BACKGROUND PAPER

ON

INTERNATIONAL HUMAN RIGHTS LAW AND THE RECOGNITION OF ABORIGINAL CUSTOMARY LAW

Megan Davis and Hannah McGlade

Background Paper No 10
(March 2005)
The Law Reform Commission of Western Australia

Commissioners

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This is one of a series of Background Papers that the Law Reform Commission of Western Australia has commissioned for the purposes of its reference on Aboriginal customary laws (Project No 94).

The purpose of the Background Papers is to provide additional information on issues relevant to the Project, to stimulate Aboriginal and non-Aboriginal peoples to make submissions to the Commission, and to assist the Commission in the preparation of a Discussion Paper in which the Commission will put forward its preliminary views on matters relevant to the terms of reference for Project No 94. The views expressed in the Background Papers are those of the individual authors and do not necessarily coincide with the views of the Commission.

The Commission invites you to make submissions on the Project by telephone, email, fax or letter (see contact details below). If you prefer to make your submissions face-to-face, you may telephone the Commission to make an appointment on (08) 9321 4833.

Law Reform Commission of Western Australia
Level 3, BGC Centre
28 The Esplanade
Perth WA 6000

Telephone: (08) 9321 4833
Facsimile: (08) 9321 5833
Email: lrcwa@justice.wa.gov.au
TERMS OF REFERENCE

Recognising that all persons in Western Australia are subject to and protected by this State’s legal system; and there may be a need to recognise the existence of, and take into account within this legal system, Aboriginal customary laws:

The Law Reform Commission of Western Australia is to enquire into and report upon Aboriginal customary laws in Western Australia other than in relation to Native Title and matters addressed under the *Aboriginal Heritage Act 1972* (WA).

Particular reference will be given to:

1. how those laws are ascertained, recognised, made, applied and altered in Western Australia;
2. who is bound by those laws and how they cease to be bound; and
3. whether those laws should be recognised and given effect to; and, if so, to what extent, in what manner and on what basis, and in particular whether:
   (a) the laws of Western Australia should give express recognition to Aboriginal customary laws, cultures and practices in the administration or enforcement of Western Australian law;
   (b) the practices and procedures of the Western Australian courts should be modified to recognise Aboriginal customary laws;
   (c) the laws of Western Australia relating to the enforcement of criminal or civil law should be amended to recognise Aboriginal customary laws; and
   (d) whether other provisions should be made for the identification and application of Aboriginal customary laws.

For the purposes of carrying out this inquiry, the Commission is to have regard to:

- matters of Aboriginal customary law falling within state legislative jurisdiction including matters performing the function of or corresponding to criminal law (including domestic violence); civil law (including personal property law, contractual arrangements and torts); local government law; the law of domestic relations; inheritance law; law relating to spiritual matters; and the laws of evidence and procedure;
- relevant Commonwealth legislation and international obligations;
- relevant Aboriginal culture, spiritual, sacred and gender concerns and sensitivities;
- the views, aspirations and welfare of Aboriginal persons in Western Australia.

Peter Foss QC MLC
2 December 2000
ABOUT THE AUTHORS

Megan Davis
Megan Davis BA (Australian History) LLB (UQ) (Duchesne College) and GDLP, LLM (International Law) (ANU) is currently a Research Fellow at the Jumbunna Indigenous House of Learning, University of Technology Sydney. Megan is the Principal Researcher on Indigenous Peoples and International Law. She has held a United Nations Fellowship with the Indigenous Project Team, Office of the High Commissioner for Human Rights, Geneva and has worked as an international lawyer in the United Nations Indigenous human rights issues for eight years.

Hannah McGlade
Hannah McGlade is a Noongar lawyer. She has a LLB, GDLP and LLM. Hannah has been involved in a number of litigation cases. She is the author of numerous papers and book chapters. Hannah’s main areas of expertise include Indigenous legal issues, Indigenous women’s issues and international law. She is currently completing her PhD at Curtin University. Hannah was the 2004 John Curtin Postgraduate Scholar. She is currently based at the Centre for Aboriginal Studies and has also consulted with the Centre for Human Rights Education in the development of her thesis: ‘The development of indigenous legal models – can they better protect the needs of Indigenous women and children victims of violence?’

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INTRODUCTION

The conundrum of how Aboriginal law intersects with the Australian legal system has been a preoccupation of law reform in Australia for decades. To date, recognition of Aboriginal law in the legal system and its processes has been piecemeal and haphazard and most Australian legislatures have been reluctant to formally recognise Aboriginal law. This is despite the fact that Aboriginal law is already taken into account in varying contexts throughout the Australian legal system and despite the commonly held belief of many Indigenous Australians that the recognition of Aboriginal law would benefit Aboriginal people. The benefits of recognition may be that it would contribute to social and economic development in Aboriginal communities and remedy alienation within the criminal justice system. It may also prevent the derogation of Aboriginal women’s rights before the courts that is the consequence of an adversarial legal system. Many Elders, such as those elders from the Kimberley region of Western Australia, believe that recognition may assist in the transferral of Aboriginal lore to their youth and significantly address the dislocation of Aboriginal youth from their culture.

The benefits of the recognition of Aboriginal law for Aboriginal youth is supported by the United Nations Committee on the Rights of the Child who recommended that ‘states respect methods customarily practised by Indigenous peoples for dealing with criminal offences committed by children when it is in the best interests of the child.’ Lowitja O’Donoghue, addressing a forum on the recognition of Aboriginal law, endorsed sentiments about the value of Aboriginal law to the community:

[T]he long standing absence of meaningful official recognition of Aboriginal customary law has had a detrimental effect on all facets of Aboriginal community development and … has substantially contributed to many of the social problems and varying degrees of lawlessness present today…. The failure of successive governments to recognise customary law has resulted in the erosion of Aboriginal cultures.

Similarly, the Aboriginal and Torres Strait Islander Social Justice Commissioner observed that:

[T]here is currently a crisis in Indigenous communities. It is reflected in all too familiar statistics about the over-representation of Indigenous men, women and children in criminal justice processes and the care and protection system; as well as in health statistics and rates of violence. Ultimately, one thing that these statistics reflect is the breakdown of Indigenous community and family


structures. They indicate the deterioration of traditional, customary law processes for regulating the behaviour in communities. This is due in part to the interventions of the formal legal system through removal from country, historical lack of recognition of ... customary law processes as an integral component of the operation of Aboriginal families and societies in the Northern Territory.\(^6\)

These perennial sentiments about the detrimental impact of institutional inertia upon Aboriginal culture have been echoed internationally. A recent meeting of experts at a United Nations Seminar on Indigenous Peoples and the Administration of Justice found a number of problems contributing to Indigenous peoples’ ongoing marginalisation. These problems included the lack of official recognition for Indigenous law and jurisdiction including Indigenous customary law; the subordination of Indigenous law and jurisdiction to national or federal jurisdiction; and ‘the failure to introduce adequate mechanisms and procedures that would allow Indigenous legal systems to be recognised and to complement national systems of justice’.\(^7\)

Australian government’s reluctance in recognising Aboriginal law and the potential benefit of Aboriginal law to marginalised Aboriginal communities are explored in this Paper. It examines international human rights law in the context of the Law Reform Commission of Western Australia’s Aboriginal Customary Laws Reference. This paper also considers the intersection of Aboriginal law with the Australian legal system and Australia’s international obligations to protect the human rights of individuals balanced with the obligation to protect Aboriginal culture.

In recent decades Australia has become increasingly engaged with international human rights law.\(^8\) Australia is a party to a number of international human rights instruments, some of which have legal force in domestic law. The judiciary increasingly employs international human rights law in legal reasoning or judicial discretion\(^9\) and Australian citizens are regularly using the United Nations human rights treaty committee system to complain about human rights violations in Australia.\(^10\) Indigenous Australians in particular have been successful in utilising United Nations complaint mechanisms, which are available to all Australian citizens. These mechanisms resulted in a highly controversial adverse decision by the Committee on the Elimination of Racial Discrimination (CERD) in 1999 on Australia’s violation of Indigenous human rights.\(^11\)

\(^6\) Aboriginal and Torres Strait Islander Social Justice Commissioner, Submission to the NTLRC Inquiry into Aboriginal Customary Law in the Northern Territory (14 May 2003).
\(^10\) ‘By May 2001, 57 complaints against Australia had been lodged with the UN treaty-monitoring bodies under the three treaties. Eight complaints had gone through all procedural steps and had been determined on their merits. In three cases, the treaty bodies had found violations of international obligations’: H Charlesworth, Writing in Rights: Australia and the Protection of Human Rights (Sydney: University of NSW Press, 2001) 61.
When commenting about the relationship between Aboriginal law and Australia’s human rights obligations, the media and public often employ the vocabulary of international human rights law. Yet the perennial sentiments of the importance of Aboriginal law to Indigenous Australia and the potential violations of Australia’s human rights in failing to accommodate Indigenous culture are not as readily countenanced. The problems Indigenous peoples face within state legal systems is a common experience among Indigenous peoples globally. This explains why the need for recognition of Aboriginal legal systems is a central aspect of the Indigenous right of self-determination. It is enshrined in the United Nations Draft Declaration on the Rights of Indigenous Peoples.12

This Paper attempts to establish a balance between the practice of Aboriginal law in Western Australia and Australia’s human rights obligations. Thus, it examines relevant Commonwealth legislation and international obligations with respect to matters of Aboriginal law. This involved the primary examination of two key questions:

1. How is recognition of Aboriginal law consistent with international human rights law?
2. How may recognition of Aboriginal law conflict with international human rights law?

This approach involved a broader consideration of international human rights law beyond merely domestically incorporated aspects of international law (perhaps more accurately defined as ‘Australia’s human rights obligations’). Important also to this examination are those unincorporated yet relevant aspects of international human rights law that are becoming increasingly applicable and influential in Australian law. The two key questions that framed this analysis respond to frequently reported concerns in the community about how international human rights law can reconcile the recognition of Aboriginal law with the notion of universality of human rights and core principles of non-discrimination and equality before the law. Furthermore, this Paper considers how the fundamental human rights of Indigenous individuals within a group, in particular women and children, can be guaranteed and protected and what type of cultural practices are viewed as harmful by international human rights law.13

International human rights law provides a framework attendant to these concerns; the jurisprudence of the United Nations human rights treaty bodies is particularly instructive. Indigenous peoples enjoy a burgeoning presence in the United Nations system, with a developing corpus of Indigenous specific human rights that calls upon states to respect the right of Indigenous peoples to have their customs, traditions, rules and legal systems taken into account.14 As it relates to matters of Aboriginal law, it is a formidable

challenge to international human rights law and municipal legal systems to ensure that all of these competing rights are balanced. Importantly, concern about the rights of Aboriginal women and children must be balanced equally with concern for substantive and procedural equality of Aboriginal people before the law and fostering respect and recognition of Indigenous culture. This Background Paper does have a significant focus upon women’s issues, supported by the fact that ‘women’s issues are often the point at which Aboriginal Customary Law intersects with human rights’. The underpinning notion of international human rights law is that rights are minimum standards and rights do conflict. The fundamental issue for this reference is how to balance those rights fairly.

**RECOGNITION**

The Terms of Reference state that ‘recognition’ means that ‘there may be a need to recognise the existence of and take into account within the legal system Aboriginal customary laws’. ‘Recognition’ is a complex and amorphous concept. The use of the term ‘recognition’ in this paper does not imply any preference for the form in which Aboriginal law is recognised. It does not imply the establishment of a separate legal system nor does it impute any suggested status for Aboriginal customary laws within the Western Australian legal system. The aim of this paper is to elaborate upon the international human rights framework and the possible limitations on legislative power in which a member of the Federation must operate.

It may be constructive, however, to reiterate a number of concerns. Recognition for most people connotes codification in a statutory form or written form. Yet the writing down of Aboriginal law seems at odds with the fluidity of Aboriginal law and restricts the potential for evolution of culture that may lead to the demise of some aspects of Aboriginal law. Aboriginal law is inextricably linked to Aboriginal culture and such laws have never applied to non-Aboriginal citizens and indeed may not apply to other Aboriginal groups. Aboriginal law varies significantly according to the Aboriginal group; therefore, it would be difficult to ascertain those principles that apply to all groups in Western Australia. However, sentencing principles, by which Aboriginal law is most frequently considered, may be helpful in regulating the use of Aboriginal law and indeed providing an effective filter to the use of distorted customary law or ‘bullshit law’.

It is also necessary to counter claims that recognition means a ‘returning’ to old, traditional ways to correct dysfunction in Aboriginal communities. Such claims are simplistic when the content and diversity of Aboriginal law is fully considered. The claims serve only to ‘oversimplify the complexity and fluidity of culture by treating culture as monolithic and moral norms within a particular culture as readily ascertainable’.

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15. Sex Discrimination Commissioner, Submission to the NTLRC Inquiry into Aboriginal Customary Law in the Northern Territory (May 2003), ‘Part C: Women and Aboriginal Customary Law’.15


17. See generally CA Zorzi ‘The Irrecognition of Aboriginal Customary Law’ (Speech delivered at the Brisbane Institute seminar, 18 May 2001).

The general tenor of this brief is that the way forward must be predicated upon the international principle of consultation and participation of the affected Aboriginal community. In the context of international human rights law, the process is as important as the substantive rights.  

This paper employs a preference for the phrase ‘Aboriginal law’ rather than ‘Aboriginal customary law’. Aboriginal law accords more closely to the nature of Aboriginal law today – a diverse mix of urban and rural communities practising forms of Aboriginal law from ‘traditional’ customary law to more contemporary hybrid configurations of Aboriginal law that have manifested themselves in initiatives such as community justice mechanisms.

BACKGROUND

WHO ARE INDIGENOUS AUSTRALIANS?

Aboriginal and Torres Strait Islanders are the first peoples of Australia. Today, the Indigenous population of Australia is estimated to be 458,500 people or 2.4 per cent of the Australian population. Of that estimate, 58,496 are identified as living in Western Australia, a large proportion of which live in urban areas, more specifically in the Perth region. This pattern of urbanisation is replicated in all states and territories; however, the proportion of Indigenous people living in remote or very remote areas is higher than that of the non-Indigenous population. For example, 30.2 per cent of Indigenous Australians live in major cities compared to 67.2 per cent of non-Indigenous Australians. The majority of Indigenous peoples live in the eastern states of New South Wales and Queensland. These population statistics are useful in understanding the nature and content of Aboriginal customary law. Not all Indigenous peoples live in rural and remote areas. Most live in urban areas and do not practise what is perceived as ‘traditional’ Aboriginal law or the type of customary practices that may breach Australia’s international human rights obligations. Another telling statistic of Indigenous Australia is that the median age for Indigenous peoples is 20 years compared with 36 for non-Indigenous Australians. The relative youth of Aboriginal and Torres Strait Islanders is at odds with the aging population of non-Indigenous Australia and raises vastly different social issues for the Indigenous community than for non-Indigenous Australia. This is significant because of the perceived need to strengthen cultural education and to remedy societal breakdown and youthful dislocation to culture through the revival in some cases and ongoing protection of Aboriginal law. Respect for Aboriginal culture is vital to survival of future generations.

SELF-DETERMINATION

The urban/rural dichotomy of the diverse demographics of the Indigenous population is paralleled by the diversity of issues, governance mechanisms and resource needs that are required from community to community.

Indigenous communities are diverse in culture and circumstance and therefore their needs are very different. Communities that are enclaves within urban areas finding themselves a sub-group of a larger, non-Indigenous political unit, have different needs and strategies to those of Indigenous communities living in remote and distinct geographical areas where they may already be engaged in initiatives that can be categorised as decentralised self-governing actions.

In Western Australia, aspirations of self-determination are recorded as far back as 1928 when William Harris led a delegation of aborigines to the Premier of Western Australia. The men protested to the Premier about the

21. Ibid 22, Table 2.5.
treatment of Aboriginal people by the government and told the Premier that Aboriginal people should be ‘allowed to live our lives in our own way’.  

Today in Western Australia, the South West Aboriginal Land and Sea Council articulated a very clear strategy of what it perceived to be self-determination for Noongar people including a governance structure and vision for the future. One Noongar woman described self-determination as women and men working towards a much more interdependent model of decision-making within families and communities.  

Obviously Noongar visions of self-determination and the needs and aspirations of the Noongar people will differ significantly to the needs and aspirations of the Bardi of Broome, the Wongi of the Goldfields or the Ngarinyin people in north-west Kimberley.

Dean Collard has written about the history of the Noongar Nation and governance issues, including the vision of the Coalition of Aboriginal Agencies whose mission statement highlights the importance of the application of the principle of self determination and Noongar cultural values.

Despite differing views on the content of self-determination, all Indigenous peoples would agree upon the unique and distinct nature and place of Aboriginal and Torres Strait Islander culture and identity in Australia and that a common goal that unites all Indigenous groups is the importance of the right of self-determination to the survival of Indigenous cultures in Australia. Self-determination has different meanings for different communities but essentially means ‘Aboriginal people controlling all aspects of [their] lives and destiny’, and a mechanism that can ‘re-empower Indigenous peoples within society’. Opinions on the manner in which self-determination can be achieved will differ from community to community; nevertheless, the core principle remains that Indigenous communities, as a distinct cultural group, should determine the nature and direction of their own affairs and should be consulted on the decisions that affect their lives.

There are many important Indigenous statements that enumerate Indigenous claims to self-determination and sovereignty such as the Barunga Statement and the Eva Valley statement. The Royal Commission into Aboriginal Deaths in Custody found that:

23. A Haebich, For Their Own Good: Aborigines and Government in the South West of Western Australia (Perth: University of Western Australia Press, 1988) 275.
The elimination of disadvantage requires an end of domination and an empowerment of Aboriginal people; that control of their lives, of their communities must be returned to Aboriginal hands.30

Similarly, an Attorney General Department’s report into violence in Aboriginal communities observed that:

The impact of personal, family and community disintegration in many Aboriginal societies, enacted by missions, statutes and regulation, and State and Commonwealth policies, is still being realised today.... The ability of Aboriginal people to be self-determining must be addressed if Indigenous communities are to implement programs that come some way to resolving the issue of violence.31

Yet the employment of the term ‘self-determination’ by Indigenous peoples always invokes controversy and fear of secessionist movements that distort and divert public debate from the ‘unfinished business’ of resolving the relationship between Indigenous peoples and the state.32 This is despite most Indigenous peoples' understanding of self-determination or sovereignty as ‘greater community autonomy yet falling short of advocating a separation from the Australian state’.33

What contributes to the confusion of Indigenous claims to self-determination in Australia is the precarious nature of Indigenous peoples' rights in a liberal democracy. In the absence of any treaty or agreement Indigenous rights are often dependent upon the government of the day. Indigenous claims to self-determination at international law are good examples. Prior to 1993 the Labor government supported Indigenous peoples’ right to self-determination.34 Since then the new Coalition government opposed the use of the right to self-determination for Indigenous peoples at international law.35 In 2004, the Howard government unexpectedly revoked its opposition to the right to self-determination for Indigenous peoples at international law and endorsed the principle at the working group. Professor Larissa Behrendt explained this conundrum of Indigenous advocacy for self-determination:

The use of the term sovereignty in Indigenous rights advocacy illustrates how a technical legal term can leak into the political rhetoric of a disadvantaged and alienated group, become a catchphrase for political goals and transform into a word with a different meaning. In this way, language can actually confine a debate in the absence of a clear understanding by both parties as to what is meant by the lexicon of political terms being used. This highlights how a semantic block can occur when two sides in a debate have different understandings of the vocabulary they are using, a stand

30. Commonwealth Royal Commission into Aboriginal Deaths in Custody, National Report Vol 1 (Canberra, 1991) [1.7.6].
33. Behrendt above n 22, 102.
Despite the semantic confusion in the national debate over Indigenous self-determination, an undeniable component of Indigenous aspirations is the recognition of Aboriginal law. Having conducted research on Indigenous Australian ideas about what constitutes self-determination, Behrendt discovered that the protection of Aboriginal law was a recurring theme reflecting the sentiments of key national Indigenous statements. This is the case regardless of the geographical location of Indigenous peoples. Aboriginal law is popularly viewed as affecting, however, a small proportion of the population in Western Australia or the Northern Territory; its recognition is a common goal of Indigenous peoples’ aspirations.

The view that recognition of Aboriginal law is an important aspiration for Indigenous peoples is reflected in a number of key national documents including the Barunga statement, the Eva Valley statement, the Royal Commission into Aboriginal Deaths in Custody, the Final Recommendations of the Council for Aboriginal Reconciliation and, most recently, the Senate Legal and Constitutional References Committee report Reconciliation: Off Track.

**WHAT IS ABORIGINAL LAW?**

Aboriginal law is popularly viewed as Aboriginal communities reliving the halcyon days of Aboriginal culture practising brutal, traditional punishment such as wounding or tribal payback. The emphasis upon non-Indigenous repulsion of payback spearing or child marriage tends to obfuscate the organic nature of customary law in Aboriginal culture, and the dynamic and shifting course of Aboriginal law. Like all legal systems, Aboriginal law is complex and is not frozen in time but evolves and adapts.

Attempts to consign customary law to the time when Aborigines wore lap laps, used spears and stood on bended knee will result in the strengths of many Aboriginal communities being excluded from devising solutions to difficult, intransigent problems.

There are many public misconceptions about Aboriginal law that is deleterious to Indigenous efforts to achieve law reform. The Northern Territory government remarked in the preamble to its inquiry into Aboriginal customary law:

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36. Behrendt above n 22, 103.
37. Ibid 113.
38. Above n 29.
40. Above n 30.
41. ‘State and territory governments consider giving magistrates and judges the discretion to take account of traditional laws in sentencing as already occurs in some circumstances in the Northern Territory’: Council for Aboriginal Reconciliation, Final Report (December 2000) 111.
42. Australian Law Reform Commission, above n 1.
Aboriginal law is commonly misunderstood as relating primarily to issues of punishment and payback.... This is simply untrue. Aboriginal law encompasses an extremely broad and complex set of rules and unwritten legislation governing social relationships, economic rights, land ownership, wildlife conservation, land management and intellectual property rights.\(^{45}\)

Aboriginal law resides in an extensive number of legal issues such as dispute resolution, intestacy, child adoption and marriage. Australian legislatures have differing approaches to the use of Aboriginal law and there is no formal legislative recognition of Aboriginal law in the Australian criminal law system.\(^{46}\) Some jurisdictions have enacted legislation that takes into account Aboriginal law in relevant circumstances. The *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth), for example, gives Aboriginal people the right to use land based on

the body of traditions, observances, customs and beliefs of Aboriginals or of a community or group of Aboriginals, and includes those traditions, observances, customs and beliefs as applied to particular persons, sites, areas of land, things or relationships.\(^{47}\)

The *Aboriginal Affairs Planning Authority Act 1972* (WA) is an example of Aboriginal custom being taken into account in the context of intestacy.\(^{48}\) The Second Reading speech explains that if the Public Trustee cannot determine who is entitled to benefit, the balance may be ‘distributed in accordance with the Aboriginal customary law as it applied to the deceased at the time of his death’.\(^{49}\) Legislation exists in different states across a diverse number of areas such as adoption, marriage and intestacy laws.\(^{50}\) Aboriginal law also involves the protection of traditional knowledge as manifest in paintings, drawings and songs. The Australian government has been considering law reform in the field of intellectual property for decades but has laboured with the same institutional inertia that all political institutions exhibit when dealing with law reform in the context of Aboriginal law.\(^{51}\) While community emphasis is placed upon ‘traditional’ Aboriginal law, a broader analysis of Indigenous communities shows that Aboriginal law is being practised in many forums throughout the country.

Indigenous participation in sentencing procedures has been occurring informally in remote communities for some time. During the late 1990s, formalisation of this practice began in urban areas with the advent of Indigenous sentencing and Circle Courts.\(^{52}\)

45. NTLRC, above n 1, Preamble.
47. *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) s 3(1).
50. See, eg, *Adoption Act 1988* (SA); *Adoption Act 1984* (Vic); *Adoption Act 2000* (NSW); *Adoption of Children Act 1994* (NT). Traditional Aboriginal marriages are recognised as de facto relationships in NSW; see *De Facto Relationships Act 1984* (NSW). In the Northern Territory Aboriginal marriages are recognised particularly in relation to intestacy and family provision: see *Administration and Probate Act 1979* (NT) Div 4A; *Family Provision Act 1979* (NT) s 7(1A).
The Aboriginal and Torres Strait Islander Social Justice Commissioner has highlighted a number of important and successful community justice mechanisms, such as Ali-Curung, Lajamanu and Yuendumu law and justice committees, as an exercise of Aboriginal law. While these dispute resolution processes are not viewed as ‘a straightforward revival of customary law’, they are contributing to the empowerment of Aboriginal communities and give form to claims of self-determination. These mechanisms have become successful configurations of contemporary Aboriginal law. According to Marchetti and Daly, these judicial practices ‘indicate a transformation’ in the Australian legal system, and ‘although the practices are experimental and fluid, they will lead to changes in how justice is done for both Indigenous and non-Indigenous peoples.’

These developments are consistent with the recommendations made by states at a United Nations experts meeting at a Seminar on the Administration of Justice and Indigenous peoples. The meeting recommended that states should help to restore Indigenous legal practices in cooperation with Indigenous legal experts as such a collaboration is more likely to result in the development of an impartial system of justice that is in full compliance with international human rights law.

THE SIGNIFICANCE OF LAW REFORM

The perennial sentiments about the importance of law reform to Aboriginal communities and culture are also informed by implacable public unease about ‘extreme levels of violence (including sexual violence) in some Aboriginal communities’. The Western Australian reference is contiguous to a number of other inquiries examining the problem of abuse and violence in Aboriginal communities. In 2001, the National Crime Prevention Program published its full report into Violence in Indigenous Communities; in 2002, the Western Australian Gordon Inquiry reported evidence of extensive Aboriginal family violence and child abuse in Aboriginal communities; and in 2003, Boni Robertson led a Queensland taskforce that handed down The Aboriginal and Torres Strait Islander Women’s Task Force on Violence Report.

Growing concern about the conflict of Aboriginal law with Australia’s human rights obligations must also be viewed through the prism of Aboriginal women’s experiences in Australia. Indigenous women experience
challenges in Australian society. They include those broad challenges encountered by women in a patriarchal society such as issues of childcare, employment and maternity leave. Indigenous women also face challenges related to race.

To assume that patriarchal gender relations are the primary cause and to locate the family as the primary site of women's oppression, does not accord with the analysis of these issues by Aboriginal women.63

Family violence in Aboriginal communities and its impact upon Aboriginal women has become an increasing focus of mainstream media. For many Aboriginal women, issues of family violence and intervention are often inflicted with race and gender conflicts. National concern for Indigenous issues is often met with great suspicion. This dilemma is highlighted by Indigenous women who say that:

Aboriginal women have been silent because of the shame it reflects on their people, and because they do not want their men, already imprisoned at a hugely disproportionate rate, further oppressed by white society.64

Another example is the assertion that ‘women don’t want to lock their men out forever. That’s a very big feminist thing, but not in these communities. They just want the violence to stop’;65 or ‘many Aboriginal women do not go to the police when they are assaulted because of the way police treat the men … police just bash black men’.66 Professor Mick Dodson in a National Press Club address on ‘Violence, Dysfunction and Aboriginality’ remarked that:

People are also silent because they fear the interrogation of the police more than the fear of repeated violent acts against them by their relatives. And there is silence because ‘it is not our business to talk up’.67

These observations about the conflict of race and gender have been identified by the United Nations Committee on the Elimination of all Forms of Discrimination against Women. In a General Recommendation on gender related dimensions of racial discrimination, the committee noted that:

[R]acial discrimination does not always affect women and men equally or in the same way. There are circumstances in which racial discrimination only or primarily affects women, or affects women in

64. M Burchil, former manager of the Family Preservation Program in Shepparton, quoted in P Bone ‘One Year On, Has Much Changed?’ The Age, 8 June 2002.
a different way, or to a different degree than men. Such racial discrimination will often escape detection if there is no explicit recognition or acknowledgement of the different life experiences of women and men, in areas of both public and private life... Women may also be further hindered by a lack of access to remedies and complaint mechanisms for racial discrimination because of gender-related impediments, such as gender bias in the legal system and discrimination against women in private spheres of life.  

In being cognisant and sensitive to the double-edged sword of intervention, it is important and necessary to reject the mythology that family violence is culturally sanctioned by Aboriginal customary law. Former Social Justice Commissioner Bill Jonas commented that:  

Indigenous family violence is not normal. And contrary to popular myth, or romanticised notions of Aboriginal culture, or the less predominant but still existing racist stereotypes of ‘savagery’, it is not culturally acceptable. And it is not part of our systems of customary law. In fact it is the reverse. It is an indication of the fragility of such customary law and a sign of the breakdown in traditional governance mechanisms in communities. It is, in short, an indication of community dysfunction.  

Audrey Bolger, in her study on Aboriginal women and violence, reinforced the distinction between Family violence and Aboriginal law:  

When discussing violence against Aboriginal women, it should be noted that while it is important to distinguish between traditional and non-traditional violence, in practice it is often difficult to do so. Strictly speaking traditional violence refers to clearly defined and controlled punishments which were applied in cases where Aboriginal Law was broken, many of which are still in use in communities where traditional Law is followed. However, it may sometimes be used to describe violence which is not prescribed by Aboriginal Law but which is condoned as a response to socially disapproved behaviour.... One result of this is that they are now subject to violence from their own men of a kind which would not have been countenanced in traditional society.  

The Commission’s reference is temporal to national controversy and public debate surrounding the Northern Territory decision in Hales v Jamilmira. The decision has contributed to a burgeoning perception in the non-Indigenous community that custom is being used to justify the abuse of women and children in Aboriginal communities. And in Indigenous communities there has been concern for decades that customary law has at times become a conduit for distorted customary law or ‘bullshit law’. In particular, the adversarial nature of our legal system has provided opportunities for white legal counsel representing Aboriginal men to employ distorted custom in defence. The prospect of distorted customary law regularly invites populist hysteria and calls for wholesale public prohibition of the practice. Nevertheless, this reference provides an opportunity for

70. A Bolger, Aboriginal Women and Violence (Darwin: Australian National University, North Australia Research Unit, 1991)
measured and informed analysis of the many configurations of Aboriginal law and the circumstances in which its practice may infringe international human rights law.  

In determining the most appropriate means of recognising Aboriginal law, consideration must be given to fostering informed understanding within non-Indigenous communities about Aboriginal people, the complexity of the Aboriginal culture and the importance of Aboriginal customary law to Aboriginal communities. Such an approach would be consistent with the recommendations of the 2003 United Nations Expert meeting at the Seminar on Indigenous Peoples and the Administration of Justice in Madrid, recommending that ‘[s]tates should recognise Indigenous peoples own systems of justice and develop these systems to function effectively in cooperation with the official national systems’. More important and fundamental to this reference is the recommendation that ‘states and Indigenous peoples should incorporate internationally recognised human and Indigenous rights into their systems of justice’. The single most effective way in which this can be achieved is through open and widespread consultation with Aboriginal communities.

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74. Ibid.
INTERNATIONAL HUMAN RIGHTS LAW

This section establishes the context of the paper and examines international human rights law which is a specific classification of public international law. It explains how international law is related to the domestic Australian legal system. It also explains how Australian citizens can employ international law when their human rights have been violated. Nations like Australia are known as ‘states’ at international law. International law belongs to a legal system that is separate from and discrete to domestic legal systems. All states are sovereign with their own legal and political systems. Thus, international law is often a controversial source of law, mainly because there is no viable or organised international governance structure. Therefore, international law is viewed as undemocratic. This explains why there is an ongoing debate about the relevance of international human rights law to the Australian legal system. Similarly, there is an ongoing debate in international law about the nature of international human rights law and whether they are truly universal. These debates are important when determining the notion of ‘conflict’ in the context of Aboriginal law. How Aboriginal law may conflict with Australia’s obligations under international law is considered in an analysis of non-discrimination, equality before the law, obligation to protect culture and harmful cultural practices.

76. See Advisory Opinion on Namibia(1971) 16 ICJ Rep 57.
Federal Court in *Nulyarimma v Thompson* held that customary international law has no effect in the Australian legal system until it is incorporated into Australian law.\(^\text{77}\) In this case consideration was made of the prohibition of genocide that is a peremptory norm of customary international law. Peremptory norms or the rule of *jus cogens* constitutes another rule of international law from which no state is permitted to derogate. *Jus cogens* principles are so fundamental that they override treaty provisions if they are inconsistent. Racial discrimination, slavery and genocide are examples of *jus cogens*. Nevertheless, in *Nulyarimma* the majority found that the court should be guided by legislative intention before it could exercise consideration of a peremptory norm of international law.

International law does not automatically become operative in the Australian legal system.\(^\text{78}\) In Australia, the authority to enter into treaties is a power of the Executive under the Australian Constitution.\(^\text{79}\) Treaties, for example, must be incorporated into domestic law before they can be effective. The first stage toward binding force of a treaty is signature, which is followed by the ratification stage. Australia has ratified a number of international human rights instruments.\(^\text{80}\) The obligation to give effect to those instruments once ratified is enshrined in the *Vienna Convention on the Law of Treaties*, the key international instrument regulating the interpretation of international treaties.\(^\text{81}\)

Ratification does not automatically render an international treaty operational in domestic law. Whether ratification automates domestic effect depends upon whether a legal system implements international law by incorporation or transformation of international law. The incorporation theory holds that international law is effectively part of the domestic law and does not require enabling legislation to incorporate it into the legal system. The alternative theory holds that international law is a discrete area of law that requires its

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\(^{78}\) The Whitlam government (2 December 1972–11 November 1975) was a significant period for Australia’s engagement with international human rights law. Most significantly, Whitlam ratified the *International Convention on the Elimination of All Forms of Racial Discrimination* and implemented it into domestic law through the *Racial Discrimination Act 1975* (Cth). Following the Whitlam government, successive Australian governments continued to ratify international human rights treaties. During the period of ratification by Australian governments, two important human rights covenants were ratified: the *International Covenant on Civil and Political Rights* [1980] ATS 23 and the *International Covenant on Economic, Social and Cultural Rights* [1976] ATS 5.


transformation into domestic law. Transformation is usually achieved through enabling legislation.

In the Australian legal system, the dominant contemporary theory that determines the effect of international law upon the domestic legal system is one of transformation or otherwise referred to as the ‘dualist approach’. Because the act of ratifying international treaties by the Australian Executive does not automatically transform international treaties into domestic law; rather enabling legislation is required to incorporate that particular treaty or aspect of international law into domestic law (or via the use of existing Commonwealth or state legislation). The notion of transformation operates to maintain the separation of powers so that the Executive power to ratify a treaty is diluted by the parliament’s capacity to make the law.

The increased awareness and importance of international law in Australia means that international human rights law, in particular, has become significant in many public debates on legal and political issues such as the refugees, unions and Indigenous peoples. International law is used in Australia in a variety of ways. NGO’s, legal advocates and community groups use international law as benchmarks by which the conduct of the government can be measured using internationally accepted standards. Public institutions and decision makers also employ and implement international law where relevant. For example, during the negotiations in amending the Native Title Act 1993 (Cth) Indigenous peoples argued that they were not adequately consulted on the drafting of legislative amendments that would directly affect their rights. Indigenous peoples were able to identify the relevant standard in the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD). In recent years public debate about the rights of asylum seekers has been dominated by reference to the international standards that were drafted after World War II. These standards were designed to provide a framework for states indicating the manner in which asylum seekers are to be treated.

International law may be used by courts when attempting to construe the meaning of a statute or in cases of statutory ambiguity. In circumstances of statutory ambiguity, legislation may also be interpreted in accordance with customary international law. A general rule of statutory construction is that, in the event of statutory ambiguity, interpretation should be consistent with international law. On this point Gleeson CJ commented that:

[W]here legislation has been enacted pursuant to, or in contemplation of, the assumption of international obligations under a treaty or international convention, in cases of ambiguity a court

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84. Polites v Commonwealth (1945) 70 CLR 60.
should favour a construction which accords with Australia’s obligations. Yet in decisions like Polites and Teoh it was apparent that, when interpreting statutory ambiguity consistent with international law, it does not principally require incorporating legislation to give effect to the principle of statutory interpretation. This serves to highlight the ongoing debate about the role of international law in the Australian legal system. Nevertheless, the importance of the vocabulary of international law has been extremely valuable for law reform advocacy. In the absence of an entrenched rights protection in Australia, incorporated international law, as well as those standards that are neither ratified by Australia nor effectively international law, have significant influence for Indigenous peoples. The International Labor Organisation (ILO) Convention has been valuable despite Australia’s failure to ratify it. Also of importance is the United Nations Draft Declaration on the Rights of Indigenous Peoples, which remains in draft form while being negotiated. In Police v Abdulla Perry J referred to the Convention Concerning Indigenous and Tribal Persons in Independent Countries (ILO Convention 169), which has not been ratified by Australia:

Section 11 of the Criminal Law (Sentencing) Act makes it plain that a sentence of imprisonment must be regarded as a sentence of last resort. In the case of Aborigines this is reinforced by provisions to be found in [ILO Convention 169]. Australia is not a party to the Convention. But it is an indication of the direction in which international law is proceeding. In the area of human rights particularly, Australian courts should always be prepared to take into account international instruments where they identify precepts of universal application, at least where they are not in conflict with the domestic laws of this country.

Perry J’s use of the ILO Convention 169 intimates that such standards may be an important source for the judiciary. The Draft Declaration on the Rights of Indigenous Peoples provides an instructive list of standards that is becoming increasingly practised by United Nations agencies and human rights advocates. While some Indigenous groups argue that aspects of the Draft Declaration have entered customary international law, it is doubtful that this is the case. Nevertheless, the Draft Declaration contains an exhaustive list of rights that defines self-determination for Indigenous peoples and elaborates on the content of self-determination.

In Minister for Immigration and Ethnic Affairs v Teoh, a majority of the High Court held that a legitimate expectation arises when the Executive ratifies international instruments. The majority of the High Court found that there was a legitimate expectation that decision makers would take into account relevant treaty provisions when interpreting legislation and formulating a decision. In this case the relevant treaty was the Convention on the Rights of the Child which had not been implemented into Australian law.

86. Above n 84.
89. Teoh above n 87.
Ratification by Australia of an international convention is not to be dismissed as a merely platitudinous or ineffectual act, particularly when the instrument evidences internationally accepted standards to be applied by courts and administrative authorities in dealing with basic human rights affecting the family and children. Rather, ratification of a convention is a positive statement by the executive government of this country to the world and to the Australian people that the executive government and its agencies will act in accordance with the Convention.  

After the decision in Teoh a bill was introduced in federal parliament with the intention of expressly precluding ratified treaties from effect in the domestic legal system unless incorporated through implementing legislation into the domestic legal system. The bill has since expired, though Teoh remains a contentious issue. Of note, however, is the Australian National Framework for Human Rights: National Action Plan released in December 2004, which states that:

The provisions of treaties to which Australia has become a party do not become part of Australian domestic law by virtue only of the formal acceptance of the treaty by Australia. The general approach taken in Australia to human rights and other conventions is to ensure, as far as is possible, that domestic legislation, policies and practice comply with the convention prior to ratification.

The controversy of international law and the Australian legal system

Australia's engagement with international law has always been politically controversial. The High Court has historically 'shown ambivalence towards international law'. For example, the Universal Declaration on Human Rights was cited only once from the World War II period until the 1970s. Federalism inevitably fuelled the controversy of international law. Decisions in Koowarta v Bjelke-Peterson and Commonwealth v Tasmania assuaged state doubts that the Commonwealth has the capacity to pass laws with respect to external affairs, and the power to ratify international treaties and enact laws with respect to international human rights law.

This historical ambivalence of the High Court was discarded during a period of the Mason High Court (6 February 1987 to 20 April 1995) and the Brennan High Court (21 April 1995 to 21 May 1998). The Mason/Brennan courts are credited as a period in which the judiciary became increasingly attendant to international law, in particular international human rights law. This period contributed to permeation in the broader community of the importance of human rights. During this period the High Court drew

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90. Ibid 291 (Mason CJ and Deane J).
93. H Charlesworth, 'International Law in T Blackshield, M Coper and G Williams (eds), The Oxford Companion to the High Court of Australia (Melbourne: Oxford University Press, 2001) 348.
94. A Devereux 'International Bill of Rights' in Blackshield, Coper and Williams, ibid 348.
95. See generally Opeskin and Rothwell, above n 82.
96. (1982) 153 CLR 168: 'Increasing emphasis is given in the United Nations and in regional organisations to the pursuit by international treaties of idealistic and humanitarian goals. It is important that the Commonwealth retain its full capacity through the external affairs power to represent Australia, to commit it to participation in these developments when appropriate and to give effect to obligations thereby undertaken': at 229 (Mason J).
extensively from international law, making reference to major human rights instruments Australia had ratified such as the *International Covenant on Civil and Political Rights* (ICCPR) and *Convention on the Rights of the Child*, as well as drawing on international jurisprudence from the International Court of Justice and the European Court of Justice.

During the Mason court, decisions such as *Mabo v Queensland (No 2)*, *Minister for Immigration and Ethnic Affairs v Teoh* and *Dietrich v The Queen* were clearly influenced by international human rights law. The recognition of Aboriginal customary law in *Mabo* was directly influenced by international human rights law:

> The opening up of international remedies to individuals pursuant to Australia’s accession to the Optional Protocol to the International Covenant on Civil and Political Rights brings to bear on the common law the powerful influence of the Covenant and the international standards it imports. The common law does not necessarily conform with international law, but international law is a legitimate and important influence on the development of the common law, especially when international law declares the existence of universal human rights.

The High Court’s rejection of Australia as a terra nullius country in *Mabo* was consistent with international law and the decision of the International Court of Justice in the Western Sahara case. The High Court’s endorsement of international law, in particular *Mabo* and *Teoh*, attracted criticism and allegations of judicial activism. It was said that international law has ‘become a charged and politicised field in Australia’. The *Teoh* decision was controversial because it rendered international law effective in the domestic legal system without clear legislative intention by the state. The government was of the view that the Teoh principle— whereby entry into a treaty created a legitimate expectation that the treaty obligations would be followed— ‘[was] not consistent with the proper role of Parliament in implementing treaties in Australian law’.

While Australia is party to numerous United Nations human rights treaties it has ratified, most treaty provisions have not been implemented into domestic law. This has been described as Australia’s ‘Janus-faced approach’ to human rights treaties; ‘the international face smiles and accepts obligations, while the domestic-turned face frowns and refrains from giving them legal force’.

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98. *Mabo v Queensland (No 2)* (1992) 175 CLR 1
99. Above n 87.
102. *Mabo (No 2)* above n 98, 42 (Mason CJ and McHugh J).
106. Charlesworth et al, above n 8, 436.
The Howard era (1993–) has become distinguished by its ambivalence toward international human rights law. Some commentators have viewed this approach to international human rights by the Howard government as useful for reform of the United Nations human rights treaties. Other commentators have interpreted this ambivalence as a form of ‘legal xenophobia’, stating that international law is ‘an intrusion from “outside” into our self-contained and carefully bounded legal system’. Still others have viewed international law as ‘vague and conflicting’ and deriving from an inherently undemocratic process that is in conflict with parliamentary sovereignty. The debate about the role of international law in the Australian legal system is ongoing. Nevertheless, for Indigenous Australia, in the absence of any formal recognition as first peoples of Australia with no entrenched rights, international human rights law provides a comprehensive framework of standards upon which Indigenous peoples may articulate their claims to the state.

Despite Australia’s impressive ratification record there are relatively few international human rights implemented into domestic law. The two major international human rights instruments are the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR). The ICCPR enumerates civil and political rights and the ICESCR enumerates economic, social and cultural rights. Article 50 of the ICCPR states that in federal governance structures the Commonwealth must ensure all members of the federation respect the covenant. The other significant instrument is the International Covenant on the Elimination of All Forms of Racial Discrimination (ICERD) that deals with the prohibition of racial discrimination.


The ICCPR and the Convention on the Rights of the Child are both scheduled to the Human Rights and Equal Opportunity Commission Act 1986 (Cth). The Human Rights and Equal Opportunity Commission (HREOC) was established in 1986 consistent with Australia’s ratification of the ICCPR. HREOC has a complaints mechanism that Australian citizens can use to complain about violations of the Racial Discrimination Act 1975 (Cth), the Sex Discrimination Act 1984 (Cth), the Disability Discrimination Act

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109. Charlesworth et al., above n 8, 424.

110. Western Australia v Ward (2002) 191 ALR 1, 274 (Callinan J).
1992 (Cth), the Age Discrimination Act 2004 (Cth) and the two scheduled Acts. The HREOC is empowered to inquire into ‘any act or practice that may be inconsistent with or contrary to any human rights’. However, HREOC’s processes provide for a remedy that is unenforceable and this has been criticised as ‘an inadequate implementation of the obligations under [the ICCPR] and Convention on the Rights of the Child’. Nevertheless, its role is to investigate and attempt to conciliate. If HREOC is unable to resolve the complaint then proceedings can be instituted in the Federal Magistrates Court or the Federal Court of Australia.

The International Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment is not scheduled to the Human Rights and Equal Opportunity Commission Act 1986 (Cth); therefore, there is no domestic or international complaints mechanism. The Crimes (Torture) Act 1988 (Cth) does, however, incorporate aspects of the International Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment.

### Table 1: Relevant International Human Rights Treaties

<table>
<thead>
<tr>
<th>Treaty</th>
<th>Name of treaty body</th>
<th>Entry into force of treaty</th>
<th>Complaint mechanism</th>
<th>Entry into force of complaint mechanism</th>
<th>Reporting period</th>
</tr>
</thead>
<tbody>
<tr>
<td>International Convention on the Elimination of All Forms of Racial Discrimination</td>
<td>The Committee on the Elimination of All Forms of Racial Discrimination</td>
<td>October 1975</td>
<td>Yes</td>
<td>28 January 1993</td>
<td>2 years</td>
</tr>
<tr>
<td>International Covenant on Civil and Political Rights</td>
<td>Human Rights Committee</td>
<td>November 1980</td>
<td>Yes</td>
<td>25 December 1991</td>
<td>5 years</td>
</tr>
<tr>
<td>International Covenant on Economic, Social and Cultural Rights</td>
<td>The Committee on Economic, Social and Cultural rights</td>
<td>March 1976</td>
<td>No</td>
<td>n/a</td>
<td>5 years</td>
</tr>
<tr>
<td>International Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment</td>
<td>The Committee against Torture</td>
<td>September 1989</td>
<td>Yes</td>
<td>28 January 1993</td>
<td>4 years</td>
</tr>
<tr>
<td>Convention on the Rights of the Child</td>
<td>The Committee on the Rights of the Child</td>
<td>January 1991</td>
<td>No</td>
<td>n/a</td>
<td>5 years</td>
</tr>
<tr>
<td>Convention on the Elimination of All Forms of Discrimination against Women</td>
<td>The Committee on the Elimination of Discrimination against Women</td>
<td>August 1983</td>
<td>Yes</td>
<td>n/a</td>
<td>4 years</td>
</tr>
</tbody>
</table>

In the absence of effective rights implementation, the international individual complaints mechanism is an important avenue for Australian citizens. Australia has ratified the First Optional Protocol to the ICCPR which came into force on 25 December 1991. This gives Australian citizens the right to make complaints of violations under the ICCPR to the United Nations, Human Rights Committee (HRC). HRC’s role is to investigate the complaints and to publish its view on such complaints. For the HRC to consider individual complaints against a state it is important and necessary for the complainant to have exhausted domestic remedies within the Australian legal system. Article 14 of the Racial Discrimination Act 1975 (Cth) allows for individual complaints to the Committee on the Elimination of Racial Discrimination. This came into force in Australia in January 1993. Australian citizens also have access to an individual complaint mechanism under the International Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment under Article 22 of the Convention. This came into force in January 1993.

The effectiveness of international human rights law: Indigenous Australia and the Committee on the Elimination of Racial Discrimination

Indigenous leaders in Australia viewed the government’s conduct during consultations on amendments to the Native Title Act 1993 (Cth) as breaching Australia’s obligations under ICERD. Of particular concern was the government’s intention to suspend the operation of the Racial Discrimination Act 1975 (Cth) with respect to certain provisions of the amending act. Indigenous advocates, including the National Indigenous Working Group, Aboriginal and Torres Strait Island Commission (ATSIC) and the Acting Aboriginal and Torres Strait Islander Social Justice Commissioner, submitted complaints to the CERD and on 11 August 1998 the committee listed Australia under its urgent action/early warning mechanisms. The committee requested the state party to provide information about its native title policy and to abolish the position of the HREOC Aboriginal and Torres Strait Islander Social Justice Commissioner.

This was the first time a Western nation had been listed using the urgent action/early warning mechanism. The ultimate decision by the committee was to condemn the Australian government for its failure to consult meaningfully with Aboriginal people. The committee also noted the lack of entrenched basic human rights in the Australia legal system. The paucity of rights protection in Australia means that the parliament can override any statutory rights such as those contained in the Racial Discrimination Act 1975 (Cth). This makes rights, such as prohibition of racial discrimination, subject to the political tenor of the day and easily overridden. It effectively enables government to legislate against Indigenous interests on the basis of their race. This capacity is arguably supported by the race’s power in the Australian constitution.


The political backlash against CERD from the Australian government was severe.\(^\text{116}\) It entailed threats of withdrawing from the human rights system,\(^\text{117}\) as well as accusations of violations of Australian state sovereignty.\(^\text{118}\) For Indigenous peoples in Australia and around the world it stands as an example of the importance and symbolic power of the human rights treaty system. As Shane Hoffman, a key Indigenous lobbyist at the United Nations for the CERD decision, observed:

\[
\text{While it is highly unlikely that the current government will revisit the Native Title Amendment Act 1998 (Cth), continued critical scrutiny of the legislation by international bodies such as the CERD committee will pressure future governments to amend the legislation to remove its racially discriminatory aspects.}\(^\text{119}\)
\]

While the United Nations treaty bodies cannot force states to change domestic law or policy, the process was important for Indigenous Australians. It confirmed that the amendments violated Australia’s human rights obligations under international law. It confirmed the value of international human rights law in the absence of any rights and protection within a domestic legal system, an international instrument that provides standards to states as to how its citizens should be treated and consulted. As Larissa Behrendt observed:

\[
\text{In the absence of rights protection in the constitution, it is the reporting and monitoring mechanisms under international law that have created the most effective method of monitoring human rights in Australia.}\(^\text{120}\)
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Moreover, broader international law has been significant to the campaign advocacy for Indigenous rights in Australia. Mick Dodson has remarked that:

\[
\text{[T]he Racial Discrimination Act 1975 (Cth), the Land Rights (Northern Territory) Act 1976 (Cth), the High Courts 1992 decision on native title – all of them were firmly grounded in, if not derived from, international law.}\(^\text{121}\)
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However, this is not to provide a romanticised or naïve view of international law. The Native Title Amendment Act 1999 (Cth) showed nothing can protect Indigenous rights in the event of a government willingly legislating on the basis of race. Parliamentary sovereignty and the rhetoric of state sovereignty are powerful political images in the Australian community and, given that the amendments were barely six years ago, nothing has changed in the

\[\text{\footnotesize{\ldots}}\]


\(^{119}\) Hoffman, above n 83, 33.

\(^{120}\) Behrendt, above n 22, 5.

Rights and cultural relativism

The apotheosis of ‘rights’ as an entitlement of all human beings occurred in the 20th century. While the concept of human rights had been developing for centuries, after the end of the two World Wars, the rights and fundamental freedoms of individuals became the central tenets of international cooperation and peace among states. The tragic legacy of human rights violations during the two World Wars fostered a spirit of cooperation among states. This intimated a willingness to permit legitimate incursions on state sovereignty to ensure that sovereignty could not be invoked as a shield behind which the rights and fundamental freedoms of citizens could be systematically abused. The treatment of Jewish people sanctioned by the policies of Nazi Germany is often invoked as an example of the horrific violation of human rights that the international community sought to prevent.

As a result, human rights were enshrined in the United Nations Charter 1945; Article 1(3) of the Charter urging member states to promote and encourage ‘respect for human rights and for fundamental freedoms for all’. Article 55 of the Charter empowers the United Nations member states to promote ‘universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language or religion’; and Article 56 calls upon all members to ‘pledge themselves to the joint and separate action in cooperation with the organisation for the achievement of the purposes set forth in Article 55’.

The Universal Declaration of Human Rights (UDHR) in particular was a significant achievement of the renewed international consensus toward affirming human rights as a condition to maintaining peace and international co-operation. The UDHR was the first international human rights instrument to reflect universal values of all states. It included economic and social rights, as well as civil and political rights. The UDHR is not legally binding in the sense that it is a General Assembly resolution; however, there is growing acceptance that aspects of the UDHR constitute customary international law.

United Nations human rights discourse and the universal nature of the international human rights legal framework has imbued rights with significantly moral influence upon domestic legal systems throughout the world. This is reflected, for example, in the statutory or constitutional entrenchment of rights in all new political systems since World War II. Yet there is an argument within the United Nations system itself, challenging the ‘universality’ of human rights and human rights rhetoric as deriving from a Western liberal tradition. The question asked by these groups is: who decides what is culture?

122. Department of Foreign Affairs and Trade, above n 79.
124. GA Res 217A(III), 10 December 1948.
Many view that rhetoric [human rights] as unproblematic as the central and inevitable component of a universal discourse about human dignity and humane treatment of individuals by governments. Others to the contrary, view a discourse about rights as alien and harmful to their states or cultures, disruptive of traditional social structures subversive of authority.\(^\text{126}\)

As the *Hales v Jamilmira*\(^\text{127}\) controversy illustrated, there are many in the Australian community who view practices such as payback spearing or child brides as harmful cultural practices, yet those Aboriginal people who practise such traditions understand that its system of law is a controlled and complex one.

The argument of cultural relativists is that it is the dominant group in a community that determines the content of ‘rights’ on the basis of its own core values and standards. The dominance of this group within a community, and therefore the permeation of their culture, renders true universality of culture nugatory. For example, during the drafting sessions for the Draft Declaration on the Rights of Indigenous Peoples some Indigenous nations did not believe that the practice of Aboriginal custom should be subject to international human rights law:

> The phrase ‘in accordance with internationally recognised human rights standards’ must be deleted. This phrase [Article 33] allows us the right to have our own structures, customs, traditions, as is inherent within our right of self-determination and the phrase added on to it, seeks to limit the full exercise of our right.\(^\text{128}\)

Conversely, the Department of Foreign Affairs and Trade *Human Rights Manual* explains the Australian government’s position on cultural relativism:

> Recognition of essential needs such as freedom and dignity is implicit in some of the earliest written codes from ancient Babylon, which refer to the need to help the poor and the dispossessed; in Hindu and Buddhist texts that focus on the human condition; in notions of human virtue and compassion which characterise early Confucianism; and in the natural law tradition of the West. Throughout all, there is recognition that, in human relations, some principles will always hold and that some common standards of behaviour can be regarded as universally valid.\(^\text{129}\)

Steiner and Alston explain the human rights instruments in the following way:

> On their face, human rights instruments (which in their treaty form mean to impose legal obligations, to convert moral rules into legal rules) are squarely on the ‘universalist’ side of this debate. The landmark instrument is the *Universal Declaration on Human Rights*, parts of which have clearly become customary international law. The two Covenants, with numerous states parties from all the world’s regions, also speak in universal terms: ‘everyone’ has the right to liberty, ‘all persons’ are entitled to equal protection, ‘no-one’

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\(^\text{127}\) Above n 71.


shall be subjected to torture, ‘every-one’ has the right to an adequate standard of living. Neither in the definitions of rights nor in the limitations clauses … does the text of these basic instruments make any explicit concession to cultural variation.\textsuperscript{130}

The debate about the universality of human rights exists in Australia, particularly in regard to Aboriginal law. Like most debates about Indigenous Australian issues it is be polarised and, therefore, void of the required nuances when discussing such complex matters as Aboriginal culture. John Tippett QC has argued that:

\textquote{It can be easy perhaps to look from outside in with a wrinkled brow and be concerned about the fact that a young woman is being married to a much older man, and of course to judge that set of circumstances by our own morality and the construct of our own legal system. The fact is, it takes place. It takes place with the consent and agreement and encouragement in many circumstances, of the community.}\textsuperscript{131}

Similarly, it has been argued that:

\textquote{On such issues [as Aboriginal law] Australia’s legal system may simply have to bite the bullet and go against the norms of international human rights. ‘Human rights are essentially a creation of the last hundred years. These people have been carrying out their law for thousands of years’}.\textsuperscript{132}

Both these arguments illustrate a strong cultural relativist position that attaches an important consequence to diversity:

\textquote{That no transcendent or trans-cultural ideas of right can be found or agreed on and hence that no culture or state is justified in attempting to impose on other cultures or states what must be understood to be ideas associated particularly with it. In this strong form, cultural relativism necessarily contradicts a basic premise of the human rights movement.}\textsuperscript{133}

The alternative universalist view is captured by Joan Kimm in her study of Aboriginal violence and the Australian legal system. Kimm represents the alternative view that:

\textquote{A fundamental problem is that many Aborigines and non-Aborigines have competing views about which set of rights should prevail. I believe the basic human right to live free of violence overrides Indigenous rights.}\textsuperscript{134}

Neither Tippett QC nor Kimm are Indigenous Australians, but like the views of non-Indigenous Australians, the views of Indigenous Australians on this matter are polarised. This reinforces the importance of the international

\begin{itemize}
\item \textsuperscript{132} C McDonald, quoted in D Fickling, ‘Bridging Whitefella Law and Clan Justice’, \textit{The Guardian} (London, 30 December 2002).
\item \textsuperscript{133} Steiner and Alston, above n 130, 367.
\item \textsuperscript{134} J Kimm, \textit{A Fatal Conjunction: Two Laws, Two Cultures} (Sydney: Federation Press, 2004).
\end{itemize}
obligation to consult with Indigenous communities before taking action such as legislative measures to address the conflict between the universalist and relativist views. It is important, however, to consider that the tenor of the debate does not, as Tracey Higgins has often observed, ‘oversimplify the complexity and fluidity of culture by treating culture as monolithic and moral norms within a particular culture as readily ascertainable’.  

This observation is shared by Wendy Shaw who argued that:

[D]amaging fiction(s) about tradition ... have also rendered Aboriginal cultures as, yet again, abhorrent, barbaric and unsuited to the modern world. Such truncation has denied the fluidity and evolution of (Indigenous) culture(s).... Aboriginal self-determination continues to be hindered as the reputation of a set of different laws has been almost irretrievably tarnished. Such laws, and the capacity for them to help alleviate the incarceration rates for Aboriginal peoples, increasingly sit outside of the domain of the Westminster System of Law in (post)colonial Australia.

As will be discussed later, the international human rights system, while condemning harmful cultural practices and traditions, equally acknowledges the capacity of practices to change and evolve.

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ABORIGINAL LAW AND THE AUSTRALIAN LEGAL SYSTEM

Aboriginal law and sentencing

The common law provides an extensive corpus of decisions in varying jurisdictions where Aboriginal law has been taken into account in determining criminal liability. There exists no recognised defence of committing an act within the scope of Aboriginal law; however, it can be taken into account if it falls within the scope of existing defences in the criminal law. There is no general framework of principles that guide particular jurisdictions. However, in the Northern Territory there is a framework of principles that guides the courts in determining the admissibility and relevance of evidence, and in New South Wales there is a set of principles known as the ‘Fernando principles’. In Western Australia the courts ‘appear to be less strict in relation to the evidence that is required before customary law will be taken into account’.139

The issue of sentencing of children is dealt with in numerous international human rights instruments. The most significant standards for Indigenous peoples are set out in ILO Convention 169:

1. In imposing penalties laid down by the general law on members of these peoples account shall be taken of their economic, social and cultural characteristics.

2. Preference shall be given to methods of punishment other than confinement to prison.

Most public controversies about Aboriginal law arise in those circumstances where the courts may take into account Aboriginal law in the sentencing process. This may occur in mitigation of an offence where evidence is given that the act was informed by traditional Aboriginal custom or practice. In those circumstances, courts will take into account an offender’s membership of an Aboriginal group and aspects of traditional practice.

In imposing sentences courts are bound to take into account, in accordance with those principles, all material facts including those facts which exist only by reason of the offender’s membership of an ethnic or other group. So much is essential to the even administration of criminal justice.140

Aboriginal law may also be taken into account where there is evidence of further customary punishment for the offence and often courts weigh up the severity of the traditional punishment. In Jadurin v The Queen it was stated that:

137. LBC, above n 46, Vol XC, [12].
139. Ibid 9.
140. R v Neal (1982) 42 ALR 609, 626 (Brennan J); see also R v Larry Colley (Unreported, Supreme Court of Western Australia, Brinsden J, 14 April 1978).
It is sometimes said that a court should not be seen to be giving its sanction to forms of punishment, particularly the infliction of physical harm, which it does not recognise itself. But to acknowledge that some form of retribution may be exacted by an offender’s own community is not to sanction that retribution; it is to recognise certain facts which exist only by reason of that offender’s membership of a particular group.\footnote{Jadurin v The Queen (1982) 44 ALR 424, 429.}

A judge may lessen or increase an offender’s sentence depending on the severity of traditional punishment or to prevent the meting out of a traditional punishment in its entirety. This can lead to different outcomes such as refusal to grant bail. In the Western Australian case Unchango v The Queen,\footnote{[1998] WASC 186.} the spectre of traditional punishment was taken into account when determining bail under the Bail Act 1982 (WA). In this case an Aboriginal woman, charged with murder, was granted bail because of assurances that her residency at a spiritual centre and the geographical location of the centre would prevent the carrying out of traditional payback. In R v Thompson, a decision that involved an Aboriginal woman from the Eastern Goldfields, the court acknowledged that it was inevitable that customary punishment would be meted out to the offender and her family.\footnote{R v Thompson (Unreported, Supreme Court of Western Australia (Kalgoorlie), No 199 of 2000, 20 February 2001).}

[The offender] not only intends but is determined to present herself to the community for traditional punishment and I accept that it will be inflicted as described by [counsel] not only on her but on her mother and three brothers … the expectation is that she and her mother will be hit with fighting sticks and her three brothers will be speared in the thigh.\footnote{R v Fernando (1992) 76 A Crim R 58, 62.}

Under the Bail Act 1982 (NT) the court must take into account the safety of the applicant and whether the applicant is in need of protection. In the Northern Territory decision of Barnes v The Queen, Bailey J refused bail on the grounds that ‘the court cannot facilitate what would amount to a crime’, referring to the expected customary punishment that would be meted when the offender returned to his community and the prospect of double jeopardy.\footnote{Barnes v The Queen (1997) 96 A Crim R 593.}

In the New South Wales case R v Fernando, Wood J determined a set of principles upon which sentencing of Aboriginal offenders could be based.\footnote{R v Fernando (1992) 76 A Crim R 58, 62.} In Fernando, an Aboriginal man from Walgett was charged with maliciously wounding his wife using a knife after a period of excessive drinking. In this case the offender had an extensive criminal record and was an alcoholic. The principles (explained below) were not intended to be applicable to every decision. Aboriginality does not make automatic the application of the principles. An offender must argue that the Fernando principles apply because of the dysfunction or disadvantage an offender experiences as a result of his or her Aboriginality. Fernando does not justify ‘special leniency on account of an offender’s Aboriginality’.
The Fernando principles give recognition to the fact that disadvantages which arise out of membership of a particular group, which is economically, socially or otherwise deprived to a significant and systemic extent, may help to explain or throw light upon the particular offence and upon the individual circumstances of the offender. In that way an understanding of them may assist in the framing of an appropriate sentencing order that serves each of the punitive, rehabilitative and deterrent objects of sentencing.\textsuperscript{146}

The Fernando principles have been applied to a varying extent in New South Wales. There is some controversy as to the manner in which these principles are employed by advocates and judges. Nevertheless, this overview illustrates the way in which state and territory courts are dealing with Aboriginal law around Australia. There is also a chasm between the reality of the practice of Aboriginal law in courts and the awareness of the Australian community about its widespread practice. Despite the paucity of knowledge within the community of the place of Aboriginal law, the existence and continuing practice of Aboriginal law and its frequent intersection with the common law is evident throughout the country. The debate has moved well and truly beyond the discussion of whether Aboriginal law does operate in the Western Australian legal system. The questions remain as to whether the processes should be formalised and whether aspects of Aboriginal law conflict with Australia’s human rights obligations.

Over the past century the common law has consistently found that criminal Aboriginal law cannot be afforded any formal degree of recognition by the Australian legal system. There are early Victorian and New South Wales Supreme Court decisions on Aboriginal law that found Aboriginal defendants subject to Australian criminal law.\textsuperscript{147} In \textit{R v Murrell} the Court heard a novel argument by counsel for an Aboriginal man who had been charged with the murder of another Aboriginal man.

This country was not originally desert, or peopled from the mother country, having had a population far more numerous than those that have since arrived from the mother country. Neither can it be called a conquered country, as Great Britain was never at war with the natives, not a ceded country either; it, in fact, comes with neither of these, but was a country having a population which had manners and customs of their own, and have come to reside among them; therefore in point of strictness and analogy to our law, we are bound to obey their laws, not they obey ours. The reason why subjects of Great Britain are bound by the laws of their country is, that they are protected by them; the natives are not protected by those laws, they are not admitted as witnesses in Courts of Justice, they cannot claim any civil rights, they cannot obtain recovery of, or compensation for, those lands which have been torn from them, and which they have probably held for centuries. They are not therefore bound by laws which afford them no protection.\textsuperscript{148}

The court rejected this argument by the counsel for the accused, Alfred Stephen. Nevertheless, Stephen raised important issues that remain unresolved in the 169 years of Australian law since the judgment. Stephen


\textsuperscript{147} M Kriewaldt, ‘The Application of the Criminal Law to the Aborigines of the Northern Territory of Australia’ (1960) 5 University of Western Australia Law Review 1.

\textsuperscript{148} \textit{R v Murrell} (1836) 1 Legge 72 (FC) 72.
also raised the spectre of double jeopardy, in that if the accused was acquitted he would face traditional punishment consistent with Aboriginal law yet arguably constituting double jeopardy. In *R v Neddy Monkey*, the court found that ‘vague rites and ceremonies’ of Aboriginal people in relation to marital status were not admissible as evidence. In *R v Cobby* the court found it could not acknowledge a traditional marriage because Indigenous peoples ‘have no laws of which we can take cognisance’.

The question of the conflict between the Australian legal system and Aboriginal legal systems was increasingly countenanced in the growing momentum for Aboriginal land rights. The fact that Aboriginal peoples had a distinct legal system became increasingly irrefutable. In *Milirrpum v Nabalco Pty Ltd* (*Gove Land Rights Case*), Blackburn J commented on the legal systems of Aboriginal communities:

> [T]he social rules and customs of the plaintiffs cannot possibly be dismissed as lying on the other side of an unbridgeable gulf. The evidence shows a subtle and elaborate system highly adapted to the country in which the people led their lives, which provided a stable order of society.... If ever a system could be called a ‘government of laws and not of men’, it is that shown in the evidence before me.

Despite this, Blackburn J was constrained and could not recognise Aboriginal title because it did not conform to property law as already existed in Australian common law. Murphy J, in *Ngatayi v The Queen*, also considered the intersection between the Australian legal system and Aboriginal law:

> The existence of two systems of law side by side, the prevailing one and aboriginal customary law, with their very different attitudes to guilt and responsibility, creates serious problems and the question of how far our laws should apply to aboriginals and how far their law should be allowed to apply to them is controversial.

The most significant development in the common law for the recognition of Aboriginal law was the High Court decision in *Mabo v Queensland (No 2)*. *Mabo* involved an action brought to the High Court by Eddie Mabo, James Rice and David Passi on behalf of the Meriam people. They were asserting traditional Meriam title to the Murray Islands in the Torres Strait Islands. The crucial argument in *Mabo* was that Aboriginal customary title was unimpaired by the annexation of the islands in 1879 by Queensland and ultimately Moynihan J did find that a customary system of law existed on the island. Yet even before *Mabo* could proceed the Queensland government enacted the *Queensland Coast Islands Declaratory Act 1985 (Old)* which retrospectively extinguished any property rights on the islands when they were annexed in 1879. This meant that the High Court had to first decide on

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149. *LBC*, above n 46, ‘Ch 2 – Recognition of Aboriginal Customary Law’, Pt A – History and Overview [7].
154. *Mabo (No 2)* above n 98.
the validity of the Act in Queensland’s defence. In *Mabo (No 1)*[^155] the High Court found (4:3) the legislation to be inconsistent with the *Racial Discrimination Act 1975* (Cth). On 3 June 1992, the High Court handed down its judgment in *Mabo* finding (6:1) that the Meriam people were entitled against the whole world to the possession, occupation, use and enjoyment of the Murray Islands. There was a legal system operating in Australia prior to 1788, which was entitled to respect and recognition by the common law in accordance with the laws and customs of Indigenous peoples. The High Court held that the nature and content of native title will be shaped by the laws and customs of traditional landholders.[^156]

Native title has its origin in and is given its content by the traditional laws acknowledged by and the traditional customs observed by the Indigenous inhabitants of a territory. The nature and incidents of native title must be ascertained as a matter of fact by reference to those laws and customs.[^157]

The High Court found that Australian law can protect Aboriginal interests, ‘in conformity with the traditional laws and customs of the people to whom the clan or group belongs and only where members of the clan or group acknowledge those laws and observe those customs’.[^158] The *Native Title Act 1993* (Cth) was enacted after *Mabo* to regulate how native title may be determined. The Act defines native title as

> the rights and interests ... possessed under the traditional laws acknowledged, and the traditional customs observed, by the Aboriginal peoples of Torres Strait Islanders.[^159]

While there was some optimism that the *Mabo* decision would lead to a greater recognition of Aboriginal law and sovereignty in the Australian legal system, subsequent decisions have tempered such optimism.[^160] The High Court’s finding of the acquisition of Australia by way of peaceful settlement as opposed to cession or conquest resulted in the domestic law completely denying sovereignty and consequently Aboriginal customary law and jurisdiction. Settlement ‘implied a legal vacuum (to be filled immediately with English law to the exclusion of any other laws or entitlements)’.[^161]

If, in Blackstone’s terminology, Australia had been ‘conquered’ (by British acts of force) or ‘ceded’ (by Indigenous acts of submission), then Indigenous legal traditions, and entitlements thereunder, would have survived under the new British sovereign (though subject to future extinguishment).[^162]

[^155]: *Mabo v Queensland (No 1)* (1989) 166 CLR 186.
[^156]: *Mabo (No 2)*, above n 98, 7.
[^157]: Ibid 58 (Brennan J).
[^158]: Ibid 60.
[^159]: Section 223(1)(a).
[^162]: Ibid.
Following *Mabo*, *Walker v New South Wales* countenanced the prospect of Aboriginal criminal law operating alongside the Australian legal system. It was found to be inconsistent with the criminal law of Australia.\(^{163}\) In *Walker* the defendant, a Bandjalung man, had been charged with an offence in Nimbin, New South Wales. The plaintiff’s statement of claim asserted, among a number of arguments, that the common law was only valid to the extent in which it was accepted by Aboriginal people:

> If the Parliament of the Commonwealth or of a State legislates in a manner affecting aboriginal people the law in so far as it relates to aboriginal people is of no effect until it is adopted by the aboriginal people whom, or whose land, it purports to effect.\(^{164}\)

Mason CJ in rejecting the arguments of the plaintiff held that:

> It is a basic principle that all people should stand equal before the law. A construction which results in different criminal sanctions applying to different persons for the same conduct offends that basic principle.\(^{165}\)

Mason CJ went on to consider that:

> Even if it be assumed that the customary criminal law of Aboriginal people survived British settlement, it was extinguished by the passage of criminal statutes of general application…. English criminal law did not, and Australian criminal law does not, accommodate an alternative body of law operating alongside it.\(^{166}\)

Meanwhile the relationship between Aboriginal customary law and the Australian legal system became the subject of an Australian Law Reform Commission (ALRC) inquiry. The lengthy and comprehensive report into Aboriginal law was released in 1986. It contained recommendations on the extent to which Aboriginal law should be recognised in Australian law. The ALRC recommended that, as far as possible,

> Aboriginal customary laws should be recognised by existing judicial and administrative authorities, avoiding the creation of new and separate legal structures, unless the need for these is clearly demonstrated.\(^{167}\)

The ALRC report advocated ‘functional recognition’ that gave recognition to Aboriginal laws in relevant areas such as Indigenous marriage and families, criminal law and sentencing, and hunting, fishing and gathering. The report also included draft legislation that would ensure uniformity of approach in all Australian jurisdictions. The ALRC recommendations have remained unimplemented, a fact that is perennially criticised by Indigenous Australians.

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\(^{164}\) *Walker*, ibid 48.

\(^{165}\) Ibid 49.

\(^{166}\) Ibid 50.

\(^{167}\) Australian Law Reform Commission, above n 1, Part VIII, [196].
The current position of the Commonwealth government on the recognition of Aboriginal law is that:

[T]he Government believes all Australians are equally subject to a common set of laws.\(^{168}\)

Neither the government nor the general community ... is prepared to support any action which would entrench additional, special or different rights for one part of the community.\(^{169}\)

In response to this position the Social Justice Commissioner has argued that:

The view that everyone should be treated the same overlooks the simple fact that throughout Australian history Indigenous peoples never have been.... The failure to provide us with the same opportunities as the rest of society in the past means that to now insist on identical treatment will simply confirm the position of Indigenous people at the lowest rungs of Australian society.\(^{170}\)

The most recent inquiry was conducted by the Northern Territory Law Reform Committee,\(^{171}\) which made a number of recommendations including cross cultural training of judicial officers; consultation with Aboriginal communities to clarify government policy in regard to ‘promised brides’; and a further inquiry to determine the extent of the use of payback as traditional punishment in order to develop government policy. The Northern Territory government’s response has been controversial.\(^{172}\) While a core aspect of the government’s response has been the commitment to develop law at a local level and to develop community law justice plans for broad consultation, the government announced that it would withdraw the defence of traditional marriage to child sexual assault cases as provided in the Criminal Code (NT). The government also found that payback would be addressed further in the development of localised Aboriginal law and justice plans. According to the government, payback will be recognised to the extent that it is not inconsistent with the Criminal Code (NT). Ultimately, the government will continue to rely upon the Supreme Court precedent relating to payback and bail decisions.

Recently the government also announced plans to provide courts with new powers to test evidence of Aboriginal customary law. According to Attorney General Peter Toyne, the current arrangements needed amending because they ‘often see evidence regarding traditional practices presented only from the offender’s perspective without giving opposing counsel a chance to explore differing community views’.\(^{173}\) The Attorney General also stated that ‘research with Indigenous women has revealed that some beliefs presented


\(^{169}\) Ibid 17.


\(^{171}\) NTLRC, above n 1.

\(^{172}\) Northern Territory Government, Response to NTLRC, ibid (November 2003).

to courts as embodying customary law, do not represent the views of all people within Aboriginal communities.\(^{174}\)

The Northern Land Council opposes the amendments that were passed in December 2004. The Council is claiming that the changes are racially discriminatory, based on legal advice from John Basten QC, because ‘Aboriginal people are being treated differently before the courts as a result of this legislation…. When they wish to present certain material before the courts ... relating to customary law’.\(^{175}\)

**Barriers to recognition: Contemporary problems with Aboriginal law and sentencing**

Public controversy of Aboriginal law periodically arises in those cases reported by the media where Aboriginal law conflicts with contemporary expectations of human rights. Germane to the growing momentum for recognition of Aboriginal law are those controversial decisions where evidence of Aboriginal law was ostensibly central to the commission of the offence. The most prominent cases have been those where evidence of Aboriginal law has sanctioned violence or sexual abuse against Aboriginal women or children. In *Sydney Williams*,\(^{176}\) Wells J took into account in sentencing the fact that the community wanted to deliver traditional punishment. In *Williams* a two-year sentence was suspended contingent upon his receiving twelve months of tribal instruction from Elders.\(^{177}\) Williams had been charged with the murder of a woman who had allegedly been taunting him about disclosing customary secrets. Williams received a traditional punishment of spearing through the thigh. This example was problematic because, as the ALRC noted, Williams then went on to commit assaults on a number of Aboriginal women.\(^{178}\) Situations like these highlight the problems of predicting the course of traditional dispute resolution procedures which are flexible and dependent upon changing circumstances, as well as being open to misunderstanding by lawyers.\(^{179}\)

In the Northern Territory, community outrage followed the decision in *Hales v Jamilmira*.\(^{180}\) In this case, the defendant Jackie Pascoe, a 50-year-old Aboriginal male, used Aboriginal law in defence of statutory rape.\(^{181}\) The girl who was referred to as ‘A’ in the proceedings was promised to Jackie Pascoe under Burarra culture and had been under pressure to fulfil her cultural obligations. In August 2001, ‘A’ was taken to Pascoe’s outstation, east of Maningrida. On Monday, 20 August 2001, the couple had sexual intercourse. Initially the Director of Public Prosecutions charged Pascoe with rape, which was reduced to unlawful intercourse with a minor. Pascoe was convicted and sentenced. The defendant, Jackie Pascoe, understood that his offence was carnal knowledge. In a recorded interview at Maningrida

\(^{174}\) Ibid.
\(^{175}\) Ibid.
\(^{176}\) (Unreported, Supreme Court of South Australia, 14 May 1976).
\(^{177}\) Ibid.
\(^{178}\) Australian Law Reform Commission, above n 1, [492].
Police Station Pascoe stated that: ‘She is my promised wife. I have rights to touch her body’ and that ‘its Aboriginal custom, my culture. She is my promised wife’.

The court recognised that Jackie Pascoe held a reasonably sophisticated knowledge of the criminal law. Gallop J reduced the magistrate’s sentence of four months to one-day imprisonment and in his reasoning controversially stated that: ‘She didn’t need protection (from white law); she knew what was expected of her…. It’s very surprising to me [Pascoe] was charged at all’.

Community outrage was predicated upon the discussion of human rights and Australia’s international human rights obligations. On appeal Riley J stated that:

Whilst proper recognition of claims to mitigation of sentence must be accorded, and such claims will include relevant aspects of customary law, the court must be influenced by the need to protect members of the community, including women and children, from behaviour which the wider community regards as inappropriate.

The fact that Aboriginal law can be used for mitigation for sexual assault is of growing concern in Aboriginal communities, particularly among Aboriginal women. It has been referred to as distorted customary law or ‘bullshit law’.

Sharon Payne, an Aboriginal lawyer, explains the term ‘bullshit law’ as a distortion of traditional law used as a justification for assault and rape of women…. It is ironic that the imposition of the white mans law on traditional law which has resulted in the newest one.

Audrey Bolger, in the course of her research on violence and Aboriginal women, quoted an Aboriginal woman as saying that ‘there are now three kinds of violence in Aboriginal society – alcoholic violence, traditional violence and bullshit traditional violence’. According to Bolger, bullshit traditional violence is ‘the sort of assault on women which takes place today for illegitimate reasons, often by drunken men, which they then attempt to justify as a traditional right’.

Professor Mick Dodson also acknowledged the problem of distorted customary law:

Some of our perpetrators of abuse and their apologists corrupt these ties and our culture in a blatant and desperate attempt to excuse their abusive behavior.

While Hales v Jamilmira drew national attention to problems of distorted Aboriginal law, it also raised questions about the role of courts in not only

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184. Hales v Jamilmira, above n 71.
188. Bolger, ibid.
189. Dodson, above n 67.
190. Above n 71.
applying ‘bullshit law’ but also to over a decade of disparaging sentencing comments about Aboriginal women.

Courts must be extremely careful not to act upon inaccurate evidence about the extent to which Indigenous law tolerates or mandates violence, especially in cases involving women.\textsuperscript{191}

In \textit{R v Lane}, the judge asserted that the evidence before him proved that rape was ‘not considered as seriously in Aboriginal communities as it is in the white community’ and that ‘the chastity of women is not as importantly regarded as in white communities’. Moreover the ‘violation of an Aboriginal woman’s integrity is not nearly as significant as it is in a white community’.\textsuperscript{192} Audrey Bolger wrote that the rape resulted in the eventual death of the woman. Bolger observed that:

The defence adduced evidence, all obtained from non-Aboriginal males, to show that rape was not a very serious crime in Aboriginal society and that by approaching the men and asking for a cigarette the woman may have been seen as inviting the men to join her.\textsuperscript{193}

Bolger argued that the difficulty in determining what constitutes Aboriginal custom arises when ‘the determination as to what is Aboriginal culture or tradition is derived from a male perspective’.\textsuperscript{194} Bolger’s observation is reflected in a series of derogatory comments that have been made about Aboriginal women in sentencing. In \textit{Mungkilli, Martin and Mintuma} the court stated that rape was not acceptable in Aboriginal communities, but not ‘regarded with the seriousness that it is by the white people’.\textsuperscript{195} In \textit{R v Narjic}, the defence argued in its submission that ‘it is the custom … for whatever reason, that wives are assaulted by their husbands’.\textsuperscript{196} These comments have been widely condemned by Indigenous women. Professor Larissa Behrendt, in condemning such sentencing comments, argued that:

Colonial notions that Aboriginal women are easy sexual sport have also contributed to the perception that incidents of sexual assault are the fault of Aboriginal women. While behaviour and treatment of Aboriginal men is often contextualized within the process of colonization, no context is provided for the colonial attitudes that have seen the sexuality of Aboriginal women demeaned, devalued and degraded. The result of these messages given to Aboriginal women by their contact with the criminal justice system would only reinforce any sense of worthlessness and lack of respect that sexual assault and abuse have scarred them with.\textsuperscript{197}

This dual oppression has been identified by the United Nations: ‘All women and particularly racialised women … run the risk of gender discrimination in

\textsuperscript{191} McRae et al., above n 179, 543.
\textsuperscript{192} \textit{R v Burt Lane, Ronald Hunt & Reggie Smith} (Unreported, Northern Territory Supreme Court, 29 May 1980).
\textsuperscript{193} Bolger, above n 70, 81.
\textsuperscript{195} \textit{Mungkilli, Martin and Mintuma} (Unreported, South Australian Supreme Court, Millhouse J, 20 March 1991).
\textsuperscript{196} \textit{R v Narjic} cited in Cunneen, above n 194, 128.
\textsuperscript{197} L Behrendt, ‘Law Stories and Life Stories: Aboriginal Women, the Law and Australian Society’ (Speech delivered at the 2004 Clare Burton Memorial Lecture, Hyatt Regency Perth, 24 September 2004).
the judicial process.'\textsuperscript{198} The HRC highlighted the dual oppression as a consideration that states like Australia should take into account when addressing discrimination against women. The HRC stated that:

> Discrimination against women is often intertwined with discrimination on other grounds such as race, colour, language, religion, political or other opinion, national or social origin, property, birth or other status. State parties should address the ways in which any instances of discrimination on other grounds affect women in a particular way.\textsuperscript{199}

Aboriginal women's dislocation with the legal system is also hampered by the 'populist vision of the neutrality and fairness of the legal system' that ignores 'the gendered and racialised biases that exist on 'the bench'.\textsuperscript{200} The disparaging sentencing tradition, however, must be balanced with the decisions in which the inconsistency between aspects of Aboriginal law and Australia's international human rights law obligations has been raised, which is often influenced by international human rights law. This in itself is growing evidence of the value of applicable human rights standards in the common law. In \textit{R v Daniel}, a case involving the sexual assault of an Aboriginal woman in Kowanyama, Fitzgerald P said:

> It would be grossly offensive for the legal system to devalue the humanity and dignity of members of Aboriginal communities or to exacerbate any lack of self-esteem felt within those communities by reason of our history and their living conditions… Aboriginal women and children who live in deprived communities or circumstances should not also be deprived of the law's protection.… [T]hey are entitled to equality of treatment in the law's responses to offences against them, not to some lesser response because of their race and living conditions.\textsuperscript{201}

In \textit{Edwards}, Muirhead J commented that: 'I am just not prepared to regard assaults of Aboriginal women as a lesser evil to assaults committed on other Australian women.'\textsuperscript{202} In \textit{Ashley v Materna}, the Northern Territory Supreme Court agreed with the magistrate's dismissal of a defence argument for the mitigation of sentencing involving the assault of an Aboriginal woman. In sentencing the Magistrate stated that:

> Now this may be conduct … which justifies action of this nature by you in Aboriginal law, but quite clearly as a matter of public policy the court cannot take it into account except perhaps in the most minor way…. Women, including Aboriginal women, stand equal to men in the law of the Northern Territory and, if Aboriginal traditional laws do come to receive recognition in whatever form by the general law of the Territory, I think it is highly unlikely, in view of international treaties that Australia has signed, if a law such as has been explained to me will have any standing because it is – I regret to have to say this to you in the presence of Elders, but it is, in my view, of such a nature that people in many countries would hold it to

\textsuperscript{199} United Nations Document CCPR/C/21/Rev.1/Add.10, CCPR General Comment 28, [30].
\textsuperscript{200} Shaw, above n 136, 329
\textsuperscript{201} \textit{R v Daniel} (1997) 94 A Crim R 96, 127.
\textsuperscript{202} \textit{Edwards} (Unreported, Northern Territory Supreme Court, 1981 SCC No 155, 156).
be discriminatory and I believe the Discrimination Boards of this country and missions and whatever would call it discriminatory.\footnote{203}{Ashley v Materna [1997] NTSC 101 (21 August 1997).}

Bailey J in Ashley v Materna also commented that:

In the absence of evidence as to the obligatory nature of the alleged law and the consequences for non-compliance, elevation of a morally indefensible practice to the status of ‘customary law’ to which courts could or should have regard would be to invite ridicule of the courts and make a mockery of the fundamental principle that all people stand equal before the law.\footnote{204}{Ibid.}

In Amagula v White, Kearney J expressed the view that:

The courts must do what they can to see that the pervasive violence against women in Aboriginal communities is reduced. There is a fairly widespread belief that it is acceptable for men to bash their wives in some circumstances; this belief must be erased.\footnote{205}{Amagula v White [1998] NTSC 61 (7 January 1998). Angel J expressed his agreement with this passage in R v Chula (Unreported, Supreme Court of the Northern Territory, 20 May 1998).}

In R v Wurramara it was stated that:

Whilst it must be acknowledged that the ‘criminal law is a hopelessly blunt instrument of social policy’ … and that the courts ‘cannot deal with the ‘root problem’, the courts must and will do what they can to deter the violence.\footnote{206}{R v Wurramara [1999] NTSCCA 45, [31] (Mildren, Thomas and Riley JJ).}

There has been growing concern in Western Australia about the attitude of the Director of Public Prosecutions toward prosecuting men who have killed Aboriginal women in Western Australia. The media has asked the question: ‘Is human life valued too cheaply by our Supreme Court judges – especially the lives of Aboriginal women who have been killed by abusive and drunken men?’\footnote{207}{R Gibson, ‘Killing’s Test DPP’s Limit’, The West Australian, 8 April 2002, 12.} It has also been claimed that Western Australian juries believed that alcohol-related violence in Aboriginal communities was so common that they were more likely to convict for manslaughter rather than murder.\footnote{208}{C Egan, ‘Juries Letting Aborigines Get Away With Murder, says DPP’, The Australian, 15 March 2002, 5.}

Also of significance to this reference is the finding of the Chief Justice’s Taskforce on Gender Bias that courts were stereotyping Aboriginal people, engaging in unconscious bias which resulted in:

- judicial officers’ inappropriate attitude towards, and lack of understanding of, Aboriginal victims of assaults;
- an inappropriate reliance on ‘customary attitudes’ (eg, rape not being as serious as in some other cases; the accused losing his ‘culture’, etc);
- some Aboriginal women receiving more severe penalties than other women for certain charges;
The way in which the law views Aboriginal women’s human rights influences the decisions that women are likely to take; for example, the choice of intervention in relation to family violence. A study by the Office of the High Commissioner for Human Rights has analysed this intersection of gender and racial discrimination and noted that:

Women from marginalized communities may be reluctant to report violence for fear of inaction or indifference by, or hostility from, State authorities who may even condone such violence.... In some societies, gender-based violence may be perceived as ‘justified’ by racial, national, cultural or religious traditions, and a State’s reluctance to remedy the situation can pose further problems for women.  

Any suggestion from the judiciary that Indigenous women may be afforded lesser standards of protection on the basis of custom is a tacit sanction to the continuing problems of family violence and treatment of Aboriginal women.

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ABORIGINAL LAW AND INTERNATIONAL HUMAN RIGHTS LAW

BACKGROUND

*Indigenous peoples* in International Law

Indigenous peoples’ issues are recorded as being considered in international law as early as the 1930’s in the ILO. It was not until the adoption by the General Assembly on 21 December 1965 of the ICERD that the claims of Indigenous peoples’ rights were more fluent. Nevertheless, Indigenous human rights issues are regarded as a relatively recent human rights priority in international law, with the 1970s viewed as the watershed decade of the ascendance of international advocacy of Indigenous rights.

[Armed with a new generation of men and women educated in the ways of the societies that had encroached upon them, Indigenous peoples began drawing increased attention to demands for their continued survival as distinct communities with historically based cultures, political institutions and entitlements to land.][211]

In responding to this newly emerging human rights issue, the United Nations Sub-Commission on the Prevention of Discrimination and Protection of Minorities engaged Jose R Martinez Cobo, a United Nations expert and diplomat, to conduct a comprehensive study on the *Problem of Discrimination Against Indigenous Populations* in 1971. The Cobo study was a defining moment for Indigenous peoples in the United Nations system. The study produced a series of volumes, released over a decade and completed in 1987. In the study Cobo identified racial discrimination as the common experience between Indigenous peoples globally. The report also highlighted the paucity of protection for Indigenous peoples in the administration of justice as well as inequity in the provision of education and health services. The study defined ‘Indigenous peoples’ as

those people having an historical continuity with pre-invasion and pre-colonial societies [who] consider themselves distinct from other sectors of the societies now prevailing in those territories or parts of them. They form at present non-dominant sectors of society and are determined to preserve, develop and transmit to future generations, their ancestral territories, and their ethnic identity, as the basis of their continued existence as peoples in accordance with their own cultural patterns, social institutions, and legal systems.][214]

This has become the contemporary United Nations definition of Indigenous peoples. This burgeoning Indigenous presence in international law constituted what Richard Falk contended was the ‘first truly intercivilisational critique of the prevailing human rights discourse’. According to Falk, their advocacy

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214. Ibid, Add 4 379, 381.
[T]ook shape against a background (and foreground) of exclusion, discrimination, and persecution, even extermination, assimilation, and marginalisation – all factors expressive of confusing admixtures of arrogance, racism, and ignorance.\(^\text{215}\)

The historical legacy of racial discrimination against Indigenous peoples is acknowledged within the United Nations system as a root cause of contemporary Indigenous problems. It has led to dispossession of lands and resources, forced assimilation, marginalisation and genocide. CERD recognised this continuing racial discrimination in its General Recommendation:

Indigenous peoples have been, and are still being, discriminated against and deprived of their human rights and fundamental freedoms and in particular that they have lost their land and resources to colonists, commercial companies and State enterprises. Consequently the preservation of their culture and their historical identity has been and still is jeopardised.\(^\text{216}\)

The acknowledgement of the destructive impact of racial discrimination upon Indigenous peoples necessitated the Cobo study. As such it informs the continuing work of the United Nations Working Group on Indigenous Populations, the Commission on Human Rights Working Group on Indigenous Populations, the Permanent Forum on Indigenous Issues and the Special Rapporteur on Indigenous Issues. Professor Erica Irene Daes, former Chair of the Working Group on Indigenous Populations, published a United Nations Sub-Commission Working Paper on Discrimination Against Indigenous Peoples. The report identified discrimination and racism as the core of contemporary Indigenous problems that manifested in the reluctance of many states to recognize the right of self-determination of Indigenous peoples … or in the insistence by the dominant world that Indigenous peoples do not have their own long-established and dynamic systems of knowledge and law.\(^\text{217}\)

Contemporary manifestations of historical and continuing racism are not only reflected in the failure of states to establish governance mechanisms or accommodate systems of law but it can also be seen in the statistics on the state of Indigenous health and poverty. A United Nations working paper in 2001 reported that the causes of Indigenous poverty in many situations come from ‘direct discrimination and exclusion from society’.\(^\text{218}\) Experts at a United Nations seminar on the effects of racism and racial discrimination on the social and economic relations between Indigenous peoples and states viewed racial discrimination against Indigenous peoples as

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\(^\text{216}\) Committee on the Elimination of Racial Discrimination, General Recommendation XXIII on the Rights of Indigenous Peoples, UN Doc HR1/GEN/1/Rev.5, 26 April 2001, [3].


a long historical process of conquest, penetration and marginalization, accompanied by attitudes of superiority and by a projection of what is Indigenous as ‘primitive’ and ‘inferior’. The discrimination is of a dual nature: on the one hand, gradual destruction of the material and spiritual conditions [needed] for the maintenance of their [way of life], on the other hand attitudes and behaviour signifying exclusion or negative discrimination when Indigenous peoples seek to participate in the dominant society. 219

The United Nations also recognised that Indigenous peoples continue to be the victims of racism and racial discrimination. 220 This informs the extensive framework of Indigenous specific mechanisms within the United Nations system that seeks to address the consequences of both the legacy of and the ongoing impact of racial discrimination upon the capacity of Indigenous peoples to enjoy fundamental rights and freedoms.

Indigenous peoples and the United Nations

The success of Indigenous advocacy to date is evident in the approval by the General Assembly of a second United Nations International Decade of the World’s Indigenous Peoples. 221 There are four United Nations mechanisms specifically dedicated to Indigenous issues:

(i) the Sub-Commission of the Working Group on Indigenous Populations (WGIP),
(ii) a CHR open-ended, inter-sessional working group elaborating a Draft Declaration on the Rights of Indigenous Peoples (Draft Declaration),
(iii) the Permanent Forum on Indigenous Issues (Permanent Forum), and
(iv) a Special Rapporteur on the situation of human rights and fundamental freedoms of Indigenous peoples. 225

(i) The Working Group on Indigenous Populations

The mandate established by the Sub-Commission on the Promotion and Protection of Human Rights in 1982 has enabled the WGIP to be instrumental in the development of indigenous peoples’ rights. The WGIP can review developments pertaining to the promotion and protection of the human rights and fundamental freedoms of Indigenous populations, and can give special attention to the evolution of standards concerning the rights of such populations. 226 The review of developments enables Indigenous peoples to report to the Working Group human rights violations and other developments within the state that may assist the Working Group. The

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220. Ibid.
222. United Nations Economic and Social Council resolution 1982/34.
standard setting mandate has been a very powerful tool for Indigenous peoples and integral to the purpose of the WGIP. It was in the WGIP that the United Nations Draft Declaration was conceived and elaborated upon, establishing for the first time in UN history a draft Declaration on the rights of Indigenous Peoples. The WGIP continues to be a popular and well attended mechanism for Indigenous peoples to engage with the United Nations:

The broad mandate and democratic process of the United Nations Working Group on Indigenous Populations has nurtured the development of hundreds of experts and practitioners on Indigenous peoples’ human rights from the United Nations, governments, Indigenous peoples, academia and NGOs. Indeed in its 20 years life, it has become a centre for authoritative international discourse on the rights of Indigenous peoples, informing and educating many scholars and activists alike. Moreover, the meetings of the UNWGIP have provided opportunities for Indigenous peoples and other participants to meet and deepen concrete partnerships and projects.227

(ii) United Nations Draft Declaration on the Rights of Indigenous People

Since 1995, the CHR working group on the United Nations Draft Declaration on the Rights of Indigenous Peoples has been negotiating text for a Declaration. The fundamental principle of the Declaration is the right of self-determination for Indigenous peoples. For Indigenous peoples self-determination is the bottom line from which all negotiations are based. The Draft Declaration begins by providing for the Indigenous right to self-determination with provisions elaborating on what self-determination means. A significant aspect of the Draft Declaration is the importance of Indigenous customs and traditional practices and the right of Indigenous peoples to continue their distinctive juridical customs, traditions, procedures and practices, in accordance with internationally recognised human rights standards. The working group has been hampered by state objections to the right to self-determination, collective rights and rights to land and resources. Nevertheless, the Draft Declaration is a significant document because it was conceived by Indigenous peoples in the WGIP. Indigenous peoples were consulted on its drafting and continue to negotiate with states on the text. The Draft Declaration is a widely used document in international human rights law and within the United Nations system. Many Indigenous peoples argue that aspects of the Draft Declaration have significant normative value in international law:

While the Draft Declaration has floundered in the Government controlled Working Group on the Draft Declaration, it has already been of great normative value. The consistent elaboration of Indigenous peoples’ claims, particularly in relation to cultural identity, self-determination, informed consent and self-identification, has influenced the policy approaches of international agencies such as the World Bank, UNESCO, UNDP and World Health Organisation [and] was a major influence in the International Labour Organisation’s decision to revise ILO Convention 107 and develop


(iii) **The United Nations Permanent Forum on Indigenous Issues**

The Permanent Forum on Indigenous Issues is the most recently established body dedicated solely to Indigenous peoples’ issues. The Permanent Forum is an advisory body to the Economic and Social Council (ECOSOC). The membership of the Forum includes sixteen independent experts, eight of whom are nominated by governments and eight of whom are appointed by the President of the ECOSOC. Members serve the Permanent Forum for a three-year period and there is an option for renewal of membership for an additional year. The primary mandate of the Forum is to discuss Indigenous peoples’ issues in the areas of economic and social development, culture, environment, education, health and human rights. The Forum members are expected to provide expert advice and recommendations on Indigenous issues to ECOSOC as well as on programmes, funds and agencies of the United Nations through the Council. Its role is also to raise awareness and promote the integration and coordination of activities on Indigenous issues within the United Nations system. The Forum is mandated to meet once a year for ten working days and submit an annual report to the Council on its activities, including any recommendations for approval. The report, once approved, is distributed to relevant United Nations organs, funds, programmes and agencies.

(iv) **The Special Rapporteur on Indigenous issues**

The Special Rapporteur on Indigenous issues was a position established by the CHR. The Special Rapporteur, currently Rudolfo Stavenhagen, is to collate and exchange information with relevant sources such as governments, Indigenous communities and non-governmental organisations on the human rights situation of Indigenous peoples. The Special Rapporteur formulates proposals and recommendations to the CHR for appropriate measures to be taken by the United Nations in remedying and improving the status of Indigenous peoples, their freedoms and human rights.

**Indigenous peoples’ rights in international law**

The advocacy for Indigenous specific rights has been hampered by a legal system that has traditionally prioritised the rights of the individual. The major international human rights instruments enumerate the rights of individuals which is problematic because

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[t]his collective nature of Indigenous objectives is at odds with the traditional focus on the individual in international human rights law and the dichotomy of the individual versus the state promoted by the post-Westphalian concept of the law of nations.

The group rights that do exist, such as Article 27 of the ICCPR, are viewed by human rights jurisprudence as the right of an individual to engage in group activity free from discrimination or prejudice. They remain individual rights.

Protection of group identity, whether involving religion, culture, or gender, has generally been approached as a matter of individual freedom to engage in group activity.

Therefore, the claims of Indigenous peoples challenge the historically individual nature of Western human rights discourse. The rights of the individual are paramount to human rights law that is inconsistent with the collective nature of Indigenous society. Collective rights are, however, recognised in numerous international human rights law instruments including the CERD, the ILO Convention 169 which used the term 'Indigenous peoples' throughout the Convention; the African Charter on Human and Peoples Rights which provides recognition of Indigenous peoples claims to collective rights; the 1978 United Nations Education, Science and Culture Organisation (UNESCO) Declaration on Race and Racial Prejudice; the 2001 UNESCO Declaration on Cultural Diversity; and the Convention on Biological Diversity. Collective rights of Indigenous peoples have been recognised by the Inter-American Court of Human Rights in Mayagna (Sumo) Awas Tingni Community v Nicaragua:

Among Indigenous peoples there is a communitarian tradition regarding a communal form of collective property of the land, in the sense that ownership of the land is not centred on an individual but rather on the group and its community.

The Australian legal system recognises collective rights under the Native Title Act 1993 (Cth). Collective rights are recognised in other legal systems such as in New Zealand where collective rights are embedded in the legal system by virtue of the Treaty of Waitangi. The Native Title Act 1993 (Cth) creates collective rights in the Australian legal system. Section 223(1) defines the expressions ‘native title’ and ‘native title rights and interests’ as

236. Arts 1(a), 2, 4(a) and 14.
237. Arts 19, 20, 21, 22, 23 and 24.
238. Art 6(1).
239. Mayagna (Sumo) Awas Tingni Community v Nicaragua [2001] IACHR 9 (31 August 2001).
240. Treaty of Waitangi (1840), Aotearoa/New Zealand (English Version) Art 2; See A lexkor Ltd v Richtersveld Community CCT 19/03 Constitutional Court of South Africa [114 October 2003] [63]; Delgamuukw v British Columbia [1997] 3 SCR 1010; R v Sparrow [1980] 1 SCR 1075, 1078.
‘the communal, group or individual rights and interests of Aboriginal peoples or Torres Strait Islanders in relation to lands or waters.’

Right of Indigenous peoples to self-determination

Indigenous peoples’ advocacy in international law is predicated upon the fundamental right of self-determination. The right of self-determination is enumerated in common Article 1 of the ICCPR, the ICESCR and the United Nations Charter 1945:

All peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

The United Nations Draft Declaration on the Rights of Indigenous Peoples provides for Indigenous peoples right to self-determination in Article 3:

Indigenous peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

The claim to self-determination was integral to Indigenous demands at the working group. A declaration of principles elaborated by a number of global Indigenous groups, including the National Aboriginal and Islander Legal Service, stated that:

All Indigenous nations and peoples have the right to self-determination, by virtue of which they have the right to whatever degree of autonomy or self-government they choose. This includes the right to freely determine their political status, freely pursue their own economic, social, religion and cultural development, and determine their own membership and/or citizenship, without external interference.²⁴¹

In international law, self-determination is a right that is interlinked with the emerging right to democratic governance:

[S]elf-determination is the oldest aspect of the democratic entitlement…. Self-determination postulates the right of a people organised in an established territory to determine its collective political destiny in a democratic fashion and is therefore at the core of the democratic entitlement.²⁴²

It is the most fundamental of all human rights and is a principle that has arguably reached the status of jus cogens in international law. ²⁴³ The notion of ‘all peoples’ is regarded as referring to any people irrespective of the international political status of the territory it inhabits. It applies, then, not only to the peoples of


Nevertheless, some states oppose the extension of the right to self-determination to Indigenous peoples. Such opposition is informed by the principle of territorial integrity and state concerns about secession. The genesis of states fear of secession is often based upon decolonisation:

Self-determination as understood in the particular context of decolonisation accounts for governments’ concerns that recognising a group’s right to self-determination may legitimise secession.245

Indigenous peoples repudiate states' arguments about secession. They argue that it implies that Indigenous peoples have relinquished their sovereignty from the outset and submitted to colonisation. To counter secession concerns that frequently arise at CHR working groups, Indigenous peoples refer to the safeguard clause from the 1970 Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States:

Nothing in the foregoing paragraphs shall be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States conducting themselves in compliance with the principle of equal rights and self-determination of peoples as described above and thus possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or colour.246

This purview of territorial integrity from the Friendly Relations Declaration is to assuage states’ fears about secession. Indigenous people assert that the democratic entitlement of the right to self-determination, as stated by Franck above, is truncated by states’ denial of self-determination to Indigenous peoples, such ‘denial of self-determination is essentially incompatible with true democracy’.248 As the Australian Indigenous delegation from ATSIC stated at the third Working Group:

To proclaim self-determination as a right of all peoples, and at the same time to deny or seek to limit its application to Indigenous peoples, surely offends the prohibition of racial discrimination. The guarantee of racial discrimination is a norm of customary

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247. See Franck, above n 242.

international law, on many accounts a peremptory norm from which no derogation is permitted. 249

The right of self-determination is exercised in many different configurations and ‘in the case of Indigenous peoples, these forms will vary in accordance with particular customs, needs and aspirations’. 250 This is reflected in Aboriginal law, as some customs, needs and aspirations are embodied in community justice mechanisms while other communities involve the practice of more traditional elements of Aboriginal law. Article 13 of the Draft Declaration states that:

Indigenous peoples have the right to manifest, practice, develop and teach their spiritual and religious traditions, customs and ceremonies; the right to maintain protect and have access in privacy to their religious and cultural sites; the right to the use and control of ceremonial objects; and the right to the repatriation of human remains.

The key to self-determination is control and consent. State parties’ consultation with Aboriginal communities on Aboriginal law is fundamental to the right to self-determination.

Is recognition of Aboriginal law consistent with international human rights law?

International human rights law has not specifically dealt with Aboriginal law in Australia and its potential conflict with human rights.

While it is clear that there are cases internationally where women’s individual human rights and minority rights are in conflict, international human rights law has yet to consider this issue in relation to Aboriginal Customary Law. 251

There has been an Australian complaint to a United Nations body; however, it was not considered because of the failure to exhaust domestic remedies. There is only one Australian example of the failure to recognise Aboriginal law being the subject of a complaint to a United Nations body. The author of the communication to the HRC in 1993 was referred to as ‘X’, a member of the Wiradjuri Aboriginal Nation of New South Wales and an initiated man of the Arrente Nation of Central Australia. X’s communication was based upon a violation of Articles 14(1), 18(1) and (4), 23(1), 26 and 27 of the ICCPR. 252 X’s complaint was that, in the course of custody proceedings before the Family Court evidence regarding the significance of X’s children’s Aboriginality was struck out on the basis of irrelevant evidence in determining the best interest of a child. X argued that this was a denial to a fair hearing. X also argued that the Family Court judge struck out evidence regarding the importance of education in Aboriginal culture violated the right to adopt and manifest one’s beliefs under Article 18(1). Further it was alleged that the Family Court judge made disparaging comments about the

249. Aboriginal and Torres Strait Islander Commission, Foundation for Aboriginal and Islander Research Action, Indigenous Woman Aboriginal Corporation, National Aboriginal and Islander Legal Services Secretariat, New South Wales Aboriginal Land Council and Tasmanian Aboriginal Centre, Joint Statement on Art 3 (Geneva, 30 October 1997).

250. Ibid.

251. Sex Discrimination Commissioner, above n 15.

initiation ceremony’ and that in having to explain the entire initiation
ceremony to the judge, X had to disclose sacred knowledge to the public. X
complained that the striking out of information about Aboriginal family kinship
structures violated Article 23(1) of the ICCPR.

Australia submitted to the HRC that the communication was inadmissible
because X failed to exhaust domestic remedies. X withdrew his appeal to
the Full Court of the Family Court. Before the HRC can determine a
complaint it must determine the admissibility of a complaint. In X’s case, the
HRC deemed that he had failed to exhaust domestic remedies and,
therefore, the communication was inadmissible by virtue of Article 5(2)(b) of
the Optional Protocol.

Even though the complaint was precluded from being considered by HRC,
the communication did lead to a change in the law. After this complaint, the
Family Law Reform Act 1995 (Cth) inserted a new provision that required the
court to consider, in relation to the child’s best interest, the child’s
Aboriginality and the need to maintain a connection with Aboriginal life.

Notwithstanding the lack of international jurisprudence there are a number of
applicable human rights standards. Of particular significance is the
United Nations Draft Declaration on the Rights of Indigenous Peoples that makes
specific provision for distinctive Indigenous tradition and custom in Article 33:

Indigenous peoples have the right to promote, develop and maintain
their institutional structures and their distinctive juridical customs,
traditions, procedures and practices, in accordance with
internationally recognised human rights standards.

In the drafting of the declaration, the recognition of the laws and customs of
Indigenous peoples as a source of law within domestic legal systems was an
important right for the Indigenous representatives from around the world.
The Inuit Circumpolar Conference, for example, believed that:

It would be beneficial to specify that the judicial system of a country
shall accommodate the justice system of Indigenous peoples and
shall fully consider the usages, customs and perspectives of such
peoples. Where possible, the local system of justice should be
controlled by the Indigenous peoples themselves.

It is also important to note that Article 33 is expressly subject to
internationally recognised human rights standards. This is an important fact
because the text agreed by the Sub-Commission is the original text which
many Indigenous groups continue to defend at the United Nations. It was
agreed by all Indigenous groups, including Indigenous Australian groups,
that Article 33 must be made subject to human rights standards.

Article 33 is drafted similar to a provision in ILO Convention 169 concerning
Indigenous and Tribal Peoples in Independent Countries. ILO Convention
169 is quite extensive in its enumeration of Aboriginal law. Article 8(2)
provides that:

[Indigenous peoples] shall have the right to retain their own customs and institutions, where these are not incompatible with fundamental rights defined by the national legal system and with internationally recognised human rights.

Furthermore Article 9(1) of ILO Convention 169 states that:

[T]he methods customarily practised by the peoples concerned for dealing with offences committed by their members shall be respected.

The methods empowered above must be consistent with the fundamental human rights defined by the national legal system and international human rights law. Some Australian commentators have lamented Australia’s failure to ratify ILO Convention 169 as a lost opportunity for Aboriginal self-determination and in particular recognition of Aboriginal customary law in the Australian legal system.254

The Sub-Commission has remarked, of the obligation to protect culture, that:

In applying national laws and regulations to Indigenous peoples, States should pay due regard to their customs or customary law and should respect the methods customarily practised by Indigenous peoples in dealing with offences, including criminal offences, committed by their members. They should also take into account the economic, social and cultural characteristics of Indigenous peoples when imposing penalties laid down by general law.255

Article 27 of the ICCPR is binding upon Australia and reads:

In those States in which ethnic, religious or linguistic minorities exist persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.

The HRC has stated that Article 27 of the ICCPR provides a positive obligation on states to protect such cultures:

[T]he Committee observes that culture manifests itself in many forms, including a particular way of life associated with the use of land resources, especially in the case of Indigenous peoples. That right may include such traditional activities as fishing or hunting and the right to live in reserves protected by law. The enjoyment of those rights may require positive legal measures of protection and measures to ensure the effective participation of members of minority communities in decisions which affect them.256

The shortfall of Article 27 is that it refers to minorities rather than peoples. Indigenous peoples insist that their status is different to that of minorities.

who have an ethnic status integrated within the state. Nevertheless, Indigenous peoples appreciate the protection that arises from Article 27.

International practice has not endorsed such a formal dichotomy, but rather has tended to treat Indigenous peoples and minorities as distinct but overlapping categories subject to common normative considerations. The specific focus on Indigenous peoples through international organizations indicates that groups within this rubric are acknowledged to have distinguishing concerns and characteristics that warrant treating them apart from ... minority populations of Western Europe. At the same time, Indigenous and minority rights issues intersect substantially in related concerns of non-discrimination and cultural integrity. 257

Jurisprudence suggests that Article 27 protects persons belonging to a minority rather than a minority as a whole. Nevertheless, it is a right that can only be exercised in conjunction with other members of a minority. If the positive legal measures taken by the state, as suggested by the HRC, are taken to remedy the conditions that impair the capacity of an individual to enjoy the inherently collective nature of Article 27 then such measures are deemed to constitute a legitimate differentiation if they are reasonable and objective. The HRC also cautions that the recognition of such rights must not violate other rights enshrined in the Covenant:

[N]one of the rights protected under article 27 of the Covenant may be legitimately exercised in a manner or to an extent inconsistent with the other provisions of the Covenant. 258

Thus, in the context of Aboriginal law, Article 27 cultural rights must not infringe, for example, the right to equality between men and women (Article 3), the inherent right to life (Article 6), the right to be free from torture or cruel, inhuman or degrading treatment (Article 7), and free and informed consent for marriage (Article 23). In particular, the committee is aware of potential violations of women’s rights.

The rights which persons belonging to minorities enjoy under article 27 of the Covenant in respect of their language, culture and religious do not authorise any State, group or person to violate the right to the equal enjoyment by women of any Covenant rights, including the right to equal protection of the law. 259

For example, the HRC has already considered Article 3, the right to equality between men and women, in the context of traditional practices that marginalise and impede women’s capacity to enjoy human rights.

Inequality in the enjoyment of rights by women throughout the world is deeply embedded in tradition, history and culture, including religious attitudes.... State parties should ensure that traditional, historical, religious or cultural attitudes are not used to justify

259.  Equality of Rights Between Men and Women, CCPR/C/21/Add.10, CCPR General Comment No 28 (29 March 2000) [32].
violations of women’s right to equality before the law and to equal enjoyment of all Covenant rights.  

In recognising that it may be necessary for states to establish measures designed to protect the culture and identity of Indigenous peoples and that such measures may constitute a legitimate, non-discriminatory differentiation of treatment, the committee is cognisant of cultural attitudes that violate women’s enjoyment of civil and political rights. The HRC discussed this further in General Comment 23(50) concerning ethnic, religious and linguistic minorities:

The enjoyment of the rights to which Article 27 relates does not prejudice the sovereignty and territorial integrity of a State party. At the same time, one or other aspect of the rights of individuals protected under that article—for example, to enjoy a particular culture—may consist in a way of life which is closely associated with territory and use of its resources. This may particularly be true of members of Indigenous communities constituting a minority.  

The Committee concludes that Article 27 relates to rights whose protection imposes specific obligations on States parties. The protection of these rights is directed towards ensuring the survival and continued development of the cultural religious and social identity of the minorities concerned, thus enriching the fabric of society as a whole.

States’ parties, therefore, have an obligation to ensure that the exercise of these rights is fully protected and they should indicate in their reports the measures they have adopted to this end.

The Committee considers it necessary to draw the attention of States parties to the fact that the obligation under the Covenant is not confined to the respect of human rights, but that States parties have also undertaken to ensure the enjoyment of these rights to all individuals under their jurisdiction. This aspect calls for specific activities by the States parties to enable individuals to enjoy their rights.

The other significant recommendation noting a positive obligation to take measures to protect Indigenous culture is the general recommendation of the Committee on the Elimination of Racial Discrimination. The committee noted a positive obligation on states to ‘recognise and respect Indigenous distinct culture’ and ‘ensure that Indigenous communities can exercise their rights to practise and revitalise their cultural traditions and customs’. In taking positive measures to facilitate this, the committee also stated that it was important that Indigenous communities are consulted and ‘that no

260. Ibid [5].  
261. CCPR General Commen Not 23(50), [3.2].  
262. CCPR General Commen Not 23(50), [9].  
263. United Nations Human Rights Committee, General Comment No 23(50).  
decisions directly relating to their rights and interests are taken without their informed consent. 266

The applicability of Article 27 to Indigenous peoples

In Lovelace v Canada 267 the HRC found that Sandra Lovelace, a registered Maliseet Indian, had been denied her right of access to her Indigenous culture and language with other members of her group. Section 12(1)(b) of the Canadian Indian Act empowered the rescission of her membership upon marriage to a non-Indian yet the Act provided no such rescission for an Indian man who marries a non-Indian. The committee found that the Act violated the ICCPR because it excluded a certain class of Indian women from government-controlled recognition of Indian bands. Lovelace affirmed the right of an individual within a group ‘to have access to her native culture and language “in community with the other members” of her group’. 268 Lovelace is significant because the interference with her membership denied her Article 27 rights. The HRC found that no legal impediments should prevent a member of a minority from associating with any other group. Any legal impediment must have a ‘reasonable and objective justification’. 269

On the other hand, Kitok v Sweden 270 is a decision that deems interference with a person’s membership as legitimate if it is justified and necessary. In Kitok the HRC emphasised the significance of protecting group rights in the interests of the survival of culture. The committee held that a restriction placed upon the right of any member of a group must be shown to have a reasonable and objective justification and be considered necessary for the continued viability and welfare of the group as a whole. 271 The facts of Kitok were that Ivan Kitok, a Saami man, alleged that the Swedish Reindeer Husbandry Act was discriminatory because it exclusively reserved the right to reindeer herd to members of Saami villages. Even though Ivan Kitok was a Saami, he had lost his membership to his ancestral village because he had found employment elsewhere and was, therefore, prohibited from reviving his membership. As reindeer husbandry was deemed integral to the practice of the Saami culture and the control of reindeer herding vital to environmental conservation, the HRC found that in restricting Kitok’s rights, the Act did not violate Article 27 as protected by the ICCPR. The committee considered that the Act was a means to ensure the continuation, viability and welfare of the Saami people as a whole. 272

For Indigenous peoples to be able to enjoy their individual human rights they must be able to practise those rights collectively and, therefore, such rights are not divisible but interdependent. The importance of these decisions of the HRC under Article 27 is significant because of the committee’s determination not to consider Indigenous peoples under Article 1. In Chief

266. Ibid [4(d)].
268. Ibid [15].
269. Ibid [16].
271. Ibid [9.2], [9.3], [9.8].
Ominayak v Canada, the committee decided not to consider the question of whether the Lubicon Lake Band could be classified as 'peoples' under Article 1 of the ICCPR because the Optional Protocol is an individual complaint mechanism. In this case, the HRC decided to consider the complaint under Article 27 and indeed found a violation of the article stating that:

"[T]he rights protected by Article 27, include the right of persons, in community with others, to engage in economic and social activities which are part of the culture of the community to which they belong."

The other decision to consider in the context of Article 27 is jurisprudence as it relates to Indigenous peoples. In Lansman v Finland, Lansman was a Saami reindeer herder who objected to a commercial decision to grant a contract to permit quarrying on a Saami sacred site. Lansman and the other complainants argued that the contract would be disruptive of the environment and interfere with their reindeer herding. In this case the committee found that, on the basis of the facts, reindeer herding would not be sufficiently impacted to constitute a violation of Article 27. A significant element of the committee’s determination was the fact that the relevant Saami group had been consulted on the decision; consultation with Indigenous peoples being an important aspect of the reconciliation of Aboriginal rights and international human rights obligations.

The most significant challenge to recognition of Aboriginal law is that recognition would violate the principle of non-discrimination and equality before the law. While such concerns are understandable, given the popular meanings of discrimination and equality before the law, international law actually permits states to treat unequally that which is unequal.

Non-discrimination is a fundamental principle of international law. It is not only the cornerstone of the international human rights law system but also the key principle of the international trade law system. In international human rights law, the principle of non-discrimination ‘is directed towards protecting the weak and vulnerable and removing the structural barriers to achieving greater equality in society’ and is regarded by many as jus cogens. The non-discrimination principle was enshrined in the purposes and principles of the Charter of the United Nations, encouraging states to respect human rights and ‘fundamental freedoms for all without distinction as to race, sex, language or religion’. Non-discrimination is a central underpinning of the ICERD and the CEDAW and is also enumerated in the ICESCR. Article 1(1) of the ICERD defines racial discrimination as constituting

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274. Communication No 511/1992 UN Doc CCPR/C/52/D/511/1992 (8 November 1994) [2.1], [3.1], [9.3], [9.7].
277. Arts 2(3) and 3.
any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field.

The CEDAW defines discrimination against women as

any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.

ICERD and CEDAW clearly deal with non-discrimination in specific contexts, race and gender. Alternatively, the ICCPR deals with discrimination in a more general context; therefore, the HRC defines discrimination for the purpose of the ICCPR as implying

any distinction, exclusion, restriction or preference which is based on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, and which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, by all persons, on an equal footing, of all rights and freedoms.278

The ICERD, in particular, has become the international community’s primary tool in combating racial discrimination. The ICERD has a reporting mechanism under which state parties must submit periodic reports on the measures that are taken by them to implement the provisions of the Convention. It has become an important method for monitoring state parties’ commitments to the Convention.279 ICERD is Indigenous peoples’ primary advocacy tool and a benchmark by which they can engage their state and measure their conduct according to internationally agreed minimum standards. This was illustrated by Australian Indigenous peoples who resort to CERD because of a lack of meaningful consultation with the state on amendments to the Native Title Act 1993 (Cth).

Inextricably linked with the principle of non-discrimination is the principle of equality before the law. Equality before the law is clearly enumerated in the Universal Declaration on Human Rights280 and in Article 26 of the ICCPR.

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

278. United Nations Human Rights Committee, General Comment No 18 (37) (Art 26) UN Doc HR/GEN/1/Rev.2 (1996), [7].
280. Art 7: ‘All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination’.
Article 26 provides equality before the law and equal protection of the law to all citizens as well as prohibiting discrimination under the law.

These definitions of what may constitute discrimination before the law accord with popular notions of discrimination. In the context of Aboriginal law, many would argue that providing an excuse for sexual assault, based on evidence of Aboriginal law, gives an advantage to one class of people on the basis of race. While Aboriginal people can admit particular evidence to prove the assertion, non-Aboriginal people are not permitted to admit similar evidence to the court. In this case, the exception excludes all persons who do not belong to that class of people. Moreover, the debates about the content of Aboriginal law and the spectre of distorted customary law may also contribute to the argument that the distinction is arbitrary. Therefore, the most logical conclusion to such reasoning would be that the recognition of Aboriginal law, in whatever configuration, is discriminatory and violates the principle of equality before the law. The reasoning at international law, however, moves beyond such a conclusion that non-discrimination and equality before the law require the same treatment for all people in all circumstances.\(^{281}\) It is accepted in international law that the principle of equality

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[d]oes not require absolute equality or identity of treatment but recognizes relative equality ie different treatment proportionate to concrete individual circumstances. In order to be legitimate, different treatment must be reasonable and not arbitrary and the onus of showing that particular distinctions are justifiable is on those who make them.\(^{282}\)

The HRC stated that the enjoyment of rights and freedoms on an equal footing, however, does not mean identical treatment in every instance.\(^ {283}\) In the International Court of Justice decision in \textit{South West Africa Cases (Second Phase)}, Judge Tanaka held that:

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[T]he principle of equality before the law does not mean absolute equality, namely equal treatment of men without regard to individual, concrete circumstances, but it means the relative equality, namely the principle to treat equally what are equal and unequally what are unequal….To treat unequal matters differently according to their inequality is not only permitted but required.\(^ {284}\)

This raises the dichotomy of formal equality and substantive equality. Formal equality is the principle that all people should be treated identically in all circumstances. Substantive equality holds that all people are not equal and consequently it is permitted to unequally treat that which is unequal. International law advocates and permits the substantive equality approach because it acknowledges that there are situations where concrete circumstances may necessitate unequal treatment for unequal matters. These circumstances permit distinctions to be made if those distinctions are


\(^{283}\) United Nations Human Rights Commission, above n 278, [8], [10].

\(^{284}\) \textit{South West Africa Cases (Second Phase)} [1966] ICJ Rep 305 (Tanaka J).
reasonable and proportionate. In the context of Aboriginal law, if the evidence to the inquiry suggests that an overwhelming inequality exists between Aboriginal people and non-Aboriginal citizens—one of those reasons being the irresolution of the relationship between Aboriginal law and the Australian legal system—then these concrete circumstances permit and require different treatment. HRC General Comment No 18 explains the obligation upon states to take positive action to address inequality:

[T]he principle of equality sometimes requires State parties to take affirmative action in order to diminish or eliminate conditions which cause or help to perpetuate discrimination prohibited by the Covenant. For example, in a State where the general conditions of a certain part of the population prevent or impair their enjoyment of human rights, the State should take specific action to correct those conditions. Such action may involve granting for a time to the part of the population concerned certain preferential treatment in specific matters as compared with the rest of the population. However, as long as such action is needed to correct discrimination in fact, it is a case of legitimate differentiation under the Covenant.

The concept that states may take action for a period of time to correct discrimination is also enshrined in the ICERD and incorporated into the Australian legal system through the *Race Discrimination Act 1975* (Cth). Entrenched in the Convention is this understanding in international law that it is permissible to treat unequally that which is unequal. This understanding permits Aboriginal and Torres Strait Islanders to be treated differently to non-Indigenous Australians because of the pre-existing inequality between these two groups. The attainment of equality in a society may warrant and legitimise differentiation of treatment.

There are two ways in which this can be done legally—special measures and actions that legitimately recognise cultural difference. Special measures are motivated by the need to remedy the impact of racial discrimination upon a community. Special measures are incorporated into the Australian legal system by ICERD. Article 1(4) of the ICERD states:

Special measures taken for the sole purposes of securing adequate advancement of certain racial or ethnic groups or individuals requiring such protection as may be necessary in order to ensure such groups or individuals equal enjoyment or exercise of human rights and fundamental freedoms shall not be deemed racial discrimination, provided, however, that such measures do not, as a consequence, lead to the maintenance of separate rights for different racial groups and that they shall not be continued after the objectives for which they were taken have been achieved.

This article also protects special measures from constituting racial discrimination. Section 8 of the *Racial Discrimination Act 1975* (Cth) incorporates Article 1(4) of ICERD. Furthermore Article 2(2) of the Convention calls upon states to take action to address racial inequality:

State parties shall, when the circumstances so warrant, take, in the social, economic, cultural and other fields, special and concrete measures to ensure the adequate development and protection of

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285. Above n 278, [12], [10].
certain racial groups or individuals belonging to them, for the purpose of guaranteeing them the full and equal enjoyment of human rights and fundamental freedoms. These measures shall in no case entail as a consequence the maintenance of unequal or separate rights for different racial groups after the objectives for which they were taken have been achieved.

According to the CERD, the intention of Article 2(2) is to recognise that state parties have minority groups such as Indigenous populations and that as a consequence of this:

\[\text{[a]}\text{ttention must be paid to the socio-economic and political situation of these groups in order to ensure that their development in the social, economic and cultural spheres takes place on an equal footing with that of the general population.}\]

It is necessary to countenance that special measures are temporary measures. The measures cease to be permissible once the objective of their employment is achieved. The High Court decision in Gerhardy v Brown is significant because it dealt with the concept of special measures in Australian law:

\[(I)\text{t has long been recognised that formal equality before the law is insufficient to eliminate all forms of racial discrimination…. Formal equality must yield on occasions to achieve … ‘effective, genuine equality’.}\]

Gerhardy involved the lands of the Pitjantjara tribe, which were protected by the Pitjantjatjara Land Rights Act 1981 (SA) that gave Pitjantjatjara members unrestricted access to their lands but required non-Pitjantjatjara people to seek permission. The defendant, Brown, was a non-Pitjantjatjara man who entered the lands without the required permission and was charged with unlawful entry. Brown challenged the prosecution on the grounds that the relevant provisions of the Act were prohibited by the Racial Discrimination Act 1975 (Cth). The High Court found that the Act was permitted by section 8(1) of the Racial Discrimination Act 1975 (Cth). The court employed a criterion for the lawful establishment of special measures:

- The special measure must confer a benefit on some or all members of a class;
- Membership of this class must be based on race, colour, descent or national or ethnic origin;
- The special measure must be for the sole purpose of securing adequate advancement of the beneficiaries so that they may enjoy and exercise equally with others their human rights and fundamental freedoms; and
- The protection given by special measures must be necessary so that its beneficiaries may enjoy and exercise equally with others, their human rights and fundamental freedoms.\[288\]

\[287. \text{ (1985) 159 CLR 70, 128–29 (Brennan J).}\]
\[288. \text{ Aboriginal and Torres Strait Islander Social Justice Commissioner, above n 6.}\]
Example of special measures taken in Australia include statutory restrictions combating alcohol abuse in remote Aboriginal communities, such as a two-kilometre law restricting consumption of alcohol within two kilometres of a liquor outlet, laws permitting police to take into protective custody any person in a public place when they have reasonable grounds to believe that the person is intoxicated with alcohol, or section 122 of the Liquor Act 1978 (NT) which makes it an offence to serve alcohol to certain declared persons. These examples would, on the basis of popular notions of discrimination and equality before the law, potentially infringe the Racial Discrimination Act 1975 (Cth). In fact, these measures such as alcohol restrictions are justified as special measures under the Act. Further important elements to the legality of special measures are the wishes of the members of the particular group. In referring to a report conducted by HREOC on alcohol in Aboriginal communities referred to as the Alcohol Report, Brennan J stated that:

The wishes of the beneficiaries for the measure are of great importance (perhaps essential) in determining whether a measure is taken for the purpose of securing their advancement.

In the Alcohol Report, Commissioner Antonios concluded:

Alcohol restrictions imposed upon Aboriginal groups as a result of government policies which are incompatible with the policy of the community will not be special measures.

The High Court’s reasoning in Gerhardy v Brown has been widely criticised because of the temporary nature of special measures. Such an approach could not be sustained because of the permanency of Aboriginal law as a facet of Aboriginal culture.

Special measures are the means to achieving equal enjoyment of rights. Distinguishing special measures from rights can in no way justify an approach to special measures which permits governments to implement policy or legislative changes on the basis that special measures are a gift to one segment of society. Successive governments have failed to explicitly identify the obligation to redress Indigenous disadvantage as a human rights obligation.

The concern with the temporary nature of special measures under CERD, or indeed the impermanence of measures implicit in the HRC comment above, is that Aboriginal law is not a transitory or temporary system but like all systems permanent and evolving. Therefore, the preferred option for the recognition of Aboriginal law would be actions that legitimately recognise cultural difference empowered by Article 1(4) of the ICERD. Such an action

289. Summary Offences Act 1923 (NT) s 45D.
290. Police Administration Act 1978 (NT) s 128.
292. Gerhardy v Brown, above n 287, [37].
293. Race Discrimination Commissioner, above n 291, 141.
294. Above n 287.
could be viewed as a legitimate differentiation of treatment under sections 9 or 10 of the *Racial Discrimination Act 1975* (Cth). This would involve recognising Aboriginal peoples as distinct peoples entitled to differential treatment rather than temporary special measures. This distinction is not only significant in law but symbolically would be an enormous development in Australian law.

Recognition of customary law as an original part of the Australian legal system is not equivalent to being sensitive to or making allowances in the Australian legal process for the cultural differences of the various ethnic groups now making up multicultural Australia. In the post-*Mabo* era it is important to understand that legislative and community recognition of customary laws is because those laws are the laws of Aborigines and Torres Strait Islanders as the first people of this country.\(^{296}\)

In the context of the native title decision of *Western Australia v Commonwealth*,\(^{297}\) the High Court indicated a favourable approach to substantive equality.\(^{298}\)

One of the most frequent objections to recognition of Aboriginal law will always be that to take account of Aboriginal law is discriminatory and violates equality before the law. For example, the judiciary’s use of Aboriginal custom in assigning guilt may be viewed by the Western Australian public as Aboriginal people drawing upon a source of law that procedurally other non-Indigenous offenders cannot. These perceptions are assuaged by international law if recognition is viewed as necessary and justified to achieve greater procedural justice for Aboriginal people. The ALRC supported this very fundamental proposition in its inquiry on Aboriginal customary law.

> [T]he need for consistency with fundamental values of non-discrimination, equality and other basic human rights does not preclude the recognition of Aboriginal customary laws. On the contrary, these values themselves support appropriate forms of recognition of cultural identity of Aboriginal people.\(^{299}\)

The greatest challenge in Australia is the pejorative nature in which discrimination is viewed and that the concept of non-discrimination and equality before the law is not widely considered in its international context. Notions of formal equality dominate public debate on Indigenous policy and substantive equality is not as commonly regarded. The notion of formal equality remains the language of Northern Territory politicians even after a significant inquiry into Aboriginal law. However, clearly it is consistent with international law, particularly the ICERD as implemented by the *Racial Discrimination Act 1975* (Cth) for states to recognise Aboriginal law whether through the less preferable special measures or actions that legitimately

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297. (1995) 183 CLR 373: ‘If there were any discrepancy in the operation of the two Acts, the *Native Title Act* can be regarded either as a special measure under s 8 of the *Racial Discrimination Act* or as a law, which, though it makes racial distinctions, is not racially discriminatory so as to offend the *Racial Discrimination Act* or the ICERD’: at 483–84.

298. McCrae *et al*, above n 179, 446.

299. Australian Law Reform Commission, above n 1, Summary Report, [37].
recognise cultural difference. The key issue is that the measures that are taken are reasonable and proportionate, and, in the case of special measures that they cease to continue after their objectives have been achieved.

ABORIGINAL LAW AND TRADITIONS AND HARMFUL PRACTICES UNDER INTERNATIONAL HUMAN RIGHTS LAW

The analysis of whether Aboriginal law conflicts with Australia’s human rights obligations is difficult to ascertain in the abstract because of the diversity and complexity of the content of Aboriginal law. For example, payback and promised marriages are elements of Aboriginal law that are disproportionately focused upon in relation to human rights obligations as opposed to community justice mechanisms. Nevertheless, it is useful to measure aspects of Aboriginal law against the various comments of United Nations treaty bodies or agencies. The determination of whether a particular act may conflict with Australia’s human rights obligations requires consideration of the relevant instrument as a whole, rather than selective articles cited in the abstract. Thus, those acts popularly regarded as Aboriginal law, such as promised marriage and payback, must be viewed in the context of an entire covenant. This is because articles in human rights instruments are, like statutes, often unclear or ambiguous in their intention and human rights instruments require interpretative rules such as the principle that specific provisions prevail over more general provisions. Furthermore, the determination of an act’s inconsistency with an instrument requires comprehension of the context in which the act is committed. In interpreting the intention of human rights instruments, the circumstance such as promised marriage or payback spearing would, in the interests of fairness, require consideration of the cultural context such as an understanding of the cultural practice or cultural belief as protected under Article 27. Nevertheless, whether an act conflicts with an obligation will utterly depend upon the facts of the case. This explains why whole-scale prohibition would arguably violate Australia’s limited obligation to protect culture but certainly its obligation to consult.

Harmful practices

While it has already been established that treaty bodies have not provided any specific comment on the practice of Aboriginal customary law in Australia, there exists numerous comments and recommendations by treaty bodies and United Nations agencies about harmful cultural practices and traditions that impact upon women and children.

There are two elements to the committee’s concern about harmful cultural practices. The first is that some cultural practices have a harmful impact upon women and children. Those practices conflict with the human rights obligations of state parties. The second element is that, despite these practices, all cultures are fluid and constantly change; therefore, they have the capacity to evolve consistent with international human rights law.

The impact of cultural and religious traditions and practices upon women and children is only a relatively recent concern for international law:

Of the several blind spots in the early development of the human rights movement none is as striking as that movement’s failure to
give to violations of women’s (human) rights the attention and in some respects the priority that they require.

The first significant step in addressing gender discrimination was the adoption by the General Assembly in 1967 of the Declaration on the Elimination of All Forms of Discrimination Against Women. The Declaration was followed in 1979 by CEDAW. It was not until the United Nations World Conference on Human Rights in 1993 that the awareness of the extent of women’s human rights violations became a global issue. One of the outcomes of the conference was the General Assembly’s adoption of a Declaration on the Elimination of Violence Against Women. In 1994, the CHR established the position of a Special Rapporteur on Violence Against Women, whose role is to receive information about violence and recommend to the United Nations how to address gender discrimination. During the 1995 United Nations World Conference on Women, the Beijing Platform for Action emerged as a significant outcome. The platform included initiatives such as gender mainstreaming within the United Nations system. The Platform was reaffirmed in June 2000 – Beijing +5.

This increased awareness of gender discrimination and the widespread violation of women’s rights have influenced broader public international law. One example of this is the Statute of the International Criminal Court that specifically targets gender based crimes. Another example is the amendment of the CERD reporting procedure to allow CERD to request information from state parties on women in the context of racial discrimination.

The continuance of cultural practices and traditions that harm women or children has been the subject of increased scrutiny. The United Nations Office of the High Commissioner for Human Rights has identified the problem:

Every social grouping in the world has specific traditional cultural practices and beliefs, some of which are beneficial to all members, while others are harmful to a specific group, such as women. These harmful traditional practices include female genital mutilation; forced feeding of women; early marriage; the various taboos or practices which prevent women from controlling their own fertility; nutritional taboos and traditional birth practices; son preference and its implications for the status of the girl child; female infanticide; early pregnancy; and dowry price.

Female genital mutilation was the subject of a major United Nations education project in which public awareness was raised about its impact upon women in those communities that practise it. The Special Rapporteur on Violence Against Women also expressed concern:

300.  Steiner and Alston, above n 130, 158.
301.  Office of the High Commissioner for Human Rights, Harmful Traditional Practices Affecting the Health of Women and Children, Fact Sheet No 23 (1995). Similarly, the Beijing Platform for Action defines violence against women to include traditional practices that are harmful to women: Beijing Declaration and Platform for Action adopted by the Fourth World Conference on Women, A/CONF.177/20/Add.1 (15 September 1995) [113(a)].
Certain customary practices and some aspects of tradition are often the cause of violence against women. Besides female genital mutilation, a whole host of practices violate female dignity. Foot binding, male preference, early marriage, virginity tests, dowry deaths, sati, female infanticide and malnutrition are among the many practices which violate a woman’s human rights. Blind adherence to these practices and State inaction with regard to these customs and traditions have made possible large-scale violence against women.

The HRC issued a general comment in the context of the ICCPR urging states to ensure that traditional, historical, religious or cultural attitudes are not used to justify violations of women’s right to equality before the law and equal enjoyment of all Covenant rights. The United Nations CHR also called upon states to:

- eliminate violence against women in public and private life
- the elimination of gender bias in the administration of justice and the eradication of the harmful effects of certain traditional or customary practices
- cultural prejudices.

The most active in the area of modifying and abolishing harmful practices has been CEDAW. General Recommendation 19 of CEDAW states that:

Traditional attitudes by which women are regarded as subordinate to men or as having stereotyped roles perpetuate widespread practices involving violence or coercion, such as family violence and abuse, forced marriage, dowry deaths, acid attacks and female circumcision. Such prejudices and practices may justify gender-based violence as a form of protection or control of women. The effect of such violence on the physical and mental integrity of women is to deprive them of the equal enjoyment, exercise and knowledge of human rights and fundamental freedoms. While this comment addresses mainly actual or threatened violence the underlying consequences of these forms of gender-based violence help to maintain women in subordinate roles and contribute to their low level of political participation and to their lower level of education, skills and work opportunities.

This recommendation requires state parties to report, under Article 5, attitudes, customs and practices that perpetuate violence against women and equally the types of violence that are the consequence of these attitudes, customs and practices. Additionally state parties are requested to report on those effective measures that they are implementing to overcome these attitudes and practices. The importance of this recommendation is the definition of gender-based violence, which is violence committed against a woman by public authorities and also private acts because she is a woman and is deemed discriminated by virtue of Article 1 of the Convention. The recommendation holds that states may be responsible for private acts if they fail to prevent such violence. The existence of these positive obligations is

303. General Comment No 28.
305. CEDAW General Recommendation No 19.
for states ‘to take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women’. The committee requests state parties to take measures to effect protection of women against gender-based violence. These measures include:

(i) Effective legal measures, including penal sanctions, civil remedies and compensatory provisions to protect women against all kinds of violence including inter alia violence and abuse in the family, sexual assault and sexual harassment in the workplace.

(ii) Preventive measures, including public information and education programs to change attitudes concerning the roles and status of men and women.

(iii) Protective measures, including refuges, counselling, rehabilitation and support services for women who are the victims of violence or who are at risk of violence.

In regards to gender-based violence derived from tradition and culture based attitudes, the committee has also questioned a number of existing cultural practices that potentially infringe Article 1 of CEDAW. The committee has found that practices such as forced marriages would breach Articles 2(f), 5 and 10(c) of the Convention.

Corollary to these concerns is that the potential of cultures to adapt and evolve is also acknowledged. The United National Development Fund for Women explains this potential:

Historically, religion and culture have proven extraordinarily adaptive; most belief systems have been revised over time to accommodate new understandings and new values that emerge in human society…. Numerous cultures offer examples of traditions, including customs harmful to women, that have changed or died out. For generations, women (and some men) in Sudan endured mutilation to acquire face marks, a traditional sign of beauty as well as an indicator of tribal affiliation. In recent years, this tradition has rapidly disappeared. The binding of women’s feet in China is another example of a nearly universal custom that is no longer practised.

This principal is incorporated into the CEDAW requiring state parties to take measures to facilitate the modification of traditional cultural practices in the realisation of women’s human rights:

States Parties shall take all appropriate measures ... to modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudice and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women.

306. Art 2(f); see also Arts 5, 11, 12 and 16.
307. CEDAW General Recommendation No 19, Art 24(t).
309. CEDAW Art 5(a).
The notion of modifying culture is an important consideration if aspects of Aboriginal law are deemed to conflict with Australia's human rights obligations. Payback is a traditional practice that is commonly regarded as traditional Aboriginal law and frequently regarded as breaching Australia's human rights obligations. The Northern Territory inquiry into Aboriginal customary law raised the issue based upon its submissions that despite the commonly regarded physical nature of payback, it also involves other non-physical punishments that do not potentially violate Australia's human rights obligations. Nevertheless, there are a number of concerns that arise with respect to the practice of payback.

Could not one describe spearing required in some payback punishments as an act of torture or inhuman punishment forbidden by Articles 21 and 22 of the Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment?

The form that payback takes, such as spearing, may give rise to potential breaches of International Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment. This depends on how a state jurisdiction views the right to practise culture and constitutes the rights of Indigenous peoples as a distinct cultural group. Payback certainly raises questions about double jeopardy. In the Australian legal system, no one can be tried or punished twice for an offence in which they have been acquitted or convicted. Frequently situations do arise where the existence of customary punishment may result in Aboriginal offenders being tried and punished for the same crime. The issue of avoiding tribal punishment arose in the case of *R v Desmond Gorey*, when Gallop J stated:

I take account of the fact that you have brought great shame upon you family and that you feel that shame. I take account of the fact that probably you will have to present yourself for punishment after you have served the gaol sentence which I propose to impose upon you.

In this context the courts are cognisant of the role that such punishment facilitates in the Aboriginal legal system and may be central to a dispute resolution system.

Similarly the practice of promised marriages has been the subject of debate regarding its potential conflict with human rights. In some circumstances arranged marriages are recognised under Aboriginal law (and it certainly is important to gauge formally the extent of the practice). As the *Hales v Jamilmira* controversy illustrated, the practice may involve young girls under the legal age of consent to marriage as well as the legal age to consent to sexual intercourse. Under the *Marriage Act 1961* (Cth) the age of

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310. NTLRC, above n 1, 3.15.
312. *R v Desmond Gorey* (Unreported, Supreme Court of the Northern Territory, 20 June 1978); see also *Jadurin v The Queen* (1982) 44 ALR 424.
313. Above n 71.
consent is 18 years.\textsuperscript{314} The Act does provide for a person to apply to a judge or magistrate for permission to marry on reaching the age of 16 years.\textsuperscript{315}

There is only one international agreement pertaining to marriage – the \textit{Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages}.\textsuperscript{316} Australia is not party to this agreement. Its preamble reaffirms Article 16 of the \textit{Universal Declaration of Human Rights} that:

\begin{quote}
Men and women of full age … have the right to marry and to found a family. They are entitled to equal rights as to marriage [and] marriage shall be entered into only with the free and full consent of the intending spouses.
\end{quote}

Certainly this convention, and indeed Australian law, emphasises the notion of choice and consent. However, the practice of promised marriage and the potential for conflict with Australia’s human rights obligations must be considered in its cultural context. This is because the resolution of any conflict cannot be achieved without the participation of those that would be affected by potential legislative measures.

When the Northern Territory amended its legislation to prohibit traditional marriage as a legal defence to sexual assault following the controversy, both the CLP and Galarrwuy Yunupingu objected to the lack of consultation with Aboriginal communities on the decision. Yunupingu argued that the Northern Territory failed in its human rights obligations to Aboriginal peoples to adequately consult Aboriginal people.\textsuperscript{317} According to Yunupingu, ‘child abuse and traditional marriage are not the same thing, and he takes offence at suggestions that underage bride are necessarily exploited’.\textsuperscript{318} In the Pascoe case, the Court called upon Pascoe to explain how ‘A’ was his ‘promised wife’ and how the system worked:

\begin{quote}
This is very complicated and I can’t do it within say 15 minutes or an hour…. It’s so complicated…. Anyway I’ll try. When a poison cousin has a daughter, she automatically promises this girl to a poison cousin in which case cousin like her mother. A’s mother promised A to poison cousin here and when she’s grew up, she start to know him, you know, until she reach puberty. When she reach puberty, when she’s about 14 to 15 years old, and that’s when can get married.\textsuperscript{319}
\end{quote}

Pascoe’s explanation, though arguably not comprehensible in the abstract, highlighted the complexity of the Aboriginal laws regulating customary marriages. They are not, as the Gordon Inquiry agreed:

\begin{enumerate}
\item \textsuperscript{314} ‘Subject to s 12, a person is of marriageable age if the person has attained the age of 18 years’: \textit{Marriage Act 1961} (Cth) s 11.
\item \textsuperscript{315} In s 12 (1) it states that: ‘A person who has attained the age of 16 years but has not attained the age of 18 years may apply to a Judge or magistrate in a State or Territory for an order authorising him or her to marry a particular person or marriageable age despite the fact that the applicant has not attained the age of 18 years’.
\item \textsuperscript{316} 521 UNTS 231, entered into force 9 December 1964.
\item \textsuperscript{317} See generally, ABC Radio ‘Aboriginal leader attacks NT laws affecting traditional marriage’ \textit{PM}, 10 December 2003.
\item \textsuperscript{318} Ibid.
\item \textsuperscript{319} \textit{Pascoe v Hales} (Unreported, Supreme Court of the Northern Territory, JA 49 of 2002, Gallop AJ, 8 October 2002).
\end{enumerate}
The simple domestic arrangements between two people, but involve the character of male accomplishment, and negotiation between a man and his prospective wife’s relatives.\(^\text{320}\)

Similarly Joan Kimm observed that:

In Aboriginal law promised marriages ‘was an integral part of classical Aboriginal society’ and while ‘it can be viewed as being quite inimical to women’s rights’, some commentators regard its suppression as ‘equally inimical to the continuation of Aboriginal culture.’ \(^\text{321}\)

The overwhelming emphasis at international law is to protect the human rights of the girl child from cultural practices that remove the right to choose and to consent. The Committee on the Rights of the Child, in its consideration of the girl child, has noted that:

\textit{History had clearly shown that it was essential to focus on the girl child in order to break down the cycle of harmful traditions and prejudices against women.}\(^\text{322}\)

Legislative measures send a formal message that traditions and customs contrary to the rights of the child will no longer be accepted, create a meaningful deterrent and clearly contribute to changing attitudes.\(^\text{323}\)

Also instructive is a CEDAW General Recommendation relating to ‘equality in marriage and family relations’, which notes that, while states report that their constitutions and laws comply with the provisions of the Convention, ‘custom, tradition and failure to enforce these laws in reality contravene the Convention’. The General Recommendation states that:

\textit{A woman’s right to choose a spouse and enter freely into marriage is central to her life and to her dignity and equality as a human being. An examination of States parties’ reports discloses that there are countries which, on the basis of custom, religious beliefs or the ethnic origins of particular groups of people, permit forced marriages or remarriages…. Subject to reasonable restrictions based for example on a woman’s youth or consanguinity with her partner, a woman’s right to choose when, if, and whom she will marry must be protected and enforced at law.}\(^\text{324}\)

To this end the committee suggested that state parties require the registration of all marriages whether civil or customary in order to monitor compliance with the Convention. Of significance also is the \textit{Convention on the Rights of the Child}. Article 24 calls upon state parties to take all effective and appropriate measures with a view to abolishing traditional practices prejudicial to the health of children. State parties are required to report on measures such as legislative provisions or education campaigns that are

\begin{footnotes}
\footnote{321. Kimm, above n 134, 62.}
\footnote{323. Ibid [292].}
\footnote{324. CEDAW General Recommendation 21, [16].}
\end{footnotes}
taken to prohibit such practices. States are also expected to report on the extent to which members of that specific group are involved in the campaign. Therefore, the state must consult with Indigenous communities on any legislative or educative measures that may be taken. Article 24 was emphasised by the final document of the World Conference on Human Rights, calling upon state parties to eliminate customs and practices that harm in particular the girl child.

In weighing up a cultural practice with human rights obligations, such as in the example of customary marriage, it is important to consider that there is competing evidence to suggest that customary marriage is ‘weakening’.\(^\text{325}\) Such evidence supports the importance of a contextual approach to reconciling the conflict with international human rights law. Using the current example, it is clear that contemporary expectations of human rights standards do not accord with customary marriage that involves children under the legal age of consent. Particularly with evidence of growing ambivalence of Aboriginal women toward its practice, it may be prudent to speculate in the abstract that the culture is evolving to accord with the changing expectations of members of the community. Nevertheless, the role of the state is to determine the extent of the practice of promised marriages and also determine the attitudes of women toward the practice and whether the practice is ‘weakening’.

### Resolving conflict

To resolve any potential conflict between Australia’s human rights obligations and Aboriginal law, the notion of ‘conflict’ must also be resolved. This invites the universalist/cultural relativist arguments that have already been visited in this paper. Similarly, Dianne Bell observed that:

> It is a delicate line we walk between cultural sensitivity and protecting women from exploitation. What is the standard of universality against which women’s rights are to be tested? At first glance, Aboriginal customary marriages are in conflict with human rights provisions, for they involve ‘promised marriage’ and ‘infant bestowal’. The cultural context within such marriages were contracted, however, binds kin in a web of reciprocal obligations, rights, and responsibilities that have implications for land ownership and ceremonial duties: in short, they were part and parcel of the survival of the culture.\(^\text{326}\)

Alternatively, international human rights jurist Makau Mutua argued that:

> It is my argument that the most fundamental of all human rights is that of self-determination and that no other right overrides it. Without this fundamental group or individual right, no other human rights could be secured, since the group would be unable to determine for its individual members under what political, social, cultural, economic, and legal order they would live. Any right which directly

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conflicts with this right ought to be void to the extent of that conflict.\footnote{327}

International feminist jurist, Christine Chinkin, has also canvassed cultural relativism in the context of conflicting rights and has concluded that:

Human rights discourse has given insufficient attention both to the resolution of conflicting rights and to the challenge of ensuring adequate protection against abuses committed by non-state actors. Since both are essential components of ensuring women’s human rights … these deficiencies seriously weaken the effectiveness of human rights legal discourse for the protection of women.\footnote{328}

Clearly there are a number of international instruments that would be applicable to Aboriginal law in relevant circumstances. The strongest instrument, the CEDAW, for example, states that there is a clear and unambiguous obligation upon states to modify or abolish the practice of custom. Yet the ICCPR contains a protection for minority rights while simultaneously guaranteeing many other rights that may conflict with the practice of Aboriginal law. Given that the ICCPR will not consider group complaints, then the prospect of it finding the practice of custom as an aspect of self-determination under Article 27 is negated.

It is also widely acknowledged that there are significant practical difficulties associated with international human rights treaty bodies applying human rights to Indigenous customary practices, thereby undermining their utility in addressing problems of discriminatory Indigenous custom.\footnote{329}

These difficulties involve some of the criticisms the Australian government levelled at CERD in relation to its understanding of the native title amendments, such as the capacity of CEDAW to ‘appreciate the nuances’ of cultural practice.\footnote{330}

As Claire Charters argued:

Were CEDAW or the Human Rights Committee to recommend the abolition of an Indigenous custom that is only discriminatory when viewed through a Western lens, for example, the custom would be attacked not only by the very fact of the application of human rights to a non-Western culture but, also, by the way in which the human rights are applied.\footnote{331}

\footnotesize{\begin{itemize}
\item \footnote{328}{C Chinkin, ‘Cultural Relativism and International Law’ in C Howland (ed), Religious Fundamentalisms and the Human Rights of Women (New York: Palgrave, 1999) ch 6, 55–67.}
\item \footnote{330}{Ibid.}
\item \footnote{331}{Ibid.}
\end{itemize}}
The reality of universal rights is that they will conflict with cultural and religious minorities and, when there is a conflict, an appropriate balance must be achieved between the right to practise culture and other rights that may conflict. The fundamental and applicable human right standard, essential in devising an approach to balancing conflicting rights, is consultation. Such a claim may appear straightforward or simple but the history of race relations between the Australian state and Indigenous Australians clearly illustrate that consultation has not been a fundamental value defining relations between the two. This was confirmed by CERD in its decision on Australia’s negotiations for native title amendments.

A second important approach is that, for those elements of Aboriginal law that conflict with community expectations of human rights, appreciation for the evolution of all cultures is the most appropriate approach. If, as has been discussed earlier, Indigenous women are becoming increasingly ambivalent or antagonistic to certain cultural practices, then this is clear evidence of the evolution of aspects of Aboriginal law. This information can only be determined, not through public sentiment or anecdotal evidence, but through a measured consultation with those people who are affected by the cultural practice. Such an approach is rightly shared by the HREOC Sex Discrimination Commissioner who determined that:

Measures to recognise Aboriginal Customary Law are often hybrid models that have been adapted to meet the needs of Aboriginal people and the mainstream law. The emphasis in these models is to put Aboriginal Customary Law principles into practice and to increase Aboriginal communities’ access to self-determination. HREOC considers that in situations where women’s human rights are at risk, Aboriginal communities should be encouraged to develop their own solutions to these problems and to adapt traditional practices to ensure women’s human rights.\(^{332}\)

Similarly Penelope Andrews argued that:

Women engaged in feminist struggles must move beyond the quagmire of the universalist aspirations of feminism and its human rights vision, versus the continuing recognition of cultural difference, now incorporated in post-modern discourse.\(^{333}\)

Importantly, Andrews noted that Aboriginal women are developing local programs that are modelled on traditional indigenous structures to ‘locate culturally appropriate methods of redressing violence’.\(^{334}\)

\(^{332}\) Sex Discrimination Commissioner, above n 15.


\(^{334}\) Ibid 939.
CONCLUSION:
‘RACE’ THE UNSPOKEN BARRIER TO RECOGNITION

Resolving the relationship between Aboriginal law and the Western Australian legal system need not be such a challenging task for a liberal democracy like Australia. To date it remains beyond the imagination of all Australian political institutions to accommodate the needs and interests of Indigenous communities. It would be wrong to suggest that the recognition of Aboriginal customary law and the continued practice of Aboriginal law violate human rights standards. Aboriginal law is diverse and complex, and traverses a wide range of classifications of law. Aboriginal culture, like all cultures, evolves and it is important to establish the value that any practice involving the violation of the fundamental rights and freedoms of women cannot be tolerated. Such an exercise is not assisted by attitudes displayed by some members of the judiciary that derogate Aboriginal women’s rights and accord them a position lower than other Australians within the legal system. Equally deplorable are the attitudes of Aboriginal men and legal counsel who have deliberately distorted custom to violate the rights of Aboriginal women employing ‘bullshit law’.

Yet the issue of Aboriginal customary law raises interesting contradictions in Australia. The application of international human rights law in Australia has been a source of speculation and dispute in public debates about asylum seekers and the detention of non-combatants. In these debates the complexity of international law is appreciated. The reality of the ambiguity of most public international law is stark because the voices of alternative interpretations of law are given public space. Furthermore, international law’s interaction with the domestic legal system is apparent. In the context of Aboriginal customary law, conflict with international law and Australia’s ‘obligations’ is so clearly uncontested and comprehended by the community. Kimm, for example, typified the problem when she broadly argued that:

International declarations which are in potential conflict and the dates on which they were entered into force for Australia are: CERD 1975, ICCPR 1976, ICESCR 1976 and CEDAW 1979.335

It would appear sufficient simply to cite all human rights instruments to establish a conflict between Aboriginal law and international human rights law. Such absolutism discharges any responsibility to be mindful of the ambiguity of human rights instruments, the interpretive methods required to understand the agreements, the complex and legitimate debate regarding cultural relativism/universalist approaches to human rights, or the jurisprudence explaining the articles. During the Tampa controversy,336 it was not sufficient for commentators on either side of the debate to simply cite the 1951 Refugee Convention or the Law of the Sea Treaty in the abstract. The debate required technical knowledge of the provisions of the treaties and their interaction with the Australian legal system. This reference

335.  Kimm above n 134, 137
336.  In August 2001, 433 asylum seekers rescued by a Norwegian ship were refused permission to enter Australia.
provides an opportunity to instigate, within Western Australia and indirectly the Australian nation, a measured discussion that is cognisant of the required nuances of international law and Aboriginal law.

Apart from these barriers to recognition that have been canvassed in this Paper, there are major political factors that perennially hamper law reform in the context of Indigenous Australians. Prime Minister John Howard best reflected this in a statement he made during the Wik native title debate:

> We have clung tenaciously to the principle that no group in the Australian community should have rights that are not enjoyed by another group.³³⁷

This statement enunciates the prevailing tenor of Australian political debate on issues of Indigenous policy. It represents a formal equality approach to non-discrimination, that equal treatment is paramount regardless of any exigent social or economic state that may necessitate differential treatment. This view is pervasive in the community and despite the decision in *Mabo*,³³⁸ Indigenous peoples have made little ground in forging an identity as a distinct cultural group beyond categorisation as a minority group. For Indigenous peoples to make such ground, mechanisms established to address inequality must find their genesis not in temporary special measures but in rights. The perception of Indigenous specific mechanisms or rights as special ‘concessions’ or special treatment permeates public debate on Indigenous issues and no doubt informs contemporary inertia that exists in resolving the relationship between Aboriginal law and the municipal legal system. Indeed since the ALRC handed down its recommendations on Recognition of Customary Law in 1996,³³⁹ not a single recommendation has been implemented, reflecting the importance of Indigenous peoples within the Australian polity.

The tendency to categorise Indigenous peoples as one of many minority groups clamouring for power is typical in liberal democracies and it has become an obstacle to much needed law reform intended to remedy Indigenous disadvantage and dysfunction. The concern about special treatment may be attributed to a number of historical realities; for example, there was no treaty signed between any Aboriginal group and the British colonisers. The existence of a treaty has been significant for Aboriginal peoples in other common law jurisdictions particularly in the context of economic development, land title and legal systems. In Australia there was no constitutional or preambular recognition of Indigenous peoples as the first peoples of Australia. Indeed, in Indigenous communities today, it is widely known that the Australian Constitution’s race power could be used to discriminate against Aboriginal people on the basis of race. This was an argument supported by the Commonwealth during *Kartinyeri*.³⁴⁰ *Mabo* failed to deliver Indigenous Australians any significant element of sovereignty. Therefore, there is a limited legal status from which Indigenous peoples can

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³³⁸ Above n 98.
³³⁹ Australian Law Reform Commission, above n 1.
³⁴⁰ *Kartinyeri v Commonwealth*, above n 115.
successfully assert special Indigenous rights politically or legally without offending the notion of formal equality with the Australian state. However, the power of the rhetoric of formal equality cannot obviate the significance of the narrative of *Mabo* for recognition of Aboriginal customary law.

The ongoing failure of the Australian polity and the Australian people to understand the culture of Indigenous Australians prolongs the racial tension that defines the relationship between Indigenous and non-Indigenous Australia. The failure of the national reconciliation movement, another initiative subject to the political tenor of the day, illustrates this.

The underlying issues confronting Australia regarding its race relations between Indigenous and non-Indigenous people will not go away. Many people thought that when half a million Australians marched across the bridge in support of reconciliation the momentum for substantive change was unstoppable. Since 2000, much of the wind has gone out of its sails.341

The recent race riots in Redfern, the recently publicised systemic racism in the armed forces, and the abolition of ATSIC are just examples of the serious and unresolved business of race in Australia. One of the perennial victims of this has been the recognition of Aboriginal customary law. The position at international law is clear. International law and domestic law permit Aboriginal law being taken into account. However, the extent and degree to which Aboriginal law is taken into account is equally confined by international law and Australia’s human rights obligations.

It is conceivable that there will be circumstances where customary law will be recognised yet other circumstances where recognition may be prohibited on the basis of international human rights law; for example, child brides as in the Northern Territory. Ultimately recognition must be accorded in a contextual framework, based upon real factual situations. The necessity of a case by case approach renders it difficult to predict in the abstract what courts may decide.

The importance of this particular reference is that, as a state, Western Australia is in the position to implement those human rights obligations that the Commonwealth and indeed other states have failed to do. International human rights law appreciates the difficulties of implementing rights in a federal system. The ICCPR calls upon states’ parties to ensure that members of the federation implement human rights obligations. Moreover, in the *National Report on Human Rights*, the Australian government conceded that it is ‘not always an efficient means of giving effect to Australia’s international human rights obligations’. The National Plan highlights the role of the states as ‘responsible for key areas of social policy and public infrastructure within Australia [and therefore] the Australian government must often rely on the states and territories to give domestic effect to international treaties’.342

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Balancing the rights of Aboriginal people to practise Aboriginal law with Australia's human rights obligations will be a challenging task for Western Australia given some jurisdictions, particularly the Commonwealth, have been ambivalent and inert to the need for law reform. This also provides an opportunity for Western Australia to achieve what other states and territories and indeed the Commonwealth has failed to do and that is to realise the emancipatory potential of liberal democracies. As Steiner and Alston observed of liberal democracies:

[The liberal state is hardly hostile to groups as such. It is not blind to the influence of groups (religious, cultural, ethnic) or of group and cultural identity in shaping the individual. Indeed the political life of modern liberal democracies is largely constituted by the interaction, lobbying and other political participation of groups, some of which are natural in their defining characteristic (race, sex, elderly citizens), some formed out of shared interests (labour unions, business associations, environmental groups). The liberal states, by definition committed to pluralism must accommodate different types of groups and maintain the framework of rights which they can struggle for recognition, power and survival.]^{343}

Johnathan Quong also agreed with the power of liberal democracies to accommodate this debate. Quong argued that claiming public/political values, such as gender equality, trumped all other considerations and failed to be an 'impartial, publicly justifiable method of resolution':

[If there is reasonable disagreement the problem cannot be solved by claiming that one public value obviously trumps another in all such cases. Disputed ... cultural practices ... are defined by the fact that they cannot be neatly resolved by appeals to gender equality or group autonomy. A justifiable method or resolution will have to find public reasons that are unrelated to arguments about the 'rightness' or 'wrongness' of the beliefs of the group.... This is the right way to determine the scope of reasonable pluralism in a liberal, deliberative democracy.]^{344}

The reality is that Aboriginal law has already been accommodated to a certain extent within the Australian legal system, most significantly by the common law. Nevertheless, there is a need to formalise aspects of the reception of Aboriginal law because of the nascent concern of ‘bullshit law’ and because of other clear injustices such as the inequity of intellectual property laws that exclude much Indigenous creativity and ingenuity from legal protection. The recognition of Aboriginal law, with the benchmark being consistency with international human rights law, would not only ‘help bring Australia into line with our international undertakings under several United Nations human rights conventions and covenants’^{345} but most importantly it would benefit Aboriginal communities. It would contribute to the correction of those conditions many Indigenous communities endure in Australia that are in breach of Australia’s human rights obligations. In particular, it would benefit Aboriginal women whose human rights are being violated by

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345. Sarre, above n 311.
Aboriginal men and disregarded by lawyers and the judiciary as encouraged by an adversarial legal system. The conclusion of most Indigenous jurists is that international human rights law is a vehicle for the evolution of culture, if indigenous peoples are adequately consulted.

One of the best means to achieve freedom from discrimination for Indigenous women, and affirmation of Indigenous custom, is an evolution of Indigenous custom. International human rights law and treaty bodies can play a meaningful role on the periphery of the development of Indigenous peoples customary laws. They can provide a catalyst for customary law to adapt to provide for the protection of Indigenous women from discrimination.346

The only way for this evolution of culture to be successful is through education. Education is integral to the work of the United Nations and state parties are viewed as the primary vehicles for such education campaigns. But this extends beyond just education of human rights in Aboriginal communities. It also requires education of the Australian community about the importance of Aboriginal law to Aboriginal communities, as well as the importance of human rights. It is vital to establish that recognition does not automatically render a conflict with Australia's human rights obligations and that conversely failure to recognise may place Australia in breach of its human rights obligations. By keeping this dichotomy in mind, the Western Australian reference into Aboriginal customary law is well equipped to facilitate meaningful consultations with Aboriginal communities. From such an authoritative basis it may lead the nation in determining how Aboriginal law may be accommodated in the Western Australian legal system. It may also manifest in education and consultation, providing a catalyst to the evolution of certain practices within Aboriginal law so they are consistent with Australia's obligations under international human rights law. Moreover, from such a consultative basis it will be able to go some way to remedying the ongoing injustice of the irresolution of Aboriginal law that is inconsistent with Australia's human rights obligations. The irresolution of Aboriginal law in the Australian legal systems is, after all, not informed by an inability to find a solution to the problem, but rather is informed by the one unspoken barrier that continues to define contemporary Australia's relationship with its first peoples – race.

346. Charters, above n 329.