-management, self-sufficiency and the furtherance of the economic, social and cultural development of Aboriginal peoples and Torres Strait Islanders, is largely based on western concepts. Apart from provisions to protect cultural material and information considered to be sacred or otherwise significant (section 7(1)(g) and (4)), the Act makes no reference to traditional laws, customs, beliefs or practices.

(f) The Commonwealth has not so far implemented the legislative recommendations of the Report of the Australian Law Reform Commission on Aboriginal Customary Law (see Item F2 below).

(g) Proposals are under consideration to implement aspects of the Royal Commission into Aboriginal Deaths in Custody (see Item F3 below).

(h) No State has legislated to recognise Aboriginal customary law generally. However, some States do have legislation which has some relationship to that customary law. For example, several States have their own versions of Aboriginal land rights legislation.

(i) In Queensland, the Community Services (Aborigines) Act 1984 (see also the Community Services (Torres Strait) Act 1984), provides for the establishment of Aboriginal Councils for every trust area to discharge the functions of local government in that area. Such Councils have power to make by-laws as to a wide range of matters, with penalties up to $500 plus $50 per day. Under Regulations, this extends to community service orders on adults. They are specifically charged with the good rule and government of the area "in accordance with the customs and practices of the Aborigines concerned" (section 25(1)).

(j) The same Queensland Acts establish Aboriginal Courts (or Island Courts) for each such area, constituted by two Aborigine (Islander) Justices of the Peace or other members of the Aboriginal (Island) Council. The jurisdiction of these Courts extend to breaches of the by-laws, disputes over usages and customs of the community (not otherwise being a breach of Commonwealth or State law or by-laws), and other matters prescribed by regulations. The Courts are required to have regard to the usages and customs of the community (section 43(1) and (2)). A recent amendment enables the extension of the jurisdiction to persons, whether Aborigines or not, within the area (section 44). There is a right of appeal under the Justices Act 1986 (section 45), although appeals are apparently rare. A stipendiary magistrate may be appointed to visit trust areas at least quarterly and to give non-binding advice to such a court (section 11). A council may appoint authorised officers to perform functions under the by-laws (sections 45A and 45B).

(k) A discussion of the role and effectiveness of Queensland Aboriginal courts is contained in the Australian Law Reform Commission's Report on Recognition of Aboriginal Customary Law, Vol 2 @ 31-42. There has been some criticism of the system, including the inferior nature of the system, the lack of training provided, the formality required, the lack of real Aboriginal influence or control (a criticism more applicable to earlier legislation) and the imposition of alien structures and values. There was no equivalent of such courts in traditional Aboriginal society.

(l) Proposals for change in the Queensland system to that more appropriate to concepts of self-determination are discussed in Item F4 below.

(m) Under the Aboriginal Communities Act 1979 of Western Australia, the Council of Aboriginal communities to which that Act extends have been given wide powers to make by-laws. The Act does not expressly refer to Aboriginal customary law. The by-laws can extend to all persons on community lands, and may prescribe fines up to $100, imprisonment for 3 months or compensation up to $250. Under arrangements

made in a few communities, courts constituted by Aboriginal Justices of the Peace have sat to deal with breaches of the by-laws as well as general offences.

(n) A discussion of the merits and disadvantages of the WA scheme is contained in the Report of the Australian Law Reform Commission on Recognition of Aboriginal Customary Law, Vol 2 @ 42-48.

(o) Provision is made in South Australian law for a "tribal assessor" to be appointed by the Minister with the approval of the relevant Aboriginal body. That tribal assessor has the function of resolving disputes concerning decisions of that body as to land and other matters. The tribal assessor is required to observe, and where appropriate, give effect to, the customs and traditions of the Aboriginal people - see Pitjantjatjara Land Rights Act 1981, Part IV, and Maralinga Tjarutja Land Rights Act 1984, Part IV. However, this falls well short of a general provision for enforcement of Aboriginal customary law in that State.

(p) The courts of the various Australian jurisdictions have continued to take a similar view to Aboriginal customary law as that taken by the courts of the Northern Territory. Courts have taken that customary law into account for limited purposes, for example, in determining the sentence for a criminal offence where the offender agreed to submit herself to the tribal elders for a specified period and to obey their lawful directions (R v Sydney Williams (1976), Supreme Court of South Australia). Subject to such specific cases, Aboriginal customs have not been given any legal effect in those courts, and Aboriginal people have been held to be subject to the ordinary law of the land in the same way as non-Aboriginal people (R v Wedge (1976), Supreme Court of New South Wales).

(q) It has been held that evidence of an Aboriginal custom, allowing an Aboriginal husband to use force to discipline his wife, is not admissible upon a charge of a criminal offence under statute for the resulting death or injury. The positive law prevails over any custom to the contrary effect (Watson (1986) Court of Criminal Appeal, Queensland).

(r) On the other hand, the High Court has recognised that the traditional responsibilities of specific Aboriginal people for a particular site on land gave them a sufficient standing as plaintiffs to challenge proposed industrial developments on that land (Onus & Frankland v Alcoa (1981), High Court).

(s) Section 18 of the Cocos (Keeling) Islands Act 1955 of the Commonwealth provides the only example in Australia of a form of general recognition of custom under legislation. It provides that the institutions, customs and usages of the Malay residents shall, subject to any law in force in the Territory from time to time, be permitted to continue in existence.

(t) The House of Representatives Standing Committee on Legal and Constitutional Affairs, in its 1992 Report "Islands in the Sun", in recommending that W.A .laws be applied to the Island's, added a caveat to ensure that Malay customs, culture and traditions continue to be taken into account (and see the Territories Law Reform Bill 1992).

F. PROPOSALS IN AUSTRALIA

1. Introduction

(a) From the early days of European settlement of Australia, the policy was not to recognise Aboriginal customary law. It has only been in comparatively recent times that official proposals for some form of comprehensive legal recognition have gained currency.

(b) The factors that are said to have contributed to changing attitudes in favour of recognition are said to include:. the

- perception that denying all recognition to distinctive and long-established Aboriginal ways of belief and action may be unjust;

- the apparent failure of the legal system to deal effectively or appropriately with many Aboriginal disputes;

- published statistics indicating disproportionately high levels of Aboriginal contact with the criminal justice system, which have been seen as symptoms of failure and discrimination within that system; and

- the movement away from policies of "assimilation" and "integration" towards policies based on "self-management" or "self-determination" at federal level and to varying degrees also at State and Territory level.

  (See Report of the Australian Law Reform Commission on the Recognition of Aboriginal Customary Laws, Vol 1 @ p2).

(c) Reference has already been made in preceding parts of this Paper to the recognition that has already been given of specific aspects of customary law for specific purposes, either by the courts or by legislation.

2. Australian Law Reform Commission Report

(a) The first comprehensive examination of possible recognition of customary law in Australia resulted from a reference to the Australian Law Reform Commission in 1977. The basic terms of reference were:

> *"TO INQUIRE INTO AND REPORT UPON whether it would be desirable to apply either in whole or in part Aboriginal customary law to Aborigines, either generally or in particular areas or to those living in tribal conditions only and, in particular:*
>
> *(a) whether, and in what manner, existing courts dealing with criminal charges against Aborigines should be empowered to apply Aboriginal customary law and practices in the trial and punishment of Aborigines;*

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

(c) any other related matter.

IN MAKING ITS INQUIRY AND REPORT the Commission will give special regard to the need to ensure that no person should be subject to any treatment, conduct or punishment which is cruel or inhumane."

(b) Arguments put to the Commission in support of some form of recognition were:

(i) Customary laws influence the lives of traditionally oriented Aboriginal people, and non-recognition contributes to the undermining or traditional law and authority.

(ii) In some communities Aboriginal customary law may be the most appropriate vehicle for the maintenance of law and order.

(iii) Recognition would reinforce decisions by individual judges and officials to recognise customary laws in individual cases and would promote consistency and clarity in the law.

(iv) Non-recognition leads to injustice.

(v) Recognition now would act as at least partial compensation to the Aboriginal people for the effects of non-recognition since 1788.

(vi) Aboriginal people support some form of recognition of their laws, although they desire to maintain control of their law and to maintain secret aspects of it.

(vii) A certain degree of recognition is required to be consistent with Federal Government policy which recognises the right of Aborigines to retain their identity and traditional lifestyle if they wish.

(viii) Australia's international standing would benefit from appropriate forms of recognition. On the other hand, arguments put to the Commission against any form of recognition were:

On the other hand, arguments put to the Commission against any form of recognition were:

(i) A court cannot recognise those aspects of Aboriginal laws which are secret and about which it cannot be informed.

(ii) Recognition should be restricted to Aborigines living a traditional lifestyle, and should not extend to "fringe dwellers" or urban Aborigines.

(iii) Difficulties in definitions and in formulating proposals for recognition make recognition impossible.

(iv) It is too late to recognise Aboriginal customary laws because they have ceased to exist in any meaningful form. There were also very strong arguments that this was not the case. The Committee supports this view in the Northern Territory.

(v) Recognition in the form of the codification of Aboriginal customary laws or similar methods of direct enforcement by means of the general law would entail the loss of control of Aborigines over their law and traditions.

(vi) Aboriginal women may benefit from the abandonment of certain Aboriginal traditions, particularly those that discriminate against women.

(vii Recognition would lead to the acceptance of certain punishments which infringe against basic human rights.

(viii) Recognition would go against the notion that there should be one law for all Australians.

(c) The Commission duly presented its Report No.31 in two volumes in 1986 entitled "The Recognition of Aboriginal Customary Laws". The Commission recommended against any comprehensive legal recognition of these laws throughout Australia. In particular, it did not advocate the codification or direct enforcement of these customary laws as part of the general law of Australia. Nor did it see it as appropriate to allow these customary laws to operate generally to the exclusion of the general law. However, it did not consider that it was too late to recognise and give force to traditional laws. It viewed those laws as still being subject to growth and adaption to new circumstances and hence sought a flexible approach. It favoured specific forms of recognition which only dealt with particular subjects but which avoided the need for precise definitions of the customary law on those subjects. The specific subjects that it deal with by way of recommendations included marriage and family matters, distribution of property, the criminal law (including policing, interrogation, evidence and sentencing), local justice mechanisms and hunting, fishing and gathering rights. It did not favour a general scheme of Aboriginal courts in Australia. Rather, it preferred local methods of resolution of disputes adapted to meet the needs of particular communities.

(d) One of the difficulties the Commission had was in defining the forms of "recognition" that would be appropriate across Australia, involving different Aboriginal people in different areas, including both those living traditional and those living non-traditional lifestyles. It therefore sought a flexible solution to meet those varying needs, one determined on an issue by issue basis in a functional way. It felt that this approach best dealt with the genuine difficulties involved, not the least of which was the danger of loss of control over customary laws to the detriment of Aboriginal people. However, it recognised that its approach was open to criticism in that it involved no genuine recognition of customary law; rather, the general legal system would be dictating the extent to which it was prepared to accommodate Aboriginal customary laws.

(e) An example of this selective functional approach is found in the Commission's recommendations as to customary marriage. It recommended that the general law should not be available to enforce Aboriginal marriage rules, including the customary rules as to promised brides (which often extends to babies). However, it also recommended that Aboriginal customary marriages should be legally recognised for particular purposes, for example, in determining rights to adopt. This recognition should include polygamous customary marriages (see Volume 1, pp179-190, 192-196).

(f) As noted in Item D2, para (h) above, the Northern Territory has already legislated to afford legal recognition to Aboriginal tribal marriages in a variety of situations within Territory power.

(g) The Committee appreciates why the Commission would adopt this approach, but is not at this stage convinced that the justification offered for the Commission's approach for the whole of Australia necessarily applies to the special situation of Aboriginal citizens in the Northern Territory, and in particular, to those Aboriginal citizens in the Territory who still lead traditional lifestyles and who consider Aboriginal customary law to be binding on themselves. Nor is it convinced that this selective, functional approach is necessarily one that accords with the expectations or desires of most traditional Aboriginal people living in the Territory, although it would welcome comment from Aboriginal people and others on this point.

(h) In any event, the Territory has, in a number of matters of relevance to this topic, already legislated in selected areas of customary law (see discussion in Item D). There may be no reason The Committee's concern in this Paper is not to enter into a detailed discussion of spewhy this selective, legislative approach should not be an ongoing process in association with any general recognition of customary law.

(i) The Committee's concern in this Paper is not to enter into a detailed discussion of specific subjects which could receive recognition as customary law. Rather it is primarily concerned with the more general question of whether customary law should be constitutionally recognised as a source of law. It discusses in Item H below the options for such general recognition of customary law as a source of law in the Northern Territory, and in particular by way of recognition in a new Territory constitution.

3. Royal Commission into Aboriginal Deaths in Custody Report

(a) The Report of the Royal Commission in 1991, Volume 4, gave some consideration to the recognition of Aboriginal customary law. It noted that the inter-relationship between that customary law and the general legal system was complex. It also noted the Australian Law Reform Commission recommendations on the subject, and that it had been "prudently" reluctant to recommend any general propositions (for example, the establishment of Aboriginal courts). It expressed the opinion that in view of the range of experience, styles of living and immediacy of connection with traditional rule, even within the Northern Territory let alone Australia, that this was sensible and in accord with the expressed views of Aboriginal people. It noted, however, that in the

Northern Territory there were a significant proportion of Aboriginal people with prime allegiance to traditional values. It also noted a sense of unease in the broader non-Aboriginal community to having two sets of laws, one for white and one for black. It expressed the view that recognition of the significance of customary law and formal reference to it in the legal system did not of itself create conflict between the two systems. Respect for Aboriginal law and practical steps to incorporate and honour its traditional social function could be achieved without proposing separate systems (@ pp97-99).

(b) The Royal Commission was unable to thoroughly examine the issues relating to possible recognition of customary law. It did, however, recommend that the Government report back to Aboriginal people at the progress in dealing with the Australian Law Reform Commission Report on the subject of recognition of customary law (Recommendation 219 @ p102).

(c) In the published Response by Governments to the Royal Commission, Volume 2, this recommendation was supported by the Commonwealth, the Northern Territory and several of the States. The Commonwealth undertook to report accordingly before the end of 1992. The Northern Territory and several States noted that the matter was under review in the Australian Aboriginal Affairs Ministerial Council (@ pp 836-8).

4. Other Proposals

(a) The Queensland Legislation Review Committee has been inquiring into legislation relating to the management of Aboriginal and Torres Strait Islander communities in Queensland. It issued a Stage 1 Report in September 1990 , which resulted in amendments to the Community Services (Aborigines) Act and the Community Services (Torres Strait) Act. In August 1991 it issued a discussion paper entitled "Towards Self-Government". This Discussion Paper advocated legislation for a new form of local self-government for local communities, with power to develop and adopt by local referendum community constitutions tailored to the local situation and which could cover a variety of matters including the recognition of customary law. This would permit flexibility to enable indigenous people to live and operate in accordance with their own customs and traditions.

(b) The Report also considered that the existing Aboriginal and Island courts should continue unless the communities agreed otherwise. Assistance should be given to communities to assess and develop community justice schemes such as the Yirrkala scheme. If the existing courts were retained, they should have power to make compensation orders for victims and community service orders for all offenders, including juveniles.

(c) In the Final Report of the Legislation Review Committee in November 1991, the proposal for new legislation was endorsed, with recognition of the pre-existing rights of indigenous peoples to their own forms of community government within the State and power to develop those forms by local referendum. These community government structures would have power to deal with a range of matters, including recognition of customary rights, law and traditions not inconsistent with the rights, functions, powers

and responsibilities of landowners. The earlier recommendations as to Aboriginal and Island Courts and community justice systems were basically endorsed.

(d) Legislation in Queensland to implement these and other recommendations is now awaited. The Queensland Parliament has recently enacted the Legislative Standards Act 1992 which requires the Parliamentary Counsel of Queensland, in carrying out his/her duties, to have regard to certain "fundamental legislative principles", including Aboriginal tradition and Island custom.

(e) No other State of Australia has as yet engaged in a similar review on such a comprehensive basis.

G. POSITION ELSEWHERE

1. Introduction

(a) It is not possible in the space of a paper of this size to engage in a detailed consideration of the extent to which indigenous customary law is legally recognised in the various countries of the World other than Australia. There are said to be about 250-300 million indigenous peoples world-wide. They live in over 70 countries, and in all but a few of these, they constitute a minority group. The arrangements that apply in these countries vary greatly, from little accommodation of indigenous law within the general legal system, to various systems of legal pluralism which do accommodate and recognise indigenous law. The position is often complicated.

(b) In a number of countries, the advent of colonialism did not oust the indigenous law. Existing legal systems continued to operate, often by way of treaty recognition in so far as they were compatible with the laws introduced by the new colonial settlers.

(c) In some of these countries, the continued operation of indigenous customary law depends, in whole or part, upon constitutional provisions.

(d) It is not possible to generalise as to the applicable constitutional and legal arrangements in this regard. A broad overview can best be obtained by briefly considering the position in a few selected countries.

2. United States of America

(a) In very broad terms, the relationship of American Indians to the USA and its government is said to be governed by four main factors:

(i) Indian tribes are independent entities with inherent powers of self-government.

(ii) The independence of Indian tribes is subject to the exceptionally wide legislative powers of the federal Congress. This has primarily been achieved through Art 1, s8 of the USA Constitution giving Congress power to regulate commerce with the Indian tribes and the power of the President to make treaties, including Indian treaties, in Art II, s2.

(iii) This power is wholly federal - States are excluded unless Congress delegates power to them; and

(iv) The federal Government has a responsibility for the protection of the Indian tribes and their properties, including protection from encroachments by the States and by citizens.

(b) Relations with Indians were formalised first by treaties with the British Crown and subsequently with the federal Government. Indian "sovereignty" and title to land was recognised by the USA Supreme Court, and title could only be extinguished by federal action. However, by a gradual process, including the use of Indian reservations, federal administration and legislation and delegation to States, the traditional roles of the tribes have been gradually eroded.

(c) In more resent years, there has been a movement in thinking back in favour of greater Indian self-management and authority. This has reinforced the scope for applying Indian customary law on Indian lands.

(d) Many Indian tribes, since the Indian Reorganization Act 1934, have adopted their own constitution and by-laws and have incorporated, with tribal councils and tribal courts. A few Indian tribes remain without written constitutions, relying on unwritten customary law.

(e) Indian law primarily operates on Indian land and not in respect of the many urban dwelling Indians. There may, however, be exceptions - for example, in Hawaii only a small area of land is set aside in trust for the indigenous Hawaiians, but Hawaiian usage is not only admissible in Hawaiian courts, it also controls inconsistent common law (absent any statute). Custom can be used to clarify ambiguous statute.

(f) It is difficult to draw legal analogies between the situation in Australia and in USA as far as the application of customary law is concerned. The differences are fundamental and reach back long into history and to the origins of indigenous-colonial contact.

(g) The exact division of jurisdiction between Indian tribal institutions and law on the one hand and federal institutions and law and State institutions and law on the other is complex and changing.

3. Canada

(a) The position as to Aboriginal or Indian customary legal rights in Canada has been shrouded in a degree of uncertainty and has involved considerable amount of litigation. However, it is now established, both by decisions of the Canadian Supreme Court and by the provisions of the Constitution Act 1982 that certain existing Aboriginal and treaty rights are constitutionally protected.

(b) Historically, colonial policy in relation to the aboriginal peoples of Canada was developed in an ad hoc manner, leading to some inconsistency of approach. There were a range of treaties in various areas, although large parts were not covered by any treaties. The Royal Proclamation of 1763 prohibited sale of Indian land to private

interests and stipulated a specific procedure for government acquisition. This lead to a pattern of cessions of land rights and the establishment of reserve lands.

(c) The federal Parliament has exclusive jurisdiction over "Indians and lands reserved for the Indians" (Constitution Act 1867, s91(24)). The primary vehicle imposing controls under this power has been the Indian Act 1876, now 1951.

(d) Under s88 of the Indian Act, subject to the terms of any Indian treaty and any other federal legislation, all laws of general application (including provincial laws) apply to Indians except on reserve lands and except in so far as inconsistent with the Indian Act.

(e) Thus Indian treaty rights such as to hunt, fish and trap, were protected from provincial laws which conflicted with those rights. In the absence of a treaty, it was rare for customary rights to be recognised by the courts outside of territories.

(f) Section 35(1) of the Constitution Act 1982 now recognises and affirms the aboriginal and treaty rights existing prior to that date. The Supreme Court of Canada has held that this extends to protect existing traditional customary rights as at 1982, even if not supported by a special treaty, proclamation, contract or other legal document. The federal Government has been held to have a fiduciary duty to protect such rights, and the federal powers of legislation must not be used to unreasonably infringe such traditional rights. Any prior extinguishment of such rights must have been indicated by a clear and plain intention. The section has therefore been interpreted as providing constitutional protection of customary rights.

(g) There has been an ongoing negotiation in recent years of out-of-court settlements of aboriginal land claims with a view to entering into comprehensive agreements for territorial self-government, the most notable of which has been the recent decision to create Nunavut from out of the NW Territories. This latter Agreement involves co-management of land, resources and wildlife throughout the entire region, to be exercised through the new territorial institutions of government. Consideration is being given to ways of "customising" or implementing customary law within the framework of the Canadian judicial system.

(h) Under section 35(3) of the Constitution Act 1982, the "treaty rights" that are protected include rights that now exist by way of land claim agreements or which may be so acquired. Thus the constitutional protection will extend to treaty rights under any such new land claims agreements.

(i) Under section 25 of the Constitution Act 1982, rights and freedoms of the Aboriginal people of Canada cannot be abrogated or derogated from under the new Canadian Charter of Rights and Freedoms applicable to all Canadians.

(j) Thus there is now substantial constitutional protection of Aboriginal customary rights and the laws that go with them, either on the basis that they are non-treaty rights that arose prior to 1982 which have not been extinguished, or on the basis that they flow from treaties whenever made.

(k) The Assembly of Indian First Nations has now advocated a general constitutionally entrenched right of self-government, and that First Nation justice systems be established to apply Aboriginal principles and practices to those indigenous people. It has accepted the recognition of gender equality, but otherwise the Canadian Charter of Rights and Freedoms (the Canadian Bill of Rights) is not to override First Nations law.

4. New Zealand

(a) Since European settlement, the Maori people have been subject to the general legal system introduced by the settlers, with little account being taken in that system of Maori laws and customs. To that extent, the position is not that dissimilar to Australia.

(b) A major difference arose from the signature in 1840 of the Treaty of Waitangi with Maori leaders in the North Island. By that Treaty, sovereignty over their lands was ceded to the Imperial Crown. However the Crown confirmed and guaranteed to the Maori the full and exclusive and undisturbed possession of their lands, estates, forests, fisheries and other properties, reserving to the Crown the exclusive right of pre-emption.

(c) Early court decisions on this Treaty held that it did not give customary rights any legal effect as against the Crown. These decisions were subsequently doubted but were later confirmed by New Zealand statute as far as Maori land was concerned. The Privy Council has since held that the rights conferred by the Treaty cannot be enforced by the courts except in so far as they have statutory recognition.

(d) A Maori Land Court was established by statute in 1865 to regulate the way in which the Crown acquired Maori land. More recently, the Waitangi Tribunal has been set up by the Treaty of Waitangi Act 1975 with power to inquire into claims by Maoris and to make recommendations about changes to New Zealand law or its administration which would further the principles of the Treaty. Maori land is dealt with by the Maori Land Court under the Maori Affairs Act 1953.

(e) There continues to be a degree of controversy about the effect of the Treaty of Waitangi in New Zealand law and whether it has any constitutional effect. Recent court decisions have indicated that the Treaty can to some extent be taken into account in determining the applicable law particularly where referred to in statutes, and that it signifies a partnership between the races, giving rise to fiduciary duties of good faith.

(f) There may also be an as yet undefined scope for giving effect to customary rights at common law.

(g) New Zealand has a network of Maori workers with disciplinary and welfare responsibility in cities as well as rural areas, with varying effectiveness.

(h) In a White Paper presented to Parliament in 1985 entitled "A Bill of Rights for New Zealand", it was proposed to include in new legislation a provision for recognising and affirming the rights of the Maori under the Treaty on an ongoing basis. This would have made the Treaty part of domestic law and enforceable in the courts.

(i) The New Zealand Bill of Rights as enacted in 1990 (No 109), does not contain such a provision. It does, however, have a provision guaranteeing the rights of minorities to enjoy the culture, profess and practice the religion, or to use the language of those minorities (section 20).

5. Papua New Guinea

(a) Unlike Australia, it seems to have been generally accepted from an early date in both Papua and New Guinea that customary rights, and in particular rights to land, were recognisable as having legal effect upon European contact. This in part may have been due to the different constitutional framework within which this contact occurred, with a protectorate being established in Papua and with German colonial occupation followed by an Australian international mandate in New Guinea. Native rights to land were recognised by early legislation, in which the capacity to deal in these native lands was regulated. The High Court of Australia has since judicially recognised this position.

(b) The Australian administration of Papua New Guinea was generally prepared to allow customary law to operate among local people in the traditional way, although it decided against the introduction of officially recognised customary courts.

(c) Comprehensive treatment of the role of custom in the legal system occurred with the passage of the Native Customs Recognition Act 1963. If provided for the circumstances in which custom could be pleaded and recognised in the ordinary courts, but included a number of exceptions, namely, repugnance to the general principles of humanity, inconsistency with legislation, contrary to the public interest or resulting in injustice and adverse to child welfare. In criminal law, it provided that custom was also not to be taken into account except for the purpose of ascertaining the existence or otherwise of a state of mind, deciding the reasonableness or otherwise of an act, default or omission, deciding the reasonableness or otherwise of an excuse, deciding in a accordance with other laws whether to proceed to conviction of a guilty person or determining the penalty. It may be taken into account where otherwise it would lead to injustice. Given these exceptions and limited operation, it did not result in widespread recognition of custom in the legal system.

(d) Most acts of sorcery were made illegal by the Sorcery Act 1971.

(e) A major development was the enactment of the Village Courts Act 1974. This was an effort to bridge the gap between unofficial customary moots held in villages and the incorporation of custom into official dispute resolution procedures. The primary function of village courts is stated to be to ensure peace and harmony in the local area by mediating in and endeavouring to obtain just and amicable dispute settlements. They have a compulsory jurisdiction but must attempt settlement by mediation first.

They have a criminal jurisdiction in non-indictable matters and a civil jurisdiction up to (PNG) K300, plus general jurisdiction as to custody of children, bride price and compensation for death. Car accident cases are excluded as are land disputes which are dealt with in parallel land courts (see the Land Disputes Settlement Act). The village courts apply customary law. Lawyers are excluded. Village magistrates are generally well versed in local custom and are supervised by regular magistrates, to whom an appeal lies.

(f) The Papua New Guinea Constitution of 1975 provides for development to take place primarily through the use of PNG forms of social and political organisations (Principle 1(6)). It calls for a fundamental re-orientation of attitudes to a variety of matters (Principle 5(1)). It provides that the laws of PNG are to consist only of the Constitution, organic laws, legislation, emergency regulations, subordinate legislation and "the underlying law" (section 9). The latter term is defined in Schedule 2 by reference firstly to custom (except so far as inconsistent with Constitutional law or statute or repugnant to the general principles of humanity) and secondly to the common law appropriate to PNG unless inconsistent with the Constitution, statute or custom. There is a duty on superior courts to formulate and develop the underlying law.

(g) The Constitution also establishes the Law Reform Commission, which has issued various papers on customary law and the development of the underlying law. Proposals for an Underlying Law Act have not yet been implemented.

(h) The Native Customs Recognition Act has now been replaced by the Customs Recognition Act. Custom may now be taken into account and enforced by courts except where it would lead to injustice or not be in the public interest, or where it would be adverse to child welfare. In civil cases, custom is limited to matters of land, hunting and gathering rights, rights over water, fishing, trespass to animals, marriage and divorce matters intended by the parties to be governed by custom, the reasonableness of acts, defaults or omissions and the existence of a state of mind of a person, or where otherwise by not taking custom into account it would lead to injustice. Custom is also to be taken into account in guardianship and custody of infants and adoption.

(i) The Customs Recognition Act preserves the operation of the Local Government Act, whereby a Council may make recommendations to the Minister on matters of custom (including customary marriage but not customary land). If accepted by the Minister, the Council may make rules to give effect to it (Part VI Division 3).

(j) Certain other items of legislation give effect to custom in specific matters.

(k) Some difficulties have been encountered in PNG in developing and expanding the use of custom outside of these specific items of legislation, and notwithstanding the Constitution and the Customs Recognition Act.

(l) The Australian Law Reform Commission, in its report on the Recognition of Aboriginal Customary Law, has compared PNG and its indigenous majority with the situation in Australia. It expressed the view that if ordinary Australian courts were

empowered to apply Aboriginal customary law and to become primary agents for its application, there would be a real danger that traditional Aborigines, whose access to and comprehension of court proceedings may be limited, would loose control of their own law. The Commission compared the western legal approach to law as a set of rules, compared to the indigenous approach which generally relates law to the resolution of conflict. As a result, the Commission ruled out any form of incorporation by codification in its recommendations. Matters of interpretation and content of customary law should not, in its view, be taken out of the hands of Aborigines (Volume 1, para 202).

6. Malaysia, Indonesia

a. Malaysia

(a) Malaysia has its own indigenous peoples, both on the mainland (Orang Asli) and the various ethnic groups on the Island of Borneo (Sabah and Sarawak). To these must be added the Malay people who originally inhabited the coastal regions, and who gave rise to the institution of the Sultanate. Many of these indigenous people subsequently adopted the faith of Islam, which had a profound effect on customary law. The law was also affected by the later colonial settlements of the Portugese, the Dutch and lastly the English, and the systems of law they introduced.

(b) English law was only applied to Malaya in so far as the religions, manners and customs of the local inhabitants would permit. As a result, customary law was accepted by the courts from an early date.

(c) Malay customary law (adat) was developed centuries ago, but with the arrival of Islam, Muslim laws were applied alongside customary laws. Both these systems of law have survived in relation to the Malays, and notwithstanding the introduction of European laws and legal systems and, since Independence, the Malaysian system of legislation, both federal and State.

(d) To a very limited extent there is some continuing application of Chinese and Hindu customary laws in some personal matters. This follows the immigration of Chinese and Indian peoples to the Malayan Peninsula.

(e) In the case of Islamic law, this is enforced through special courts known as the Syariah courts independent of the civil courts. In Sabah and Sarawak native laws are administered by Native courts.

(f) The Constitution of Malaysia recognises the term "law" as including not only the common law in so far as it is in operation in Malaysia, but also "any custom or usage having the force of law in the federation or any part thereof" (Article 160). Provisions for equality before the law contain exceptions which include any provision regulating personal law (Article 8(5)(a)). Certain special constitutional privileges are conferred on Islam and on the Malays and the natives of Salah and Sarawak which are of relevance to preserving the operation of adat and Islamic law.

(g) Some customary law has been codified. In a number of cases it is now dealt with by statute. It is clear that the Constitution is the supreme law of the federation (Article 4) and that within the limits of that Constitution it is legally possible by legislation to override customary or Islamic law.

b. Indonesia

(a) In a similar manner to Malaysia, customary law (adat) applied and continues to apply as part of the law of the country.

(b) Indonesian customary law was affected in many places by the introduction of the Islamic Faith and its laws.

(c) The Dutch colonial government was mainly concerned with the laws applicable to non-natives, thus giving rise to a dual system of laws. Customary laws were left to largely operate on their own, administered through the indigenous local institutions. Indonesians were given the option of subjecting themselves to European law, but few chose the option. However some colonial legislation was extended to native Indonesians.

(d) The 1945 Indonesian Independence Constitution stipulated that existing institutions and regulations were to continue until new ones were established in conformity with that Constitution.

(e) Some efforts have been made since Independence to introduce a single national law on specific topics. However adat law continues to operate in an uncodified manner in most of Indonesia.

(f) The former "native" or "customary law" courts have now been replaced by a system of general courts of justice. These are in addition to Islamic courts, military courts and administrative courts. At a village level, traditional methods of dispute resolution are still common.

7. South Africa

(a) Upon first European settlement at the Cape, Roman-Dutch law was applied, later supplemented by local legislation. No recognition was given to African customary law as a system of law. However Africans were frequently left to act and live in accordance with their traditional laws and customs.

(b) Modifications to this position were introduced as further territories were annexed. Upon the annexation of the Transkei, magistrates courts were given a discretion to apply customary law between Africans. Legislation was passed for the Transvaal to apply the laws, habits and customs among Blacks as long as they did not appear to be inconsistent with the general principles of civilisation recognised in the civilised world. Provision for separate trials in a special court was made. Somewhat similar legislation was enacted for Natal.

(c) The position in the Republic of South Africa is now governed by the Black Administration Act 1927. Magistrates can try cases between "Blacks" (as defined) and may apply customary (or indigenous) law. Courts of chiefs and headmen have also been retained. However the law of the land does not recognise customary law as a concurrent system of law, and disputes between Blacks and non-Blacks are determined in accordance with the law of the land, which excludes customary law.

(d) In the homeland Republics of Transkei and other areas, courts are empowered to apply tribal law.

(e) Elsewhere in Africa, there is a great diversity of legal systems. In many African countries, customary or tribal law survived colonial settlement. The Privy Council, for example, accepted that in a least some cases the law and rights of traditional African societies were capable of surviving European conquest or cession. In some cases, native law was protected by a convention - e.g. Swaziland. However European law did have a modifying influence and did supply some of the deficiencies of traditional legal systems.

(f) Since the acquisition of independence by many African countries, customary law has continued to be applied subject to the legislation of these new nations.

H. OPTIONS FOR RECOGNITION

1. Introduction

(a) The two most convincing arguments for some form of recognition of Aboriginal customary law in the Northern Territory are:

(i) that Aboriginal customary law continues in practice to exist as a living system in the lives of many Aboriginal Territorians, influencing and controlling their daily actions and lives, and

(ii) that many of those Aboriginal Territorians have, in the course of the Committee's consultations, expressed a deep desire for some form of formal recognition of their customary law.

(b) The decision of the High Court in Mabo can perhaps be regarded as a first step in the recognition of Aboriginal customary law - namely, a recognition by the common law of the legal force of customary indigenous rights to land where those rights have continued to be asserted without significant interruption and where they have not since been extinguished by or pursuant to the general law.

(c) If other aspects of Aboriginal customary law are to be formally recognised (and the Committee expresses no firm view on this point at this time), the question arises as to the form that that recognition should take. There are a number of options, outlined in the Australian Law Reform Commission's Report, Vol I @ paragraphs 198-208. These comprise:

(i) Recognition by way of incorporation of customary law, either generally or by reference to specific subjects, into the general law, such that it becomes a part of that single body of general law. This in turn can be done in several ways, either by statutory codification of the rules of customary law, or by incorporation by way of reference to those customary laws without setting out their content in detail. There are no examples of such codification in Australia, but an example of the latter form of incorporation of specific subjects by way of reference might be the legislative provisions for protection of Aboriginal sacred sites, such as contained in the Northern Territory Aboriginal Sacred Sites Act.

(ii) Recognition by way of exclusion of Aboriginal customary law from the general law, allowing the former to be regulated directly by itself. This could possibly entail the establishment of tribal courts to administer the separate system of customary law.

(iii) Recognition by way of translating Aboriginal customary law into concepts and institutions known to the general law.

(iv) Recognition by way of adjustment or accommodation of the general law to take into account Aboriginal customary law in appropriate ways - for example, by taking into account Aboriginal custom in the sentencing of Aboriginal criminal offenders convicted under the general law, in the manner described earlier in this paper.

(d) There may be little, if any, scope for the incorporation of Aboriginal customary law, in whole or part, into the general law by way of codification. Of all the options for recognition, this is the least likely to be acceptable or workable in the Northern Territory. Factors to be taken into account in this regard include the great diversity in traditional law, the difficulties of expressing that law in statutory form, the fact that it would not be possible to codify much of the law because of its secret nature, and the fact that it would probably result in the loss of control of that law by the Aboriginal people directly affected.

(e) Considerable difficulty could also be encountered in a form of recognition that attempts to translate customary law into a western framework. In most cases, the differences between the two systems and the ideas and concepts on which they are based may be too great.

(f) On the other hand there could be considerable merit in a continuation of the process of legislative incorporation of selected aspects of Aboriginal customary law by reference, but only in appropriate cases where there is broad agreement, including support from traditional Aboriginal people,to do so. This is a matter that could be subject to some form of ongoing study. The Committee invites suggestions and comment on the best way of achieving this. It would not be necessary to have any constitutional support for this process as the legislature could take action as it thought fit under its general law-making powers.

(g) In much the same way, there may be some merit in a continuation of the process of adjusting the general law to take into account selected aspects of Aboriginal customary law in appropriate ways. This is also a process that can be undertaken by the legislature under its general law-making powers, as well as by adjustments to court procedures, and does not need constitutional support. It is a process that is already well advanced in the Northern Territory in the various areas of the law discussed earlier in this paper.

(h) However, neither of these ongoing processes discussed in the two previous paragraphs really amount to any form of comprehensive recognition of Aboriginal customary law, and may not of themselves satisfy the requests for recognition by traditional Aboriginal people with whom the Committee has already come into contact. Without necessarily reflecting the views of the Committee, there are arguments in favour of going further and providing for some more general form of constitutional recognition. This would meet these requests made to the Committee for recognition, it would in turn give due recognition to the important place of Aboriginal people and their laws in contemporary Territory society, it would acknowledge the historical reality of prior Aboriginal occupation of the Northern Territory within the framework of the unique traditional systems of culture and law, and it may well contribute to some meaningful form of reconciliation and a sense of partnership between indigenous and non-indigenous Territorians.

(i) The difficulties of any more comprehensive form of recognition of customary law have, however, been recognised by the Australian Law Reform Commission, which recommended against it Australia-wide. These difficulties stem partly from the diverse nature of Aboriginal communities, varying from largely traditional societies on the one hand, to groups living in a largely westernised manner on the other, including in urban or near urban situations. Inevitably, any general recognition of customary law will lead to issues of demarcation and to problems of the inter-relationships between that law and non-indigenous law. While the Territory has a greater percentage of Aboriginal people leading traditional lifestyles, the situation is still not one of a discrete, homogeneous group of indigenous people living in accordance with a single code of customary law.

(j) There may be alternatives to any comprehensive form of recognition of customary law as an enforceable source of law, but which still acknowledge the importance of customary law in the lives of Aboriginal Territorians. One of these is suggested below, in the form of a constitutional preamble.

2. Preamble

An alternative to any comprehensive recognition of customary law would be to include a form of preamble in any new Territory constitution. This preamble could refer to the history and the prior occupation of the Territory by the Aboriginal people as distinct societies, with their own culture and law and how many of the descendants of those people continue to live in accordance with their own culture and law. Such a preamble might not be expressed to be legally enforceable in itself, but could have effect as an aid to the interpretation of Territory law. It would also have an educative effect and may assist in the process of reconciliation.

3. General Constitutional Recognition

(a) Any form of general constitutional recognition of customary law must, if it is to be legally meaningful, elevate that law to the status of a source of law in the Northern Territory, in a similar way as the other present sources of law in the Territory (see item D.1 para (d) above).

(b) However, clearly the matter is not just simply one of acknowledging the status of customary law as a source of law. In determining the form of any such recognition, a number of consequential issues also have to be addressed, including:

(i) whether all aspects of customary law should be recognised, or whether some exceptions are necessary or desirable;

(ii) who should be bound by customary law as so recognised;

(iii) whether customary law as so recognised should apply throughout the Territory or only in specified areas; and as a corollary, whether it should only be applied in areas under the jurisdiction or control of appropriate Aboriginal institutions;

(iv) the interrelationship and priorities between customary law as so recognised and the other sources of law in the Territory;

(v) how should customary law as so recognised be enforced and by what institutions.

(c) In a paper of this nature, it is only possible to canvas these issues in a most general way, without getting into the detail of particular laws. The purpose is to draw attention in broad outline to some of the main issues involved in any comprehensive recognition of customary law as a source of law. Comment is invited on these broad issues as well as on any matters of detail that any person may wish to raise.

Should there be any exceptions

(d) The Committee refers to the first of the five factors mentioned in paragraph (b), that is, whether there should be any exceptions to the types of customary law to be recognised. In this regard, the diversity and complexity of Aboriginal customary law has already been noted in this paper. Also noted is the fact that it is based on ideas and concepts radically different from "Western" ideas and concepts. The tendency to judge whether certain aspects of customary law are appropriate for recognition in the wider legal system, viewed from the perspective of a different cultural and legal background, has to be kept in mind to avoid any prejudicial judgment. On the other hand, there are an emerging set of international standards by which to judge the validity of any law, standards which are increasingly transcending particular cultural or legal derivations. These standards are becoming evident in the developing jurisprudence of human rights.

(e) In most cases, there will be no clash between indigenous customary law and these wider international standards. This is in part because the relevant international instruments give some prominence to cultural and indigenous rights. This is

recognised, for example, in Article 27 of the International Covenant on Civil and Political Rights, guaranteeing to members of ethnic, religious or linguistic minorities the right, in community with other members, to enjoy their own culture, to profess and practice their own religion, and to use their own language.

(f) However, all such indigenous rights have to balance against other fundamental rights and to any reasonable restrictions arising therefrom. There may be isolated examples where insistence upon the full application of existing indigenous rights under customary law could lead to an infringement of individual human rights. For example, certain forms of traditional punishment, such as spearing, may be seen as offending against the individual's right not to be subject to "cruel, inhuman or degrading treatment or punishment" (ICCPR, Article 7).

(g) These are very difficult issues, involving contemporary notions and values. It is a matter discussed in the Australian Law Reform Commission's Report, Vol I @ paragraphs 179-193, where the Commission, while accepting a need for adherence to international human rights norms, stressed the need to determine the application of those norms in the context of the particular society and not in the abstract or by reference to "western" expectations.

(h) Subject to this last-mentioned consideration, the Committee sees merit in a provision that would only recognise customary law as a source of law (if in fact it is to be so recognised) in so far as that law was consistent with international human rights norms or, as expressed in Papua New Guinea, the general principles of humanity (see also ILO Convention No 169, discussed in Item C.4 above). The inter-relationship between the two would of course be a matter to be worked out by the appropriate judicial institutions.

Who should be bound

(i) The Committee now refers to the second of the 5 factors in paragraph (b) above, that is, who should be bound by customary law if it is to be recognised as a source of law in the Territory. In this regard, it has already been noted in this paper that Aboriginal customary law is still commonly regarded as having an obligatory effect on a number of Aboriginal people in the Territory who have a traditional lifestyle and that in a real sense it can already be said to be part of the "law" in relation to those people.

(j) The question that follows from this is whether, if Aboriginal customary law is to be recognised as a source of law, its legal operation as so recognised should be limited to those Aboriginal people already so affected. The alternative of giving that law some wider application to the Territory community as a whole would be likely to involve serious objections, not only from non-Aboriginal people, but possibly also from people of Aboriginal descent who live a "westernised" life style and who no longer consider themselves, or have never considered themselves, as being subject to customary law. If some limitation of legal application is to be adopted by reference to specific categories of persons, there may be difficulties defining the lines of demarcation. In addition, objections to what would be a form of discriminatory legal pluralism may be voiced.

(k) There may in any event be some aspects of customary law that should perhaps apply to persons who do not lead traditional lifestyles, particularly where they reside or are present in Aboriginal communities. For example, customary rules as to secrecy or privacy in ceremonial matters.

(l) The Committee sees no easy answers to these issues, but would welcome comment.

Geographical limitations

(m) The Committee now refers to the third of the issues referred to in paragraph (b) above, namely, whether any recognition of customary law in the Territory should be limited geographically in some way, including whether it should only be applied in areas under the jurisdiction or control of appropriate Aboriginal institutions. In this regard, the Committee notes that a number of Aboriginal localities in the Territory are now governed under the system of community government. Other areas have their own local Aboriginal councils or committees under a variety of arrangements. None of these institutions presently have the legal power to apply Aboriginal customary law within their own areas.

(n) It would be possible to empower appropriate Aboriginal institutions to adopt and enforce customary law principles within their areas of jurisdiction. No doubt this would need to be subject to existing constitutional and statutory limits, a matter considered further below. It may also need to be integrated with existing judicial institutions having jurisdiction over the same area, to ensure effective means of enforcement, and also in association with any new Aboriginal institutions that might be created for the purpose of the application of customary law.

(o) One advantage of a geographical application of customary law is that it would allow that law to be applied in areas of exclusive or predominant Aboriginal populations in the Territory where traditional life styles were still observed. It also allows for Aboriginal control of, or at least close involvement in, the process of adoption and enforcement of that law. A geographical demarcation also has the advantage of simplicity and clarity, thereby avoiding the problems of demarcation spoken of in relation to any application of customary law by reference to specific categories of persons. It has the disadvantage that outside the specified geographical areas, customary law would still have no effect as a source of law except in so far as the general law otherwise provided. The latter effect could to some extent be countered by an ongoing program of study to consider how to give wider effect to customary law within the general law, discussed above in H.1 paras (f) and (g).

(p) The Committee notes in this context recommendations of the Queensland Legislation Review Committee which would, if implemented, allow Aboriginal self-governing local communities to adopt through their own constitutions aspects of customary law, with effect within the area of jurisdiction of those communities (see paragraph item F.4 above).

(q) The Committee would welcome comment on the methods whereby Aboriginal customary law, if it is to be recognised, could be given effect by reference to geographical criteria. Comment is also invited on which Aboriginal institutions could

appropriately be given power to apply customary law within their area of jurisdiction and by what mechanisms those institutions might give effect to customary law in that area.

Relationship between customary law and other sources of law

(r) The Committee now turns to the fourth of the factors mentioned in paragraph (b) above, namely the interrelationship and priorities between customary law if recognised as a source of law in the Territory and the other sources of law in the Territory. In this regard, it is quite clear that customary law must be applied consistently with the Commonwealth Constitution and with any relevant laws of the Commonwealth Parliament. This necessarily follows from the superior status of that Constitution and those Commonwealth laws, whether in relation to a State or a territory. In a similar way, if Aboriginal customary law is to be constitutionally recognised as a source of law in the Northern Territory, then that recognition would be subject to, and have effect in accordance with, the terms of that recognition as included in the new Territory constitution. The more difficult issue is to determine the status of that customary law in relation to Territory legislation and also the common law as applicable in the Territory.

(s) To a large extent, consideration of the issue raised at the end of the preceding paragraph is associated with the two questions posed in paragraphs (b) and (c) above; namely, whether any recognition of customary law should be limited by reference to specific categories of persons or by reference to specific geographical areas. If recognition is limited in either of these two ways, then it may usually be more practicable to tailor the general law to avoid any conflict with customary law as and when recognised. However, even with these limitations, there would be scope for inconsistencies to arise. A typical example would be where customary law accorded certain traditional hunting and fishing rights, and where in the interests of conservation the Territory introduced certain statutory limits or controls on hunting and fishing of native animals which could, if they had superior legal effect, impede the exercise of those traditional rights.

(t) As far as the common law in its application to the Territory is concerned, the Committee sees less cause for concern in this regard. The rules of customary law could be given equivalent status to the common law in its application in the Territory, in much the same way as applies in Papua New Guinea. There is much less likelihood of inconsistency arising between common law and customary law. The more likely result would be that the common law would expand to accommodate customary law, such as has recently occurred as a result of the High Court decision in Mabo, recognising customary indigenous rights to land of a proprietary nature.

(u) The decision in Mabo also recognised the superior force of statute law, both Commonwealth and State, including the power of the Crown pursuant to statute to alienate land and also to extinguish customary rights to land by a sufficiently clear legislative intention. There would seem to be compelling reasons in the wider public interest why superior status should be given to statute law over all customary law in this regard, to enable the legislature to deal with the exigencies of any given situation

and in order to change the general law where necessary to meet the needs of the time. This, for example, is the situation in Papua New Guinea.

(v) This could lead to concerns that Territory legislation could be used to override customary law and customary rights. However the danger of this occurring is limited by the operation of the Racial Discrimination Act of the Commonwealth. In addition any Territory legislative power could be subject to constitutional guarantees. For example, a requirement that the removal of any customary rights should only result from a clear legislative intention to that effect, and that if this involves any acquisition of "property" that this should only occur on "just terms", that is, subject to payment of fair compensation (cf: Commonwealth Constitution section 51(31) and Northern Territory (Self Government) Act 1978, section 50). Whether the superior force of statute should be subject to these or any other overriding constitutional guarantees, and if so, what form those guarantees should take, are matters upon which the Committee would welcome comment.

Enforcement

(w) Finally, the Committee turns to the fifth factor mentioned in paragraph (b) above, namely, if customary law is to be recognised as a source of law, how should it be enforced and by what institutions or mechanisms. In this regard, the Committee has noted above how there have been increasing demands for Aboriginal consultation and participation in the business of government and its effects on Aboriginal people. This paper has not previously dealt with the question of how this could be achieved in relation to the enforcement of customary law. It did note certain practices that have already been employed in the Territory, such as having Aboriginal justices of the peace to sit with magistrates when dealing with Aboriginal defendants, as well as proposals made for community justice schemes using traditional consultative methods in association with magisterial sittings.

(x) Difficulties may arise if customary law, as a comprehensive and recognised source of law, was to be applied and enforced generally by the existing general courts. The reasons for this have already been outlined above, and include the unique and distinct nature of customary law, the fact that it is unwritten and that much of it is secret, and that direct enforcement by the general courts would entail a real risk of the loss of control of that law by the Aboriginal people. It may not be practical option to vest jurisdiction as to all matters of customary law, at least in cases at first instance, in the general courts, with power to determine, apply and enforce that customary law. The Committee invites comment, however, on this point.

(y) Here may, however, be some situations where it might be appropriate to vest jurisdiction in the general courts in cases where some aspect of customary law arises. Examples have already been given above where the general law (statute or common law) specifically provides for particular aspects of customary law to be taken into account in some way, thus necessitating some reference by the general courts to that customary law. In other cases, appropriate arrangements could be made with particular Aboriginal communities to use the existing general courts for the purpose of applying customary law, rather than some other specialised justice mechanism tailored specifically for those Aboriginal communities. Where there is any conflict between

customary law and the general law, it might also be appropriate to vest jurisdiction in the general courts, perhaps with power to arrive at such decision as is just in the circumstances.

(z) An alternative to giving the general courts comprehensive jurisdiction with respect to customary law would be to establish a comprehensive system of special Aboriginal courts or similar institutions to deal with matters of Aboriginal law, such as has been used in Papua New Guinea and in parts of Queensland (see discussion in items G.5 and E.1 para (j) above). The Australian Law Reform Commission, in its Report Vol 2, looked in some depth at various models that have been tried along these lines, as well as other community justice options that have been tried or suggested (see in particular @ Chapter 31).

The range of options considered included:

(i) local Aboriginal autonomy over a range of law and order matters, to be exercised through local Aboriginal institutions of government;

(ii) Aboriginal courts or similar bodies officially constituted;

(iii) specifically designed structures aimed at overcoming the difficulties often experienced with Aboriginal courts (eg: the Yirrkala scheme);

(iv) bodies with power of mediation and conciliation (as distinct from adjudication);

(v) administrative measures for recognising Aboriginal customary law; and

(vi) changes to the existing courts, for example, by way of some form of "Aboriginalisation" of those courts.

(za) The Law Reform Commission, after considering arguments for and against a system of Aboriginal courts, recommended against a general scheme of such courts in Australia (paragraph 817). It stated that there was no indication that such a scheme could be welcomed by, or be workable in, the diverse range of Aboriginal communities It felt that it was better that such questions be considered in the broad context of proposals for local self-government. Particular courts could be established in response to genuine local demands or initiative, subject to certain basic standards. Alternatively, existing general courts could be retained if the local community so wished.

(zb) The Law Reform Commission noted that, with few exceptions, Aboriginal communities had not sought separate or independent justice mechanisms to be officially established. What they had often sought was improved working relationships with the police and the courts (paragraph 835). No one solution or straight forward answer appeared as to the extent to which Aboriginal communities should be given power to apply customary law in order to deal with Aboriginal offenders. In the view of the Commission, its only possible response was to present various options and to initiate, or further the process of discussion and consultation with a view to the eventual introduction of agreed justice mechanism proposals, there being no single preferred approach. The decision must rest with each Aboriginal community after

being fully informed of the various options (paragraph 838). The Commission considered the possibility of setting up an official agency to liaise with Aboriginal communities, groups and organisations to assist in the formulation of justice proposals tailored to meet the needs of the particular Aboriginals concerned. A variation of this suggested by Dr Coombs was for a non-governmental research service to be established for similar purposes. To a considerable degree, the Commission felt that the choice of the appropriate method depended on the wider issues of self-government and local customs (paragraphs 839-843).

(zc) There may well be considerable merit in a flexible approach to the introduction of justice mechanisms which comprise or include any reference to the application and enforcement of customary law. This could be done on an individual community by community basis, in consultation with the Aboriginals concerned and with existing Aboriginal institutions. One option might be to facilitate this by giving community governments the power to not only adopt customary law rules, but also to establish justice mechanisms to apply those rules as adopted, being in conjunction with or as supplementary to the wider legal system. Other options for community consultation and implementation could be considered, and the Committee invites comment and suggestions thereon In the absence of the adoption by the community concerned of any specific forms of implementation and enforcement mechanisms, then customary law would continue to be enforced in traditional ways outside of the wider general legal system.

(zd) Under these proposals, even if there was to be some form of constitutional recognition of customary law as a source of law, provisions for general enforcement of that law would be left to be determined in accordance with specific schemes prepared in consultation with the Aboriginals concerned and as subsequently put into legal effect by some appropriate mechanism.

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APPENDIX I

Part S - Aboriginal Rights: Extract from the Discussion Paper on a Proposed New State Constitution for the NorthernTerritory dated October 1987

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PART: S - Aboriginal Rights: Extract from the Discussion Paper on a Proposed New State Constitution for the Northern Territory - dated October 1987.

1. Comprehensive Commonwealth legislation in the form of the Aboriginal Land Rights (Northern Territory) Act 1976 presently applies in the Northern Territory. In the Option Paper entitled "Land Matters Upon Statehood" dated November 1986, it was advocated that this Act be patriated to and become part of the law of the new State upon the grant of Statehood by some agreed method. that Paper suggests that the process of patriation should include appropriate guarantees of Aboriginal ownership. In the absence of Commonwealth land rights legislation applying Australia-wide, the Select Committee in broad terms endorses this approach.

2. One option, favoured by the Select Committee, is to entrench these guarantees of Aboriginal ownership in the new State constitution, such that they can only be amended by following specified entrenchment procedures. The extent of these guarantees and the degree of entrenchment are matters upon which public comment is invited.

3. There is a question whether the new State constitution should go further in its reference to Aboriginal citizens of the new State. One possibility is to include in the constitution some fundamental principles of a non-enforceable nature in the form of a preamble which would give particular recognition to the place of those citizens in comtemporary society (and see Part T, paragraph 8 below).

4. Such a preamble could take many forms. It might, for example, recognize that the new State is now a multi-racial and multi-cultural society in which Aboriginal citizens are fully entitled to participate with other citizens on an equal, non-discriminatory basis under the law. Where special provisions are provided under new State law for any particular class or group of citizens, they should only have effect for so long and in so far as they are necessary to redress any continuing lack of equality of opportunity or other disadvantages.

5. In an address by Ms L Liddle to the 1986 Law Society Conference on Statehood, she indicated that the new State constitution should go further and recognize not only the current place of Aboriginal citizens in the new State, but also their historical rights, including their traditional ownership of the land the usurpation of those rights by European settlement.

6. There is undoubtedly some merit in recognizing the pre-existing circumstances of Aboriginal citizens of the new State, including as to their language, social cultural and religious customs and practices. Having regard to the desirability of maintaining harmonious relationships within the new State, it is preferable that any such recognition should be in a form acceptable to the broader new State community and compatible with its multi-racial, multi-cultural nature and the principles of equality and non-discrimination. The exact form this recognition should take is a matter for discussion.

7. The Select Committee makes no specific recommendation on these proposals but invites public comment.

APPENDIX II

List of submissions to the Committee

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List of written submissions to the Committee.

Submission No.	Name	Organisation
2(a)	Kevin Fletcher	
3	Wendy Whiley	NT Women's Advisory Council, Groote Eylandt
9		NT Local Government Association
11		Tangentyere Council Inc
13		Northern Territory Trades & Labour Council
14		Office of Equal Opportunity,
19	P McNab	
23	Ms Sheila Keunen	
26	Prof J M Thomson	Northern Territory University
32		Alice Springs Peace Group
34(b)	T S Worthington-Eyre	
35	R G Kimber	
36	Phillip R Hockey	
39	Dr Peter K Thorn	
42		Nat'l Spiritual Assembly of the Baha'is of Australia
48	Earl B M James	
49	Bruce Reyburn	
50		Julalikari Council Inc

List of oral submissions to the Committee.

Name	Place	Date
Mr Holland	Palmerston	28/3/89
Mr Winungij	Maningrid	02/5/89
Mrs J Hargraves	Batchelor	31/3/89
Mr V Forrester	Amoonguna	14/4/89
Mr Rioli	Pularumpi	11/5/89
Mr Mansfield	Oenpelli	09/5/89
Mr Tipungwuti	Nguiu	11/5/89
Mr Johnston	Lajamanu	13/3/89
Mr J Herbert	Lajamanu	13/3/89
Mr Nicholls	Lajamanu	13/3/89
Mr M Price	Lajamanu	13/3/89
Mr Finlay	Junkurrakur (Tennant Ck)	17/4/89
Mr J Havnen	Junkurrakur (Tennant Ck)	17/4/89
Mr Manyidjarri	Gapuwiyak	05/5/89
Mr J Havnen	Tennant Creek	16/7/88

List of oral submissions to the Committee (Cont'd)

Name	Place	Date
Mrs Kanromger	Tennant Creek	06/7/88
Mr MacMichael	Nhulunbuy	08/5/89
Mr MacMichael	Nhulunbuy	09/5/89
Mr Rungari	Dagaragu	13/3/89
Mr Martin	Jabiru	09/5/89
Mr Rainer	Angurugu	02/5/89
Mr H Bigfoot	Docker River	04/4/89
Mr V Forrester	Alice Springs	05/7/88
Mr I Yule	Alice Springs	05/7/88
Ms Gilmour	Alyangula	08/5/89
Mrs Waddy	Alyangula	08/5/89
Mr Donaldson	Alyangula	08/5/89
Mr Goldflam	Alice Springs	13/4/89
Mr D Collins MLA	Alice Springs	13/4/89
Mr P McNab	Darwin	10/8/88
Mr K Fletcher	Darwin	10/8/88
NT Women's Advisory Council	Darwin	10/8/88
Ms S Schmolke		
Ms M Bull		
Ms I Williams		
Office of Equal Opportunity	Darwin	10/8/88
Ms L Powierza		
Mr H Coehn		
Mr Perceval	Darwin	11/8/88
Mr A Hosking	Darwin	11/8/88
Mr K Ellis (TLC)	Darwin	11/8/88
Mr N Lynagh (NTLGA)	Darwin	11/8/88
Mr E James	Darwin	27/9/89
Mr D Shannon	Palmerston	28/3/89