AUSTRALIAN SENATE

LEGAL AND CONSTITUTIONAL REFERENCES COMMITTEE

SUBMISSION TO THE INQUIRY ON PROGRESS TOWARDS NATIONAL RECONCILIATION

ADELAIDE, 19-11-02

The Law Society of South Australia is pleased to make a submission to the Committee.

The terms of reference of the inquiry refer to the adequacy of Government responses to the *Reconciliation Council's Report*, the *Road Map* and the *Social Justice Commissioner's Report for 2000 and 2001.*

They are all documents of great importance in Australia's on-going path to reconciliation. They are of great importance now and in time they will assume greater historical significance, not least in their implementation and the changes they make to Australian society and culture.

They deserve proper recognition, respect and active support in their implementation by all Governments. It is proper that the Senate Legal and Constitutional References Committee has commenced this inquiry.

The national strategy to promote recognition of Aboriginal and Torres Strait Islander rights has particular interest and relevance to the work of the Law Society.

1 Recognition of Aboriginal and Torres Strait Islander Customary Law

The proposal that there be legislation to give Magistrates and Judges the discretion to take into account traditional laws and sentencing is an important step which ought to be adopted.

Recognition of customary law in sentencing always assumes the primacy of the jurisdiction of the criminal courts and raises the question of double jeopardy and the "two punishments problem". It leaves the courts in the uncertain position of appearing to condone customary law sanctioned violence.

That inevitably leaves the common law courts in a position of having to decide what customary law is and whether the instant case was a "genuine case" of customary law. It is always decided *ex post facto*, it is always decided as a result of police intervention and it may be considered to be a form of recognition in mitigation of punishment which occurs after the horse has bolted. By that we mean that contemporary Traditional Society has not been able to deal with introduced substances like petrol sniffing, so social and cultural change has meant that full recognition of customary law may no longer be feasible. In some ways the opportunity for recognition has passed and the Road Map recommendations are a realistic concession to what can now be achieved in the recognition of customary law in the criminal jurisdictions and to the reality of law and order maintenance in contemporary traditional societies.

However there is more to customary law than recognition of traditional punishment. The Law Society of South Australia suggests that there are areas of traditional customary law which ought to be recognised and adopted, whether by adaptation of the common law or by statute. They include the following:

1.1 **Recognition of customary law marriage and of customary law kinship systems in the operation of administration and probate rules**. Many Aboriginal people who die with property, die intestate, yet the legislative rules that apply for the distribution of their property reflect those of the 19th century European nuclear family. It is submitted that the States and Territories should give consideration to amending their Administration and Probate Acts and rules to take into account the customary law rules that apply as to the distribution of property.

1.2 Similarly consideration ought to be given to the **recognition of customary law rules as to the care of children, in circumstances of family breakdown, violence and circumstances where children are objectively in need of alternative care**. The Recommendations of the *Bringing Them Home Report*, [Human Rights and Equal Opportunity Commission 1997] have dealt with these matters to some degree and they will also be dealt with in the South Australian *Child Protection Review 2002.*

1.3 **Recognition of customary law kinship systems in the operation of *Wrongs Acts* and similar legislation and common law principles**, particularly as they apply to limitations set on the recognition of voluntary/gratuitous services provided to certain classes of family members, which again reflect the 19th century European nuclear family.

Again, it is submitted that the States and Territories should give consideration to amending such legislation to take into account the family structures and responsibilities found in indigenous families. This would mean for example, that the aunt who provides necessary personal care to a niece who has been injured, in accordance with customary norms and principles, will be entitled to have that service compensated in the same way that a mother in an Anglo-European setting is now recognized when providing care to a child.

2 Effectiveness of existing remedies

It is the experience of the many working in this area that there has been a continual tension between the acceptance and adoption of human rights principles and the existing principles of the common law of Australia. ALRM solicitors, for instance, say that workers suffering from psychological or psychiatric injuries arising from racial discrimination in the workplace often find it extremely difficult to establish their case and obtain a satisfactory outcome. Workers who suffer such injury are usually engaged in highly protracted and disputed litigation in Worker's Compensation Tribunals and in the Equal Opportunity Commission.

Almost invariably they are unable to return to the workplace because of the long-term detrimental effects of both the discrimination and, in many cases, its denial, implicit in the defence of the allegations. The effect is that those who are most disadvantaged, and victims of illegal discriminatory behaviour, lose permanent employment and are thrown into a market place where there is only a remote chance they will secure further permanent employment.

3 The Australian Constitution

The Road Map to reconciliation recommends the repeal of Section 25 of the *Australian Constitution* and the introduction of a new section to make it unlawful to adversely discriminate against any people on the grounds of race. It is submitted that this is a crucial benchmark for the Committee to examine. It is not appropriate in the 21st century that the legal foundation of the Australian Commonwealth contains provision for discrimination against voters on the basis of race. It is not enough that laws of the States or Territories which were racially discriminatory in relation to voting, would now be outlawed by the *Racial Discrimination Act*.

Nevertheless the Commonwealth Parliament has shown no signs yet of seeking the repeal of that Section, nor does the Prime Minister's letter to the Chairperson of the Council for Aboriginal Reconciliation make mention of it. The Law Society joins with the ALRM in suggesting that it would not be unreasonable for both

major political parties and the minor parties to endorse an amendment to repeal Section 25 of the Constitution and to replace it with a provision stipulating that it is unlawful for the State, Territory or Commonwealth Parliaments to pass laws which disqualify or disadvantage citizens in relation to voting at Federal, State or local elections, on the basis of their race.

A wider Commonwealth law prohibiting discrimination in terms, for instance, of the constitutional entrenchment of the *Racial Discrimination Act* would be desirable but it seems unlikely to receive bipartisan support.

It is submitted that this Committee should recommend that the Parliament enact a law repealing Section 25 and replacing it with a law of the type discussed above, with a view to having such a law put to the people of Australia pursuant to Section 128 of the Australian Constitution.

Also attached as an addendum is an expression of concern by the Aboriginal Issues Committee relating to enterprise bargaining and funding matters involving ATSIC and the ALRM.

The Law Society believes this to be a separate, but serious, issue. It does support the general position put in the addendum that the ALRM is at the coalface on a daily basis in assisting indigenous people in civil and criminal law matters and that adequate funding for this role should be made available.

ADDENDUM

Improving Indigenous Outcomes; Funding Implications and Impasse

The Aboriginal Legal Rights Movement, [ALRM] is an Aboriginal and Torres Strait Islander Legal Service [ATSILS] funded by the Aboriginal and Torres Islander Commission [ATSIC]. It provides for legal services to all Aboriginal communities, organisations and individuals throughout South Australia. It is also the Native Title representative body for South Australia.

For some years, ALRM has been seeking to negotiate an Enterprise Bargaining Agreement between the organisation and its employees. That Enterprise Bargaining Agreement makes specific provision for a Performance Management Program. Under that Performance Management Program [PMP], increments to salary increases for years of service and reclassification of employees within the wage structure would be linked to the PMP.

At the time of writing, ALRM is simply unable to negotiate an Enterprise Bargaining Agreement because it has been informed that its prime funding body, ATSIC, does not have the financial resources to fund it. This is extremely disappointing. Employees have not had an increase in real wages, beyond safety net adjustments for 10 years. All salaries at ALRM are well below comparative salary levels for equivalent legal aid organisations funded by the State of South Australia. There is no real prospect of implementing the PMP without an Enterprise Bargaining Agreement and ALRM has been informed that it simply cannot be funded. It will be necessary for ATSIC's funding allocations to be increased to allow for the implementation of Enterprise Bargaining Agreements for this important aspect of the road map to reconciliation to be implemented.

In the 1999-2000 Annual Report the Chairman of ATSIC said

> *"Practical Reconciliation amounts to little more than support for Indigenous programs -"business as usual" in other words. But business as usual is not enough...Indigenous programs are under resourced and not benchmarked".*

The Chairman has noted that benchmarking for funding ATSILS ought to be on a basis that allows for equivalence between ATSILS and state legal aid services in terms of salaries, wages and conditions. We leave aside for the moment cost effectiveness in service provision, though ATSILS tend to do more with less money, as the information which ALRM provided to a recent ATSIC review of legal aid services in South Australia shows.

ALRM is concerned that for ATSIC's purposes, benchmarking and comparisons are made, not on the basis of best practice or comparisons with equivalent state bodies - but with other underfunded ATSILS. In other words, by necessity of it's own circumstances ATSIC perpetuates the problem the Chairman so justly complained about.

ATSIC has sought to deal with this by describing itself as a "supplementary funder" of ATSILS. Yet this has been done with out consultation with the states or other potential sources of ATSILS funding - let alone the ATSILS themselves. There have been no bilateral agreements made with the State, although it is certainly arguable for ATSIC to say that the state of SA has at least a moral responsibility to fund Aboriginal peoples' representation in state courts - the vast majority of ALRM's work is in the criminal and civil [non Family Law] jurisdictions.

Meanwhile ALRM continues to function as an under resourced organization. It does so in state jurisdictions where it is unaware of the amount of, or use to which Commonwealth "indigenous money" is put in South Australia on the provision of services such as gaols, community corrections, police and courts. The State is not made accountable to the Aboriginal people of SA or to ATSIC in relation to the provision of these services, which are properly resourced and with which ALRM has to contend daily, in the provision of legal services to Aboriginal people.