



## Royal Commission into Aboriginal Deaths in Custody Recommendation

### 219. Report on the Recognition of Aboriginal Customary Law

*The Australian Law Reform Commission's Report on the Recognition of Aboriginal Customary Law was a significant, well-researched study. The Royal Commission received requests from Aboriginal people through the Aboriginal Issues Units regarding the progress in implementation of the recommendations made by the Australian Law Reform Commission and in some cases from communities which had made proposals to the Law Reform Commission. This Commission urges government to report as to the progress in dealing with this Law Reform Report.<sup>1</sup>*

<b>Background<sup>2</sup></b>	<p>The Royal Commission into Aboriginal Deaths in Custody (RCIADIC) noted widespread frustration with failures to implement the recommendations of the Australian Law Reform Commission's (ALRC) Report on the Recognition of Customary Law, which was published in 1986 following several years of community consultation. The Northern Territory and Queensland Aboriginal Issues Units submitted that these recommendations should be put into effect, with a body established to implement them. The Royal Commission noted that legislation proposed in the Report had not progressed past the drafting stage at the time of its final report in 1991.</p> <p>The Report favoured 'functional recognition of Aboriginal law' and offered the Julalikari Council Patrols and Northern Territory Aboriginal Community Justice Project as strong examples of functional recognition in action.</p> <p>The RCIADIC did not discuss specific recommendations from the Report, noting that it was unable to make a thorough examination of issues related to the recognition of customary law, due to the complexity of the issues, and diversity of contexts across Australia. However, the Royal Commission recognised that the ALRC recommendations related to sentencing could have significant bearing on the over-representation of Aboriginal people in prisons.</p>
<b>Intent</b>	Governments report their progress in responding to and/or implementing recommendations from the ALRC Report on the Recognition of Aboriginal Customary Laws.
<b>Responsibility</b>	The Commonwealth Government and all state and territory governments.
<b>Key contacts</b>	None identified.
<b>Key action taken</b>	
<b>2005 Review<sup>3</sup></b>	The Department of Justice considered there had been <b>no progress</b> on Recommendation 219 as there had not been a formal response to the ALRC's Report.

<sup>1</sup> Royal Commission into Aboriginal Deaths in Custody (Final Report, 1991) vol 4, 102 ('RCIADIC').

<sup>2</sup> Ibid 97-102, [29.2.39]-[29.2.54].

<sup>3</sup> Aboriginal Justice Forum (Vic), Department of Justice (Vic), *Victorian Implementation Review of the Recommendations from the Royal Commission into Aboriginal Deaths in Custody* (Review Report, October 2005) vol 1, 489 ('2005 Review').

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### 2018 Review<sup>4</sup>

#### Commonwealth Government

Deloitte concluded that the Commonwealth Government had **fully implemented** Recommendation 219 by releasing a 1996 report on implementation of the recommendations from the ALRC Report on the Recognition of Aboriginal Customary Laws.

#### Victorian Government

Deloitte concluded that Recommendation 219 was **not implemented** in Victoria as there had not been any response to the ALRC Report, as it was considered of limited relevance to the Victorian context.

In its 1994 implementation report, the Victorian Government acknowledged that traditional Aboriginal law systems were disrupted soon after settlement. To address challenges faced by Aboriginal people with the criminal legal system, it proposed providing appropriate support through Aboriginal organisations, Aboriginal Community Justice Panels, and cross-cultural awareness training.

### Since then

#### Koori Courts

In Victoria, there was considerable engagement with Aboriginal community representatives in the development and establishment of Koori Courts (which have operated since 2002), however we have been unable to determine whether recommendations from the ALRC's Report on the Recognition of Aboriginal Customary Laws were considered in this process.

Developed to reflect cultural issues and operate in a less formal way, in Koori Courts the accused sits at the bar table with the magistrate, Elders and Respected Persons, a Koori Court Officer, the prosecutor, community corrections officer and their lawyer and family. Aboriginal organisations may be in the courtroom to contribute to the conversation and offer support.

Everyone is encouraged to take part in a sentencing conversation by having a yarn and avoid using legal language. Aboriginal Elders or respected persons may give cultural advice to help the magistrate make a judgment that is culturally appropriate and helps reduce the likelihood of reoffending.

Koori Courts were established under the Victorian Aboriginal Justice Agreement. Burra Lotjpa Dunguludja (the fourth phase of the Agreement) included commitments to increase the number of Koori Courts across Victoria and court jurisdictions, to enhance cultural considerations and the involvement of Elders in mainstream courts and develop culturally appropriate 'therapeutic courts'.<sup>5</sup>

#### Considering Aboriginality in sentencing

The ALRC Pathways to Justice Report (2017) made several recommendations around sentencing and Aboriginality that sought to formalise consideration of systemic and background factors impacting on Aboriginal people. These did not speak specifically to

<sup>4</sup> Deloitte Access Economics, Department of Prime Minister and Cabinet, *Review of the Implementation of the Recommendations of the Royal Commission into Aboriginal Deaths in Custody* (Report, August 2018) 439-440 ('2018 Review').

<sup>5</sup> Department of Justice (Vic), *Burra Lotjpa Dunguludja: Victorian Aboriginal Justice Agreement Phase 4* (Agreement, 2018) ('AJA4').

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customary law but may be seen as a mechanism to consider cultural factors relevant within local contexts.

The Pathways to Justice Report also made recommendations around accessibility of community-based sentencing options for Aboriginal people, including ensuring the cultural appropriateness of community-based sentencing options. This again speaks to a consideration of context in sentencing that may be seen as a re-incarnation of the vision of recognition of customary law that remains applicable in contemporary Victorian contexts where traditional customary law may have been interrupted, but where cultural factors remain significant.

(These matters are discussed further in relation to RCIADIC recommendations on sentencing and alternatives to imprisonment).

### **Treaty**

In negotiating a Treaty, the Victorian Government is acknowledging that prior to the formation of the State of Victoria, Aboriginal communities were here practicing their own law, lore, and cultural authority.

Work is underway toward a treaty or treaties with Aboriginal people. Treaty is an opportunity to recognise and celebrate the unique status, rights, cultures and histories of Aboriginal people. It's an opportunity to have stronger recognition of Aboriginal culture and custom, address wrongs and redefine relationships between the State, Aboriginal and non-Aboriginal people in Victoria.

## **Evidence of impact**

### **Authorising documents**

#### **Report on the Recognition of Aboriginal Customary Laws<sup>6</sup>**

The Australian Law Reform Commission offered this summary of their Report on the Recognition of Aboriginal Customary Laws:

*The focus of ALRC Report 31 (tabled 12 June 1986) was whether it would be desirable to apply, either in whole or in part, Aboriginal customary law to Indigenous peoples—generally or in particular areas or to those living in tribal communities only. In addition, the report addressed whether in criminal cases existing courts should be able to apply Aboriginal customary laws to Indigenous peoples and whether Aboriginal communities should have power to apply their customary laws in the punishment and rehabilitation of Aboriginal people.*

*The report outlined that, with very limited exceptions, Aboriginal customary laws have never been recognised by general Australian law. It reported that customary laws were a significant influence in the lives of many Indigenous people. More importantly however, the report recognised that there was no one 'authentic version' of customary law. Customary law was and continued to be a series of dynamic and changing systems applying to different groups of Indigenous Australians. The report highlighted that*

<sup>6</sup> Australian Law Reform Commission, *Report on the Recognition of Aboriginal Customary Laws* (Report No. 31, 1986) ('Report on the Recognition of Aboriginal Customary Laws').

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*Aboriginal people must have the final say in the negotiation and consultation surrounding the recognition of customary law.*

Key recommendations from the Report on Recognition of Aboriginal Customary Laws:

### Criminal law

- A partial customary law defence, similar to diminished responsibility, should be introduced that would reduce a charge of murder to manslaughter in those cases where an accused acted in the well-founded belief that the customary laws of his or her Indigenous community required the act constituting the offence.
- Aboriginal customary laws and traditions should be considered where relevant in determining criminal intent and in establishing whether a defence (for example, provocation or duress) to a criminal charge is made out.
- Aboriginal customary laws should be considered in the exercise of sentencing discretion.
- An Aboriginal defendant should be able to give unsworn evidence unless the court finds that he or she will not be disadvantaged by giving sworn evidence.
- Courts should have specific powers to hear evidence in private, to exclude certain persons from the court or to take other steps to protect secret information about Aboriginal customary laws where this is necessary.

### Criminal investigation

- More sensitive policing practices are required in Aboriginal communities.
- Special rules are required to protect Indigenous suspects under police interrogation and to help ensure the reliability and voluntariness of any admission or confession. Admissions or confessions obtained in contravention of these rules would not be admissible unless a court was satisfied that, in the circumstances, the suspect understood the caution, understood the nature of the questions and did not answer merely out of deference to authority or under the influence of suggestion.

### Recognition

- As far as possible, Aboriginal customary laws should be recognised by existing judicial and administrative authorities, avoiding the creation of new and separate legal structures, unless the need for these is clearly demonstrated.
- The recognition of Aboriginal customary laws should be carried out by means of federal legislation applicable in all States and Territories, relying on the full range of the Commonwealth's constitutional powers.
- Government and Indigenous groups should work together to decide on the methods by which Indigenous customary laws are recognised.

The Report discussed Indigenous Courts, but did not recommend a general approach, instead offering criteria applicable to any local justice systems in Aboriginal communities.

### **Outputs**

None identified.

### **Outcomes**

None identified.

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### Community views

#### Victorian Aboriginal Legal Service<sup>7</sup>

The ALRC concluded that the recognition of Aboriginal customary laws risked being ineffective if geographically limited to particular communities. The fact that some Aboriginal customary laws ceased to be practised in a particular area did not mean that other aspects may not still be relevant. This point was made by the Victorian Aboriginal Legal Service in their 1981 submission to the ALRC:

*The Aboriginal population of Victoria both rural and metropolitan could be said to be 'urbanised'. There are no Victorian Aborigines living in (what is commonly known as) a tribal situation and accordingly the Victorian Aboriginal Legal Service makes no submission as to legislation incorporating customary laws into the European legal structure (VALS would have some reservations about the adoption of this procedure even in tribal areas). Although no complete system of customary law is still operative in Victoria, it is stressed that many traditional values and obligations still exist in the Victorian Aboriginal community. Perhaps the most important traditional values that survive in Victoria are those that relate to family organisations and structure and kinship obligations...Victorian Aborigines continue to suffer from a legal system that fails to recognise a different system of family structure and obligations.*<sup>8</sup>

The ALRC concluded that the recognition of Aboriginal customary laws could take a variety of forms, and whether particular proposals could be applied depended upon the merits of the proposal and the appropriateness of its application in particular cases.

### Related recommendations

#### ALRC Pathways to Justice

##### Recommendation 6-1

Sentencing legislation should provide that, when sentencing Aboriginal and Torres Strait Islander offenders, courts take into account unique systemic and background factors affecting Aboriginal and Torres Strait Islander peoples.

##### Recommendation 6-2

State and territory governments, in partnership with relevant Aboriginal and Torres Strait Islander organisations, should develop and implement schemes that would facilitate the preparation of 'Indigenous Experience Reports' for Aboriginal and Torres Strait Islander offenders appearing for sentence in superior courts.

##### Recommendation 6-3

State and territory governments, in partnership with relevant Aboriginal and Torres Strait Islander organisations and communities, should develop options for the presentation of

<sup>7</sup> Australian Law Reform Commission, 'Arguments Against the Recognition of Aboriginal Customary Laws', *Australian Law Reform Commission* (Web page, 18 June 2010) <<https://www.alrc.gov.au/publication/recognition-of-aboriginal-customary-laws-alrc-report-31/8-aboriginal-customary-laws-recognition/arguments-against-the-recognition-of-aboriginal-customary-laws/#:~:text=There%20are%20no%20Victorian%20Aborigines,the%20adoption%20of%20this%20procedure>> ('Arguments Against the Recognition of Aboriginal Customary Laws').

<sup>8</sup> Victorian Aboriginal Legal Service, *Submission to the Australian Law Reform Commission* (Submission 283, 20 May 1981) ('Submission to the Australian Law Reform Commission').

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information about unique systemic and background factors that have an impact on Aboriginal and Torres Strait Islander peoples in the courts of summary jurisdiction, including through Elders, community justice groups, community profiles and other means.

### 2005 Review<sup>9</sup>

#### Recommendation 119

That the Department of Justice (Criminal Law Policy)

(a) clarify whether the Australian Law Reform Commission's Report on the Recognition of Aboriginal Customary Laws was considered by Victoria and, if so, with what outcome;

(b) provide a report to the Aboriginal Justice Forum on (a).

That the Victorian Government continue to implement and monitor Recommendation 219 through any monitoring process established as a consequence of this Review.

### Assessment summary<sup>10</sup>

Recommendation 219 was intended to encourage governments to report their progress in responding to and/or implementing recommendations from the ALRC's Report on the Recognition of Aboriginal Customary Laws. A key recommendation of the Report was for functional recognition of Aboriginal customary laws in general Australian law.

Previous reviews noted the lack of a response to this recommendation in Victoria given its limited relevance to the Victorian context. It was unclear whether this assessment of relevancy reflected Aboriginal perspectives or simply those of Victorian government officials.

There was considerable engagement with Aboriginal organisations and community representatives in the development and establishment of Koori Courts (which have operated since 2002), however we have been unable to determine whether recommendations from the ALRC's Report on the Recognition of Aboriginal Customary Laws were considered in this process.

We have since been involved in policy and legislative projects with the potential to ensure greater consideration of Aboriginality and cultural factors in sentencing. These will be outlined in more detail in relation to the RCIADIC recommendations that they are most relevant.

Victorian governments did not report their progress in considering or responding to the ALRC Report referred to in this recommendation. We couldn't find evidence of initiatives in Victoria over the last 32 years prompted by reference to the Report on the Recognition of Aboriginal Customary Laws.

While Recommendation 219 has limited relevance in 2025, it remains critically important to recognise and accommodate Aboriginal cultural practices and obligations throughout all processes and procedures in the criminal legal system.

<sup>9</sup> 2005 Review, 513.

<sup>10</sup> Meeting with Aboriginal Justice Caucus Working Group (Project Team, Online, 31 October 2023) ('Working Group Meeting (31 October 2023)'); Meeting with Aboriginal Justice Caucus (Project Team, In person, 13 December 2023) ('Aboriginal Justice Caucus Meeting (13 December 2023)').

## Assessment of Recommendation 219

**Is the intent of the recommendation accurately described?**

Yes  No

**Does the action taken align with the intent of the recommendation?**

0 – No action taken

1 – Action taken is of little relevance to the intent of the recommendation

2 – Action taken partially aligns with the intent of the recommendation

3 – Action taken fully aligns with the intent of the recommendation

**0**

(Score out of 3)

**Is there evidence of the desired impact or outcome/s?**

0 – No evidence

1 – Evidence of output rather than outcome

2 – Some evidence action contributed to outcome/s

3 – Clear link between action and impact or outcome/s

**0**

(Score out of 3)

**How relevant is the recommendation in the current context?**

0 – No relevance – refers to practices, agencies or laws that no longer exist

1 – Low – some relevance, but most aspects of the recommendation no longer apply

2 – Moderate – remains relevant, but some aspects of recommendation no longer apply

3 – High – entirely relevant to current context

**1**

(Score out of 3)

**Does full implementation have the potential to reduce incarceration, increase safety in custody and/or progress Aboriginal self-determination?**

0 – No potential to improve Aboriginal justice outcomes

1 – Low – potential to improve Aboriginal justice outcomes, but none of the three identified

2 – Moderate – potential to progress one or two of the outcomes identified

3 – High – potential to reduce incarceration AND increase safety in custody AND self-determination

**0**

(Score out of 3)

### Potential actions for further work

No actions identified.

## Low priority for further work

### Relevance and potential impact

		Low (0-2)	Moderate (3-4)	High (5-6)
Extent of action taken and evidence of outcomes	High (5-6)			
	Moderate (3-4)			
	Low (0-2)	Rec 219		

## **Bibliography**

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