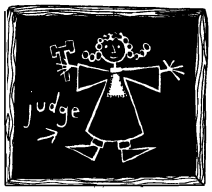
However, such schemes have operated without official legal or statutory recognition. This situation contains several drawbacks. One of these is the fact that, with changes of practice or personnel, actions (such as traditional punishments) which were officially tolerated or approved may come to be considered a breach of the general law. For this reason many indigenous communities seek formal or legal recognition of aspects of customary law.

3. Most significantly, in the Final Report, Royal Commission into Aboriginal Deaths in Custody, 1991.
4. The term used in Nina, Daniel, 'Watch Out for the Native', (1997) 22(1) *Alt.LJ* 17. Nina examines the way in which non-state forms of justice may be appropriated by the state — and, at the same time, how in this process the state may become 'indigenised'. This clearly represents both the danger and the dream for indigenous people seeking recognition of customary law.
5. The Report notes that incorporation 'will enable the community to hold and receive moneys, make payments, employ staff and take out insurance, amongst other activities. This requires the Council to have a separate identity to that of its members'. These points are valid: however it should be noted that their purpose is to fulfil non-indigenous, not indigenous, expectations and laws.
6. Mediation may operate at an informal or preventative level (for example, the Tangentyere Council Social Behaviour Project), pre-trial (for example, the Aboriginal Mediation Project developed by Queensland's Department of Justice), or pre-sentencing (for example, the Katherine Community Aid Panel). Magistrate's Court Advice systems have operated, for example, in South Australia and in the NT at Groote Eylandt. 'Warden schemes' exist, for example, at Yuendumu and Ngukurr, and involve the appointment of people to perform part of the traditional function of the police, without usurping that function. Community court or 'elders' council' schemes may be considered the most 'radical'. They have existed in limited form in WA and Queensland, although both schemes appear to be little used. One of the clearest potentially applicable overseas model is the PNG Village Courts system.
7. For example, see comments recorded in Brennan, Frank, 'Self-Determination: The Limits of Allowing Aboriginal Communities to be a Law Unto Themselves', (1993) 16(1) *UNSW Law Journal* 245 at 246, 250-52.
8. Spencer, David, 'Mediating in Aboriginal Communities', (1996-97) 3 *Commercial Dispute Resolution Journal* 245 at 252, quoting Welsh, J., *Aboriginal and Islander Mediation Initiative*, Project Proposal, Department of the Attorney-General Queensland, 1992, p.26.
9. Young, Douglas W., 'Grassroots Justice: Where the National Justice System is the 'Alternative': The Village Court System of Papua New Guinea,' (1992) *Australian Dispute Resolution Journal* 31 at 40-41.
10. Nina, above, ref. 4.



LEGAL STUDIES

Evaluating the legal system

The following questions for discussion draw on two articles in this issue: 'Mandatory Sentencing and the Concentration of Powers' p. 211 and 'Monsters round the Stomping Ground' p. 216.

1. The Royal Commission into Aboriginal Deaths in Custody examined six Aboriginal juvenile deaths. The National Report commented that 'the cases investigated ... illustrate how the juvenile justice system prejudices the Aboriginal youth offender'. What are the ways in which the juvenile justice system demonstrates such 'prejudices'? Are all young people 'equal before the law'? Explain the reasons for your conclusions.

2. For some people in Australia, 'Prison is a death sentence'. What does such a statement mean? Do you agree? Why did the Royal Commission into Aboriginal Deaths in Custody recommended that incarceration be the punishment of last resort? How can this recommendation be reconciled with the reasons that underpin mandatory sentencing laws such as that of the Northern Territory?

3. It could be said that: 'Alternative dispute resolution undermines the doctrine of the rule of law, in Australia. To be effective, such programs must recognise Indigenous legal systems, and this would mean there will be two, or even more laws applicable to many actions — citizens will not know what actions might generate legal liability.' Do you agree? How would you assess the ADR proposal, will it enhance the effective and just operation of the legal system in the Northern Territory?

4. Compare and contrast the way mandatory sentencing and alternative dispute resolution proposals in the Northern Territory address the justice issues particular to Aboriginal youth. Evaluate the way the reforms and responses of the justice system evolved under each of the legislative schemes.

Further reading

C. Cunnen and Terry Libesman, *Indigenous People and the Law in Australia* Butterworths' Legal Studies Series, 1995.

C. Cunneen and D. McDonald, *Keeping Aboriginal and Torres Strait Islander People Out of Custody — An Evaluation of the Implementation of the Recommendations of the Royal Commission in Aboriginal Deaths in Custody,* ATSIC 1997.

E. Johnston, M. Hinton and D. Rigney, *Indigenous Australians and the Law,* Cavendish, 1997.

McRae, Nettheim and Beacroft, *Indigenous Legal Issues: Commentary and Materials* 2nd edn, 1997, LBC Services.

Web sites

ATSIC home page
http://www.atsic.gov.au/

Council for Aboriginal Reconciliation
http://www.austlii.edu.au/au/orgs/car/

NTU Faculty of Law List of Web Resources
http://www.ntu.edu.au/faculties/law/martin/subject.htm#Indigenous

Melissa Castan
Melissa Castan teaches law at Monash University.