# Submission of the
# Sex Discrimination Commissioner
# on behalf of the
# Human Rights and Equal Opportunity Commission

# to the
# Northern Territory Law Reform Committee

# Inquiry Into the Recognition of
# Aboriginal Customary Law in the Northern Territory

**May 2003**

**Sex Discrimination Commissioner**
**Human Rights and Equal Opportunity Commission**
**Level 8, Piccadilly Tower**
**133 Castlereagh Street**
**SYDNEY NSW 2000**

**Ph: 02 9284 9600**
**Fax: 02 9284 9789**

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## Introduction

### 1. Human Rights and Equal Opportunity Commission

The Human Rights and Equal Opportunity Commission (HREOC) administers the *Sex Discrimination Act 1984* (Cth) (the Act). The objects of the Act include giving effect to certain provisions of the Convention on the Elimination of all forms of Discrimination Against Women; eliminating, so far as is possible, sex based discrimination in certain defined areas of public life and promoting the principle of equality between men and women.

The Human Rights and Equal Opportunity Commission is concerned about the status and role of women in Australian society, and with ensuring that women and men are guaranteed the full enjoyment of their human rights. As such, this submission emphasises the distinct experience of Aboriginal women in relation to mainstream law and Aboriginal Customary Law.

An accompanying submission has been prepared by the Aboriginal and Torres Strait Islander Social Justice Commissioner and should be read in conjunction with this submission.

### 2. The context for the submission

HREOC is concerned that in the past Aboriginal women have not been sufficiently consulted or included in the development and implementation of laws, policies and programs that relate to Aboriginal communities. The emphasis of the submission is on Aboriginal women's experiences of mainstream law and Aboriginal Customary Law. In particular, emphasis has been placed on including the views Aboriginal women, as heard in HREOC's consultations.[1] This approach has been taken in order to assist the Committee with its stated focus on identifying community concerns and developing practical measures to address these concerns.

HREOC's consultations serve to highlight some of the distinct views that Aboriginal women have in relation to their communities, Aboriginal Customary Law and mainstream law. They emphasise the importance of including Aboriginal women's views within the current Inquiry from the outset.

The most significant issue in HREOC's consultations was Aboriginal women's experience of violence. HREOC considers that the failure of mainstream law and Aboriginal Customary Law to ensure women's safety and freedom from violence must be central to any discussion of the recognition of Aboriginal Customary Law. Aboriginal women's experience of violence infuses their dealings with many other areas of mainstream law and Aboriginal Customary Law. It also presents a barrier to Aboriginal women's access to other areas of law, both mainstream and Customary. Some of these other areas of law are discussed in this submission.

[1] See Introduction section 4 and Appendix A for details of the consultations.

## 3. Overview of the submission

The submission highlights women's experiences of mainstream and Aboriginal Customary Law and the key areas which are of concern for women in relation to the greater recognition of Aboriginal Customary Law. The submission focuses on Aboriginal women's lived experience of Aboriginal Customary Law. This information may assist the Committee in determining the strength of Aboriginal Customary Law and the capacity of this law to provide benefits to the Northern Territory.[2]

The third point of the Terms of Reference requires the Committee to make recommendations on the extent to which Aboriginal Customary Law can be recognised in the Northern Territory.[3] Specific recommendations have not been provided in terms of measures to achieve formal or informal recognition of Aboriginal Customary Law. However, the submission does provide a series of principles to inform the development of any proposal to recognise Aboriginal Customary Law.

The submission is divided into four sections.

*Part A: The human rights context for women*

Part A provides a brief overview of the human rights context for considering the recognition of Aboriginal Customary Law. Emphasis has been given to the United Nation's *Convention on the Elimination of All Forms of Discrimination Against Women* (CEDAW).

Human rights standards and relevant international developments are considered in more detail in the accompanying submission prepared by the Aboriginal and Torres Strait Islander Social Justice Commissioner.

*Part B: Aboriginal women and mainstream law*

Part B of the submission discusses the barriers that women, and in particular Aboriginal women, face in accessing and participating in the mainstream legal system in Australia. Identifying and acknowledging these barriers is important when evaluating the alternative of using Aboriginal Customary Law. This is relevant not only to highlight the need for changes to the mainstream legal system in order to improve Aboriginal women's access to justice and increase social harmony within Aboriginal communities. It also raises the questions of whether these problems represent a barrier for hearing and incorporating the views of Aboriginal women in progress towards recognising Aboriginal Customary Law, and whether a customary law approach would actually be a better means for addressing them.

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[2] Northern Territory Government "Terms of Reference" *Towards Mutual Benefit: An inquiry into Aboriginal Customary Law in the Northern Territory* http://www.nt.gov.au/justice/docs/lawmake/tmb_termsref.pdf.

[3] Northern Territory Government "Terms of Reference" *Towards Mutual Benefit: An inquiry into Aboriginal Customary Law in the Northern Territory* http://www.nt.gov.au/justice/docs/lawmake/tmb_termsref.pdf.

*Part C: Women and Aboriginal Customary Law*

Part C of the submission outlines concerns for Aboriginal women with past attempts at recognising Aboriginal Customary Law. In particular, this includes the need to acknowledge the distinctive position of women in Aboriginal societies, their role in Aboriginal Customary Law and the need to ensure that their views are heard.

The section then considers a number of areas where women's and girl's individual rights are often seen as clashing with Aboriginal Customary Law and considers the effectiveness of Aboriginal Customary Law in dealing with these issues. The issues addressed are family violence, sexual assault, child protection, promised marriages and traditional punishments.

*Part D: Principles for recognising Aboriginal Customary Law*

Part D sets out principles to inform the development of any proposal to recognise Aboriginal Customary Law. These principles emerged from HREOC's consultations. They provide a means for ensuring that gender is central to the development of any proposals. They are provided to assist the Committee in developing proposals for recognising Aboriginal Customary Law, including providing a series of next steps that the Northern Territory Government could take in acting on the Committee's final report.

## 4. HREOC's consultations for this submission

In April 2003, HREOC conducted a range of consultations and discussions in the Northern Territory as input to the preparation of this submission. Due to the short time frame for preparation of submissions, these consultations were necessarily limited.

The consultations[4] included:

- Discussions with members of the community of Angurugu on Groote Eylandt;
- a forum in Darwin of Indigenous women;
- meetings with government officials and service providers in the Indigenous policy field, particularly in the areas of law, family violence and women's issues;
- meetings with the co-Chairs of the Law Reform Committee's Inquiry; and
- meetings with ATSIC including with Commissioner Anderson and staff of the Territory Office and Yilli Rreung Regional Office.

This spread of consultations was chosen in order to hear a range of different views and experiences, and also to discuss the operation of existing services and programs in the Northern Territory.

[4] See Appendix A for a full list of consultations.

## Part A: The human rights context for women

### 1. Introduction

As a starting point to this Inquiry, the Northern Territory Government has stated that any recognition of Aboriginal Customary Law must be "consistent with universally recognised human rights and fundamental freedoms".[5] HREOC endorses this requirement as essential to any recognition of Aboriginal Customary Law.

Human rights standards and relevant international developments are considered in detail in the accompanying submission prepared by the Aboriginal and Torres Strait Islander Social Justice Commissioner. That information will not be repeated here. Rather, the purpose here is to highlight the key issues in terms of ensuring consistency between women's human rights and Indigenous peoples' rights, and in particular, measures to recognise Aboriginal Customary Law.

### 2. Aboriginal women's human rights

### 2.1 Women's rights

The principal human rights treaty in relation to women's rights is the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW).[6] The rights enshrined in CEDAW broadly cover all aspects of women's lives. These rights include political participation, health, education, employment, marriage, family relations, equality before the law and freedom from discrimination. The right to freedom from violence has been accepted as implicit in the right to freedom from discrimination since 1992.[7]

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[5] Northern Territory Government "Terms of Reference" *Towards Mutual Benefit: An inquiry into Aboriginal Customary Law in the Northern Territory* http://www.nt.gov.au/justice/docs/lawmake/tmb_termsref.pdf.

[6] *Convention on the Elimination of All Forms of Discrimination Against Women* GA Res 180 (XXIV 1970) 19 ILM 33 (1980). Individual human rights, to which women are entitled, are also established in the *Universal Declaration on Human Rights*; *International Covenant on Civil and Political Rights*; *International Covenant on Economic, Social and Cultural Rights*; *International Convention on the Elimination of All Forms of Racial Discrimination*; *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*; and *Convention on the Rights of the Child*. Australia is a party to each of these treaties. The *Beijing Platform for Action* and *Beijing+5 Outcome Document* are also key international documents in relation to women's individual human rights. *Beijing Platform for Action* adopted by the Fourth World Conference on Women 15 September 1995. *Beijing+5 Outcome Document* adopted by the twenty-third United Nations General Assembly special session "Women 2000: gender equality, development and peace for the twenty-first century" New York 5-9 June 2000.

[7] Domestic violence was fully acknowledged as a human rights issue only relatively recently. The *Convention on the Elimination of All Forms of Discrimination Against Women* does not explicitly refer to violence. It was only in 1992 that the Committee on the Elimination of Discrimination against Women confirmed that violence is a form of discrimination against women to which CEDAW applies. Committee on the Elimination of Discrimination Against Women *General Recommendation 19* (11th session 1992). In 1994, the United Nations *Declaration on the Elimination of Violence Against Women* recognised that domestic violence is central to women's subordination in society.

Australia is a party to CEDAW.[8] This represents an undertaking by the federal Government to ensure that women in Australia are able to enjoy the rights set out in CEDAW.

### 2.2 Indigenous peoples' rights

In addition to these rights, Aboriginal women, as Indigenous peoples, have the right to practise their culture. Article 27 of the International Covenant on Civil and Political Rights (ICCPR) establishes minority rights.

> 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.[9]

The Human Rights Committee has noted that this provision applies to Indigenous peoples, and that it creates a positive obligation on States to protect such cultures.[10] Similarly, the Committee on the Elimination of Racial Discrimination has called on parties to the Convention on the Elimination of All Forms of Racial Discrimination (CERD) to:

> Ensure that indigenous communities can exercise their rights to practise and revitalize their cultural traditions and customs and to preserve and to practise their languages.[11]

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[8] The *Convention on the Elimination of All Forms of Discrimination Against Women* was ratified by Australia on 28 August 1983 and is annexed to the *Sex Discrimination Act 1984* (Cth) as a Schedule. Australia has entered two reservations to the *Convention on the Elimination of All Forms of Discrimination Against Women* in respect of the maternity leave provisions (art11(2)(b)) and its general application in so far as it would require alteration of policies excluding women from performing combat duties.

[9] *International Covenant on Civil and Political Rights* GA Res 2200A (XXI 1966) Article 27. Note that the Australian Law Reform Commission's report provides comments on the implementation of Article 27 in relation to the recognition of Aboriginal Customary Law. Australian Law Reform Commission *The Recognition of Aboriginal Customary Laws* Report No 31 Volume 1 AGPS Canberra 1986, 130-132. The Government response also addresses the issue of conflict between human rights and the recognition of Aboriginal Customary Law. Office of Indigenous Affairs Department of the Prime Minister and Cabinet *Aboriginal Customary Laws: Report on Commonwealth implementation of the recommendations of the Australian Law Reform Commission* AGPS Canberra 1994, 7. See also International Labour Organization *Convention Concerning Indigenous and Tribal Peoples in Independent Countries* (ILO 169) International Labour Conference (76th 1989 Geneva Switzerland) and the *Draft Declaration on the Rights of Indigenous Peoples* Sub-Commission on Prevention of Discrimination and Protection of Minorities Commission on Human Rights 1994. These provisions establish the distinct and special rights of indigenous peoples, as a group right, and indigenous individuals. Australia is not a party to ILO 169. The Working Group on Indigenous Populations finalized a *Draft Declaration on the Rights of Indigenous Peoples* in 1994. This draft is currently being considered by the open-ended inter-sessional working group of the Commission on Human Rights. Neither of these provisions are binding on Australia.

[10] "With regard to the exercise of the cultural rights protected under article 27, the 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. … 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." Human Rights Committee *General Comment 23* para 7 in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies* UN Doc HRI/GEN/1/Rev5 2001.

[11] Committee on the Elimination of Racial Discrimination, *General Recommendation XXIII on the Rights of Indigenous Peoples* para 4(e), in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies* UN Doc HRI/GEN/1/Rev5 2001.

The recognition of Aboriginal Customary Law would be a means of implementing minority rights and therefore of providing the opportunity for Aboriginal women to enjoy these rights.

## 3. Potential conflict between women's individual human rights and Indigenous peoples' rights

The federal Government has an obligation to ensure both Aboriginal women's individual human rights and their minority rights as Indigenous peoples. In many instances, there will be no conflict between these sets of rights and they will both be able to operate in an interdependent and mutually reinforcing manner.

The difficulty arises where these rights appear to be in conflict. More specifically, one of the issues for this Inquiry is how to address situations where the recognition of Aboriginal Customary Law appears to conflict with the maintenance of women's individual human rights.

The potential for conflict between customary practices and women's rights has been recognised at the international level. For example, the Office of the High Commissioner for Human Rights has stated that:

> 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 (FGM); 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 preferences and its implications for the status of the girl child; female infanticide; early pregnancy; and dowry price.[12]

## 4. Reconciling apparent conflict

### 4.1 Introduction

HREOC considers that it is possible to reconcile conflict between women's individual human rights and Aboriginal Customary Law. As set out below, mainstream law should consider apparent conflicts between the systems, where required to do so, on a case by case basis. It is also important to recognise that custom and law can adapt to general social change, thus allowing resolution of apparent conflict. The potential for conflict should not be used by government as an excuse to avoid recognition of Aboriginal Customary Law.

[12] Office of the High Commissioner for Human Rights "Harmful traditional practices affecting the health of women and children" *Fact Sheet No.23* http://www.unhchr.ch/html/menu6/2/fs23.hrm. Similarly, the *Beijing Platform for Action* defines violence against women to include traditional practices that are harmful to women. *Beijing Platform for Action* adopted by the Fourth World Conference on Women 15 September 1995 para 113(a).

### 4.2 A case by case approach

The test established by the Human Rights Committee to determine whether the individual or minority right should prevail has been whether the restriction upon the right of the individual member of a minority could be shown to have a reasonable and objective justification and be necessary for the continued viability and welfare of the minority as a whole.[13]

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. Aboriginal Customary Law may be as diverse as Aboriginal communities and there can be disagreement as to what constitutes Aboriginal Customary Law. In these circumstances, a contextual approach to resolving apparent conflict that acknowledges the individual circumstances involved is more likely to resolve potential conflicts.

HREOC considers that it is preferable for judicial decision makers to be required to balance Aboriginal Customary Law issues with human rights standards, rather than imposing a legislative uniform ban or refusing to recognise certain practices. For example, as recommended in the accompanying submission by the Aboriginal and Torres Strait Islander Social Justice Commissioner, there could be a provision in the Northern Territory *Sentencing Act 1995* requiring magistrates to take account of Aboriginal Customary Law where relevant, and in accordance with human rights.

### 4.3 Allowing for culture to change

CEDAW requires States Parties to take measures to modify cultural practices in order to ensure that women's human rights are protected.

> 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 prejudices 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.[14]

This need not involve the immediate outlawing of such practices, but rather can involve measures to encourage cultural change by those people practising the particular culture. For example, in General Recommendation 14 the CEDAW Committee condemned the practice of female circumcision.[15] However, the CEDAW Committee recommended that educative measures be taken to combat the continued practice of female circumcision, rather than the immediate implementation of coercive laws to punish perpetrators. In doing so, the CEDAW Committee recognised that it necessarily takes time to eradicate abusive practices that have a cultural base.

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[13] Test used in *Lovelace* v *Canada* (Human Rights Committee 24/77) and *Kitok* v *Sweden* (Human Rights Committee 197/85). These cases are discussed in the accompanying submission by the Aboriginal and Torres Strait Islander Social Justice Commissioner.

[14] *Convention on the Elimination of All Forms of Discrimination Against Women* Article 5(a).

[15] Committee on the Elimination of Discrimination Against Women *General Recommendation 14* (9th session 1990).

The United Nations Development Fund for Women (UNIFEM) has emphasised the need to "… replace harmful customs with new practices that respond to current needs".[16]

> Advocates of gender equity must recognize and challenge the social acceptance and perpetuation of harmful traditional practices in all cultures. 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. As an African observer recently wrote, "Traditions are highly sacrosanct and untouchable where women are concerned. Still, I have seen traditions change during my lifetime. The change was so easy and smooth when the men took the initiative. Change, however, requires a lot of pain and hard work when it is initiated by women."
>
> 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 practiced.[17]

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.

## 5. Non-negotiable women's human rights

> The International Convention on the Elimination of All Forms of Discrimination Against Women proceeds from the assumption that all practices that harm women, no matter how deeply they are imbedded in culture, must be eradicated.[18]

In considering the relationship between protecting minority rights and the rights of women to equality, the Human Rights Committee has confirmed the importance of upholding women's rights.[19]

> Inequality in the enjoyment of rights by women throughout the world is deeply embedded in tradition, history and culture, including religious attitudes… States should ensure that

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[16] United National Development Fund for Women (UNIFEM) "Women, Culture and Traditional Practices" *CEDAW Advocacy Kit* gopher://gopher.undp.org:70/00/unifem/poli-eco/poli/whr/cedaw/cedawkit/wctp.

[17] United National Development Fund for Women (UNIFEM) "Women, Culture and Traditional Practices" *CEDAW Advocacy Kit* gopher://gopher.undp.org:70/00/unifem/poli-eco/poli/whr/cedaw/cedawkit/wctp.

[18] United National Development Fund for Women (UNIFEM) "Women, Culture and Traditional Practices" *CEDAW Advocacy Kit* gopher://gopher.undp.org:70/00/unifem/poli-eco/poli/whr/cedaw/cedawkit/wctp.

[19] The Human Rights Committee has also noted that "… none of the rights protected under Article 27 of the Covenant may be legitimately exercised in a manner or to an extent inconsistent with other provisions of the Covenant." Human Rights Committee *General Comment 23* para 8 in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies* UN Doc HRI/GEN/1/Rev5 2001.

> traditional, historical, religious or cultural attitudes are not used to justify violations of women's right to equality before the law and to equal enjoyment of all Covenant rights…[20]
>
> The rights which persons belonging to minorities enjoy under Article 27 of the Covenant in respect of their language, culture and religion 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.[21]

Similarly, International Labour Organization (ILO) Convention 169 and the Draft Declaration on the Rights of Indigenous Peoples, while not binding on Australia, establish the right for Indigenous peoples to retain their customs and traditions[22] and to deal with offences[23] subject to the requirement that this is not

> ... not incompatible with fundamental rights defined by the national legal system and with internationally recognised human rights.[24]

While all attempts should be made to reconcile women's individual human rights with the minority rights of Indigenous peoples to retain and enjoy their culture, HREOC considers that women's individual human rights must ultimately prevail. Particularly in the context of this Inquiry, HREOC considers that the recognition of Aboriginal Customary Law must also take active steps to ensure women's right to individual safety and freedom from violence.

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[20] Human Rights Committee *General Comment 28* para 5 in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies* UN Doc HRI/GEN/1/Rev5 2001.
[21] Human Rights Committee *General Comment 28* para 32 in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies* UN Doc HRI/GEN/1/Rev5 2001.
[22] International Labour Organization *Convention Concerning Indigenous and Tribal Peoples in Independent Countries* (ILO 169) Article 8 International Labour Conference (76th 1989 Geneva Switzerland).
[23] International Labour Organization *Convention Concerning Indigenous and Tribal Peoples in Independent Countries* (ILO 169) Article 9(1) International Labour Conference (76th 1989 Geneva Switzerland).
[24] International Labour Organization *Convention Concerning Indigenous and Tribal Peoples in Independent Countries* (ILO 169) Article 8 and 9(1) International Labour Conference (76th 1989 Geneva Switzerland).

## Part B: Aboriginal women and mainstream law

### 1. Introduction

A starting point for the recognition of Aboriginal Customary Law is a critical examination of the ways that the mainstream legal system has dealt with Aboriginal women's issues. Any measures to recognise Aboriginal Customary Law must take account of the structural barriers Aboriginal women face in accessing the mainstream legal system. For example, giving women a choice between mainstream and Aboriginal Customary Law on family violence offences is meaningless if mainstream law has already failed her. Giving a magistrate the decision of whether a case is appropriate for determination within the mainstream or Aboriginal community will work to the detriment of women if that magistrate is not aware of the vulnerabilities of mainstream law for Aboriginal women.

This section begins by discussing some of the barriers all women are likely to face in accessing and participating in the legal system in Australia, and proceeds to focus on some of the legal issues that Aboriginal women have identified as of particular concern to them.

HREOC's consultations with Aboriginal women in the Northern Territory focussed largely on the criminal justice system. Criminal law, including Aboriginal women's experiences as offenders and victims of crime, and the impact upon them and their communities of their men's contact with the criminal justice system, was at the forefront of concerns about the law during the consultations. In particular, the levels of violent crime suffered by Aboriginal women are so extreme, and the effects so profound, that other issues were inevitably secondary.[25]

The violence suffered by Aboriginal women affects their abilities to participate in other areas of community life, including in the practice of Aboriginal Customary Law. The limited time available for consultation to HREOC in the preparation of this submission led to the focus on this primary issue, which is discussed further below at Part C section 4.2 and 4.3. Nevertheless, the specific effects of other areas of law on Aboriginal women - particularly native title rights, land use rights, family law, the child protection system, intellectual property, anti-discrimination law and general civil litigation (specifically, in this case, focussing on the barriers to access for Aboriginal women) – ought to be the subject of consultation with Aboriginal women during this Inquiry, and should be dealt with in the context of the Principles discussed at Part D.

### 2. Experiences common to women before the law

### 2.1 A male norm

Despite the many improvements in the status of women in Australian society, women still do not enjoy full equality with men. Women remain economically worse off than men, earning less and possessing less wealth. Women are less well represented than

[25] See J Atkinson *Trauma Trails: Recreating songlines* Spinifex Melbourne 2002 for a discussion of the trauma of colonisation that leads to violence.

men in positions of power and decision making, including in senior legal ranks. So long as equality is not a reality for women, their ability to access the legal system and receive justice is curtailed.

While there are some areas of the law in which gender is not at issue, all too often an assumption of a male norm underlies many of the decisions made in the law. Maleness is seen as an invisible standard from which femaleness is a deviation and therefore suspect. As Graycar and Morgan have noted in discussing the hidden white male norm, "while women are women and blacks are blacks, white men are just 'regular people.'"[26]

The key areas where women are seen to deviate from the male norm relate to their sexuality and their reproductive roles.[27] These suspect characteristics of "femaleness" show up in many areas of the law and cut across jurisdictions. This is not only because gender biases remain apparent in many areas of law, including parts of the criminal law, family law, social security law, and employment law as well as many civil matters[28], but because gender is embedded in legal institutions and the legal process itself.

### 2.2 Man-made law

The most obvious way in which law remains institutionally male is the dominance of men as judges, legislators, senior lawyers and academics, as well as in the legal justice system. While women are present at law schools and graduating as lawyers in record numbers, they are not, and have never been, fully represented as the makers of law. In addition, the professions that administer the criminal justice system, such as police and prison staff, are overwhelmingly male dominated. Mainstream law, then, continues to reflect the interests and experiences of men.

> The law has developed largely without the insights, perceptions and understandings which women can bring.[29]

Historical inequalities are reproduced through the doctrine of *stare decisis*, or precedent, which produces common law based on previous decisions. There is the risk that unexamined sex bias and inequalities will be imported into decisions through precedent, as well as through residual biases in the attitudes of legal actors.[30] While the law may now be adapting to respond better to women, nevertheless, women have been excluded from the process of defining legal reality through their historical exclusion from the legal system.

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[26] R Graycar and J Morgan *The Hidden Gender of Law* Federation Press Sydney 2002, 60.
[27] Connell has proposed that "normative heterosexuality" is that form of masculinity which is valued in all aspects of social life and that there are three specific social structures which underpin our gender relations: the gender division of labour, the gender relations of power and sexuality. R Connell *Masculinities* Polity Oxford 1995.
[28] Including in the assessment of damages, the contributions of women by their unpaid labour and the time limitations in civil actions for assault or abuse that often do not recognise that a woman's powerless position may have prevented her from reporting or taking action on her experiences.
[29] Australian Law Reform Commission *Equality Before the Law* Discussion Paper 54 Commonwealth of Australia Sydney 1993, 68.
[30] See A Mason CJ "The role of a constitutional court in a federation" (1986) 16 *Federal Law Review* 1.

Unless law reformers consciously counteract the male bias in law, by taking active steps to make women the central consideration of reform, they replicate the structures that exclude women.

### 2.3 Gender in legal processes

Gender also shapes legal processes, such as the processes determining what aspects of experience can be spoken of in court. One of the mechanisms that tends to exclude women and other marginalised groups before the law is the notion of legal relevance. Experiences must be limited and distilled to become legal issues. Often this means excluding parts of an experience that, especially to victims of violence who are witnesses in prosecutions, represent the full lived experience that they are presenting to the court. While of course irrelevant information should be excluded to assure an accused a fair trial, it is arguable that the automatic exclusion of material purely because it is not legally relevant to the issue under scrutiny does not serve justice yet silences female victims of violence.

As one young witness in court proceedings wrote, the jury was discharged in the trial of her father for rape and incest in which she was the witness

> …because the Crown Prosecutor informed the jury about the haemorrhaging that I had suffered. The defence said that this would prejudice their client and the judge agreed, saying that such evidence was 'inflammatory' and 'emotional'. Well, being continually raped, bashed, humiliated, robbed and dragged off to a clinic to have an abortion as a young teenager and then to be raped and haemorrhage afterwards, and have both parents refuse to take you to a doctor because your father is the one responsible for the pregnancy in the first place – IS EMOTIONAL! And much worse than emotional. To this day I carry the physical consequence and the deep emotional and spiritual pain that haunts me even in my sleep.[31]

The law is yet to adequately recognise the harm caused to women and children who are involved in the legal system as victims of crime and to take all appropriate steps to minimise this harm.

The legal process often acts to further traumatise women rather than to deliver justice. Methods of taking evidence, which require women to repeat their story a number of times, often in different proceedings, means that women often see the process as an exacerbation of the violence rather than the delivery of justice.

### 2.4 Gender bias in legal doctrine

Legal gender bias may be manifested in an inability to recognise women's social disadvantage. For example, women's experiences of violence may still not be adequately taken into account by courts. The law of provocation developed from a male perspective and failed to account for the fact that women's experiences of violence differs from men's. For many years the law failed to take into account women's survival mechanism in remaining with an abusive partner in the face of the overwhelming threat of that violence should they attempt to leave. As one enlightened judge noted in 1990,

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[31] "Caroline" in *National Conference on Sexual Assault and the Law* Conference Proceedings Melbourne 28-30 November 1995, 63.

> If it strains credulity to imagine what the ordinary man would do in the position of a battered spouse, it is probably because men do not typically find themselves in that situation. Some women do, however. The definition of what is reasonable must be adapted to the circumstances which are, by and large, foreign to the world inhabited by the hypothetical 'reasonable man'.[32]

Still too often the characterisation of the reasonable person, as the test has become, remains a test of a reasonable man, and fails to take account of the experiences of women.

Another example of a law that is not shaped by women's experiences is the law relating to consent in sexual assault, which

> …generally assumes that a woman has consented to sex until she forcefully states otherwise or takes action which blatantly means no. This locks women into being sexually reactive rather than being proactive sexual agents.[33]

Laws that require such a reaction from women reinforce women's vulnerability to sexual assault in society. For example, a common assumption is that a woman somehow leaves herself open to sexual assault (and therefore at least to a degree consents to such an assault) if she is intoxicated or drug affected. On the other hand, many men attempt to excuse their unacceptable or illegal behaviour on the basis that they were similarly affected. Women's behaviour is curtailed and prescribed by such attitudes that are legally entrenched.

Justice Mary Gaudron has written that "equal justice is justice that is blind to differences that don't matter but is appropriately adapted to those that do".[34] The challenge for the law is to distinguish appropriately between the two.[35]

## 3. Specific issues for Aboriginal women before the law

### 3.1 Intersectionality

The 1994 *Equality Before the Law* report identified the multiple disadvantage of Aboriginal women in their access to and their interaction with the legal system.

> Of all the identifiable groups of women whose concerns have been presented to the Commission, Aboriginal and Torres Strait Islander women are least well served by the legal system. This fact is related to, but not dictated by, the extreme social and economic disadvantage experienced by many Aboriginal and Torres Strait Islander women.[36]

[32] *R v Lavallee* [1990] 1 SCR 852, 874.
[33] K Townsend *National Conference on Sexual Assault and the Law* Conference Proceedings Melbourne 28-30 November 1995, 6.
[34] Foreword to R Graycar and J Morgan *The Hidden Gender of Law* Federation Press Sydney 2002, vii.
[35] See the accompanying submission by the Aboriginal and Torres Strait Islander Social Justice Commissioner for a discussion of equality and special measures in the context of Indigenous rights.
[36] Australian Law Reform Commission *Equality Before the Law: Justice for women* Report No 69 Commonwealth of Australia Sydney 1994, 118.

In the same year, the report of the Western Australian *Chief Justice's Taskforce on Gender Bias* found that Aboriginal women's experiences of the law were affected by their race, their sex and their extreme socio-economic deprivation.[37]

Almost ten years later, little has changed for Aboriginal women participating in the legal system. HREOC's consultations with Aboriginal women in the Northern Territory have confirmed a number of ongoing specific concerns in women's interaction with the mainstream legal system. These are the role of police; restraining orders; access to the legal system; courts and incarceration issues.

### 3.2 Police

The police are the primary gatekeepers of the contact between Aboriginal women and the legal system. Overwhelmingly, Aboriginal women do not initiate their involvement with the law. Rather, they come into contact with the law as offenders or as victims of crime.[38]

There is a clear gender element in the kinds of offences which bring offenders to the notice of the criminal justice system. There is some international evidence indicating that police arrests reflect actual patterns of offending.[39] Nevertheless, police, as gatekeepers, play a role in defining offending behaviour. They bring their own gender perspectives to bear in identifying offenders and defining their offences.

> Aboriginal women comprise three-quarters of all women held in police custody and in the Northern Territory the proportion is close to 90 per cent of those detained. The police custody survey shows that women in general are detained in police custody proportionately more for offences of public disorder than are men, and that Indigenous women are particularly susceptible to being detained.[40]

As the primary point of contact for Indigenous Australians with the mainstream legal system, the ability of police to deal with Aboriginal offenders and victims of crime is seriously compromised. The lack of trust between Aboriginal people and police means that violence and sexual abuse within Aboriginal communities is vastly underreported. The Queensland Aboriginal and Torres Strait Islander Women's Taskforce on Violence succinctly identifies the disincentives to the report of child sexual abuse, for example, as the "…lack of assistance from police or fear of reprisals, or shame".[41]

The acceptance of violence in Aboriginal communities by police was noted consistently during HREOC's consultations. Police practice in some parts of the

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[37] Taskforce Sub-Committee on Aboriginal Women and the Law *Report of the Chief Justice's Taskforce on Gender Bias* Western Australia 1994 para 52.
[38] S Payne "Aboriginal women and the law" in P Easteal and S McKillop *Women and the Law* AIC Conference Proceedings No 16 Australian Institute of Criminology Canberra 1993, 69.
[39] S Walklate *Gender, Crime and Criminal Justice* Willan Publishing USA 2001, 4.
[40] C Cunneen *Conflict, Politics and Crime Aboriginal Communities and the Police* Allen & Unwin Sydney 2001, 165. See the discussion of over-policing of Aboriginal and Torres Strait Islander women in Aboriginal and Torres Strait Islander Social Justice Commissioner *Social Justice Report 2002* HREOC Sydney 2002, 145.
[41] Aboriginal and Torres Strait Islander Women's Task Force on Violence *Report of the Aboriginal and Torres Strait Islander Women's Task Force on Violence* Department of Aboriginal and Torres Strait Islander Policy and Development Queensland 1999, 101.

Northern Territory of "…pushing all the drunks into town camps…"[42] was seen to lead to violence, for example. On the other hand, early police intervention was also seen to be problematic.

> If police come they will make it worse for the family, but first thing the other family goes and talks with other family and they will sort it out cultural way or family way before police. If police already comes and gets that man then we can't do anything. It's better if we could settle that problem cultural way or family way.[43]

There is no doubt that policing in Aboriginal communities, particularly in remote communities, is perennially problematic. The policing of violence against Aboriginal women brings particular problems that need to be specifically addressed. One example of the difficulties faced by police and Aboriginal women in their dealings with each other arises in the handling of restraining orders.

*Restraining orders*

Women may often seek formal police assistance at the time violence occurs, in the form of criminal charges or applications for restraining orders, only later to reconcile with the violent man and seek the withdrawal of the charges or application. This may often seem inexplicable to police, but there is now greater understanding of the dynamics of family violence and a recognition that procedures need to be designed with these dynamics in mind.

One of these procedures is the "no drop" policy, where police will refuse to withdraw a restraining order even where the woman has reconciled with the violent man, leaving the court to deal with the matter. This transfers responsibility for the proceedings onto the legal system. Denying a woman the choice to withdraw a restraining order may actually protect her. Nevertheless, women may still suffer for their original notification of the police.

> When the men are in prison you see the women getting more and more scared as the release date gets closer.[44]

Restraining orders may also be ineffective.

> Restraining orders don't work in remote communities because logistically it is impossible to avoid each other[45]

> But no matter if she gets a restraining order, [in a] few weeks she'll be back with him.[46]

Despite limitations, restraining orders are a useful tool for police and Aboriginal women, even if only because "we have to do something".[47] More than this, however, a restraining order has the capacity to empower a woman in a certain situations.[48]

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[42] Alison Anderson, ATSIC Commissioner, 9 April 2003.
[43] Groote Eylandt man, 5 April 2003.
[44] Central Australian Aboriginal Family Legal Unit, 9 April 2003.
[45] Central Australian Aboriginal Family Legal Unit, 9 April 2003.
[46] Groote Eylandt woman, 6 April 2003.
[47] Central Australian Aboriginal Family Legal Unit, 9 April 2003.
[48] Darwin Forum, 8 April 2003.

### 3.3 Negotiating the legal system: Language, culture and legal aid

Aboriginal people, including women, often do not trust the mainstream legal system.[49] These experiences infect all the dealings of Aboriginal women with the mainstream legal system. In addition, there are a number of specific barriers that Aboriginal women face in negotiating that system.

*The "whiteness" of law*

The legal profession, including the magistracy and judiciary, continues to be predominantly peopled by white men. This affects both men and women, victims and offenders, who come into contact with the legal profession, but arguably disproportionately disadvantages Aboriginal women.

> The legal system is a boys club. White men only find out what Aboriginal men want.[50]
>
> Women need some sort of protection from violent men, however everywhere she turns it is male – the courts, the police.[51]

One opinion expressed during consultations with Aboriginal women for this submission was that "[a] lot of the cases when prosecuted are done by white men, who just don't have the same commitment."[52] Part of this perceived lack of commitment may arise from the difficulty of white legal actors in understanding Aboriginal culture. This restricts their ability to rigorously pursue the legal issues. Examples were cited of prosecutions failing to call expert witnesses in appropriate cases.[53]

Aboriginal women particularly face cultural difficulties in discussing issues of violence, particularly sexual assault and child sexual abuse, with men. The ignorance of Aboriginal society and Aboriginal Customary Law of many in the mainstream legal profession compounds problems. A common example of this is the belief that violence against women is sanctioned by Aboriginal Customary Law.[54]

However, there was also recognition of the degree of commitment to understanding Aboriginal culture and perspectives of individual legal actors in many cases.

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[49] See for example, Australian Law Reform Commission *Equality Before the Law: Justice for women* Report No 69 Commonwealth of Australia Sydney 1994, 119. "Aboriginal and Torres Strait Islander peoples know the Australia legal system as one which authorised the annexation of their land and the loss of their lifestyle and many of their ritual roles… Women have experienced their children being forcibly taken from them, have lost many of their women specific roles as custodians of culture, have been imprisoned and died in custody, grieved over relatives who have died in custody and have been subjected to violence perpetrated by non-Aboriginal and Aboriginal men, all with the express or apparent sanction of the law."

[50] Darwin Forum, 8 April 2003.

[51] Darwin Forum, 8 April 2003.

[52] Darwin Forum, 8 April 2003.

[53] Darwin Forum, 8 April 2003.

[54] See the discussion at Part C section 4.2. The Australian Law Reform Commission's *Equality Before the Law* Report also noted a lack of understanding of the separation of women's business and men's business, including a failure to recognise that some women's business must not be disclosed to men. It pointed out that this privileged Indigenous men's views within the legal system. Australian Law Reform Commission *Equality Before the Law: Justice for women* Report No 69 Commonwealth of Australia Sydney 1994, 122-123.

*Legal aid*

The legal aid system prioritises resources to defend criminal allegations, which are therefore predominantly channelled towards men. Women, as victims of violence, were perceived during consultations as often having difficulty in obtaining legal advice where the offender is an Aboriginal man. This places women at a disadvantage in accessing the legal system, both in relation to the criminal trial and in associated proceedings, such as subsequent compensation proceedings.[55]

*Language*

The ability to communicate across language and cultural barriers is a continuing problem for Aboriginal women seeking access to justice. The problems occur because many women are unable to understand the context and meaning of what they are told.

> She went to court and we had an interpreter but because of the wording she couldn't understand and kept turning to me.[56]

> [P]oor communication ensures that advice from legal professionals is misunderstood or just not heard, negating Yolngu hopes of a "fair go".[57]

Interpreters were seen to be necessary for the delivery of justice at all stages of the legal process, from initial contact with police through to the judicial processes.[58]

### 3.4 Courts

Problems experienced by Aboriginal women dealing with the legal process are heightened by the courtroom experience, whether in the capacity of offenders or victims of crime. They

> …may be shy of white people, easily intimidated by authority figures, and [have a] cultural background [which] is such that sexual matters are not referred to in mixed company let alone in the presence of court personnel.[59]

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[55] Darwin Forum, 8 April 2003.

[56] Darwin Forum, 8 April 2003. One suggestion to address this issue was to have more Aboriginal magistrates. "Especially these magistrates, they should have more Aboriginal people. They don't have to study eight or nine years, they have life experience. They don't need all that thick paper." Groote Eylandt woman, 6 April 2003.

[57] R Trudgen *Why Warriors Lie Down and Die* Aboriginal Resource and Development Services Darwin 2000, 69.

[58] Groote Eylandt woman, 5 April 2003. This may well be the case with English speaking Aboriginal people as well. Aboriginal people can "… learn the phonics of words and use them in the right place in a sentence, and most of the time in the correct context… But still they can have no understanding of what the words really mean" because of the vast conceptual differences between the two cultures. R Trudgen *Why Warriors Lie Down and Die* Aboriginal Resource and Development Services Darwin 2000, 94. This raises the issue of whether interpreters ought to be given a broader role of "communication facilitators" who are able to convey the cultural context and perspective: New South Wales Law Reform Commission *Sentencing: Aboriginal offenders* Report 96 NSWLRC Sydney 2000, 232.

[59] J Lloyd and N Rogers "Crossing the last frontier: Aboriginal women victims of rape in Central Australia", in P Easteal (ed) *Without Consent: Confronting adult sexual violence* Australian Institute of Criminology Canberra 1993, 153.

Court processes in particular are time limited and rushed.

> Magistrates have a good understanding of customary law issues (particularly those in the bush courts) however the reality of bush courts is that they don't have time to properly address issues (there are 80 matters that have to be gotten through in one day – which is 10 matters an hour). There is never time for witnesses to be called.[60]

On the other hand, Aboriginal women share the widespread concerns about the time taken by the mainstream legal system to deliver justice.

> The white system just grinds along – it deal with sexual assault too slowly. It should be dealt with more expeditiously.[61]

> The biggest problem with the white system is the time frame. Kids give their statements straight away only to have to recall it years later. There are also language issues with this. They should only have to give evidence once, on tape.[62]

The judiciary also was described during HREOC's consultations as often lacking awareness of Aboriginal cultural issues.

> Because women take a long time to answer in court, they often get cut off and this is interpreted as them saying 'no'.[63]

> Magistrates and police always deal with our colour. They have to learn our rules too. Like, if someone dies, the person in custody has to come back [to fulfil their ceremonial obligations]. That magistrate has to learn – maybe do a cross-cultural course or something.[64]

Ultimately, Aboriginal women share the mainstream concerns about the effects of the judicial processes upon women, particularly as victims of crime.

> A lot of women have gone into the system and been denied justice.[65]

> We've got to do our court system better so that we support our victims better.[66]

> Women won't speak up – we need to find those who will and support them.[67]

### 3.5 Incarceration

Aboriginal and Torres Strait Islander Women are incarcerated at a rate higher than any other group in Australia. In the decade since the Royal Commission into Aboriginal Deaths in Custody incarceration rates for women have increased at a more rapid rate than for men, and imprisonment rates for Aboriginal and Torres Strait Islander Women have increased more than for other women.[68]

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[60] Central Australian Aboriginal Family Legal Unit, 9 April 2003.
[61] Darwin Forum, 8 April 2003.
[62] Darwin Forum, 8 April 2003.
[63] Darwin Forum, 8 April 2003.
[64] Groote Eylandt woman, 6 April 2003.
[65] Darwin Forum, 8 April 2003.
[66] Darwin Forum, 8 April 2003.
[67] Darwin Forum, 8 April 2003.
[68] See "A statistical overview of Indigenous women in corrections" in Aboriginal and Torres Strait Islander Social Justice Commissioner *Social Justice Report 2002* HREOC Sydney 2002, 136-152.

Despite this, Aboriginal women remain "…invisible in the picture of criminal justice".[69] For example, none of the recommendations of the Report of the Royal Commission into Aboriginal Deaths in Custody related specifically to Aboriginal women offenders in the criminal justice system.[70]

The patterns of Aboriginal women's offending are different from Aboriginal men's, and often represent the direct results of poverty. Increases in incarceration rates for robbery offences have been the most dramatic of recent years; Indigenous women comprise nearly 80 per cent of public drunkenness offences; and fine defaulting remains a significant factor in incarceration rates.[71] The position of Aboriginal women as victims of violence is also relevant to their offending patterns and levels of incarceration.[72]

Particular attention should be given to the incarceration of Aboriginal women because of the crucial role Aboriginal women play in the family and community. This is relevant given the primary parenting roles of women and their role in negotiation and dispute settling roles in Aboriginal Customary Law.[73]

It is important that the relatively small absolute number of women in prison in Australia is not allowed to obscure the very particular issues around incarceration for Aboriginal women.

Women are also, of course, directly affected by the incarceration of Indigenous men and boys. Aboriginal women see the prison system itself as "…an aspect of the violence cycle which de-socialises, brutalises and de-skills their menfolk".[74] Men's incarceration was considered by women consulted by HREOC in the preparation of this submission to have extremely detrimental effects on the community.

> Now [he] goes away, has fun, comes back and is worse.[75]
>
> [Boys who commit crimes are] sent somewhere [that is, to prison] to eat good food and watch tv and leave someone else to look after his family and come back [with a swagger].[76]

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[69] New South Wales Law Reform Commission *Sentencing: Aboriginal offenders* Report 96 NSWLRC Sydney 2000, 176.
[70] Aboriginal and Torres Strait Islander Social Justice Commissioner *Social Justice Report 2002* HREOC Sydney 2002, 136.
[71] Aboriginal and Torres Strait Islander Social Justice Commissioner *Social Justice Report 2002* HREOC Sydney 2002, 143-145. The 1990 National Prison Census also indicated that Aboriginal women were incarcerated most frequently for offences relating to non-payment of fines, drunkenness and social security fraud. S Payne "Aboriginal women and the law" in P Easteal and S McKillop *Women and the Law* Report No 16 Australian Institute of Criminology Canberra 1991, 66. See also New South Wales Law Reform Commission *Sentencing: Aboriginal offenders* Report 96 NSWLRC Sydney 2000, 189.
[72] C Cunneen and K Kerley "Indigenous women and criminal justice: Some comments on the Australian experience" in *Perceptions of Justice: Issues in Indigenous community empowerment* 1995, 81, quoted in New South Wales Law Reform Commission *Sentencing: Aboriginal offenders* Report 96 NSWLRC Sydney 2000, 176.
[73] See Part C section 2.2 and 4.1.
[74] Harry Blagg *Crisis Intervention in Aboriginal Family Violence: Summary report* Partnerships Against Domestic Violence Crime Research Centre University of Western Australia 2000, 7.
[75] Groote Eylandt woman, 6 April 2003.
[76] Groote Eylandt woman, 6 April 2003.

> Have to get something for them and not send to prison. They need to stay here for their ceremonies. We can take them out bush.[77]

> We don't want them to end in gaol – [they] come out and do more. They should learn in their community about living here instead of about another culture. We should set up something here.[78]

## 4. Conclusion

The particular barriers discussed in this section may be common in many ways to those experienced by men, yet they tend to affect women in different ways and generally more harshly. They also affect the way in which Aboriginal women can participate in the process of recognition of Aboriginal Customary Law.

> Young women need a strong mind and determination to be able to live between the two systems [of white law and Aboriginal Customary Law].[79]

> The younger generation are struggling. They are caught between the city and traditional life.[80]

The experiences of Aboriginal women in dealing with Aboriginal Customary Law are dealt with in the following section.

[77] Groote Eylandt woman, 7 April 2003.
[78] Groote Eylandt woman, 7 April 2003.
[79] Central Australian Aboriginal Family Legal Unit, 9 April 2003.
[80] Darwin Forum, 8 April 2003.

## Part C: Women and Aboriginal Customary Law

### 1. Introduction

Women's issues are often the point at which Aboriginal Customary Law intersects with human rights. A key concern for this Inquiry must be how to best protect the human rights of Aboriginal women and girls. To assist the Committee, this section specifically addresses some of the points at which Aboriginal Customary Law and women's human rights intersect, such as family violence, sexual assault and marriage.

This section also deals with the need for mainstream institutions and processes, including this Inquiry, to make the views of Aboriginal women central when recognising Aboriginal Customary Law.

### 2. Status of Aboriginal women in mainstream society

### 2.1 Respecting Aboriginal women

> When we go to other places, we respect. That's what we do in Aboriginal communities: we respect.[81]

> I respect woman's law. Man comes from woman, so that's how I look at it. I didn't come from a tree. Woman raised me. Even if I have to go see President John Howard or Bob Hawke, if I tell that boss: why are we threatening women? Why [is there] violence with women, and yet we come out from woman?[82]

Over the past two hundred years, Aboriginal women have been denied status within mainstream Australian society, while their status within their own communities has diminished, resulting in disempowerment and marginalisation.[83] Over this time there has been a failure by mainstream Australian society to address the concerns of Aboriginal women. Aboriginal women have also sometimes been reluctant to emphasise gender issues, in order to focus on Aboriginal peoples' shared experiences of racism and colonisation.[84] However, Aboriginal women are often left out altogether under this approach.

> Aboriginal women have specific needs which differ from the needs of non-Aboriginal women and the needs of Aboriginal men... Too often the programs for women ignore the particular needs of Aboriginal women believing that the Aboriginal programs will pick them up. To date Aboriginal programs have not done this. [85]

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[81] Groote Eylandt woman, 7 April 2003.
[82] Groote Eylandt man, 5 April 2003.
[83] See, for example, New South Wales Law Reform Commission *Sentencing: Aboriginal offenders* Report 96 NSWLRC Sydney 2000, p183, L Behrendt "Consent in a (neo)colonial society: Aboriginal women as sexual and legal 'other'" (2000) 15(33) *Australian Feminist Studies* 353.
[84] Evidence to the Inquiry into Equal Opportunity and Equal Status for Women in Australia demonstrates this view. "Gender balance programs can be detrimental to our relationships. We are an oppressed people and we cannot further divide and separate ourselves." Evidence of Mary-Ann Bin-Sallik, then Head of Aboriginal Studies and Teacher Education Centre at the University of South Australia, to the House of Representatives Standing Committee on Legal and Consitutional Affairs *Half Way to Equal: Report of the inquiry into equal opportunity and equal status for women in Australia* AGPS Canberra 1992, 192.
[85] Evidence of Carol Thomas, then Secretary of the NSW Women's Aboriginal Corporation, to the House of Representatives Standing Committee on Legal and Consitutional Affairs *Half Way to Equal:*

Specifically because non-Aboriginal discussions of gender issues focus on white women and discussions of Aboriginal issues tend to focus on men, HREOC considers that it is important to make the distinct experience of Aboriginal women central to this Inquiry. Women who spoke to HREOC as part of this submission also emphasised this point.

> Women's issues have to be at the forefront.[86]

> Women's issues and customary law go hand in hand.[87]

In order to adequately consider the position of Aboriginal women in Aboriginal Customary Law, this Inquiry should pay particular attention to the historical and contemporary biases inherent in mainstream society, including the impact of past policies and practices on Aboriginal women.

### 2.2 Bias in mainstream society

The unique position of women in Aboriginal societies has often been misinterpreted and obscured, due to male bias in mainstream culture. This began with the earliest interactions with anthropologists, who assumed that men were the only source of authority and so recorded men's laws and practices.[88] As one Aboriginal woman put it, Aboriginal men "have been taught by non-Aboriginal men to consider themselves superior", while Aboriginal women have been told "it is the men who own the land, know the only sacred sites and rituals and make the decisions".[89]

This historical bias laid the foundation for an ongoing emphasis on the role of men, and a "feedback loop" in which male views are recognised and reflected back to communities by mainstream institutions while women's views are marginalised.

> [T]he white male bias of frontier society in central Australia is legendary. Liaison officers, administrators and community advisors are almost always male. The few women who work in these positions are too few to cope with the remaining 50% of the population whose hopes, fears, expectations and opinions remain unrecorded, refracted through male eyes or recorded by men who believe women are scarcely worth a footnote. What consultation occurs is male to male. Aboriginal men gain valuable experience. A vicious circle is established in which the male political role gains a footing and the women, who remain separate, become marginal in the new and emerging social order.[90]

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*Report of the inquiry into equal opportunity and equal status for women in Australia* AGPS Canberra 1992, 192.

[86] Darwin Forum, 8 April 2003.

[87] Darwin Forum, 8 April 2003.

[88] This was not unique to Australia, but also a common result of colonisation in other parts of the world, such as Africa. "Customary law was not written and was interpreted solely by males during the colonial era. Thus, the needs and opinions of females were completely ignored in the interpretation of custom … The customary law that evolved in the post-colonial era was, therefore, devoid of women's needs, greatly discriminatory against women, and often contrary to the practices of some ethnic groups." F Naa-adjeley Adjetey "Reclaiming the African woman's individuality: The struggle between women's reproductive autonomy and African society and culture (1995) 44 *American University Law Review* 1351 at 1365.

[89] F Gale quoted in J Scutt *Women and the Law: Commentary and materials* Law Book Company 1990, 22.

[90] D Bell "Consulting with women" in F Gale *We are Bosses Ourselves: The status and role of Aboriginal women today* Australian Institute of Aboriginal Studies Canberra 1983, 25. See also New

Women's role in Aboriginal Customary Law may also be obscured by apparently gender neutral policies, practices and structures. For example, Barbara Cummings argues that girls were a particular target of past assimilationist policies of removing Aboriginal children from their families, meaning that women's connection to their land is more likely to have been broken.[91] This has a continuing impact for such women, who find it harder to establish rights over their land and a position within their communities. Cummings also argues that the structure of land councils reflects women's broken connection with the land.

> In the absence of an independent women's council, the importance of women's direct relationship to land remains diminished. This occurs, in part, through the lack of an independent structural voice. More importantly, the absence of such a voice affects the contemporary structure of anthropological models. These models continue to suffer from the historical shortcomings of an anthropology based on an assessment of a culture based on male observation and interaction and discussion with men. Not surprisingly, the result of this process is a diminished status being given to women.[92]

## 3. Ensuring Aboriginal women's views are heard

### 3.1 Consulting Aboriginal women

The male bias in mainstream interactions with Aboriginal communities is exacerbated by a continuing failure to consult appropriately with Aboriginal women. Aboriginal women rarely speak freely with white women, let alone white men, yet consultations seldom allocate sufficient attention and resources to fully garner women's views. For example, in the Australian Law Reform Commission's reference on Aboriginal Customary Law, male field officers conducting consultations commented on their own failure to engage the views of Aboriginal women.[93] HREOC believes that this lack of consultation has serious ongoing consequences for the viability of any proposals to recognise Aboriginal Customary Law. To offset the historical and continuing failure to gather women's views on Aboriginal Customary Law, effective consultation with women is crucial.

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South Wales Law Reform Commission *Sentencing: Aboriginal offenders* Report 96 NSWLRC Sydney 2000, 183-186.

[91] B Cummings "Assimilation, gender and land in the Northern Territory after Kruger: Postcards from the 'factual substratum'" (1998) 14(3) *University of New South Wales Law Journal* accessed at www.austlii.edu.au/au/other/unswlj/forum/1998/vol14no3/cummings.html

[92] B Cummings "Assimilation, gender and land in the Northern Territory after Kruger: Postcards from the 'factual substratum'" (1998) 14(3) *University of New South Wales Law Journal* accessed at www.austlii.edu.au/au/other/unswlj/forum/1998/vol14no3/cummings.html

[93] D Gunter *Aboriginal Customary Laws, the Pitjantjatjara (Part of NT, SA & WA*) Field Trip No.1 Australian Law Reform Commission Sydney 1978, 26. See also another report prepared for the Central Australian Aboriginal Legal Aid Service as part of their input to the Australian Law Reform Commission's customary law reference, D Bell and P Ditton *Law: The old and the new: Aboriginal women in Central Australia speak out* Aboriginal History Canberra 1980, 5. "In the past women have rarely been consulted on matters concerning their life choices. Their attitudes and preferences on the basics of life – health, housing, education, community development – are neither known nor sought by those fact-finding missions which regularly visit Aboriginal communities in search of data on which to base programmes, policies and projected estimates." And see K Brown "Paper promises?" (1999) 24(5) *Alternative Law Journal* 221 at 223: "The colonial experience of consultation with indigenous groups invariably revolved around those in control of indigenous structures so that the version of customary law that evolved reflected their interest."

### 3.2 Women within Aboriginal communities

While mainstream institutions have failed to include Aboriginal women in their processes, many women also raised concerns with HREOC about women's views being heard within Aboriginal communities.

> Our law got no room for women.[94]

> They get away with [domestic violence] because the man's up here and the woman's down there.[95]

> If you're a woman you shut your mouth and don't say anything [about domestic violence].[96]

Some women with whom HREOC consulted for this submission saw women as unable to enjoy a place in mainstream or Aboriginal Customary Law:

> Women are falling down the cracks where the white systems and customary law meet.[97]

The past and continuing disempowerment of Aboriginal women within mainstream society, and often in their own communities, means that any measures taken to recognise Aboriginal Customary Law must pay particular attention to hearing what Aboriginal women have to say on the issue.

### 3.3 Aboriginal women as leaders

Some Aboriginal women who spoke to HREOC believed that communities need more women leaders.

> In some communities women hold power, but very few. These women get burnt out because they have very little support.[98]

> The majority of CDEP positions are allocated to men. There are no women CDEP supervisors. No women mentors sitting alongside men. No equity.[99]

It is crucial, where there are strong women leaders, that they are involved in consultations on Aboriginal Customary Law and given adequate support in any new measures introduced. The "default" position for government work is still to make men central to consultations and negotiations. Given their history of subordination in mainstream society, it also cannot be assumed that women will automatically be involved in decision making within their communities.[100]

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[94] Alison Anderson, ATSIC Commissioner, 9 April 2003.
[95] Darwin Forum, 8 April 2003.
[96] Darwin Forum, 8 April 2003. See also P Andrews "Violence against Aboriginal women in Australia: Possibilities for redress within the international human rights framework" (1997) 60 *Albany Law Review* 917 at 928: "[T]here appears to be a general consensus that a combination of colonial attitudes towards all Australian women, patriarchal values prevalent in Australian society, and the differing sex roles and status in indigenous society have resulted in the subordinate status of Aboriginal women."
[97] Darwin Forum, 8 April 2003.
[98] Darwin Forum, 8 April 2003.
[99] Darwin Forum, 8 April 2003.
[100] The United Nations has written, in an international context, that "Indigenous women must be involved in [projects on indigenous customary knowledge] as they are predominantly the custodians of that knowledge and often the most unlikely to benefit from the project and/or any benefit sharing."

## 4. Defining Aboriginal Customary Law to include women

### 4.1 Introduction

> Aboriginal Law was/is the maintenance and healing of relationships and was/is a constant process of negotiation, mediation and conciliation in managing and resolving the conflicts natural to all human associations. Aboriginal women were and are the custodians of this aspect of Law. They ensure protocols are maintained, that conflicts are not allowed to fester and grow, and that incorrect behaviour is dealt with in appropriate ways.[101]

Given the historical and continuing failure of mainstream institutions to see the importance of women in their communities and as custodians of law, it is particularly important that the Inquiry start with a broad definition of Aboriginal Customary Law. Aboriginal Customary Law should not be understood only in terms of enforcement, which emphasises the role of men, but must also include the crucial role women play in upholding and maintaining law. A narrow definition will leave women out.

Women's role in Aboriginal Customary Law encompasses all aspects of life. However, there are some specific areas of mainstream law where women's and girl's rights and needs are often seen as clashing with Aboriginal Customary Law. These are: family violence, sexual assault, child protection, promised marriages and traditional punishments. They are each discussed below.

### 4.2 Family violence

Violence, and particularly male violence against women family members, is a problem throughout Australian society.[102] In Aboriginal communities the extent of violence between community and family members is exacerbated by a range of factors, enumerated in various reports, such as substance abuse, generational abuse, mental health issues, poverty and unemployment.[103] The devastating effect of colonisation on Indigenous populations in Australia, as around the world, has been both a cause and an intensification of these social problems.

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United Nations Development Programme *UNDP and Indigenous Peoples: A Policy of Engagement* UNDP New York 2001, 21.

[101] J Atkinson "A nation is not conquered" (1996) 3 (80) *Indigenous Law Bulletin* accessed at www.law.unsw.edu.au/centres/ilc/ilb/vol3/may/atkinson.html.

[102] "Domestic violence is a society problem. You are going to have it as a much worse situation in Aboriginal communities. It doesn't just belong to Aboriginal people, it's all of society." Darwin Forum, 8 April 2003.

[103] See, for example, Aboriginal Issues Unit of the Northern Territory "Too much sorry business" in Royal Commission into Aboriginal Deaths in Custody *National Report* AGPS Canberra 1991 Volume 5 Appendix D(i); A Bolger *Aboriginal Women and Violence* Australian National University North Australia Research Unit Darwin 1991; Aboriginal and Torres Strait Islander Women's Task Force on Violence *Report of the Aboriginal and Torres Strait Islander Women's Task Force on Violence* State of Queensland 1999; S Gordon et al *Putting the Picture Together: Inquiry into response by government agencies to complaints of family violence and child abuse in Aboriginal communities* State Law Publisher Perth 2002. Judy Atkinson has written that "[i]t is time to ask, with all these reports, with all this activity, what progress has been made over the last six years." J Atkinson "A nation is not conquered" (1996) 3 (80) *Indigenous Law Bulletin* accessed at www.law.unsw.edu.au/centres/ilc/ilb/vol3/may/atkinson.html.

*The extent of the problem*

The extent and seriousness of violence against Aboriginal women and children has been well established and is incontrovertible. Although Aboriginal family violence is recognised as a problem by Australian society it is not given the attention it desperately needs. The Queensland Aboriginal and Torres Strait Islander Women's Task Force on Violence has stated that the violence in Aboriginal communities is "immeasurable."

> Indigenous women's groups, concerned about their disintegrating world, have been calling for assistance for more than a decade. While their circumstances may have been recognised, their pleas have not been met and in some cases, deliberately ignored. At times, Government representatives appeared to regard violence as a normal aspect of Indigenous life, like the high rate of alcohol consumption. Interventions were dismissed as politically and culturally intrusive in the newly acquired autonomy of Indigenous Communities. Moreover, the 'Aboriginal cause' attracted little interest or sympathy in the broader Australian community… The violence being witnessed can only be described as immeasurable and Communities, pushed to the limit, are imploding under the strain.[104]

Many Aboriginal women spoke to HREOC about family violence as both endemic and ignored.

> Many women just endure immense amounts of suffering.[105]
>
> I have never seen an Aboriginal community with a low rate of domestic violence.[106]
>
> Quite often the five beds in intensive care in the Alice Springs hospital are taken up by Aboriginal women who have been bashed.[107]
>
> There is no media on the desperate plight of Aboriginal women and their situation. It is racism. There is never any national outcry even though women in the Northern Territory are 33 times more likely to be killed.[108]

During consultations, the Central Australian Aboriginal Family Legal Unit summed up the problem, saying that "[i]t is hard to come to any conclusion other than there is a lot of violence in communities and a lack of protection for women."[109]

*Family violence is not Aboriginal Customary Law and should not be tolerated*

It is very clear that bashing women and children, raping them or otherwise assaulting them, are not traditional Aboriginal customs. Audrey Bolger has defined traditional violence as follows.

> By traditional violence is meant the punishments for transgressions which were part of the means of social control in Aboriginal society and were meted out to both male and female offenders. Such physical punishments, which could involve spearing, beating or even death, were not between individuals but were the responsibility of whole communities or relevant

[104] Aboriginal and Torres Strait Islander Women's Task Force on Violence *Report of the Aboriginal and Torres Strait Islander Women's Task Force on Violence* Department of Aboriginal and Torres Strait Islander Policy and Development Queensland 1999, x.
[105] Central Australian Aboriginal Family Legal Unit, 9 April 2003.
[106] Darwin Forum, 8 April 2003.
[107] Darwin Forum, 8 April 2003.
[108] Darwin Forum, 8 April 2003.
[109] Central Australian Aboriginal Family Legal Unit, 9 April 2003.

> groups in those communities, both women and men. There were recognised punishments for specific transgressions and they were carried out by particular people under community control.[110]

Bolger went on to make the well-known distinction between traditional violence and "bullshit" traditional violence, the latter being an assault on a woman, often by a drunken man, which he then attempts to justify as a traditional right. This argument is still commonly made by defence lawyers, even those from representative Aboriginal legal services, in order to minimise punishment for the offending men. During consultations women spoke of these arguments, and the lawyers who make them, with disgust.

Aboriginal women who spoke to HREOC argued strongly that domestic or family violence is totally unacceptable to them and is not part of traditional law.

> I will not tolerate domestic violence in any form.[111]

> Domestic violence isn't a part of our culture and those men who acknowledge that have no support.[112]

> It's not Aboriginal culture to bash any Aboriginal woman or child.[113]

> [Men] use tradition as a shield and they hide behind it.[114]

Women on Groote Eylandt also told HREOC that family violence was not acceptable in their traditional law.

> If a man belt up a woman in those days his grandfather used to talk to him and he would get a spear. That man used to listen to his Elders and go by law and custom. Even women. He would listen to his grandmother.[115]

*How is Aboriginal Customary Law dealing with the problem of family violence?*

Traditional Aboriginal Customary Law did not necessarily develop effective responses to family violence of the magnitude that has developed in recent times. As a result, some communities are responding to family violence in a variety of ways, which may or may not be described as Aboriginal Customary Law.

On Groote Eylandt, HREOC officers spoke to women and men about responses to family violence. The community response to family violence can be summarised as a combination of traditional law, individual actions and recourse to white law. The following is a description of the varied responses to family violence situations.

> [There] are women who feel scared – go to police or safer place; family drop at police; go to shelter on mainland. Some women can stand up; others afraid. When stand up, fight back, man sometimes stop because he knows she'll fight back. [She gets] stick to fight off man with spear. Sometimes [we] encourage her to stand up to him and talk back, fight back so he can't

[110] A Bolger *Aboriginal Women and Violence* Australian National University North Australia Research Unit Darwin 1991, p49.
[111] Darwin Forum, 8 April 2003.
[112] Darwin Forum, 8 April 2003.
[113] Darwin Forum, 8 April 2003.
[114] Darwin Forum, 8 April 2003.
[115] Groote Eylandt woman, 6 April 2003.

> keep doing it. Sometimes she goes away to shelter and takes kids for 3-4 months. Then he begins to realise he's lost his kids – makes promise to Elders that will behave. Then people follow up to check he's keeping his promise.[116]

Women from the Groote Eylandt community told HREOC that a common response, both now and in the past, to violent men is to have a respected person or family member speak to the offender about their behaviour to convince them to stop. In the past, Elders would speak to offenders and it would have an effect. Now, the results are less certain.

Sometimes this approach is successful.

> Her daughter's husband used to bash her [daughter]. When [this woman] went there, [her daughter was] bashed. [One day, her son-in-law said] "I promising you I won't ever lay my hand on your daughter because we got three kids and I don't want them to see their mother like this." [Woman] talking to him helped stop this. Now he hasn't hurt her.[117]

At other times, speaking to men does not work.

> Some men different, won't listen to women: "I don't want to hear you". [Women] say "alright, but just giving you some information".[118]

Some men talked about taking action against other men, as a community or family matter.

> At the moment I am working [as a peacemaker] in my inner circle – just my sons, my nephews, adopted son and my sister's nephew. Because they got family now and I don't want them to argue with each other as a husband and wife. If they fight I'm gonna settle them. If they don't, I will go with weapon. That's what I did with my two sons because they were beating their wife. I got nulla nulla and beat [my son] up and told him – there is no more, I don't want to see you beating your wife. Just to show him that I got feeling for the woman because they got children together. So I told him next time you're gonna get spear through your body.[119]

Another man told HREOC that

> … if a woman gets beat up in her home, when he's drunk, people go direct to [the Community Legal Worker]. If the man is violent, I step in, I talk to him. Most of the men listen to me because I've been doing that job … for a long time. Sometimes I flog him. That's how they settle. [It's] better than getting police.[120]

*Should family violence be dealt with by Aboriginal Customary Law?*

A small number of Aboriginal women whom HREOC spoke to in Darwin believed that Aboriginal Customary Law should deal with family violence, along with other behaviour that is illegal in mainstream law.

> If you are living in a traditional community then the community should deal with it.[121]

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[116] Groote Eylandt woman, 5 April 2003.
[117] Groote Eylandt woman, 5 April 2003.
[118] Groote Eylandt woman, 5 April 2003.
[119] Groote Eylandt man, 5 April 2003.
[120] Groote Eylandt man, 5 April 2003.
[121] Darwin Forum, 8 April 2003.

> Men should be punished the tribal way.[122]

However, serious problems or qualifications were also raised. Some of these involved doubts about the capacity of Aboriginal Customary Law to deal with issues of violence against women, particularly given women's reticence to speak out about violence.

> Women are generally afraid to challenge traditional systems. Most wouldn't feel comfortable asking a woman if she'd like something done about it.[123]

> There is not enough consistency in traditional responses to leave it to traditional responses to deal with domestic violence.[124]

> Sometimes the traditional punishment doesn't fit the crime. That is, one day they may get hit, the next day just growled at.[125]

Others thought that traditional punishments were not an appropriate response to violence.

> I object to the 'eye for an eye' punishment as it reinforces the violence. That is, he bashes her, they bash him.[126]

Some women also pointed out the difficulties for women of reporting family violence in communities where power and law revolve around kinship. "Leaving it the community" said one woman, "depends on the community."[127]

> [Women] have to have a choice [between customary and mainstream law] because some families are stronger than others. There may be a power imbalance between families.[128]

However, in consultations women also made it clear that that it is essential to have community involvement in any measures to address family violence.[129]

*A place for mainstream law in addressing family violence*

Given the extent of the problem of family violence and the concerns that Aboriginal Customary Law approaches do not address family violence, the majority of men and women who spoke to HREOC for this submission believed that mainstream law should play a part in addressing domestic violence.

Women consulted by HREOC on Groote Eylandt thought that it is appropriate to involve the police or courts when a traditional approach of speaking to the violent man does not help. In a specific case of a local man who had a history of abusing his wife and was refusing to let her leave their home, women made the following comments.

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[122] Darwin Forum, 8 April 2003.
[123] Darwin Forum, 8 April 2003.
[124] Darwin Forum, 8 April 2003.
[125] Darwin Forum, 8 April 2003.
[126] Darwin Forum, 8 April 2003.
[127] Darwin Forum, 8 April 2003.
[128] Darwin Forum, 8 April 2003.
[129] Darwin Forum, 8 April 2003.

> His father talk to him, but he's not listening.[130]
>
> He should go back to jail. She was free while he was away. Not locked in house.[131]
>
> We talk to him but he don't understand so we hand him over to white man's law.[132]

One man also said that he thought Aboriginal Customary Law needed to adapt to address the current levels of violence against women.

> We should adjust the law to white law. Women get more belting and hardship than men. Men drink in these days, take drugs, take it out on women. [We] need to adjust the law. White man's law is better now. Young women can be safe.[133]

Most women wanted stronger responses to domestic violence, with mainstream law taking at the very least a "safety net" role in protecting women and children. Some women did have serious doubts about the capacity of the mainstream legal system to deal with issues of violence effectively,[134] and this is likely to be exacerbated by the barriers that women face in dealing with the mainstream legal system.[135] In considering ways of addressing family violence in Aboriginal communities regard should be given to the discussion of capacity building[136] and the principles outlined below.[137]

### 4.3 Sexual assault

Sexual assault remains a taboo subject in many Aboriginal communities. Women (and men) will not necessarily speak out about sexual assault.

> Our men don't talk about it. Our women don't talk about it. And it is our kids who suffer from it.[138]
>
> It is always hard to prove a case if you don't have evidence and witnesses and people won't get up and talk about things where there are cultural reasons.[139]
>
> People won't report it because they are frightened for the families.[140]

Women again emphasised to HREOC that "[i]t's not the law; it has never been the law to rape."[141]

> Traditionally there has been severe punishment for sexual assault, like flogging.[142]

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[130] Groote Eylandt woman, 5 April 2003.
[131] Groote Eylandt woman, 5 April 2003.
[132] Groote Eylandt woman, 5 April 2003.
[133] Groote Eylandt man, 5 April 2003.
[134] See the discussion at Part C section 4.3.
[135] See the discussion at Part B.
[136] See the accompanying submission by the Aboriginal and Torres Strait Islander Social Justice Commissioner.
[137] See Part D.
[138] Darwin Forum, 8 April 2003.
[139] Darwin Forum, 8 April 2003.
[140] Darwin Forum, 8 April 2003.
[141] Darwin Forum, 8 April 2003.
[142] Darwin Forum, 8 April 2003.

> If I run away with a 10 or 13 year old girl and she's not my promise, her father or uncle will come with spear. For sexual assault, they kill.[143]

Most women were critical of current Aboriginal Customary Law responses to sexual assault.

> [C]ustomary law shouldn't be used when there has been a rape, there is nothing that gives women a role in customary law.[144]

> The traditional system deals with sexual assault badly.[145]

> I can't really see a community solution.[146]

However, women also pointed out the flaws in mainstream responses to sexual assault. They argued that encouraging women to speak out about sexual assault often left them subject to painful and protracted legal proceedings, without remedy or with a family member temporarily sent away to gaol.

> The white system just grinds along – it deals with sexual assault too slowly. It should be dealt with more expeditiously.[147]

> Why should we say anything [about sexual assault]? No one does anything. It fails in court and then the community is left to deal with it.[148]

Both service providers and individual women believed that there needs to be more community education about sexual assault.

> I would like to see more education out there to say that this is wrong, this is not on, like they did with domestic violence.[149]

Women wanted to retain access to the mainstream legal system for sexual assault. They wanted sexual assault to be "non-negotiable" as an offence. One suggestion was that recognition of Aboriginal Customary Law could have "exceptions" for sexual assault and other defined offences where Aboriginal Customary Law would not have precedence. This is based on the *Major Crimes Act*[150], a statute giving federal courts in the United States jurisdiction over fourteen major crimes committed by Indigenous Americans on their own territory.

Lorraine Braham MLA, Member for Braitling, has presented a Private Member's Bill suggesting changes to the Northern Territory *Sentencing Act 1995*. Her proposal is for Aboriginal Customary Law to be removed as a relevant or mitigating factor in

[143] Groote Eylandt man, 5 April 2003.
[144] Alison Anderson, ATSIC Commissioner, 9 April 2003.
[145] Darwin Forum, 8 April 2003.
[146] Darwin Forum, 8 April 2003.
[147] Darwin Forum, 8 April 2003.
[148] Darwin Forum, 8 April 2003. See also Part B section 3.
[149] Darwin Forum, 8 April 2003.
[150] *Major Crimes Act* 18 U.S.C. § 1153 (1885).

sentencing in cases of sexual offences against minors.[151] HREOC did not discuss this Bill with Aboriginal women during our consultations in the Northern Territory.

### 4.4 Children's issues

Issues were also raised in consultations that specifically related to children. These included child protection issues, with women concerned about sexual assault and abuse of both boy and girl children. Several women made criticisms of mainstream legal dealings with children, such as the protracted nature of legal proceedings and the difficulties in expecting young Aboriginal children to give evidence over several years in a system and language that is alien to them.

Many people thought that the strengthening of Aboriginal Customary Law would benefit children by strengthening their sense of themselves as part of a community and distinct culture.[152]

More general issues included the inherent tension in raising children in two cultures that are not in harmony with each other.[153]

### 4.5 Promised marriages

In the HREOC consultations there was some support for traditional marriage arrangements made in accordance with individual human rights of the parties.

> If traditional marriages are being practised in the community and the girls human rights are not being abused then its good.[154]

> It can work – I know of situations where a boy and girl were promised to each other and they stay at each other's places during school holidays.[155]

Some women pointed out that promised marriages are quite rare now. In many cases, "promise" arrangements are more symbolic than real.

> No one is promised to anyone these days, they just find friends![156]

> In my partner's community, people laugh about someone being their "promise" even though they are married to other people. I don't know of anyone who has been forced to marry their promise.[157]

Women felt that the media sensationalised the issue, making it more difficult for communities to resolve. However, women and girls living outside traditional communities were less supportive of traditional arrangements, and pointed out that

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[151] Lorraine Braham MLA, 10 April 2003. Ms Braham also indicated that if the Bill is passed she would be interested in having the same removal in all cases of sexual assault and other situations such as domestic violence.
[152] Groote Eylandt woman, 6 April 2003.
[153] For example, Alison Anderson, ATSIC Commissioner, 9 April 2003: "Using customary law as a benchmark sets a different standard for Aboriginal kids."
[154] Darwin Forum, 8 April 2003.
[155] Darwin Forum, 8 April 2003.
[156] Groote Eylandt woman, 6 April 2003.
[157] Darwin Forum, 8 April 2003.

many young people want to choose their marriage partner, and are "caught between the city and traditional life."[158]

> Because of the stolen generation I don't have a tie with traditional law however I find the idea of traditional marriages scary as it raises issues of sexual abuse of young people – something which there is already high incidence of. A man should only be able to take his promise when she is above a certain age.[159]

Women also pointed out girls' lack of power in relation to Aboriginal Customary Law on promised marriages. Girls do not have the authority to comment on traditional law, or may not know their laws in full as they learn about them as they grow up.

> No one supports the young girl in arranged marriages. That is, in the talking, no one asks her what she wants.[160]

There were serious problems with traditional marriages where they were abused or went wrong. Then, women pointed out that it is difficult to intervene.[161]

> [A woman] didn't agree to her husband taking a second wife, so her husband beat her everyday until she agreed. They lived in a traditional remote community. No one could talk to him because he was considered a mad man.[162]

One suggestion was that while traditional marriages in principle could be supported, where a girl was opposed to the marriage or there were problems of violence, ways needed to be found to support the girl without undermining all such marriages. For example, the man could be given gifts as compensation in place of the betrothed, or the promised marriage could be symbolic rather than real.

> There is always something her family can do to stop marriage. There is a balance – need to find out cultural information. Women won't speak up – we need to find those who will and support them.[163]

Making promised marriages subject to human rights principles does mean that girls must give free and informed consent to the marriage, and further, that they cannot be required to have sex with their husband if they do not consent.[164] It also means that if marriages are taking place without that consent from the parties or if rapes are taking place within these or any other kind of marriage, there is an obligation on governments to take active measures to prevent them.

Promised marriage arrangements are complex and vary between communities. Mainstream society relies heavily on evidence from each community in understanding these arrangements. However, there are also differences in the way that promised

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[158] Darwin Forum, 8 April 2003.
[159] Darwin Forum, 8 April 2003.
[160] Darwin Forum, 8 April 2003.
[161] "Intervention in arranged marriages is difficult. For example, there was a situation where a younger woman was promised to an older man. She didn't want it so we helped her leave town, but she was away from her community and turned to drink": Darwin forum, 8 April 2003.
[162] Darwin Forum, 8 April 2003.
[163] Darwin Forum, 8 April 2003.
[164] See the discussion of women's and girls' human rights at Part A.

marriages are understood by women and men within communities.[165] Evidence used in the mainstream legal system has to take into account that there may be more than one perspective, or even practice, of promised marriages within a community and should not rely only on evidence given by men.

Decisions on recognising customary marriage need to be made without sensationalism. However, HREOC would also argue that they need to be made in accordance with the human rights of the girl child to be safe and protected from violence. Particular attention needs to be given to the vulnerability of young girls in communities where sexual assault is not yet adequately addressed.

### 4.6 Traditional punishments

Discussion on Aboriginal Customary Law in mainstream fora often focuses on traditional punishments, particularly "payback", to the exclusion of other issues. However, there are two issues that were specifically raised in consultations on women and traditional punishments and are relevant to the discussion here.

*Payback*

While women in the Darwin forum generally supported traditional punishments for men living in traditional communities they were very hesitant about saying whether there were circumstances where women should be flogged as punishment. The general sense was that while no-one wanted to speak for women living in traditional communities, Aboriginal women are worried about women being subjected to violence in any form, particularly given the degree of violence already being experienced by women.

*Cursing*

There was also concern in consultations that traditional punishments are being used to control women, in particular to prevent them accessing help when they are beaten. On Groote Eylandt, cursing played a significant role in the lives of the community, particularly women. Women were frightened of men cursing them or their houses. One woman said:

> We all live in Fear with a capital "F". We're frightened of this business: cursing.

Women who try to escape violence can be "punished" with a curse.

> It wouldn't be good to have a woman's shelter here. Men wouldn't care – they would drive a car straight in or curse it. If I cursed that area, all the woman would come out.[166]

[165] Annette Hamilton found significant differences between the descriptions of betrothals by men and women in Northern Arnhem Land, and concluded: "It is possible then to see Aboriginal bestowal arrangements not as a fixed system defined by the operation of arbitrary rules, but as a number of potential models not all of which are used by the population equally." A Hamilton "The role of women in Aboriginal marriage arrangements" in F Gale *Woman's Role in Aboriginal Society* Australian Institute of Aboriginal Studies Canberra 1978, 34.
[166] Groote Eylandt man, 5 April 2003.

> We have a case involving a woman in her mid thirties still living in fear. Her husband is a killer. She says it's tradition. She can't escape. Even when he is in gaol she is forced to go and live with her in-laws. She left him to go live with her daughter but he had a heart attack so she had to go back or she'd be flogged. She was scared that if she didn't she'd be sung.[167]

In traditional communities, there is not always a question of whether traditional punishments should or should not be permitted. On Groote Eylandt, a woman who was asked how she felt about living under the threat of curses said:

> There's no way of getting out. It's the law! You have to find a way to respect it.[168]

**5. Role of men**

The women and men consulted by HREOC all agreed that men had an important role in supporting women on Aboriginal Customary Law issues. Women emphasised the need to consider men in areas of law or policy reform that relate to "women's issues" such as violence.[169]

On Groote Eylandt, some men played an important role in combating family violence. These men played a role in challenging other men's behaviour, by speaking with or "flogging" men who were violent.

In other consultations, Aboriginal women were critical of the lack of leadership from Aboriginal men on the family violence issue, with some men even covering up or supporting violent behaviour:

> Not enough male leaders are saying enough is enough. Especially those with an ear to the government.[170]

> In Perth a group of men stood up against violent men and they were silenced.[171]

> We are up against strong Indigenous men too.[172]

> There is a denial factor. Men have to face the fact that they can't be doing what they have been doing for ages.[173]

On Groote Eylandt men and women working separately but in partnership seemed particularly successful in implementing community programs. One Groote Eylandt Community Legal Worker is supported by work done (without payment) by her husband in dealing with men who are violent, while she deals mostly with women. The mental health workers are also a husband and wife team.

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[167] Central Australian Aboriginal Family Legal Unit, 9 April 2003.
[168] Groote Eylandt woman, 7 April 2003.
[169] For example, some women consulted said that there is no follow up for men. "[I]f they slip no one tells them to lift their socks up." Central Australian Aboriginal Family Legal Unit, 9 April 2003. "One thing we don't do very well at all is interact with Aboriginal males. There is nothing for them (in way of support) when they go back to their community. They go back to their old habits." Darwin Forum, 8 April 2003.
[170] Darwin Forum, 8 April 2003.
[171] Darwin Forum, 8 April 2003.
[172] Darwin Forum, 8 April 2003.
[173] Darwin Forum, 8 April 2003.

Men on Groote Eylandt spoke about working together with women, as well as working together with Balanda law.

> We have to be Balanda and Yolngu, black and white, white and black. Do something together. Yolngu is always beside you. Men and women, working together.[174]

Given the need in traditional communities to have women working with women and men with men for legal and cultural reasons, there is a strong argument for setting up parallel and complementary structures for women and men in such communities, rather than expecting one measure to cover all.

Maintaining a gender focus in recognition of Aboriginal Customary Law means encouraging men and women to work together, or separately but in complementary ways, where that is culturally appropriate. The section in the accompanying submission prepared by the Aboriginal and Torres Strait Islander Social Justice Commissioner on capacity building emphasises that a uniform national or Territory-wide approach will not allow the development of appropriate solutions for the recognition of Aboriginal Customary Law. The principles[175] also discuss the need to approach recognition at a community level with particular attention given to gender issues.

## 6. Conclusion

Marcia Langton wrote, over a decade ago, that "the appalling level of domestic violence against Aboriginal women is not being addressed by Aboriginal Law."[176] This continues to be the case, just as it is also true that mainstream law fails to protect Aboriginal women from violence. Both Aboriginal and mainstream approaches to domestic violence need to be strengthened, and in HREOC's view, this is an issue that the Inquiry cannot ignore.

In consultations and in other work HREOC has noted an implicit assumption that women have to wait for rights until the community has them. In the context of this Inquiry such an assumption could take the form of implementing Aboriginal Customary Law initiatives without seriously addressing the question of family violence, sexual assault or child protection. It is possible that measures implemented without consideration of violence may have the effect of exacerbating the problem. For example, a measure that gave certain community members the power to decide traditional law outcomes without ensuring that women's rights to life and safety were protected could potentially worsen women's position by limiting their access to mainstream law.

HREOC heard very strongly from women during consultations that the violence and safety issues could not wait. HREOC does not believe that measures to recognise Aboriginal Customary Law can be considered in isolation from issues of violence and women's status.

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[174] Groote Eylandt man, 7 April 2003.
[175] See Part D.
[176] Aboriginal Issues Unit of the Northern Territory "Too much sorry business" in Royal Commission into Aboriginal Deaths in Custody *National Report* AGPS Canberra 1991 Volume 5 Appendix D(i), 373.

## Part D: Principles for recognising Aboriginal Customary Law

### 1. Introduction

HREOC has set out the following principles to inform the development of any proposal to recognise Aboriginal Customary Law. These principles consistently emerged in HREOC's consultations in the Northern Territory as a means of working with Aboriginal communities to recognise Aboriginal Customary Law. While some of the principles seem common sense, they are often overlooked. They may also be used to assess the appropriateness of any proposal for recognising Aboriginal Customary Law.

These principles were raised in the context of discussing Aboriginal Customary Law and women's issues. They provide a means for ensuring that gender is central to policy and program development. These principles ensure women's involvement from the outset of policy and program development, with women's issues and concerns incorporated into proposals rather than added as an afterthought.

However, this does not mean that they are only relevant to women. The principles have much broader application for ensuring a partnership approach between governments and Aboriginal communities. They are consistent with a focus on building capacity and effective governance within Indigenous communities.

### 2. Principle one: A community based approach

> I'm concerned about the codification of customary law. There are so many different communities – they can't come up with one code.[177]

The significant differences between Aboriginal communities[178] mean that measures to recognise Aboriginal Customary Law need to be tailored to meet the needs of the particular community.[179] The need to ensure a community based approach was highlighted by field work on Aboriginal Customary Law in the Northern Territory conducted by Diane Bell and Pam Ditton.

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[177] Darwin Forum, 8 April 2003. The issue of codification of Aboriginal Customary Law is discussed in detail in the accompanying submission by the Aboriginal and Torres Strait Islander Social Justice Commissioner.

[178] Christos Mantziaris and David Martin attribute this diversity to the 'intense localism' of Indigenous societies. C Mantziaris and D Martin *Native Title Corporations: A legal and anthropological analysis* Federation Press Sydney 2000, 40.

[179] In HREOC's consultations with government departments, service providers and Aboriginal women and men, all acknowledged the need to take the distinct circumstances of different Aboriginal communities into account and the need to tailor any response to these particular circumstances. The *Social Justice Reports* for 2000 and 2001 both identify flexibility as key to the development of governance and community capacity building initiatives. See "Strengthening Indigenous governance" in Aboriginal and Torres Strait Islander Social Justice Commissioner *Social Justice Report 2000* HREOC Sydney 2000, 104-123. See also "Indigenous governance and community capacity building" in Aboriginal and Torres Strait Islander Social Justice Commissioner *Social Justice Report 2001* HREOC Sydney 2001, 67-98.

> The diversity we found in the six communities we visited indicates that blanket solutions are dangerous. There can be no one appropriate and acceptable solution put forward on the basis of consultation and research to date.[180]

This principle is consistent with the Kalkarinji and Batchelor statements, which state that the control and delivery of services relating to essential services and infrastructure, health, education, law and justice should be culturally appropriate.

In HREOC's view, the best way to ensure recognition of diversity is for proposals to be developed at the community level, rather than imposed from above.[181] The community should be involved in the development and management of any measures, policies or programs introduced to recognise Aboriginal Customary Law,[182] without the imposition of burdensome and inflexible arrangements or over-regulation by government.[183]

> [There is a] need to educate, need to get the community involved. It is about empowerment and giving control to the community.[184]

This principle is also consistent with the *Social Justice Principles* that ATSIC has proposed to underpin policy development on Indigenous issues.[185] The *Social Justice Principles* include the need for government to accept "… the importance of empowerment for decision making and planning at the community and regional levels …".[186]

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[180] D Bell and P Ditton, *Law: The old and the new. Aboriginal women in Central Australia speak out* Central Australian Aboriginal Legal Aid Service Canberra 1980, 116.

[181] The importance of local level knowledge and the fact that "… policies and programs being discussed and developed at the National and State/Territory levels were not always practical or relevant to remote area Aboriginal communities" was cited as one of the reasons for establishing the Kurduju Committee. Combined Communities of Ali-Curung, Lajamanu and Yuendumu Law and Justice Committees *The Kurduju Committee Report* Volume 1 2001, 6. Similarly, Jackie Huggins has stated that "… ensuring programs respond to community-based initiatives, rather than top-down policy imperatives …" is important to the success of initiatives to address family violence. J Huggins, *Family Violence in Indigenous Communities – A case of the systemic failure of good governance*, Indigenous Governance Conference Canberra 4 April 2002, 4. The Australian Law Reform Commission identified "… the acceptability of the proposals to the local community as a whole …" as one of four criteria by which the suitability of local justice mechanisms should be assessed. Australian Law Reform Commission *The Recognition of Aboriginal Customary Laws: Summary Report* Report No 31 AGPS Canberra 1986, 70.

[182] This was identified by the Kurduju Committee as one of a number of cultural considerations in establishing an Aboriginal community safe house, with their report noting that "... staff need to be community members/residents in order to ensure open communication between women and Safe House "she's not going to tell her story to a white lady"." Combined Communities of Ali-Curung, Lajamanu and Yuendumu Law and Justice Committees *The Kurduju Committee Report* Volume 1 2001, 22.

[183] The *Social Justice Report 2000* identifies the need to avoid over-regulation as a principle for implementing greater regional and Indigenous governance. Aboriginal and Torres Strait Islander Social Justice Commissioner *Social Justice Report 2000* HREOC Sydney 2000, 121.

[184] Darwin Forum, 8 April 2003.

[185] Aboriginal and Torres Strait Islander Commission *Recognition, Rights and Reform* AGPS Canberra 1995, 9-10. ATSIC has recommended that the federal Government should negotiate with State, Territory and local governments for the adoption of these principles.

[186] Principle 2(c) Aboriginal and Torres Strait Islander Commission *Recognition, Rights and Reform* AGPS Canberra 1995, 10. The principles also acknowledge the diversity of Indigenous cultures and peoples (Principle 1(b) and 2(b)), the right of Aboriginal and Torres Strait Islander peoples to self-

HREOC's *Social Justice Report 2000* identifies effective Indigenous participation as "… vital to achieving improvements in Indigenous disadvantage and the recognition of Aboriginal and Torres Strait Islander rights".[187] Similarly, the *Social Justice Report 2001* identifies ownership of governance models by Indigenous peoples as being a factor needed to increase Indigenous participation and control over decision-making processes at a community level.[188]

The principle of a community based approach also underpins the Council of Australian Governments commitment to advancing Aboriginal reconciliation through "… an approach based on partnerships and shared responsibilities with indigenous communities, programme flexibility and coordination between government agencies, with a focus on local communities and outcomes".[189]

In addition, to make this principle effective, it is important for non-Aboriginal people involved with any measures to have a knowledge of the local community that they are working with.[190]

> We need government to recognise, when they put someone to work with Aboriginal people it's still not enough. It's very important that they know us.[191]

Community based solutions are most likely to succeed. On Groote Eylandt, a number of community based programs using locally developed solutions have been successful. One of these involved the use of a loudspeaker in the community. This loudspeaker is used each morning to tell the children it is time to come to school, with the result that enrolment in the primary school has increased from 100 to over 280. As one woman on Groote Eylandt commented, "kids crawl like ants from everywhere".[192] Another involved the development of a local solution to drinking problems in Angurugu on Groote Eylandt.

> Originally [we] had a club that was open 10 to 5. Unemployed people would go in the day and employed people at night. Would be fights at change over. Had a vote between people who didn't drink and those who did. Decided to take away licence. Now only people that drink are miners and people who are resident in town.[193]

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determination (Principle 1(c)); and the need to ensure the involvement of Aboriginal and Torres Strait Islander peoples in review and evaluation processes (Principle 2(e)).

[187] Aboriginal and Torres Strait Islander Social Justice Commissioner *Social Justice Report 2000* HREOC Sydney 2000, 122.

[188] Aboriginal and Torres Strait Islander Social Justice Commissioner *Social Justice Report 2001* HREOC Sydney 2001, 83, 88.

[189] Prime Minister "Council of Australian Government communiqué" *Press Release* 3 November 2000.

[190] The UNDP has identified training and sensitisation of its staff as important to forming effective partnerships with Indigenous peoples. "Building an understanding of indigenous peoples' development perspectives and developing cultural sensitivity is crucial if UNDP is to avoid the common pitfall of paternalistic, 'top-down' approaches to programmes involving indigenous peoples." United Nations Development Programme *UNDP and Indigenous Peoples: A policy of engagement* UNDP New York 2001, 10.

[191] Groote Eylandt man, 7 April 2003.

[192] Groote Eylandt woman, 6 April 2003.

[193] Groote Eylandt woman, 5 April 2003.

The Top End Women's Legal Service (TEWLS) identified the employment of local women as contributing to their success in working in remote communities.

> TEWLS receives money from ATSIC and we visit remote communities. It is obvious that we could not do anything because we are not from those communities, but the key is to employ women from these communities. Such women are the links.[194]

At Ali-Curung, dispute resolution structures have been developed that include different roles for Elders from each language group and the Traditional Owners in order to address conflicts that have arisen as a result of relocation.[195]

### 3. Principle two: Ensuring women's involvement

> Often communities aren't functioning and it's the women who are trying to make it work.[196]

Any recognition of Aboriginal Customary Law must ensure women's involvement. This must include a role for women in the development and implementation of any measures.

> The mode of recognition of customary law … must recognize women as having a role in the maintenance of customary law, in the socialization of children into the value system, in dispute settlement procedures and in the performance of religious rituals, which maintain harmony and resolve conflict.[197]

This principle is one that is followed by the United Nations Development Programme (UNDP) in its development work and engagement with Indigenous communities.

> As indigenous women tend to experience triple discrimination (poor, female, and indigenous), it is critical that they play a central role in decision-making processes as well as in the design, planning, implementation and evaluation of relevant programmes and projects. UNDP stresses the importance of empowering indigenous women, and promoting gender equity within indigenous communities.[198]

It is not sufficient to establish structures following discussions with Aboriginal men and hope that Aboriginal women will become involved at a later stage. This fails to recognise the role of women within their communities, the different needs and approaches of men and women, and existing barriers to their participation in formal structures.

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[194] Darwin Forum, 8 April 2003.
[195] Combined Communities of Ali-Curung, Lajamanu and Yuendumu Law and Justice Committees *The Kurduju Committee Report* Volume 1 2001, 10. For a discussion of the impact of relocation on communities in Central Australia, see also D Bell and P Ditton *Law: The old and the new. Aboriginal women in Central Australia speak out* Central Australian Aboriginal Legal Aid Service Canberra 1980, 29.
[196] Darwin forum, 8 April 2003.
[197] D Bell and P Ditton *Law: The old and the new. Aboriginal women in Central Australia speak out* Central Australian Aboriginal Legal Aid Service Canberra 1980, 11.
[198] United Nations Development Programme *UNDP and Indigenous Peoples: A policy of engagement* UNDP New York 2001, 20.

For example,

> It is extremely inappropriate for women to sit publicly with men in a formal meeting frequently held indoors where there is insufficient room to allow proper separation of the sexes. Women also avoid large meeting for they fear that someone may inadvertently bring up a topic which is tabu to them. Men avoid women's meetings for similar reasons.[199]

Measures to involve women should reflect the diversity of Aboriginal women's experiences across the Northern Territory and the difference in women's positions within different communities. This may require different arrangements in each community. An externally imposed structure, that dictates the nature of women's involvement in that structure, is likely to have limited success. In some communities there will be strong women who are able to ensure that women's voices are heard. In other communities, where women lack this power, women may be unlikely and unwilling to take positions in formal structures that are dominated by men.

Options for involving women must be developed at the local level and include women at all stages of development and implementation. Such options could include using representative bodies to allow women to speak under a collective banner,[200] ensuring women hold key positions in the community,[201] using male/female teams to work with the community[202] and establishing parallel structures for men and women.[203]

### 4. Principle three: Recognising the importance of individuals

Where Aboriginal Customary Law is strong, it often relies on key individuals who are overworked, overburdened and under resourced. Any proposal to recognise Aboriginal Customary Law needs to identify and involve key individuals in a community and, in particular, support them in their role.

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[199] D Bell and P Ditton *Law: The old and the new. Aboriginal women in Central Australia speak out* Central Australian Aboriginal Legal Aid Service Canberra 1980, 13.

[200] For example, The Ngaanyatjarra Pitjantjatjara Yankunytjatjara (NPY) Women's Council provides a forum to discuss women's issues and to deliver advocacy and input to public policy on behalf of the women residing on Ngaanyatjarra, Pitjantjatjara and Yankunytjatjara communities and homelands. In consultations, the NPY Women's Council was identified as a mechanism which had allowed women to speak about domestic violence and sexual abuse under a collective banner. Lorraine Braham MLA, 10 April 2003.

[201] "Women must be involved at all levels – as liaison officers, administrators and community advisers". D Bell "Consulting with women" in F Gale *We are Bosses Ourselves: The status and role of Aboriginal women today* Australian Institute of Aboriginal Studies Canberra 1983, 27.

[202] A number of examples were raised during HREOC's consultations for this submission where a male/female team had been used, with the woman speaking to women in the community and the man speaking to the men. For example, the Department of Community Development, Sport and Cultural Affairs uses such a team in working with the Walpiri community. On Groote Eylandt, one of the Community legal Workers had significant support from her husband in working with the community and there was a husband and wife team employed as mental health workers. See also discussion at Part C section 5.

[203] D Bell and P Ditton *Law: The old and the new. Aboriginal women in Central Australia speak out* Central Australian Aboriginal Legal Aid Service Canberra 1980, 7.

This should include access to appropriate resourcing and remuneration for ongoing positions. Failure to support individuals in these roles can lead to the withdrawal or loss of these individuals, impacting on the success of programs and policies.

> Most of the strong Elders get used up quickly. They are extremely pressurised. Every agency wants them. You get good alliances with certain Elders and then they disappear.[204]

In particular, women within communities need to be encouraged to take leadership roles and supported when they do. In 1980, Diane Bell and Pam Ditton wrote:

> It will be necessary to allow that women have not been groomed, as have men over the last 20 years, to become spokespersons for their communities. Expertise and confidence in new areas of law all take time. We cannot expect women to immediately sit around a conference table with white men.[205]

This issue remains relevant today. [206]

> In some communities women hold power, but very few. These women get burnt out because they have very little support.[207]

In consultations, HREOC was repeatedly told of the importance of particular individuals to the success of programs and to the general wellbeing of Aboriginal communities in the Northern Territory. For example, on Groote Eylandt, it was clear that the dedication of individuals holding certain positions in the community had been key to the success of these programs and initiatives. Such individuals often persisted in their position despite some negative community reaction.

> Groote CLWs [Community Legal Workers] used to get a lot of flack for helping the women.[208]

Individuals within Aboriginal communities cannot leave their job at the end of the day. In effect, they are always "on call", and so in need of particular support. One of the Community Legal Workers on Groote Eylandt, employed for five hours a week, recounted one such experience.

> Woman came [at night time] – wanted to help her look for couple. Said no ... But ended up getting up in night and doing. Our custom is that I have to help them, I can't lock the door and go to sleep.[209]

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[204] Police officer, Groote Eylandt, 7 April 2003.
[205] D Bell and P Ditton *Law: The old and the new. Aboriginal women in Central Australia speak out* Central Australian Aboriginal Legal Aid Service Canberra 1980, 116.
[206] Since 1980 there have been some commendable programs aimed at developing the leadership capacities of Aboriginal women, including most recently "Our strong women: Indigenous women, law and leadership" the national advocacy training program of the National Network of Indigenous Women's Legal Services. Public Interest Advocacy Centre *PIAC E-Bulletin* No 100 30 September 2002 www.piac.asn.au/news/bulletins/109.html. The Council of Australian Governments also identified "… investing in community leadership initiatives …" as a priority action in its commitment to advancing Aboriginal reconciliation. Prime Minister "Council of Australian Governments communiqué" *Press Release* 3 November 2000. However, there needs to be a greater and ongoing government commitment to developing the leadership skills of Aboriginal women to work within their communities and within mainstream society.
[207] Darwin Forum, 8 April 2003.
[208] Darwin Forum, 8 April 2003.

This is similar to the experience of the mental health workers on Groote Eylandt.

> Not just 9 to 5 – people can come during the night. It's hard work but I like it. It's not just for me ..., it's for my people.[210]

HREOC's earlier experience has also been that the involvement of key individuals in projects can increase their likelihood of success.

> The use of the local network and resources is invaluable. For example, on Thursday Island the assistance given by the Torres Strait Islander women's network to send details of our meeting, resulted in increased attendance … One of the successes of this trip is attributed to the fact that Patimah [project developer] is from Thursday Island and she still maintains close cultural and community contact. She is well known and respected throughout the Torres Strait.[211]

## 5. Principle four: Adequate resourcing

For any model or system of recognising Aboriginal Customary Law to be successful, it will require adequate resourcing.[212] There seems to be a presumption that Aboriginal people will take on voluntary and onerous community work and unpaid overtime to an extent that is not expected of non-Aboriginals. In some communities, individuals are expected to take on advisory positions and other roles without remuneration of any kind, while their colleagues hold full-time paid positions. For example, as noted above, the TEWLS Community Legal Workers on Groote Eylandt are paid for five hours work per week, and yet are effectively on call 24 hours a day.

In addition, programs that have proved to be successful often have minimal impact across the Northern Territory as adequate resourcing has not been made available to extend these programs to other communities. For example, the TEWLS outreach program only has funding to work with four Aboriginal communities, while the Kurduju Committee model is only funded to operate in Central Australia. Similarly there was concern that a series of pilot programs are established in communities, with no long term commitment of funding. This limits the ability to attract staff, develop networks within the community, and provides an unstable operating environment.

Resourcing should provide for training and pay for the individuals involved, the provision of structural and administrative support, be provided on an ongoing basis, and extended to Aboriginal communities across the Territory. It should also be sufficient to ensure women's involvement. Without adequate resourcing, past experience suggests community involvement is likely to prove inadequate and deteriorate over time. Ultimately it may prove more cost effective for community development that adequate funding be in place.

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[209] Groote Eylandt woman, 5 April 2003.
[210] Groote Eylandt woman, 7 April 2003.
[211] H McCaskill and P Molone *A Consultation Project with Aboriginal and Torres Strait Islander Women: Sex Discrimination Act 1984* Project Developers Brisbane 1994, 5.
[212] The Kalkarinji and Batchelor statements call for direct funding arrangements with the federal Government in order to facilitate Aboriginal self-government, and negotiations by the Government with Aboriginal communities regarding the resourcing of community justice mechanisms.

The *Social Justice Report 2001* identifies the need for a long term financial commitment from governments as necessary to increasing Indigenous participation and control over decision making processes at the community level.[213] The need for appropriate support from Government, including technical support to build capacity and long-term funding arrangements is included as a principle for implementing Indigenous governance and ensuring effective Indigenous participation in the *Social Justice Report 2000*.[214]

In the Northern Territory, HREOC heard repeated examples of a need for increased resourcing for programs.

> Central Australian Aboriginal Family Legal Unit (CAAFLU) is a pilot programme. It has been funded for three years. However there is no emergency funding which means it can't afford to put women in crisis accommodation as often this accommodation requires the money to be given upfront.[215]

> Papanya has no safe house so when assaults occur they have to hide in the bush or go to their grandmother's house which puts her house in jeopardy.[216]

> There are no resources, no safe houses. In general, a lack of protection for women and children. For men too – they go to prison and when they come out there is nothing for them.[217]

> A lot of community solutions are misconceived (depends on the community), and handed an under-funded program or a pilot program. We need more long-term solutions.[218]

At the Darwin forum, areas identified as requiring increased resources included safe houses, anger management programs, support for young Aboriginal women experiencing domestic violence, support for men following release from prison, mental health programs for men, counselling and support for victims of sexual assault and their parents.

### 6. Principle five: Consultation

Ensuring proper consultations prior to the introduction of mechanisms to recognise Aboriginal Customary Law should be a priority. These consultations will assist in ensuring that any measures developed to recognise Aboriginal Customary Law reflect the views and aspirations of Aboriginal communities. Local input, support and control of such measures will be crucial to their success.

The Kalkarinji statement, the Batchelor statement, ATSIC's *Social Justice Principles*,[219] and the National Strategy for recognising Aboriginal and Torres Strait

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[213] See "Indigenous governance and community capacity building" in Aboriginal and Torres Strait Islander Social Justice Commissioner *Social Justice Report 2001* HREOC Sydney 2001, 67-98 and 215.
[214] Aboriginal and Torres Strait Islander Social Justice Commissioner *Social Justice Report 2000* HREOC Sydney 2000, 122.
[215] Central Australian Aboriginal Family Legal Unit, 9 April 2003.
[216] Central Australian Aboriginal Family Legal Unit, 9 April 2003.
[217] Darwin Forum, 8 April 2003.
[218] Darwin Forum, 8 April 2003.

Islander rights[220] all identify negotiation as being central to governments engagement with Aboriginal and Torres Strait Islander communities.

Richard Trudgen has identified problems with consultations with Aboriginal communities as an ongoing limitation for effective policy making.

> Policy-makers… are severely disadvantaged by this communication breakdown because they cannot hear in dialogue what the people are saying – or even that they are asking intelligent questions. Government committee after government committee and consultant after consultant goes out to consult with Yolngu, but each one returns with very little because they cannot really hear the people. Some English is spoken during these meetings, but it is usually a simplified form. The visitors accept these simple English words as being the people's deep, complete thoughts because the dominant culture tends to see the people as simple. But what the people say in English is just a faint echo of the powerful knowledge and information they want to share. So the world loses the chance to hear wisdom that is thousands of years old while the people are passed off as an almost muted race.[221]

People expressed strong concern to HREOC that communities were being insufficiently consulted in the current Inquiry.[222] There was also a reluctance to speak on behalf of other communities.

> We need to sit down as a community and decide issues. Decide what is customary law.[223]

> Traditionally and by law it is not possible to talk for other communities.[224]

> Other groups [of Aboriginal people] speak another language but will speak the same as I think. But all languages need to speak.[225]

This concern has also been raised by Larissa Behrendt.

> Our culture is also very protective of a person's right to speak. Who speaks and who someone is speaking for are closely observed protocols.[226]

It is essential to ensure that women are included in consultations. This has often not been the case in the past.

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[219] Aboriginal and Torres Strait Islander Commission *Recognition, Rights and Reform* AGPS Canberra 1995, 9-10.
[220] The National Strategy is available online at www.austlii.edu.au/au/other/IndigLRes/car/2000/9/.
[221] R Trudgen *Why Warriors Lie Down and Die* Aboriginal Resource and Development Services Darwin 2000, 77. This is supported by the UNDP, which has identified the need to ensure "… culturally appropriate methods that allow indigenous peoples to express their views and preferences" as one of the keys to operational engagement with indigenous peoples. United Nations Development Programme *UNDP and Indigenous Peoples: A policy of engagement* UNDP New York 2001, 20.
[222] In contrast, as part of its inquiry into the recognition of Aboriginal Customary Law, the Law Reform Commission of Western Australia will take a period of two or more years to visit and consult with Aboriginal people. The Law Reform Commission of Western Australia *Aboriginal Customary Law Reference: Project overview* Project 94 2002. The project overview is available online at www.lrc.justice.wa.gov.au.
[223] Darwin Forum, 8 April 2003.
[224] Darwin Forum, 8 April 2003.
[225] Groote Eylandt man, 7 April 2003.
[226] L Behrendt "Women's work: The inclusion of the voice of Aboriginal women" in (1995) 6 *Legal Education Review* 169, at 173.

> Aboriginal women have long felt that their opinions are neglected, little known and even less respected.[227]

Failure to ensure appropriate means of consulting with Aboriginal women was identified as a problem by the researchers who undertook field trips in the Northern Territory as part of the ALRC inquiry.

> On very rare occasions did women attend meetings in communities, and on occasions it required considerable argument to obtain a meeting with groups of women.[228]

> Perhaps the most difficult task on the research tour was the establishment of the social and legal position of women. In the traditionally oriented communities it was indicated that discussions about law matters should be held with the men only. [229]

These difficulties were clearly linked to the fact that only male researchers were sent to speak to Northern Territory communities, and identified as an issue that needed to be addressed in future consultations.

> Special arrangements will need to be made on future research tours to have separate discussions with the women, if necessary, using women research officers.[230]

The failure to properly consult with Aboriginal women was confirmed by Diane Bell and Pam Ditton in consultations they undertook in Central Australia.

> In the past women have rarely been consulted on matters concerning their life choices. Their attitudes and preferences on the basics of their life – health, housing, education, community development – are neither known nor sought by those fact finding missions which regularly visit Aboriginal communities in search of data on which to base programmes, policies, and projected estimates. Yet we found that women had opinions which are important and respected within their society.[231]

Based on HREOC's consultations, it appears that this lesson still has not been learnt.

> Men tend to be consulted on what constitutes traditional law.[232]

> Women don't really have a voice.[233]

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[227] D Bell and P Ditton *Law: The old and the new. Aboriginal women in Central Australia speak out* Central Australian Aboriginal Legal Aid Service Canberra 1980, 5.
[228] B Keon-Cohen *Aboriginal Customary Law, Northern Territory: Top End* Field Report No. 3 Australian Law Reform Commission Sydney 1978, 9.
[229] D Gunter *Aboriginal Customary Law: Kimberleys and part of Northern Territory* Field Report No.4 Australian Law Reform Commission Sydney 1978, 36.
[230] D Gunter *Aboriginal Customary Laws, the Pitjantjatjara (Part of NT, SA & WA*) Field Trip No.1 Australian Law Reform Commission Sydney 1978, 26.
[231] D Bell and P Ditton *Law: The old and the new. Aboriginal women in Central Australia speak out* Central Australian Aboriginal Legal Aid Service Canberra 1980, 5.
[232] Catherine House, 10 April 2003.
[233] Darwin Forum, 8 April 2003.

## 7. Principle six: A staged approach

The implementation of measures to recognise Aboriginal Customary Law must reflect the capacity of individual communities. In some communities, Aboriginal Customary Law may be operating well and there may be strong community leaders. In other communities, this capacity will need to be developed.

> At the moment we don't have communities able to deliver justice i.e. the communities don't have the capacity to do so. They are not even responsible for their own kids now. First we need to make them responsible.
>
> We need to build on the programs that Aboriginal people have in place – there are skilled people who can take on roles – and most of them are women.[234]

There is an increasing acceptance of the importance of and support for developing Indigenous community capacity and governance.[235] These processes are crucial to ensuring the success of measures to recognise Aboriginal Customary Law.

Concern was expressed during HREOC's consultations that there has not to date been an ongoing and long term commitment made by Governments in working with Aboriginal communities.

> Governments walk away too easily, and off load their responsibilities.[236]
>
> We always see pilot programs, but they are not carried through and not funded sufficiently.[237]

A staged approach to recognising Aboriginal Customary Law, including a focus on capacity building within communities, is important to the success of any new measures.

> We need to lay the essential foundations that empower our people to take real decision-making responsibility and help them develop the necessary institutions that ensure they can put their decision making into practice.[238]

The steps required in each community will be different and will need to relate to the circumstances of the community. However, what is consistent between communities is the need for government to make a long term commitment to working with communities to recognise Aboriginal Customary Law and to ensure that proposals reflect and build community capacity.

In HREOC's consultations, many people considered that the Northern Territory Law Reform Committee's Inquiry should be a first step in an ongoing process. There was a strong feeling that a "grand plan", as developed by the Australian Law Reform

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[234] Alison Anderson, ATSIC Commissioner, 9 April 2003.
[235] See the accompanying submission by the Aboriginal and Torres Strait Islander Social Justice Commissioner for detailed discussion of these issues.
[236] Darwin Forum, 8 April 2003.
[237] Darwin Forum, 8 April 2003.
[238] J Huggins *Family Violence in Indigenous Communities – A case of the systemic failure of good governance* Indigenous Governance Conference Canberra 4 April 2002, 4.

Commission, was less likely to lead to practical changes on the ground for Aboriginal communities.

HREOC is aware that the Northern Territory is focussed on developing practical measures that can be implemented in communities. These measures need to be delivered in a sustainable way with an ongoing commitment to empowering communities.

### 8. Principle seven: Mainstream law as a safety net

HREOC considers that the need to ensure women's safety and freedom from violence must be a priority for any system of recognition of Aboriginal Customary Law.[239] Aboriginal women must be able to access mainstream law in cases involving violence, including where an Aboriginal Customary Law approach has failed. However, this should not be used as an excuse by governments to avoid recognising Aboriginal Customary Law.

One possible approach is to limit the cases in which Aboriginal Customary Law will apply.[240] For example, mainstream law could apply to crimes such as rape, sexual assault and domestic violence. This approach acknowledges that women may be in a relatively powerless position within their community, particularly in relation to these crimes, and require the external support of mainstream law. This approach was supported by the Aboriginal women who attended HREOC's Darwin forum.

> There are certain acts I think that should be non-negotiable.[241]

> When a crime [such as rape] is committed, it should be dealt with by white man's law because customary law says that women are not equal under customary law. They are beneath men.[242]

> Sometimes police involvement in a domestic violence issue eases the tension in a situation.[243]

Another possible approach would be to structure measures so that Aboriginal Customary Law is applied in the first instance, with access to mainstream law used as a last resort. This would give communities the opportunity to resolve issues using Aboriginal Customary Law, while providing women with a safeguard. It would require clear guidelines and protection against intimidation, so that women are not forced to accept the Aboriginal Customary Law solution if it is inadequate.

> Community approach is the first option, the talking to families etc. The last option is the restraining order. The issues are that the woman often doesn't want to leave, just for the violence to stop.[244]

The Aboriginal women that HREOC spoke to were clear that there was an important role for mainstream law in their communities.[245] Similarly, the importance to

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[239] See Part C section 4.2, 4.3 and 6 for a discussion of family violence and sexual assault.
[240] See Part C section 4.3 for more detailed discussion of this approach in relation to sexual assault.
[241] Darwin Forum, 8 April 2003.
[242] Alison Anderson, ATSIC Commissioner, 9 April 2003.
[243] Darwin Forum, 8 April 2003.
[244] Darwin Forum, 8 April 2003.

Aboriginal women of access to mainstream law was confirmed by organisations that work with Aboriginal communities.

> Clients [at the crisis centre] say that they like the new laws, they like the way they can protect them. This is evident in the number of women who use restraining orders and go to court.[246]

## 9. Applying the principles – Aboriginal advisory committees to court

### 9.1 Outline of the proposal

One option that has been raised as a means of recognising Aboriginal Customary Law is the establishment of Aboriginal advisory committees to the court.[247] HREOC understands that these committees would consist of a small number of members of the local Aboriginal community. These committees would appear in court and advise the magistrate or judge of cases which could be better handled by Aboriginal Customary Law. With the magistrate's or judge's agreement and the consent of the victim and defendant, the case would then be handed over to the Aboriginal community to deal with under Aboriginal Customary Law.

### 9.2 Assessment of the proposal

Following is an assessment of this proposal against the principles identified above for recognising Aboriginal Customary Law.

*A community based approach*

There are elements of this proposal that very strongly involve the community. In particular, this approach empowers communities to advise when Aboriginal Customary Law should apply and then to implement Aboriginal Customary Law in relation to specific cases. The proposal recognises the importance of a community based approach and provides an ongoing role for community involvement in the delivery of justice.

However, the proposal would need to ensure sufficient flexibility in each community in order to acknowledge the diversity of communities and to avoid creating another level of bureaucracy that does not reflect the way Aboriginal Customary Law actually operates within a community.

It is also not clear that a fixed committee with limited membership is the appropriate solution for all communities. In particular, the dynamics within a community and the strength of different families within a community may mean that such an approach is not appropriate. For example, committee members may not be able to hear cases that relate to particular relatives, or may be pressured to act in certain ways in cases involving certain families. Options for addressing this concern could include allowing flexible membership of the committee depending on the particular cases before the

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[245] See Part C section 4.2.
[246] Jane Lloyd, 8 April 2003.
[247] This option was raised in discussions with the Co-Chair of the Inquiry, the Hon Austin Asche AC QC on 8 and 11 April 2003.

court and/or establishing more than one committee where there is more than one language group living in a particular area.

*Ensuring women's involvement*

HREOC is concerned about the ability of this proposal to adequately ensure women's involvement. The views of Aboriginal women within a community must be carefully sought and considered prior to the introduction of any committee.

In certain communities, there will be strong women who are able to sit on such a committee and ensure that a woman's perspectives are heard. However, in many communities it is likely that women will not be willing to sit on these committees, and that where they are represented on committees, they will not be in a position to ensure that women's views are heard.

Significant pressure could be brought to bear on women who are members of the advisory committee and victims of crime to agree to a particular approach. While this issue applies generally to all members of the committee and victims, it is likely disproportionately to affect women because of their relatively powerless position in communities.[248] In addition, there may be cases where it is more appropriate to have a separate women's committee to advise the magistrate due to the nature of the crime or the aspects of Aboriginal Customary Law involved.

In the longer term, this concern may partially be addressed through measures to encourage and support women's leadership, which may increase women's willingness to sit on such committees and increase their effectiveness in ensuring women's concerns are heard.

*Recognising the importance of individuals*

Committees such as the proposed Aboriginal advisory committees provide for the involvement of key individuals within a community. If the appropriate individuals can be identified and involved, this is likely to improve community acceptance and the success of such committees.

Individuals who take on this advisory role must be supported through remuneration and administrative and advisory support. This would acknowledge the other commitments and responsibilities that these individuals often have, and increase the likelihood of their longer term engagement with the committee.

One possible concern is that appropriate individuals will not be available or willing to take on these positions. The absence in some communities of strong Elders to take on these positions is reflected in comments made to HREOC during consultations for this submission.

> They used to do that before – have Elders in the court room … I think it would be good to have this again but I think that there is not much Elders here. We got some here but I think they won't support young people.[249]

[248] See Part C section 3.
[249] Groote Eylandt man, 5 April 2003.

> It is desirable to involve Elders however in some communities there are very few Elders – very rare to find someone over the age of 70. Most Elders today are in their fifties (so have to define Elders as this age group).[250]

Initial measures to encourage and develop leadership within Aboriginal communities, in order to ensure that there are appropriate people to take on these committee positions, may be an important support to the longer term success of this proposal.

*Adequate resourcing*

The proposal for Aboriginal advisory committees would need to be adequately resourced to be successful. In particular, the committee positions should be paid positions given that committee members would be working in a court system where all other official positions are paid. Also important would be appropriate administrative and advisory support. In addition, resourcing would be required to enable Aboriginal Customary Law processes to be developed to deal with those cases that the court handed back to the community.

*Consultation*

Should the Law Reform Committee recommend a proposal along these lines, the Northern Territory Government should ensure an extensive process of consultation with Aboriginal communities prior to making any decision on the establishment of these committees. Aboriginal people are in the best position to advise on the effectiveness of this proposal within their community. Suggestions and modifications to this proposal that come directly from Aboriginal communities are likely to improve any such committee's potential for success. Assessing the level of support amongst Aboriginal people for such committees should also be a key determinant of their introduction.

*A staged approach*

Consideration should be given to a staged introduction of any Aboriginal advisory committees. The success of the proposal would depend upon serious work to develop leadership and other appropriate skills prior to establishing the committee. It is possible that some communities would already be in a position to establish an advisory committee. However, for many communities a more staged approach, as discussed at Part D section 7, will be required.

Consideration could be given to ways in which existing structures could be used to work towards such an approach. For example, Aboriginal Local Justice Agreements and existing provisions under the Northern Territory *Sentencing Act 1995* may provide a means of supporting and trialling such an approach.

[250] Darwin Forum, 8 April 2003.

*Mainstream law as a safety net*

By requiring the consent of the victim and defendant, and requiring the magistrate to make the final decision to refer a matter to the community, the proposal would retain mainstream law as a safety net. However, there remains a concern that pressure could be brought on the individuals involved to agree to a case being dealt with under Aboriginal Customary Law. This would particularly be a concern if there were power imbalances between different families within the community, with a strong family able to exert significant pressure on others in the community.

One option may be to limit the cases in which such an approach could be used. This is consistent with the views of women at the HREOC Darwin forum that certain crimes, such as rape and sexual assault, should be dealt with under mainstream law.[251] Certainly, the whole community, Aboriginal and non Aboriginal, would need to be satisfied as to the type of offences that were referred to the committees under the proposal, and that offences were adequately dealt with once referred to the community.

This approach would not overcome the difficulty of power imbalances within communities when considering more minor offences. In these cases it would be important that the magistrate or judge ensure that victims and defendants are aware of and able to exercise their right to have the matter heard by the court where this is their preference.

[251] Darwin Forum, 8 April 2003.

## Conclusion

HREOC strongly endorses the Northern Territory Government's commitment to increase the recognition of Aboriginal Customary Law in the Northern Territory. Recognising Aboriginal Customary Law will promote self-determination in Aboriginal communities. This will assist in addressing the significant and disproportionate disadvantage that Aboriginal people face and improving community harmony. Recognising Aboriginal Customary Law also promotes Indigenous peoples' right to practise their culture, an internationally established human right.

HREOC is concerned that in the past Aboriginal women have not been sufficiently consulted or included in the development and implementation of laws, policies and programs that relate to Aboriginal communities. This has compounded the disadvantage they experience in the mainstream legal system and under Aboriginal Customary Law. The principles identified by HREOC provide a means for ensuring that gender is central to the development of proposals to recognise Aboriginal Customary Law. In summary, these principles are to ensure:

1. a community based approach;
2. women's involvement;
3. the importance of key individuals;
4. adequate resourcing;
5. consultation;
6. a staged approach; and
7. mainstream law as a safety net.

Ensuring women's safety and freedom from violence must be a priority for any system of recognition of Aboriginal Customary Law. HREOC considers that these individual human rights for women are not negotiable. Issues of violence and women's status must be central to any consideration of measures to recognise Aboriginal Customary Law. HREOC heard very strongly from Aboriginal women during consultations that violence and safety issues cannot be deferred pending the comprehensive realisation of Indigenous people's rights. Failure to take into account these principles and in particular any failure to recognise Aboriginal women's individual human rights would doom these reforms from the outset.

**Appendix A: Consultations**

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|---|---|
| 4 April 2003 | Angela Dowling, Top End Women's Legal Service |
| 5 – 7 April 2003 | Visit to Angurugu, Groote Eylandt |
| 7 April 2003 | Police Officer, Groote Eylandt |
| | Tony Fitzgerald, Northern Territory Anti-Discrimination Commissioner |
| | Neil Westbury, Director and Prue Phillips-Brown, Senior Policy Officer, Office of Indigenous Policy |
| | Rolf Gerritsen, Director, Pam Griffiths, Deputy Director, and Eileen Cummings Indigenous Policy Officer, Office of Social Policy |
| 8 April 2003 | Darwin Forum of Indigenous women |
| | Jane Lloyd, Ngaanyatjarra Pitjantjatjara Yankunytjatjara Women's Council Domestic Violence Service |
| 9 April 2003 | ATSIC Territory Office and Yilli Rreung Regional Office |
| | Alison Anderson, ATSIC Commissioner |
| | Central Australian Aboriginal Family Legal Unit (CAAFLU) |
| | Kate Halliday, Department of Justice, co-founder of Top End Women's Legal Service |
| 10 April 2003 | Catherine House – women's refuge |
| | Lorraine Braham MLA, Member for Braitling |
| 11 April 2003 | Allan Van Zyl, Senior Policy Advisor, Department of Justice and Terri Robson, Director, Policy and Community Liaison, Crime Prevention |

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