- Matters relating to crime and punishment are primarily the prerogative of the States and it is the State courts before which most Aboriginal offenders appear.

- The High Court's role as a unifying force in matters of sentencing has been a limited one and that the Court has not been disposed to grant special leave where sentencing only is involved.

- It is difficult to generalise about Aboriginal offenders because 'some lead lives that are, at any rate, no different from those of their white neighbours, whereas others live in remote areas, heavily influenced by customary law.'

Justice Toohey's paper considered at some length the way in which the Courts should have regard to Aboriginal customary laws. He drew a distinction between the place of customary law as a defence to a criminal charge and as a factor in the sentencing process. He pointed out that the ALRC in its report: *The Recognition of Aboriginal Customary Laws* recommended the former required, in large part, legislative recognition whereas in his view, the latter could be accommodated to a great extent within the existing law and sentencing discretions available.

Justice Toohey referred to ALRC Discussion Paper No.30, *Sentencing: Penalties* (1987) which posed two questions:

- Should aboriginality be listed as a factor relevant to sentencing?

- Should special sentencing options be available for aboriginal offenders or should special rules regulate the operation of sentencing options in relation to aboriginal offenders?

Justice Toohey said the relevance of Aboriginality as a factor in sentencing is readily understood and should be readily accepted. The offender's Aboriginality may be relevant in pointing to the story of his life, the community (white or black) in which he finds himself and the particular circumstances giving rise to the offence. He cautions against the court focusing unduly on customary laws rather than looking at all aspects of an offender and the circumstances of the offence. The suggestion that Aboriginality should be a mitigating factor or given some formal recognition was more suspect. It carried overtones of patronage and superiority.

> The irrelevance of Aboriginality is not necessarily to mitigate; rather it is to explain or throw light on the circumstances of an offence and in so doing making the way to an appropriate penalty.

Depending on the facts Aboriginality may well be a factor in mitigation, but on the other hand it may be relevant to aggravation. Justice Toohey also considered that the notion of special sentencing options was also open to criticism if too much emphasis is placed on Aboriginality rather than on the circumstances of the offender.

On the general question of punishment for certain offences and whether these may be dealt with by an Aboriginal community, Justice Toohey commented:

> it is important that we not set up one system as intrinsically superior to another; however, in the absence of some notion of self-government, the ultimate authority in matters of sentencing will come from statute and common law.

* * *

aborigines: toomelah report

> The inquiry was struck by the fact that even after numerous State and federal gov-

ernment enquiries into Aboriginal and Torres Strait Islander needs, the awarding of joint responsibility for Aboriginal affairs to the Commonwealth Government by a constitutional amendment in 1967, the conclusion of a Commonwealth-State arrangements with respect of funding for Aboriginal Affairs in 1976, and the passage of the Aboriginal Land Rights Act by the New South Wales Parliament in 1983, the people of Toomelah still suffered living standards far below those experienced by the vast majority of non-Aboriginal residents of New South Wales and, for that matter, for the vast majority of Australians. Words, intention and good-will are simply not sufficient.

In June 1988 the Human Rights and Equal Opportunity Commission (HREOC) published its report on the problems and needs of Aborigines living in the New South Wales — Queensland border region, in particular, the communities of Goondiwindi, Boggabilla and Toomelah. Long standing tensions between the local Aboriginal and non-Aboriginal communities had resulted in violence and damage to property in January 1987. Seventeen Aboriginal men were charged with offences. There were claims that the cause of the conflict and violence was racial tension and HREOC decided to launch an investigation into the underlying causes.

The three communities which were the centre of the inquiry had the following profiles:

- Goondiwindi: a prosperous regional centre on the Queensland side of the Macintyre River. It is the general service centre for the area and has 4 000 residents well supplied with services.
- Boggabilla: situated 9 km south east of Goondiwindi on the New South Wales side of the Macintyre River. It has a population of 500, approximately 40 of whom are Aborigines. It is reasonably provided with services.
- Toomelah: situated 18 km to the south east of Boggabilla with a population of 500, all of whom are Aborigine. It has very limited services including an inadequate water supply and sewerage system. The roads are all unsealed and the community is inaccessible after heavy rain.

Based on preliminary findings by Race Discrimination Commissioner Irene Moss, HREOC announced a formal enquiry in July 1987. The inquiry was constituted by Justice Einfield, President of HREOC, Sir James Killen, a former Federal Minister and Ms Kaye Mundine, a Senior Commonwealth Public Servant active in a number of Aboriginal organsations. The Terms of Reference of the inquiry were:

- to inquire into and report on the social and material situation of persons in Goondiwindi, Boggabilla and Toomelah and identify the social and material needs of these and nearby communities;
- in particular to inquire into and report upon the extent to which any problems or deficiencies identified have been caused by inadequate educational and/or employment opportunities and/or other facilities and the existence of the Queensland — New South Wales border between the town of Goondiwindi and the other two towns;
- to investigate and report on the state of the community relations in Goodiwindi, Boggabilla and Toomelah and the way in which problems identified can be solved among these and nearby communities;
- to report on the impact of community relations on the social and material needs of these communities;

- to recommend to all relevant persons and/or authorities steps which might be taken to resolve the identified problems of these communities.

The inquiry looked at the historical background to the three communities and in particular focused on the inter-government conflicts involving federal, state and local government authorities and the way in which these had had a particular impact on the Toomelah Aboriginal Community. It also examined the particular problems of the Toomelah Aboriginal residents in relation to housing, water and sewerage, roads, education, the role of local government, and the local social environment.

The Commission's report made formal findings in relation to each of these issues and then proceded to make recommendations in relation to each of them. The report found that:

> the Toomelah community of 500 Aboriginal people endures appalling living conditions which amount to a denial to them of the most basic rights taken for granted by most other groups in society, and by other Australian communities of similar size. Their houses are sub-standard and overcrowded, actually contributing to a range of diseases. The community has for decades lived without an adequate and certain water supply, a properly functioning sewerage system and a safe means of sewage disposal. The lack of a sewerage system is partly due to the damming of the Macintyre River without offering and making available the dammed water to the Toomelah community as it is offered and made available to other nearby towns and private properties. The community is frequently completely isolated from all services in contact with the outside world due to closure of the inadequate access roads by rains.

In addition the report found:

- Community members display higher than average rates of a range of diseases for which they cannot get adequate treatment.
- Housing conditions have been accepted by authorities at all levels of government although they lack physical safety and protection from weather and are a danger to the health of occupants.
- The health services at Toomelah are wholly inadequate.
- The secondary schooling facilities for Aboriginal children at Toomelah were unsatisfactory and resulted in severe discrimination against Aboriginal students attending schools in Queensland and a consequential high drop out rate.
- The Goodiwindi State High School in Queensland has been overtly racist against Aborigines contributing in major part to racial tension, unhappiness and stress and the high drop out rate.
- The Moree Plains Shire Council has levied rates on residents but has not supplied the services expected.

The Commission's report went on to make specific recommendations seeking to remedy each of the identified problem areas. It was also very critical of the relevant government departments and the role they have played in the current condition of the Toomelah community. These included criticisms of the departments, both Commonwealth and State, with special responsibilities for Aborigines. The report urged that the policy of Aboriginal self-determination should be effectively implemented particularly with respect to the provision of basic services and the

establishment of a decent quality of life for all Aboriginal and Torres Strait Islander peoples.

* * *

aborigines: a u.n. report

> I am the inferior of any man whose rights I trample underfoot.
>
> Robert G Ingersoll, 1884

The lack of attention given to the rights of Aboriginal Australians has been criticised in a recently released report of the United Nations Working Group on Indigenous Populations compiled by its chairwoman Professor Erica Daes. Individual Aborigines and representatives of Aboriginal organisations have made regular visits to Geneva in recent years to appear before the Working Group and Professor Daws made an extensive tour of Australia early in 1988.

The Sydney Morning Herald (5 August 1988) said the report found that Aborigines lived in 'poverty, misery and extreme frustration' while being denied self-determination and the social status enjoyed by most Australians. The conclusion reached in the report was that 'Australia stands in violation of her international human rights obligations relating to non-discrimination or unequal treatment in general and to the provision of certain minimum services in particular'.

The report also commented:

> The problems are wide-ranging and involve, inter alia, Aboriginal and Islander self-government, their participation in national and State Governments, land and natural resources, preservation of identity and existence, traditional ways of life, culture, language, education, health, housing, the position of women, children's rights and administration of justice.

Furthermore, according to the Report:

> Frequent denials of existing rights and broken promises of new rights have brought about frustration mixed with anger and lack of Aboriginal and Islander trust and faith in the federal and State Governments.

* * *

sexual harassment case

blame the victim. The President of the Australian Law Reform Commission has criticised a recent sexual harassment decision as a dangerous throwback to the days of blame-the-victim. Justice Evatt said she was concerned at the decision to award no damages against Dr Atallah Sheiban, of Sydney, after he was found to have sexually harassed three former receptionists.

Speaking at a function to mark the fourth anniversary of the Commonwealth Sex Discrimination Act, Justice Evatt said Justice Einfeld, who heard the case as president of the Human Rights and Equal Opportunity Commission (HREOC), had implied that 'if there's any discomfort about [sexual harassment] it may be the woman's problem'.

She said the decision threw into doubt who was actually responsible for sexual harassment.

> I think we need to look at this very carefully and make sure that we are prepared to assert strenuously that a woman does have the right to integrity of her person, no matter what. That should be recognised by everybody.
>
> If the woman is concerned about it, it's not because she's in some way neurotic or unable to cope with male behaviour. We have to fight about this.
>
> Ideas that regard the victim as responsible can flow if they're not carefully guarded against. They can flow into all kinds of other areas of violence and coercion against women.