Parliament of Tasmania

LEGISLATIVE COUNCIL SELECT COMMITTEE

Aboriginal Lands

Members of the Committee

Mr Tony Fletcher
Mrs Sue Smith (Chairperson)
Mrs Silvia Smith
Mr Jim Wilkinson

Secretary: Mrs Sue McLeod

Table of Contents

List of Abbreviations

Act	**Aboriginal Lands Act 1995**
ALCT	**Aboriginal Land Council of Tasmania**
ATSIC	**Aboriginal and Torres Strait Islander Commission**
ATSIC Act	**Aboriginal and Torres Strait Islander Commission Act 1989**
Bill	**Aboriginal Lands Amendment Bill 1999**
FIAA	**Flinders Island Aboriginal Association**
TAC	**Tasmanian Aboriginal Council**
TALC	**Tasmanian Aboriginal Land Council**
TRAC	**Tasmanian Regional Aboriginal Council**
1975 ACT	**The Aboriginal Relics Act 1975**

Executive Summary

On 12 October 1999 the Government, through a media statement, informed the Tasmanian community that an *Aboriginal Reconciliation Package* would be introduced to Parliament before the end of the year and would address a range of issues including :

- the transfer of eight areas of Crown Land totalling 52,800 ha;
- determining Aboriginality for the purpose of ALCT elections to the Aboriginal community; and
- enabling the Aboriginal community to conduct traditional burial and cremation ceremonies

Whilst acknowledging the package of measures would not please everyone and that an attempt to strike a sensible balance was the aim, the Premier commented :

> "In preparing the package we have been conscious of the meaning of reconciliation, careful not to alienate one section of the community against another."[1]

The ensuing concern expressed by members of the Aboriginal community, local government authorities in the area of proposed transfers, recreational land users, shack site owners and many others was the catalyst for the Legislative Council supporting the proposal for a select committee. The subsequent number of submissions, both written and verbal, totalling 114**,** illustrated community concern.

As the Committee's hearings progressed three main issues surfaced. These are discussed in depth in the following chapters :

- Reconciliation
- Aboriginality
- Land Transfer Process

In 1995 the then Premier of the day, the Hon Ray Groom MHA, in presenting the Aboriginal Lands Bill, said :

> "This is historic legislation. It transfers twelve areas of land of special cultural and historic significance and is a major advance for the Aboriginal people of Tasmania. The fact that the title of significant pieces of land is being transferred to the Aboriginal community without heated debate and controversy is plain evidence of a more tolerant and understanding society than existed in the past."[2]

Five years on we have seen significant inroads into that 'tolerant and understanding society', much of these attributable to aspects of the 1995 legislation that have failed to deliver in terms of the aspirations of both indigenous and non-indigenous community members. In the Bill currently proposed by the Government significant steps have been taken to attempt to resolve some of the issues associated with the 1995 legislation.

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[1] Government Media Statement – 12 October 1999.

[2] Hon Ray Groom MHA, Premier, Second Reading Speech on Aboriginal Lands Bill 1995, 24 October 1995.

The Committee strongly supports the continuing process of reconciliation that enables not only Tasmanians, but all Australians, to come together in the community and provides justice and equity to all. The current proposal to transfer land to the Aboriginal community was seen by the Premier as being a major step towards reconciliation. It became evident that this was not the case and many witnesses believed it had caused further divisions, not only between indigenous and non-indigenous people within the communities in which land is to be handed back, but also within the indigenous community itself.

The rationale for further land transfers was interpreted differently by various sections of the community. Some saw Tasmania as one State, sharing the sixty percent of the State under Crown ownership with no particular group having advantage over the other. Others believed that the 1995 land transfers were a one off occurrence undertaken as a contribution to reconciliation. Access issues in relation to sites already transferred clearly added to community tensions.

The issue of Aboriginality dealt with in Chapter 3 has raised evidence of concerns from many within and outside the Aboriginal community. Aboriginal Elders believe that they have a role in determining Aboriginality. Members of the Tasmanian community who, whilst seeing themselves as Aboriginal and in most instances being accepted under the Commonwealth ATSIC rules but not accepted by the ALCT election rules, also wish to have a feeling of participation in the ownership of any transferred land as well as input into management of these lands. The Committee accepts that the Aboriginal community should determine Aboriginality. It was concerned however that the only avenue of appeal outside this process was to the Supreme Court and thus has recommended an alternative to this costly and, to many, fearful experience.

Areas of Crown Land, including some of the areas provided for transfer in the current Bill, have special Aboriginal heritage values. The need for a process to determine whether ownership of Crown Land should be transferred to the Aboriginal community was considered. The Committee further considered the need to investigate models for both the development of criteria and the establishment of an open rigorous process of assessment that would allow Tasmanian Aboriginal claims for land rights to be fairly but rigorously assessed.

In communities where land transfer was proposed, matters concerning the cultural heritage of both indigenous and non-indigenous people were raised continually.

The Committee has recommended that a process be developed to allow any future claims or proposals to be removed from the political arena and to be fairly assessed by an independent expert body.

Aboriginal burials and cremations were discussed in Chapter 5. It is evident that there are several and varying customs depending on the tribal region to which the deceased person belonged. As the proposed legislation provides for strict guidelines and regulations with regard to applications for burials and cremations, the Committee recommended that they be permitted.

Parliament House, Hobart **Sue Smith MLC**
28 June 2000 **CHAIRPERSON**

Summary of Recommendations

The Committee recommends that :

Chapter 2 - Reconciliation

1. The process of reconciliation be continued to enable not only Tasmanians, but all Australians, to come together in the community and provide justice and equity to all.

2. The transfer of the proposed Crown land parcels should not be supported as it does not assist reconciliation.

3. Adequate funding be provided to assist with environmental land management of the parcels of land that were previously transferred to the Aboriginal community by the 1995 and 1998 Acts.[3]

4. The Aboriginal Relics Act 1975 be reviewed and the concept of site significance be introduced.

5. Financial support and encouragement be given to the Young Offenders Program on Clarke Island.

6. Indigenous centres of cultural excellence be developed to assist in the education of the community as a whole.

Chapter 3 - Aboriginality

1. Aboriginality be determined by the Aboriginal community.

2. In the case of a dispute as a result of a finding by the Aboriginal Land Council of Tasmania, a Tribunal be established to determine Aboriginality.

3. The Tribunal consist of three persons appointed by the responsible Minister – an Elder from the community where the applicant normally resides, an eminent Aboriginal person of statewide standing, and a current or retired legal practitioner.

Chapter 4 – Land Transfer Process

1. Claims by Tasmanian Aborigines for land rights is not sufficient justification to transfer Crown land.

2. If the Tasmanian Government proposes in future to transfer land to meet a claim for land rights by Tasmanian Aborigines, it should first develop criteria against which the claim can be tested.

3. The process for the development of such criteria involve :

   - the preparation of draft criteria by Government;
   - independent, expert and fair testing of criteria through a rigorous process of assessment such as that managed by the Resource Planning and Development Commission;

[3] Aboriginal Lands Act 1995 and the Aboriginal Lands Amendment (Wybalenna) Act 1999.

- a recommendation to Government by an independent expert body; and
- approval by Parliament of the Government's preferred criteria. The recommended criteria should then be applied to all future applications for the transfer or management of land.

4. A process of rigorous assessment be determined to identify sites on Crown Land with Aboriginal cultural heritage values of special significance for management of their special values.

Chapter 5 – Burials and Cremations

1. Aboriginal burials and cremations as prescribed in the Bill be permitted.

Chapter 1 – Introduction

1.1 Appointment and Terms of Reference

On Tuesday, 30 November 1999 the Legislative Council resolved that a Select Committee of Inquiry be appointed "to inquire into and report upon the Aboriginal Lands Amendment Bill 1999, having regard to the Aboriginal Lands Act 1995 and any other matters seen as relevant to the Bill".

The Committee comprised four Members of the Legislative Council – Mr Tony Fletcher, Mrs Silvia Smith, Mrs Sue Smith (Chairperson) and Mr Jim Wilkinson. Mr Ray Bailey, the President of the Council, took up an ex officio role on the Committee and participated in the hearing of evidence.

The Select Committee was dissolved due to prorogation on 21 March 2000. On Thursday, 30 March 2000 the Legislative Council resolved to reappoint the Committee on the basis :

> "that the Membership of the Committee, and its terms of reference be those agreed to in the First Session of the Forty-Fourth Parliament and that the Minutes of Proceedings of, an evidence taken by, the Committee be referred to the Committee."[4]

1.2 The Reason for Establishing the Committee

The Committee was established as a result of concerns expressed by members of the wider community to some Members of the Legislative Council following the Premier's announcement through the media on 12 October 1999 of the proposed transfer of eight parcels of land to the Aboriginal community.

These concerns had been brought to the attention of Members of the Committee prior to the Committee's establishment. In supporting the establishment of the Select Committee, the Member for Apsley in the Legislative Council stated :

> "This issue is one that has certainly caused a lot of debate. It has caused a lot of people to want to know just how far this process is likely to go. They always talk about some of the terms which are used and where is the line in the sand going to be drawn in the future, and that is one of the issues which is very pertinent to most people."[5]

One of the main areas of concern amongst the community however stemmed from the perceived lack of consultation by the Government before the Premier advised the public of its intention.

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[4] Memorandum to the Clerk of Committees from the Clerk of the Council dated 31 March 2000.
[5] Hon Colin Rattray MLC, Hansard, Legislative Council, 30 November 1999.

The Committee was established therefore as a means of addressing these concerns and to allow the Tasmanian community an opportunity for input into the process.

The Government also supported the appointment of a Select Committee and the Leader of the Government in the Legislative Council stated :

> "… I am quite confident that this select committee can do good work on behalf of the Tasmanian people to ensure that those areas of apparent contention can be resolved. That is the intention here".[6]

1.3 Proceedings

The Committee called for evidence by way of advertisements placed in the three regional daily newspapers and the local newspapers on Flinders Island, the North West Coast and the West Coast. In addition invitations were sent to key stakeholder groups and individuals.

One hundred and five written submissions were received and verbal evidence given by seventy-three witnesses in Tasmania. Witnesses are listed in Attachment 1.

The Committee met on twenty-three occasions. The Minutes of these meetings are set out in Attachment 4.

Documents received into evidence are listed in Attachment 3.

[6] Hon Michael Aird MLC, Hansard, Legislative Council, 30 November 1999.

Chapter 2 – Reconciliation

Q. How would you define reconciliation*?*

A. "If I could answer that, there is a Nobel Prize somewhere in that for me".[7]

The Committee strongly supports the continuing process of reconciliation that enables not only Tasmanians, but all Australians, to come together in the community and provides justice and equity to all.

2.1 What is reconciliation?

A number of witnesses who supported transfers of land to the Aboriginal community expressed the view that such transfers would assist in the 'process of reconciliation'.

The Premier, on the first day of Committee hearings, stated that :

> "We see this as a major step towards reconciliation between indigenous people and the broader community in Tasmania …" [8]

It was therefore necessary to examine not only the meaning of 'reconciliation' but also whether the proposal enhanced the process of reconciliation. It became apparent that a universal definition of reconciliation was difficult. When questioned on a definition for reconciliation, Mr Justice Slicer answered that,

> "If I could answer that, there is a Nobel Prize somewhere in that for me".[9] He later suggested that the "final phase of reconciliation would be mutual acceptance".[10]

Senator John Herron, the Federal Minister for Aboriginal and Torres Strait Islanders, believed reconciliation was:

> "accepting each others culture and our equality".[11]

The Leader of the Opposition, Mrs Sue Napier, believed that reconciliation is :

> "a process whereby past grievances are addressed and a new solid foundation for future relationships between Aboriginal and non-Aboriginal Tasmanians is laid". [12]

Mr Richard Bingham, Chairman of the Government's Aboriginal Land and Cultural Issues Working Group, believed that reconciliation was :

> "about the non indigenous community understanding and accepting the rights of the indigenous community on the terms in

[7] Justice Pierre Slicer, Transcript of Evidence, 2/2/00, p. 3.
[8] Jim Bacon MHA, Premier, Transcript of Briefing, 1/2/00 p.1.
[9] Justice Pierre Slicer, Transcript of Evidence, 2/2/00, p. 3.
[10] Justice Pierre Slicer, Transcript of Evidence, 2/2/00, p. 4.
[11] Senator John Herron MP, Transcript of Meeting, 16/2/00, p. 14.
[12] Hon Sue Napier MHA, Transcript of Evidence, 2/2/00, p.1.

> which the indigenous community believes they ought to be accepted".[13]

Mrs Lyn Mason, Mayor of the Flinders Island Council believed that :

> "reconciliation is two sides moving towards each other. Maybe one side moves more than the other …"[14]

Ms Darlene Mansell believed :

> "in a nutshell, … it's … about coexistence and showing respect to the different ideologies and value systems that exist".[15]

Corroboree 2000 : Towards Reconcilition promoted reconciliation as :

> "A united Australia which respects this land of ours; values the Aboriginal and Torres Strait Islander heritage; and provides justice and equity for all".[16]

Given the variety of definitions, all of which have something in common, the Committee accepts that reconciliation is very difficult to define. It further accepts that there is not, in the immediate future, likely to be a defining moment when everyone will accept that reconciliation has been achieved but the Committee commits itself to the reconciliation goal and makes the point that a reconciled nation without rancour is a better nation.

2.2 Land is an important consideration

There is no dispute that land has a special meaning to Aboriginal people and is considered by some to be fundamental in the reconciliation process. This was amplified by Mr Greg Brown when he gave evidence that :

> "the ownership of land by Aboriginal people is fundamental to their health and well being in the spiritual side of things … It is much broader than the fact of just owning land.
>
> Aboriginal people have a very strong connection to the land and to the sea. It is not easily understood by a lot of people.
> It can add to a sense of well being … eventually generating economic activities …"[17]

The Tasmanian Aboriginal Centre submitted the following evidence to the Committee :

> "We would just like to open by saying that we feel that to build a just society the rights of all people ought to be respected and recognised. There are three fundamental rights: a right to an identity, a right to our land, and a right to be able to practise our cultural heritage unhindered by any white laws. That is what we say. We support this bill because it is a worthy attempt by the Bacon Labor Government to give us that opportunity to be able

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[13] Mr Richard Bingham, Chairman, Aboriginal Land and Cultural Issues Working Group, Transcript of Evidence, 10/4/00, p. 1.
[14] Mrs Lyn Mason, Flinders Island Council, Transcript of Evidence, 22/2/00, p. 6.
[15] Ms Darlene Mansell, Transcript of Evidence, 10/4/00, p. 9.
[16] Council for Aboriginal Reconciliation – Corroboree 2000 : Towards Reconciliation.
[17] Mr Greg Brown, Department of Premier and Cabinet, Transcript of Evidence, 1/2/00, p. 27.

> to practise those rights, and it recognises those certain rights - that we have distinct rights because we are Aboriginal people. There is no disputing that we can directly link ourselves back to our traditional ancestors and, by virtue of that fact, we should be accorded those distinct rights. Okay?
>
> I would just like to make another point, that the TAC feel that the bill probably doesn't go far enough. We would urge that Rocky Cape and Mount William National Park and Eddystone Point be included in Schedule 3 of the bill, because those areas there are very rich in Aboriginal heritage - there are many midden sites. There are a lot of sites of significance, and I think at one of those sites there is an actual traditional burial site. So we would like to put it to you, to urge you to consider those two other areas to be included with the other eight parcels of land that are proposed to be returned to us".[18]

The Committee concludes that to many within the Aboriginal movement the return of land is fundamental to a successful reconciliation process.

2.3 Tensions in the process

The Committee notes that the Premier's announcement on 12 October 1999 created extreme tension in communities throughout the state.

The Flinders Island Council passed a unanimous motion :

> "That Council advises the Premier that it strongly opposes the proposed transfer of land within the Furneaux Group to the Aboriginal Land Council of Tasmania because :
>
> - the process did not include consultation with all stakeholders;
> - the process showed total disregard for the shared heritage of all the Straits people;
> - the claims are based on tenuous historical evidence; and
> - it places an unreasonable proportion of land to transfer within the Furneaux Group."[19]

As a result of the proposed legislation, the Mayor of Flinders Island told the Committee :

> "there are still those who wholeheartedly agree with this concept of reconciliation but unfortunately I cannot identify them any longer and I can't count on any support to keep building bridges in this divided community.
>
> … Many people are filled with distrust …
>
> Two years ago we were working steadily towards a far more cohesive community. Now, through no fault of our own, those of us who have been active participants in the reconciliation process are having to defend our past actions and explain that many of the Aboriginal community are as disillusioned with this

[18] Mr Rick Maynard, Tasmanian Aboriginal Centre, Transcript of Evidence, 9/3/00, p. 1.
[19] Flinders Island Council, Transcript of Evidence, 22/2/00, p. 2.

> action as the other members of the reconciliation movement on Flinders Island."[20]

The community on Flinders Island questioned to what extent land transfers qualified as a reconciliation gesture. They believed they were being asked to be the major contributors with the loss of twenty percent of their land mass and also expressed concerns regarding management issues.

The minutes of the Flinders Island Council in November 1999 show Councillor Graham advising that :

> "the local indigenous considered too much of the subject land is located within the Furneaux Group in addition management issues in relation to the land that has already been given to the Aborigines has not been settled".[21]

Again the community of Cape Barren, with a population of 54 was divided in opinion, with 27 people signing a petition in favour of no transfers of land and 13 signing another petition in favour of transfers. The issue of the management of past land transfers arose again and again.

The Cape Barren Islanders petition opposing the transfer of land stated :

> "As residents and land owners of Cape Barren Island we oppose the return of all Crown Land on the island to the Aboriginal community.
>
> We believe that this is not part of the reconciliation process and that by returning the land to the aboriginal community this will not benefit the island and its residents in any way."[22]

They expressly stated their concerns :

> "We believe that both Aboriginal Land Councils have a greater interest in power rather than a genuine interest in the land and the community. The aboriginal land councils do not represent the aboriginal community.
>
> The government should listen to the residents of Cape Barren Island rather than the Aboriginal Land Councils. The government has neglected to do this.
>
> Visitors to Cape Barren Island believe they need permission to visit the island. This is a step backward rather than forward. As residents we do not want to live in this type of community.
>
> Land return is not part of the reconciliation process.
>
> Cape Barren Island is not an isolated piece of land. It has a community made up of both aboriginal and non-aboriginal people. The government should take this into consideration when making their decision. Return of land on the island will divide the community.

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[20] Mrs Lyn Mason, Flinders Island Council, Transcript of Evidence, 22/2/00, pp. 6-7.
[21] Flinders Island Council, Transcript of Evidence, 22/2/00, p. 3.
[22] Petition from residents and landowners on Cape Barren Island, 17 February 2000.

> The Government should meet with residents of Cape Barren Island that oppose the return of land before making any decisions regarding this community.
>
> How much power will the government give the Aboriginal Land Councils?
>
> Can the government tell us how the return of the land will benefit residents of Cape Barren Island?"[23]

From the Circular Head community, Mrs Joy Gillies who stated she was an Elder of the Circular Head Aboriginal Corporation, identified the tension in the reconciliation process. Mrs. Gillies gave evidence that she did not agree with the process for the transfer of lands encompassed in the present legislation.

> "I just wanted to come and give my opinion as to the fact that I am the Elder of the Circular Head Aboriginal Corporation and the only Elder in the district. I just feel that it is time that you, the people of the south of the State, acknowledge that there is an Aboriginal Corporation here in Circular Head and that we are local people. We are very, very concerned with our own land and our own place and we just feel that the local people should be able to have some input into the say of what happens. We don't want lands rights as such; what we want is a representation of being able to look after the land to the best of everybody.
>
> … I think if there is to be land given back to Aboriginals it should represent the whole people of Circular Head, not the people down south running it."[24]

No-where was the frustration and tension brought about by Aboriginal land transfers more evident than in Circular Head where the issue of access to the Mt. Cameron West (Preminghana) site had embroiled the community and recreational users.

The Committee notes that issues of access – the incidents at the Bowen Memorial at Risdon Cove combined with the infamous locked gate at Mt Cameron West - has caused a serious loss of support in the process of providing land to the Aboriginal people for cultural reasons.

While it was the belief of legislators at the time that these issues were covered under the Aboriginal Lands Act 1995, only testing in the Courts will finally determine the law.

These and other issues have given rise to much of the evidence indicating the loss of some of the goodwill achieved under the transfer process of the 1995 Act.

The tension in communities and opposition to the process was further heightened by the absolute disregard for European cultural heritage in the Government's assessment process.
In evidence from the Tasmanian Outer Islands Association concern was expressed that :

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[23] Petition from residents and landowners on Cape Barren Island, 17 February 2000, p. 3.
[24] Mrs Joy Gillies, Transcript of Evidence, 14/3/00, p. 1.

> "the historical evidence used by the Aboriginal community to substantiate the present claims is since the beginning of the nineteenth century - and it's that that we have quite a deal of concern with. We don't say that the points in it are incorrect … but what we're saying is you have only been presented with one side of the story. The story of the families that have evolved since the early nineteenth century through till now, with some of them fourth and fifth generation Islanders or Straits people … has not been taken into account. I think that is the one aspect that association members feel somewhat aggrieved or hurt by, that all that they and their family and descendants have stood for counts for nothing in this process…"[25]

In communities where land transfer was proposed the issue of the cultural heritage of both indigenous and non-indigenous people was raised continually.

The issue of access to the proposed transfer site on Clarke Island was also raised by many descendants of the Maclaine/Salier families. They wished to preserve the right of access for current and future descendants to the Maclaine/Salier family heritage sites on Clarke Island, particularly the grave of Emily Ann Maclaine which they hold sacred. They support the efforts of Mr Peter C. Sims to have these sites listed on the Register of the National Estate.

In the Circular Head area recreational users, local community members and fishermen all raised their rights to recreational pursuits - many of which had spanned generations - and how there was the proven capacity for Aboriginal sites to be protected and respected under State Government control.

Mr Brian Walker of Spreyton who is a long-time user of the Arthur-Pieman area for recreational purposes stated :

> "I just come as an individual who, as I wrote [in my submission] have regularly used that area over the last twenty years basically … the opportunity has arisen to come and put my view forward that the area seems to be shrinking all the time and this is what I perceive as another way of shrinking the area even further for recreational use mainly".[26]

Mr Lyell House of Forest, a long-time resident in the Arthur-Pieman district stated :

> "If you were to go down there, any of you people, when there is a long weekend and see just exactly what goes on down there and the amount of activity and what it is worth to the State just in four-wheel drives, motor bikes etcetera – that track has been there now for 60, 70 years or longer … The damage is not being done, as they claim".[27]

Mr Martin Viney of the Marrawah Surfers' Association also gave evidence relating to the recreational use of the proposed transfer sites :

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[25] Mrs Helen Cooper, Tasmanian Outer Islands Association, Transcript of Evidence, 22/2/00, p. 3.
[26] Mr Brian Walker, Spreyton, Transcript of Evidence, 14/3/00, p. 1.
[27] Mr Lyell House, Forest, Transcript of Evidence, 14/3/00, p. 3.

> "A place that can be good one day can be terrible the next. For that reason alone we are forced to actually search for the best conditions for a certain day. In that regard we need to be mobile and this is part of surfing, looking for the way, I suppose, and taking your family with you".[28]

The shack site categorisation program has also raised tensions. Shack sites were excised from the current proposal without provision for access to the beach and the issues surrounding the program still, at the time of writing, have to be settled. The Chairman of the Government's Working Party, Mr Richard Bingham also said that the shack site categorisation program should be "pinned down" before the Bill was passed, but it appears this was not given any consideration by Government in its desire to introduce the current Bill in late 1999.

Thus evidence suggests that there are significant divisions in relation to land transfer, not only between indigenous and non-indigenous people within the communities in which land is to be handed back, but also within the indigenous community itself.

The real question therefore is whether the transfer of lands to the Aboriginal communities in the Furneaux Islands and the Circular Head area enhances the reconciliation process.

The weight of evidence received by the Committee suggested that the Government's proposal to transfer land had caused wide spread tension in community. In the mid-1990s both the indigenous and the non-indigenous communities on Flinders Island overcame many of their differences which was recognised by them receiving a Community Award at the 1997 Australian Reconciliation Convention in Melbourne. This current proposal however has once again divided the Flinders Island community.

The Committee cannot agree that the reconciliation process has been enhanced by the proposal.

The Committee received other evidence as to why the program of transferring land to the Aboriginal Land Council of Tasmania was flawed and now addresses these issues.

2.3.1 Management Funding

Evidence provided to the Committee showed that a lack of financial support for the previous transfers had caused management problems in these areas. To date land under the control of the Aboriginal Land Council of Tasmania, and including Thule Estate and Modder River which are proposed to be transferred, amounts to approximately 5500 hectares.

The Tasmanian Aboriginal Land Council (TALC), as the appointed land managers, commented :

> "Before we got those outlands back we worked with the National Parks and wildlife Service in 1983. There were five of us at Preminghana for four months and we actually got rid of all the gorse and that was supposed to be a three-year project but then in 1995 the Aboriginal Lands Act came into place. We managed the land for the community through the Aboriginal Land Council

[28] Mr Martin Viney, Marrawah Surfers' Association, Transcript of Evidence, 14/3/00, p. 1.

> of Tasmania and one of our biggest problems still is funding to be able to go out and do these lands".[29]

Mr Ross Britton from the Arthur-Pieman supported TALC's views :

> "Where they [the Aboriginal community] get the money to manage the areas handed back to them is a major concern to them because they just don't have the money. This is where we believe, with the establishment of maybe an authority management team, we can get money and work both ways".[30]

Whilst there was some belief that the 1995 transfers would attract ATSIC funding, Mr Colin Hughes from TALC, in answering a question to this effect stated :

> "No, its through NHT – the National Heritage Trust – Coastcare have funds there to go and fix up these sections of coast if there's erosion; Bushcare provide funds for weed eradication – and places like that".[31]

The Committee also noted in the 2000-2001 budget documents that the Government contributions to ALCT to "assist with the Council's operating cost, co-ordination and land management activities"[32] remains at the 1999-2000 level of $85,000.

The Flinders Island Council also believed there were funding issues involved in the management of the previously transferred parcels of land :

> "I think there is an inability to access funding so long as you haven't got a clear chain of command or as long as there is still dispute between the owners of the title and the theoretical land managers, then it is almost impossible to work out a clear path towards accessing funding. I can sympathise with anybody who is in control of funds for not handing funding on in that situation. Those issues need to be really quite clear cut, I would suggest, before any funding is handed over otherwise you just end up with a situation where some members of the community may feel justified in saying a great deal of money was handed over and nothing happened. You need a clear executive control within the community so that you can act on any funds that become available".[33]

The Committee believes that adequate funding should be provided to assist with environmental land management of the parcels of land that were previously transferred to the Aboriginal community by the Aboriginal Lands Act 1995 and the Aboriginal Lands Amendment (Wybalenna) Act 1999.

2.3.2 Local Management

The issue of 'local management' as it relates both to past transfers and the proposals put forward in the current legislative package continues to be a

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[29] Mr Colin Hughes, Tasmanian Aboriginal Land Council, Transcript of Evidence, 3/2/00, p. 15.
[30] Mr Ross Britton, Arthur-Pieman Coalition, Transcript of Evidence, 16/3/00, p. 10.
[31] Mr Colin Hughes, Tasmanian Aboriginal Land Council, Transcript of Evidence, 3/2/00, p. 16.
[32] Operations of Government Departments 2000-01 – Volume 2, pp. 359-361.
[33] Mrs Lynn Mason, Flinders Island Council, Transcript of Evidence, 22/2/00, p. 10.

bone of contention between groups and individuals of the Tasmanian community.

The 1995 Act specifically provides in section 31 (1) that the Council[34] must involve a local Aboriginal group or a local Aboriginal person in the management of Aboriginal land but in subsection (2) introduces other factors which have the capacity to disenfranchise local groups.

A 'local Aboriginal group' is defined in the 1995 Act :

> "in relation to an area of Aboriginal land, means an Aboriginal group nominated by the Council for that area".[35]

Thus, while a community may recognise certain residents as their local Aboriginal group, under the 1995 Act, the Aboriginal Land Council of Tasmania has the right to appoint any management group which is then recognised as the local group for management purposes.

Whilst ALCT has made every attempt to consolidate the Flinders Island Aboriginal Association (FIAA) as managers of the Wybalenna site and produced correspondence showing these attempts, FIAA has so far failed to complete the formal agreement even though it is managing the site on a day-to-day basis.

In the far North West TALC is seen as the manager of the Mt Cameron West site. While the Circular Head Aboriginal Corporation accepts that it does not have the capacity to manage this area, it believes it does have the capacity for input into any decision-making. The Corporation gave evidence of a desire to be involved in further management issues through a process different from that which the Act specifies.

2.3.3 Consultation Process

The current Aboriginal Land and Cultural Issues Working Group was established :

> "to analyse the land and cultural issues raised by representatives of the Aboriginal community who met with the Premier in November of 1998 and to recommend appropriate processes for working through and resolving those issues".[36]

The membership was drawn from nine different organisations representing the Aboriginal community. Four groups were specifically represented - Tasmanian Aboriginal Council, Aboriginal Land Council of Tasmania, Deloraine Aboriginal & Cultural Association and the Aboriginal Elders Council. Government representatives included Mr Richard Bingham as Chair and officers from the Department of Primary Industries, Water and Environment, the Department of Premier and Cabinet and the Office of Aboriginal Affairs. The Working Group met eight times between December 1998 and June 1999.[37]

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[34] Aboriginal Land Council of Tasmania established under Section 5 of the *Aboriginal Lands Act 1995*.
[35] Aboriginal Lands Act 1995.
[36] Mr Richard Bingham, Chairman, Aboriginal Land and Cultural Issues Working Group, Transcript of Evidence, 1/2/00, p. 2.
[37] Mr Richard Bingham, Chairman, Aboriginal Land and Cultural Issues Working Group, Transcript of Evidence, 1/2/00, pp. 1-2.

The role of Aboriginal members of the Working Group was to establish a position on various issues representative of the nine organisations which had nominated them. The Committee received some evidence of concern within the Aboriginal community at the process used and frustration was expressed. In answer to why members withdrew from the Aboriginal Working Group which met "to discuss the work of the Aboriginal Land and Cultural Issues Working Group and to obtain a representative position on the issues"[38], a representative of the Tasmanian Aboriginal Land Council commented :

> "I am not too sure myself that was when we had a new manager and some people changed their views in that we thought that if we had stayed on the committee it would have been a waste of time because our views wouldn't have been heard anyway because there other groups that maybe didn't have the same opinion as us".[39]

Again, in answer to a question on the issue of their views, TALC responded that :

> "they were being heard but … didn't think they would be respected by other members on that party."[40]

The Flinders Island Aboriginal Association (FIAA) is another group listed as represented on the Aboriginal Working Group and in giving evidence to the Committee, on behalf of FIAA, Mrs Alma Stackhouse stated :

> "I believe that the working party or members of the working party, being Richard Bingham, had come and met with my community to discuss land being handed back the week prior to that. [referring to 28 October] I believe the Premier made the statement around about 11 or 12 October, but this community wasn't consulted until quite some time later. I want that on record and I want this community in which we live to understand we, I believe - we being the Aboriginal community here - are being blamed for non-consultation with the wider community under the pretence of reconciliation. We are innocent in that.
>
> We are very disappointed that the consultation process has not been given the same respect to us here on Flinders Island."[41]

Mrs Stackhouse was awarded an OAM for service to the Aboriginal community in 1989, is a founding member of FIAA and a member of the National Council for Aboriginal Reconciliation.

The matter of lack of local consultation within the Aboriginal community also arose in Circular Head. In answer to whether consultation occurred with her or any other members of the Aboriginal community of Circular Head in relation to the current proposal, Mrs Joy Gillies of the Circular Head Aboriginal Corporation, responded that it had not.[42]

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[38] Mr Richard Bingham, Chairman, Aboriginal Land and Cultural Issues Working Group, Transcript of Evidence, 1/2/00, p. 2.
[39] Tasmanian Aboriginal Land Council, Transcript of Evidence, 3/2/00, p. 3.
[40] Tasmanian Aboriginal Land Council, Transcript of Evidence, 3/2/00, p. 3.
[41] Mrs Alma Stackhouse, Flinders Island Aboriginal Association, Transcript of Evidence, 22/2/00, p. 5.
[42] Mrs Joy Gillies, Transcript of Evidence, 14/3/00, p. 4.

In evidence on behalf of the Tasmanian Regional Aboriginal Council (TRAC), the elected arm of ATSIC, Mr John Clark stated :

> "I suppose the first thing is that TRAC has a perception - there is no written hard evidence or anything like that which is recorded anywhere - that the consultation process internally in the Aboriginal community probably was not as wide as it should have been, and therefore some of the points that we might raise could have been probably sorted out if that process had taken place."[43]

Ms Darlene Mansell, who was initially a member of the Aboriginal Working Party, claimed that the :

> "…Aboriginal community consultative process was indeed very exclusive".[44]

In her written submission she stated :

> "…Aboriginal representation on the Aboriginal Working Party dwindled dramatically over a period of months to absolute minimal (ALCT, TAC & TALC) prior to the announcement by government of the Aboriginal package".[45]

The above are a sample of the continuing concern within the Aboriginal community about the way consultation was undertaken. The same concern at the lack of consultation was expressed outside the Aboriginal community.

While the Committee acknowledges that a perfect process of consultation has yet to be discovered, major players such as the local government authorities in the areas of the proposed land transfers expressed great concern at the lack of consultation from a Government committed to a 'partnership process'. The Premier, while briefing the Select Committee at the commencement of the hearings, acknowledged :

> "… that people do have legitimate rights and legitimate concerns but those cannot be held up to prevent, if you like, or to hold back the fundamental principle. What I did say at the time of the announcement was that the Government was prepared to listen to all points of view about this and to take into account in drafting the legislation, the concerns that others might have who had legal rights of access, for instance, a lease or licence holders or whatever.
>
> After I made the initial announcement, before the legislation was introduced into Parliament, there was substantial consultation with groups and individuals all around the State about the issues that they raised with us about this land transfer package and in the main we believe that those issues and concerns that have been raised have been addressed in the legislation."[46]

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[43] Mr John Clark, Tasmanian Regional Aboriginal Council, Transcript of Evidence, 16/3/00, p. 1.
[44] Ms Darlene Mansell, Transcript of Evidence, 10/4/00, p. 2.
[45] Ms Darlene Mansell, Submission to the Legislative Council Select Committee on Aboriginal Lands, 27 January 2000, p. 2.
[46] Jim Bacon MHA, Premier, Transcript of Briefing, 1/2/00, p. 2.

It was clear however during the Committee's hearings, particularly in Circular Head and the Furneaux Islands, that communities still had concerns that had not been taken into account in drafting the legislation.

In evidence to the Committee the General Manager of Circular Head Council stated :

> "… that Council has grave fears about further transfer of Aboriginal lands at West Point and Sundown Point because it is by no means clear as to what public access really means."[47]

And again :

> "With respect to the West Point and Sundown Point further transfer of land, this council has not been consulted on any basis to do with the management of roads and roads in the area are an issue to us."[48]

The Mayor, in answer to whether the Circular Head Council was consulted answered quite categorically :

> "No Madam Chair. We heard about it on the grapevine, I suppose a couple of days before, two or three days before it was about to be announced."[49]

Again in respect to consultation in the Furneaux Islands, Deputy Mayor Helen Cooper stated :

> "Council in its motion has expressed the four points that were of great concern and the first one was the lack of consultation during the whole process of this amendment process, the lack of consultation with all stakeholders. It considered that there was no representation with the community of the Furneaux group, the wider community … or directly with the Flinders Island Aboriginal Association or the Cape Barren Community Association through the working party or the consultation party that was working out the amendments".[50]
>
> "The announcement of the Government's proposal came somewhat out of the blue, if I could use that expression. Announcements that come out the blue like that cause immediate and unnecessary tensions and cause these to surface between the wider community and the Tasmanian Aboriginal community and locally within the internal ranks of the Aboriginal community itself - that is, FIA and the Cape Barren Island Community Association - and other Tasmanian Aboriginal organisations.
>
> The effect that this lack of consultation had on the community could well be likened to a proverbial slap in the face particularly after all the efforts achieved in the reconciliation process with the Wybalenna Agreement. … Council also feels that there was a negative impact on the local Aboriginal groups who had to

[47] Mr Paul Arnold, Circular Head Council, Transcript of Evidence, 14/3/00, p. 2.
[48] Mr Paul Arnold, Circular Head Council, Transcript of Evidence, 14/3/00, p. 3.
[49] Mr Ross Hine, Circular Head Council, Transcript of Evidence, 14/3/00, p. 7.
[50] Mrs Helen Cooper, Flinders Island Council, Transcript of Evidence, 22/2/00, p. 3.

> wear the decision that was made with questionable input and prior knowledge."[51]

There appear to be some differences in evidence over the consultation process taken with private leaseholders. A submission from ALCT presents copies of notes taken in conjunction with a visit on 27 April 1999 and a copy of a letter dated 20 June 1999 sent to non-Aboriginal people who had an interest in Cape Barren, but resided elsewhere. These documents were presented to show ALCT attempted to brief people as a way of allowing them to have input. Private landowners with adjoining leases however believed that the landlord - that is the Government and the Lands Department - should have been consulting with them before any proposed new landlord entered the negotiating arena, thus giving more legitimacy to the process.

The Committee believes that had this procedure been followed, the confusion surrounding the consultation process with leaseholders would not have eventuated and that, while the legislation was primarily about the principle of land transfer, unless issues of process were addressed first, no recourse was open to affected parties.

The evidence suggests therefore that adequate and extensive consultation with all interest groups, especially those important groups within the areas in which land is proposed to be transferred, has not taken place regarding land transfers under the current Bill. This has led to divisions within local communities. This alienation of sections of the community goes against what the Premier said in his media release of 12 October 1999 :

> "In preparing the package, we have been conscious of the meaning of reconciliation, careful not to alienate one section of the community against another".[52]

The Hobart Quaker Peace and Justice Committee believed that :

> "… part of the process [of reconciliation] is understanding the Aboriginal processes of their skin system. When we take on board some of their processes of a lot of negotiation… A lot of yarning done in pubs and parks and it is really valuable, this yarning that goes on. We are doing some yarning now. Laughter, humour and joy and accepting that the process is so important and acknowledging Aboriginal processes in the way we work".[53]

The rationale for further land transfers differed amongst various sections of the community. Quite clearly some saw Tasmania as one State, sharing the sixty percent of the state under Crown ownership with no particular group having advantage over the other. Others believed that the land transfers effected under the Aboriginal Lands Act 1995 were a one-off occurrence. They accepted that it had taken until 1998 to achieve the transfer of the site at Wybalenna and that this had been a contribution to reconciliation.
Concern was expressed at where the transfer process would end if it stays within the political arena. With transfers relating to Rocky Cape National Park, Mt William National Park, Mt Roland, Bruny Island and more of the west and south west coasts openly mooted during the Committee hearings, this concern was given some legitimacy.

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[51] Mrs Helen Cooper, Flinders Island Council, Transcript of Evidence, 22/2/00, p. 3.
[52] Media Statement by the Premier, 12 October 1999.
[53] Ms Robyn Clare, Hobart Quaker Peace and Justice Committee, Transcript of Evidence, 10/4/00, p. 9.

While the lack of due process and the disregard of communities is of concern, it is not the fundamental reason that the Committee concludes that the land should not be transferred.

The Committee does conclude however that the lack of commitment to community discussion has diminished the level of trust in and support for the process.

2.3.4 The Aboriginal Relics Act 1975

From time to time the Aboriginal Relics Act 1975 (1975 Act) was raised and identified as a reason for tension between groups in society. The issue was raised both by those who generously support the aboriginal movement and those more driven by the commercial needs of society.

The various comments of Justice Pierre Slicer are relevant.

> "The sooner that Act is fixed the better".[54]

> "If you asked me, every midden site in Tasmania should be protected as a sacred object, I would tell you you're loopy. Why? They were kitchen sites. If there's something in them that advances our knowledge or which is important, like that one, yes, you should, but I expect you'd do that if you found a good fossil site, you'd proclaim it, saying, 'We really don't want people to knock these fossils off because they tell us about Tasmania'. That's really a different test than this sort of test. This is about land. The other is more about the Aboriginal Relics Act. But if you want my answer, when I read some of these statements about midden sites and so on, I think the world's gone mad".[55]

> "There is no easy one process but I would suggest that you separate the Aboriginal relics debate from this debate".[56]

Circular Head sawmiller Donald Britton identified both the commercial need and the need for balanced change to protect significant cultural heritage.

> "…it raises the issue of the Aboriginal Relics Act 1975. We've had a lot of problems with our property and also just in general on the significance of sites. I'm not sure how well you know the Relics Act but basically any object or site that has an association with the Aboriginal people is classed as a site and there's no degree of significance on that - a little stone flake scattered has the same significance as a stone carving or petroglyph. With our property at Temma we have been precluded from logging probably half of the harvestable timber on that. There is a significant lot of our property stopped from logging, the other half we would have like to put back into plantation but because in putting trees in you have to disturb the soil and once a flake is exposed, that's a site, you cannot disturb, so it's no go. So at the moment we are negotiating this with the Government – this has been going on for fifteen years – for some sort of

[54] Justice Pierre Slicer, Transcript of Evidence, 3/2/00, p. 9.
[55] Justice Pierre Slicer, Transcript of Evidence, 3/2/00, p. 11.
[56] Justice Pierre Slicer, ibid.

> compensation or land swap deal on that, so it has been very frustrating for us. To me, a broken shell or a stone scatter just does not have the significance of a settlement site or a stone carving so we feel that a lot of these problems wouldn't be anywhere near as great if that Relics Act was reviewed and some degree of significance given to those sites".[57]

Generally the Committee found agreement that the 1975 Act was creating tensions, that it did need review and that fundamental to that review was the need to recognise that some Aboriginal heritage sites are more significant than others.

2.4 Achievable Outcomes

Although the Committee does not recommend the transfer of the proposed Crown Land parcels to assist reconciliation, there are outcomes which can be achieved which the Committee believes will assist in the reconciliation process.

2.4.1 Young Offenders Program

The Committee visited most of the sites proposed to be transferred to the Aboriginal community. The Young Offenders Program on Clarke Island, although in its early stages, shows success in the rehabilitation of young Aboriginal offenders by offering a program more suited to their culture.

The Committee was impressed with the management of the program as well as the attitude of the young people they met. The Committee believes that support and encouragement should be given to this program to ensure that, as a minimum, the per capita funding currently available through Ashley Detention Centre is allocated, also on a per capita basis, to the Clarke Island program.

This program is a tangible example of Aboriginal communities being prepared to address their social concerns by means of appropriate alternatives to those currently provided within the Tasmanian Government system. Similar programs should be encouraged in other areas such as health, education and employment.

The Committee believes that financial support from the Tasmanian Government for this program would be a stronger signal of reconciliation than continuing land transfers.

2.4.2 Indigenous Cultural Centres of Excellence

Further evidence was received which supported the establishment of an indigenous cultural centre to assist in the education of the community as a whole and as part of a process of reconciliation.

Mr Peter Sims believes that such a site should be established on the West Coast :

> "I would envisage an establishment which would actually create employment so you could employ a lot of Aboriginal people. I would see this as a Parks and Wildlife centre. I would see this as a tourist centre. So you have a mix of the various interests in that area and other people who have interests in managing that

[57] Mr Donald Britton, Transcript of Evidence, 16/3/00, p. 3.

> land, are the land managers, recreation interest should have some access to that building as well. So it would be a multi-use building but the emphasis would be on a cultural centre of Aboriginal sites of significance…"[58]

Ms Darlene Mansell suggested :

> "A practical process like creating an Aboriginal cultural interpretive centre offers a lot to Aborigines and non-Aborigines, primarily Aborigines. I think the flow-off is a natural evolutionary part of reconciliation that we would be dealing with … There would be more practical progress to the Aboriginal community in terms of employment, education, and we can go on… rather than returning a national park that has a lot of liability…"[59]

It is evident that the transfer of land to indigenous people by itself does not assist the reconciliation process. The Committee believes however that the development of indigenous centres of cultural excellence would assist in the education of the community as a whole and also contribute to the process of reconciliation.

2.4.3 Management Funding

The Committee identified in section 2.3.1 that funding issues have led to problems in the environmental land management of the parcels of land previously transferred.

The Committee believes that positive outcomes can be achieved for Government by re-addressing the provision of financial support to assist Aboriginal communities with the environmental land management of the parcels of land transferred by the Aboriginal Lands Act 1995 and the Aboriginal Lands Amendment (Wybalenna) Act 1999.

2.4.4 The Aboriginal Relics Act 1975

In section 2.3.4 the Committee stated that *The Aboriginal Relics Act 1975* had caused tension between groups within society.

The Committee believes that by reviewing the 1975 Act to recognise that some Aboriginal heritage sites are more significant than others would also achieve a positive outcome for Government.

Conclusion

The Committee concludes that :

1. Although reconciliation is difficult to define there is not likely to be, in the immediate future, a defining moment when everyone will accept that reconciliation has been achieved.
2. To many within the Aboriginal movement the return of land is fundamental to a successful reconciliation process.

3. Funding issues have led to problems in the environmental land management of the parcels of land previously transferred.

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[58] Mr Peter Sims, Transcript of Evidence, 10/4/00, p. 10.
[59] Ms Darlene Mansell, Transcript of Evidence, 10/4/00, p. 8.

4. The lack of appropriate and widespread consultation in relation to the current proposal to transfer parcels of Crown Land to the Aboriginal community has had a negative impact. The process used in formulating the legislation was flawed in terms of consultation and has caused tensions, not only between indigenous and non-indigenous people but also within the indigenous community.

5. To ease tensions and to facilitate reconciliation any re-write of the 1975 Act should introduce a process which allows members of the Aboriginal community to identify places they believe are of significance. It would further provide that the nomination for special consideration or special protection of the site should then pass to an independent body, such as the Land Use Planning Appeals Board (LUPA), for consideration leading to approval or rejection.

6. The Young Offenders Program operating on Clarke Island demonstrates success in the rehabilitation of young Aboriginal offenders by offering an alternative program more suited to their culture The provision of adequate financial support would be a stronger signal of reconciliation than the transfer of land. As a minimum, the per capita funding currently available through the Ashley Detention Centre should be similarly allocated to the Clarke Island program.

7. The transfer of land to indigenous people by itself does not assist the reconciliation process. The development of indigenous centres of cultural excellence would assist in the education of the community as a whole and also contribute to the process of reconciliation.

Recommendations

The Committee recommends that :

1. The process of reconciliation be continued to enable not only Tasmanians, but all Australians, to come together in the community and provide justice and equity to all.

2. The transfer of the proposed Crown land parcels should not be supported as it does not assist reconciliation.

3. Adequate funding be provided to assist with environmental land management of the parcels of land that were previously transferred to the Aboriginal community by the 1995 and 1998 Acts.[60]

4. The Aboriginal Relics Act 1975 be reviewed and the concept of site significance be introduced.

5. Financial support and encouragement be given to the Young Offenders Program on Clarke Island.

6. Indigenous centres of cultural excellence be developed to assist in the education of the community as a whole.

[60] Aboriginal Lands Act 1995 and the Aboriginal Lands Amendment (Wybalenna) Act 1999.

Chapter 3 – Aboriginality

> **"Aboriginality is our identity crisis and we should be looking at practical ways and means of dealing with the issue. Governments and their agencies need to understand their role in the process and not take over the process".**[61]

3.1 Who is an Aboriginal person?

Section 3 of the *Aboriginal Lands Act 1995* (the Act) provides that an 'Aboriginal person' has the meaning given to that expression for the purposes of the Commonwealth Aboriginal and Torres Strait Islander Commission Act 1989 (ATSIC Act). Under the provisions of the ATSIC Act an Aboriginal person is defined as "a person of the Aboriginal race of Australia".

A rule of thumb method for deciding who is a person of the Aboriginal race of Australia has been whether a person identifies himself or herself as Aboriginal and is accepted by his or her community as being Aboriginal.

The definition of "Aboriginal person" was considered by the Federal Court of Australia in the case of *Edwina Shaw and Another v Charles Wolf and Others* (the Wolf case), heard by Justice Merkel.

The question to be determined by the Court was whether each of the eleven candidates standing for Regional Council (Hobart) election under the provisions of the ATSIC Act was in fact an Aboriginal person as required by that Act. Justice Merkel stated that the ATSIC Act gave :

> "little guidance as to how to restore the difficulties of proof inherent in tracing descent and establishing identification". [62]

He went on to say that the :

> "problem in the present case is determining a practical and realistic approach to the definition of an Aboriginal person which gives effect to, rather than frustrates, the [ATSIC] Act and its objects".[63]

Justice Merkel concluded that descent alone is not a sufficient criterion for recognition as an Aboriginal person, but a small degree of Aboriginal descent coupled with genuine self-identification or with communal recognition may in a given case be sufficient for eligibility.

Justice Merkel recognised the interaction and interdependence of the three factors involved in the identification of Aboriginality in the context of their application to particular individuals and went on to consider each of these :

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[61] Ms Darlene Mansell, Transcript of Evidence, 10/4/00, p. 2.
[62] Federal Court of Australia Decision – [1998] 389 FAC (20 April 1998), Edwina Shaw & Another v Charles Wolf & Others, p. 5.
[63] Federal Court of Australia Decision, ibid., pp. 5-6.

3.1.1 Descent

> "… if … the Court is satisfied that a person does not have *some* descent then the person cannot be an Aboriginal person for the purposes of the Act". [64]

3.1.2 Self Identification

> "It is the genuineness of the identification, rather than its content, that is the critical issue. To be genuine it is sufficient that the self-identification is bona fide and that the grounds for it are real and not hypothetical or spurious".[65]

In the context of a "concealed but nevertheless passed on family history" :

> "… Aboriginal identification often became a matter, at best, of personal or family, rather than public, record. … oral histories and evidence as to the process leading to self-identification may, in a particular case, be sufficient evidence not only of descent but also of Aboriginal identity".[66]

3.1.3 Communal Recognition

> "Communal identification may be based on physical, cultural, social or other attributes perceived in a particular community to exist in Aboriginal persons. Although the evidence will usually relate to views held by persons comprising the relevant community it is a communal, rather than personal, recognition that is relevant."[67]

3.2 The Wolf Case Criteria applied in the 1999 Bill

The principles established by Justice Merkel in the Wolf case have been prescribed in clause 5 of the *Aboriginal Lands Amendment Bill 1999* (the Bill). The Bill was introduced into the House of Assembly by the Premier and read the first time on 6 December 1999 prior to Parliament being prorogued.

An "Aboriginal person" is defined in clause 5 of the Bill as a person who satisfies the following requirements :

(a) Aboriginal ancestry;
(b) self-identification as an Aboriginal person;
(c) communal recognition by members of the Aboriginal community.

This definition is consistent with findings in the Wolf case, where :

(a) the word "descent" rather than "ancestry" was used. The Macquarie dictionary however defines an "ancestor" as

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[64] Federal Court of Australia Decision, op.cit., p. 8.
[65] Federal Court of Australia Decision, op.cit., p. 9.
[66] Federal Court of Australia Decision, op.cit., p. 10.
[67] Federal Court of Australia Decision, op.cit., p. 10.

> "one from whom a person is descended usually distantly".[68]

(b) the term "self-identification" was used; and

(c) the words "communal recognition" were also used.

3.3 Aboriginal Ancestry Guidelines

Guidelines adopted by the Tasmanian Electoral Office with respect to the 1996 Aboriginal Land Council of Tasmania (ALCT) elections stated :

> "A person must be able to provide authentic documentary evidence that shows a direct line of ancestry linked back through an identifiable family name to traditional Aboriginal society.
>
> This will usually be in the form of a verifiable family tree, or archival or historical documentation which links a person to a traditional family or person.
>
> Photographic evidence or family folklore alone will not normally be sufficient to prove Aboriginal ancestry.
>
> Where a person is claiming their Aboriginal ancestry from outside Tasmania, proof of descent must be available from the other area of Australia concerned".[69]

3.4 Communal Recognition Guidelines

> "Normally, in addition to showing Aboriginal ancestry, a person must be able to demonstrate communal recognition or acceptance by members of the broader local Aboriginal community.
>
> This means that a person must be known by other Aboriginal people in the local community and show a link to Aboriginal ancestry through either their own or their family's acknowledgment of their Aboriginal ancestry and their involvement with that local community.
>
> The 'local community' in this context can be taken as a geographic area in which there are family groups and extended family groups who have associated with each other and recognised each other's Aboriginality. In some situations the 'local community' may have statewide coverage.
>
> In practical terms it will generally be required :
>
> For a person to obtain three signatures from recognised members of the broader Aboriginal community or families who live in their local community;

[68] The Macquarie Concise Dictionary, (New South Wales : 1982), p. 30.
[69] Tasmanian Electoral Office - The Aboriginal Land Council of Tasmania – 1996 Election Procedures and Guidelines, p. 6.

> That these three community members be able to acknowledge that person's or family's identification as Aboriginal within that community; and
>
> That the signatories not be from the immediate family group of the person seeking confirmation and be from family groups who are accepted members of the broader local Aboriginal community.
>
> It would not usually be sufficient for confirmation of communal recognition to come from an Aboriginal organisation alone, without separate support from local families and community members. However evidence of communal recognition may be considered from one or more Aboriginal organisations alone, if the basis of the evidence can be properly demonstrated".[70]

Mr Richard Bingham, Chairman of the Aboriginal Land and Cultural Issues Working Group, believed that the words 'Aboriginal community' meant the whole of the Tasmanian Aboriginal community.

> "…I think the perspective the Government would take is that communal recognition means something more than recognition by a limited number of people. I think there would have to be some general level of acceptance across the broader community before you could say that a person meets the criteria."[71]

Justice Merkel stated in the Wolf case that :

> "The relevant community might be the general Aboriginal community in a particular locality or a much smaller part of that community whose members reside in a specific locality or have some common historical, cultural or social characteristic. In some instances a community might consist of an extended Aboriginal family living in a particular locality. The Court, in having regard to evidence of identification or recognition by any relevant community, need not be concerned with defining the relevant community or communities other than in the most general sense. The weight to be attributed to such communal recognition as is found to exist will vary according to the facts of the particular case".[72]

A number of people claiming to be Aboriginal persons and who gave evidence before the Committee claimed that their respective Aboriginal communities are in the best position to make this sort of identification.

Justice Pierre Slicer also supported this view and said in the course of providing evidence to the Committee :

> "… it's got to be a process of politics within the Aboriginal community as distinct from legislative enactment".[73]

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[70] Tasmanian Electoral Office - The Aboriginal Land Council of Tasmania – 1996 Election Procedures and Guidelines, pp. 6-7.
[71] Mr Richard Bingham, Chairman, Aboriginal Land and Cultural Issues Working Group, Transcript of Evidence, 10/4/00, p. 9.
[72] Federal Court of Australia Decision, p. 11.
[73] Justice Pierre Slicer, Transcript of Evidence, 2/2/00, p. 10.

The Committee believes that this is a reasonable proposition and that the Aboriginal communities in the North, South, North-West, Flinders Island and Cape Barren Island ought to be considered as local regions, enabling local Aboriginal persons to determine the question of communal recognition.

3.5 Ancestry and Communal Recognition

It is argued by many who have been accepted as Aboriginal persons that in the nineteenth century there were only two women recognised as Aboriginal remaining on mainland Tasmania who had children. These women were Dolly Dalrymple and Fanny Cochrane (Smith). Therefore, in order to be entitled to claim Aboriginal ancestry in Tasmania, it is said to be necessary to trace one's ancestry to one of these women or to an Aboriginal woman of the sealing communities of the Furneaux Islands.

In the Wolf Case Justice Merkel referred to the archivist R.J. Drysdale who made reference to the diary of George Gatenby which contains entries dating from 26 June 1843. The diary says that the "Blacks" were working for the Clerk, the Chief District Constable for Hamilton, and for a Mr Young. He also referred to a record made by an early settler, Henry Judd, who saw between twenty and thirty men and women near the Huon River who were "the few blacks that were left in the colony".[74]

Justice Merkel also noted that Dr Cassandra Pybus has observed that there were a number of "half-caste" women of Aboriginal/European descent who stayed on the mainland of Tasmania after the 1830s, working in households, and it was possible that some may not have been recorded. In evidence before the Federal Court Dr Pybus stated :

> "By the 1820s it is clear that there is a number of girls, probably half-caste girls, who are working as servants, I suggest, possibly prostitutes, possibly kept mistresses – it's kind of hard to establish quite the nature of their relationship – living with white settler families".[75]

Justice Merkel further stated :

> "One significant difficulty in researching Aboriginal geneology from these sources is that archival records usually did not include information as to whether an individual was Aboriginal".[76]

The conflicting accounts contained in, and hypotheses raised by, the various historical records demonstrate that the general historical record, particularly when relied upon to discount descent in a particular case, is not complete or reliable in all instances.

The Committee is of the view that many child-bearing Aboriginal women remained on mainland Van Diemen's Land after 1835. As a consequence there are likely to be many Tasmanian people who claim to be Aboriginal but are unable to establish direct descent from these women by means of archival records.

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[74] Federal Court of Australia Decision, op.cit., p. 16.
[75] Federal Court of Australia Decision, op.cit., p. 17.
[76] Federal Court of Australia Decision, op.cit., p. 15.

3.6 Eligibility for ALCT Elections

Under the provisions of the Aboriginal Lands Act 1995 ownership of land was transferred to the Aboriginal Land Council of Tasmania (ALCT) in perpetuity. ALCT is a statutory body created to take responsibility for the ownership of Aboriginal land and to determine how that land is to be managed. To qualify as an ALCT elector and for membership of the Council, a person must comply with the present definition of "Aboriginal person" under section 3 of the Act.

This requirement has caused a great deal of difficulty and uncertainty. On the other hand, Justice Merkel took a practical approach articulating principles conducive to practical solutions.

Evidence provided to the Committee by Justice Pierre Slicer and other witnesses suggested that the Aboriginal community itself should determine who is an Aboriginal person. At a meeting of Elders in April this year the general consensus was –

- "It is not the role of a statutory government body to determine aboriginality.
- Elders must be consulted in the process of determining aboriginality for ALCT".[77]

Under section 10 of the Act however, the Chief Electoral Officer has responsibility for determining eligibility to enable Aboriginal persons' names to be entered on the Roll.

Subsection (6) provides that, in the event of a dispute under section 10, an appeal may be made to the Supreme Court of Tasmania. This will almost inevitably mean that the final question will not be determined by the Aboriginal community, but by a person who is not an Aboriginal. Justice Pierre Slicer believes that the Supreme Court should be taken out of the legislation and that "it is for the Aboriginal people to self-define".[78]

It is the view of the Committee that the Bill provides for an even more complicated process. Proposed section 9 (3) of the Act provides :

> "The Council [i.e. ALCT] is to prepare, in consultation with the Chief Electoral Officer, information on the process and requirements for enrolment of a person on the Roll, including matters relating to the entitlement of a person to have his or her name entered on the Roll and the rights of a person to object or appeal under sections 10B, 10D and 10E".[79]

Proposed section 10A(2) provides that the Chief Electoral Officer must enter on the Preliminary Roll the names of all persons who "have lodged a properly completed enrolment form …".[80] The word "properly" is not defined and the Committee believes that it should be.

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[77] Minutes of Elders Gathering, 7 April 2000.
[78] Justice Pierre Slicer, Submission to the Legislative Council Select Committee on Aboriginal Lands, 18/1/00, p.2.
[79] *Aboriginal Lands Amendment Bill 1999*, pp. 7-8.
[80] *Aboriginal Lands Amendment Bill 1999*, p. 9.

Proposed section 10A (3)(c) provides that the Chief Electoral Officer is to call for objections to the transfer of names on the Preliminary Roll to the Roll on the basis that the person is not an Aboriginal person.

Under proposed section 10B any person may object to the transfer of the name of a person on the Preliminary Roll to the Roll on the basis that the person is not an Aboriginal person.

Proposed section 10C provides that ALCT is to appoint a Roll Coordinator to accept or reject objections to the transfer of the name of a person on a Preliminary Roll to the Roll.

Proposed section 10D provides that a person aggrieved by a decision of the Roll Co-ordinator may appeal to ALCT for a review of that decision.

Proposed section 10E provides for an appeal to the Supreme Court from a decision of ALCT.

It is evident that many persons seeking to prove they are Aboriginal persons would not be able to meet the costs of a Supreme Court challenge. Legal aid may not be granted in circumstances where that decision is made by Aboriginal persons who do not accept that the applicant is an Aboriginal person.

It is the Committee's view that this process is cumbersome and unnecessary and has the potential to take a long time to finalise when such matters should be settled as soon as possible.

The Committee considers that a Tribunal should be established for the purpose of determining Aboriginality. The Tribunal should consist of three people appointed by the responsible Minister – an Elder from the community where the applicant normally resides, an eminent Aboriginal person of statewide standing and a current or retired legal practitioner. The legal practitioner should be the chairperson, and in the event of the holder of that office not being able to fulfil his or her duties, a deputy – also a legal practitioner - should be appointed to do so.

An application to the Court in Wolf's case would have been costly. If it were left wholly to the Aboriginal community to determine Aboriginality it may cause injustices in cases where those claiming to be Aboriginal are denied that claim by others in the wider Aboriginal community.

The rules and guidelines under which the Tribunal operates should be more informal than Supreme Court proceedings. Tribunal procedures should be established to promote the object of the Act expressed in the long title of the Act :

> "… to promote reconciliation with the Tasmanian Aboriginal community by granting to Aboriginal people certain parcels of land of historic or cultural significance".[81]

Not only should reconciliation occur with indigenous persons but also with non-indigenous persons. The granting of land must be to the benefit of all Tasmanians. To this end, the guidelines by which the Tribunal should operate should accord with the rules and principles established in the Wolf case.

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[81] *Aboriginal Lands Act 1995*.

3.7 Onus of Proof

It is the Committee's view that the onus of proving to be an Aboriginal person must lie with a claimant appearing before the Tribunal. This principle accords with the intent of the Bill. A claimant must establish that proof on the balance of probabilities.

Conclusion

The Committee concludes that :

1. Many child bearing Aboriginal women remained on mainland Van Diemen's Land after 1835. It is likely therefore that many Tasmanian people who claim to be Aboriginal are unable to establish direct descent from these women by means of archival records.

2. Aboriginality is best determined by the Aboriginal community.

3. In cases of dispute, arising as a result of a finding by the Aboriginal Land Council of Tasmania, the proposed process for determining Aboriginality is cumbersome and unnecessary.

Recommendations

The Committee recommends that :

1. Aboriginality be determined by the Aboriginal community.

2. In the case of a dispute as a result of a finding by the Aboriginal Land Council of Tasmania, a Tribunal be established to determine Aboriginality.

3. The Tribunal consist of three persons appointed by the responsible Minister – an Elder from the community where the applicant normally resides, an eminent Aboriginal person of statewide standing, and a current or retired legal practitioner.

Chapter 4 – Land Transfer Process

'We appreciate that it's the right of the Aboriginal community to identify what may or may not be of significance but it's the validation process of these claims that we feel needs to be opened up". [82]

4.1 Do Tasmanian Aborigines have land rights?

Tasmanian Aborigines have a right to claim land. The primary right to such claims is provided through the Commonwealth Native Title process. This process is open, transparent and rigorous. The process tests Native Title claims against criteria established by the High Court, the Commonwealth Parliament and State Parliaments. It is meant to deliver equity Australia wide according to Commonwealth law supported by State laws.

Since the Mabo and Wik decisions of the High Court, the Commonwealth Government and the State Governments have enacted laws to enable land claims to be made. Tasmanian claimants are required by State law to access the National Native Title Tribunal to have land claims adjudicated.

It is a fact that Australia wide most Native Title claims are unsuccessful. The vast majority of indigenous Australians are unable to regain ownership or control of their land through Native Title processes. Creditable counsel and the historic record suggest that claims for Native Title by Tasmanian Aborigines would be unsuccessful.

If that is the case Tasmanian claimants would be no different from the vast majority of claimants across Australia.

4.2 The Indigenous Land Fund

Recognising that most claims Australia-wide would be denied, the Commonwealth Government established the Indigenous Land Fund (ILF) to offset the disadvantage of unsuccessful claimants. The ILF is an important fall back position for those Aborigines, particularly Tasmanian Aborigines, who are unable to a mount a successful claim for land.

The following representation of a Commonwealth Government document[83] explains the ILF.

What is the Land Fund?

The Indigenous Land Fund is a public trust account which is established to provide an ongoing source of funds for the Indigenous Land Corporation (ILC). The ILC uses the money it receives to help indigenous people to buy land and manage indigenous-held land. The ILC is the "operational arm" of the Land Fund, but the two are quite separate.

[82] Mrs Helen Cooper, Tasmanian Outer Islands Association, Transcript of Evidence, 22/2/00, p. 4.
[83] Commonwealth Document - www.ilc.gov.au

Why was the Land Fund established?

The Land Fund was established as part 2 of the Commonwealth's response to the High Courts historic Mabo decision in 1992.

The Commonwealth Government passed Native Title Legislation in 1993. It was recognised that the overwhelming majority of indigenous people had been dispossessed and would be unable to regain ownership or control of their land through Native Title processes. The Land Fund was established to help address that dispossession and to rebuild an indigenous land base for future generations.

How much goes into the Fund?

Each year for a period of 10 years $121 million (in 1994 terms) is being paid into the funds. Contributions will cease in 2004. From the annual allocation $76 million is retained in the fund and invested, while $45 million is transferred to the ILC for land acquisition, land management and running expenses.

The Fund is a perpetual fund, which always remains the property of the Commonwealth and when annual allocations to the Fund cease in 2004 funding to the ILC will continue from investments earned on the Fund.

Who controls the Land Fund?

The Fund is managed by ATSIC under delegation from the Minister for Finance. The ILC is represented on a Consultative Forum that can express its views on the Investment policy to the Minister for Finance.

Who can access the Land Fund?

The Land Fund itself cannot be directly accessed. The ILC receives an annual draw down of $45 million (indexed). Indigenous people and organisations can approach the ILC with specific proposals to purchase land or for land management. All proposals are considered within the ILC's policy guidelines for National and Regional strategies.

Although there have been three Tasmanian applications claiming Native Title, all three have been rejected by the National Native Title Tribunal. One claim was pursued in the High Court but has recently lost its final appeal.

It is important to note that Tasmanian Aborigines have already been successful in applications to the Indigenous Land Council for funds to offset their level of disadvantage. The Thule Estate on Flinders Island, The Modder River Station on Cape Barren Island and the private lease of Crown land on Clarke Island have been acquired using funds from the Indigenous Land Council. To some degree - and the Committee believes to a significant degree for local communities - the transfer of ownership of these lands has further empowered Tasmanian Aborigines.

The Indigenous Land Fund has one significant disadvantage for Aboriginal claimants in that the funds can only be used to acquire private property. That private property may be a freehold title or private leasehold of Crown property. It is clear that Tasmanian Aborigines could not mount a successful Native Title claim over Crown Land and, because Indigenous Land Council

funding can be used only to acquire private property, opportunities to acquire Crown Land are very limited.

4.3 The question of Crown land

Areas of Crown Land, including some of the areas provided for transfer in the current Bill, have special Aboriginal heritage values. The Committee has considered the need for a process to determine whether ownership of Crown Land should be transferred to Aboriginal community representatives.

The Crown, on behalf of all the people of Tasmania including Aboriginal Tasmanians, owns the Crown Estate which comprises approximately sixty percent of Tasmania's total land mass. Governments of the day are custodians of the Crown Estate for the time being.

There exists a need for the Crown to buy and sell land for specific purposes. There is also a precedent through the shack sites and other programs for the Crown to sell parts of the Crown Estate to private individuals for cultural, commercial or recreational reasons.

Substantive argument exists that the core Crown Estate comprising land classified as national park, state reserve, nature reserve, game reserve, conservation area, regional reserve, historic site, private nature reserve or private sanctuary ought to remain intact. The public's right, subject to reasonable guidelines, to access and use the core Crown Estate is inviolable. The public's links to this core Crown Estate for recreational and other purposes are deeply embedded and long standing.

There is however a precedent for the Government to transfer Crown Land to Aborigines. As early as 1847 the government granted 10 hectares to Walter George Arthur and many requests, petitions, applications and some grants have been made in the years since.

In 1995 the Government of the day, with the support of the Parliament, transferred Crown Land to the descendants of the indigenous people of Tasmania. There were conditions attached to the transfer, including that the land be held in perpetuity for the benefit of present Aborigines and their descendants. The Bacon Government is now proposing that the Parliament transfer further parcels of land to the Aboriginal Land Council of Tasmania (ALCT) to be held in perpetuity for the benefit of Tasmanian Aborigines.

The Committee has already rejected the proposition that land transfers will assist reconciliation. The Committee has further considered the possibility of transferring land as recognition of the contemporary Aboriginal community having rights to land.

The competing demands are between the claim for land and other rights that do not presently exist for Tasmanian Aborigines and the notion that National Native Title rights supported by the Indigenous Land Fund, provides equality in these matters for all Australian Aborigines regardless of where they live. A change to this situation would require the Tasmanian Parliament to establish a basis for land rights for Tasmanian Aborigines that is more generous than that applying to Australian Aborigines as a whole.

The Committee finds no evidence that suggests that the rejection of a Tasmanian Native Title claim is any different to the rejection of a Native Title claim elsewhere in Australia. The Committee does not however believe that

the option to grant further Crown land to Tasmanian Aborigines should be shut off.

The Committee is strongly of the view that if any Government of the day proposes to grant Crown land that proposal should be tested through an open, transparent and rigorous process of assessment. It is contemporary practice within the Tasmanian jurisdiction that proposals for fundamental change to land classification and use are subjected to stringent testing against established criteria. The land use legislation was established for this purpose and the Commonwealth/State Regional Forest Agreement followed a similar process. The Committee believes that any proposal to grant Crown land ought to be subject to the same rigorous assessment against established criteria. The question is how rigorous and against what criteria?

Many witnesses supported the need for criteria to be developed for the purpose of assessing lands proposed for transfer to the Aboriginal community. Mr Peter Sims, in agreeing that there was a need to establish criteria, stated :

> "Is it fair that the national legislation should apply equally to all Aborigines in Australia rather than specific Aboriginal groups or Tasmanians? Looking at it broadly, I would say they should be treated exactly the same – exactly the same as other States".[84]

Ms Jennie Herrera from the Hobart Quaker Peace and Justice Committee stated that if :

> "… the Tasmanian Government, looking at Tasmanian situations, … set up some form of tribunal to look at the specific situation here, we would be very much in support of that process".[85]

Mr Peter Innes-Smith, a New Zealander now living at Temma Farm, also believes that :

> "No land should be given away without serious consideration and consultation, and parameters put in place in agreements that are to be measured and met".[86]

The Committee considered the need to investigate models for both the development of criteria and the establishment of an open rigorous process of assessment that would allow Tasmanian Aboriginal claims for land rights to be fairly but rigorously assessed. The Committee sought advice from the Resource Planning and Development Commission with regard to its model for determining land issues.

The *Resource Planning and Development Act 1997* established the Resource Planning and Development Commission (RPDC) as a statutory body. The Commission oversees the State's planning system and assesses the public land use issues. Membership of the Commission represents a range of community, industry, conservation and local and State Government interests and is headed by a full-time and 5 part-time Commissioners.

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[84] Mr Peter Sims, Transcript of Evidence, 9/3/00, p. 15.
[85] Ms Jennie Herrera, Hobart Quaker Peace and Justice Committee, Transcript of Evidence, 10/4/00, p.4.
[86] Mr Peter Innes-Smith, Submission to Legislative Council Select Committee on Aboriginal Lands, 23/1/00.

The Commission is both a reflection of and a vehicle for changed land expectations. Emphasis is placed on the rights of the community to fully participate in the policy and development process.

The Committee believes that the Resource Planning and Development Commission model is highly regarded by the public and the Commissioners have earned the confidence of the community. It is seen as expert, independent and an appropriate vehicle to deliver fair and just decisions on proposals put before it.

The Committee has considered the potential for Commissioners or special Commissioners of the Resource Planning and Development Commission or a similar body to make expert, independent and fair judgements in regard to Aboriginal lands rights. This may well be an option but the Committee reached the decision that the Government of the day wanting to transfer Crown Land should identify and test the range of options available.

In the meantime there is argument that the Crown Estate should remain intact and lands with special values should be managed by the Crown Land managers with due regard for those special values.

Conclusion

The Committee concludes that :

1. Tasmanian Aborigines have been granted land on which to nurture their culture.

2. Tasmanian Aborigines have no greater rights to the return of land than Aborigines elsewhere in Australia.

3. Tasmanian Aborigines have continuing rights to claim for Native Title in the Commonwealth jurisdiction.

4. Native Title arrangements provide equality of rights for Aborigines Australia wide.

5. Most claims for Native Title Australia wide are unsuccessful.

6. If a claim by Tasmanian Aborigines for Native Title is unsuccessful a secondary process through the Indigenous Land Corporation for funds to acquire private land can be triggered.

7. Tasmanian Aborigines have already been successful in applications to the Indigenous Land Corporation for funds to offset their level of disadvantage, and the transfer of ownership of these lands has further empowered the Tasmanian Aborigines.

8. A process should be created to allow any future claims or proposals to be removed from the political arena and to be fairly assessed by an independent expert body.

9. This process should involve open, transparent and rigorous assessment.

10. Any process of assessment can only be successful if the proposal is tested against criteria that fairly represents the common good.

11. If any Tasmanian Government in the future wishes to introduce land rights more generous to Aborigines than those available under the present Commonwealth Native Title system, it should first develop criteria against which to test the validity of the proposal.

12. There is a need to identify those Aboriginal cultural heritage sites of special significance existing on Crown Land and to manage them with due regard to their values.

Recommendations

The Committee recommends that :

1. Claims by Tasmanian Aborigines for land rights is not sufficient justification to transfer Crown Land.

2. If the Tasmanian Government proposes in future to transfer land to meet a claim for land rights by Tasmanian Aborigines, it should first develop criteria against which the claim can be tested.

3. The process for the development of criteria should involve :

    - the preparation of draft criteria by Government;
    - independent, expert and fair testing of criteria through a rigorous process of assessment such as that managed by the Resource Planning and Development Commission;
    - a recommendation to Government by an independent expert body; and
    - approval by Parliament of the Government's preferred criteria. The recommended criteria should then be applied to all future applications for the transfer or management of land.

4. A process of rigorous assessment be determined to identify sites on Crown Land with Aboriginal cultural heritage values of special significance for management of their special values.

Chapter 5 – Burials and Cremations

> **"I'm an Aboriginal, I know I am and I want to be buried or have a traditional burial cremation on the crown land at Ben Lomond because that is where my ancestral remains are".**[87]

The Premier said in his second reading speech on the *Aboriginal Lands Amendment Bill 1999* (the Bill) that 'enabling the Aboriginal community to conduct Aboriginal cremations and burials demonstrates that this Government recognises the rights of Aborigines to practice their culture.'

The Bill amends the *Cremation Act 1934* to enable Aboriginal cremations to occur on Aboriginal land. Aboriginal land is defined in the *Aboriginal Lands Act 1995* and refers to land owned by the Aboriginal Land Council of Tasmania. There is no current provision for conducting Aboriginal cremations on Crown Land or private land.

The Bill provides for the following process to apply to the conduct of Aboriginal cremations :

> "**4A. (1)** A person who wishes to conduct an Aboriginal cremation on Aboriginal land must apply, in writing, to –
>
> - the Aboriginal Land Council of Tasmania for approval to use the Aboriginal land specified in the application for the purpose of an Aboriginal cremation; and
>
> - the Director of Public Health for approval to use that Aboriginal land for the purpose of an Aboriginal cremation.
>
> **(2)** On receipt of an application under subsection(l)(b), the Director of Public Health is to consult with the General Manager of the council of the municipal area in which the Aboriginal land is situated.
>
> **(3)** The Director of Public Health must not give his or her approval for the use of Aboriginal land for the purpose of an Aboriginal cremation unless the Director is satisfied that the person who wishes to conduct the Aboriginal cremation has obtained the approval of the Aboriginal Land Council of Tasmania for such use."[88]

The Bill also amends the *Cremation Act 1934* to enable the Governor to make regulations with respect to the conduct of Aboriginal cremations.

> "Approval from the Aboriginal Land Council of Tasmania to conduct cremations on Aboriginal land will be required along with the approval of the Director of Public Health for use of the site for cremations. In addition, a person wishing to conduct an Aboriginal cremation will be required to comply with cremation

[87] Mr Jay McDonald, Tasmanian Aboriginal Centre, Transcript of Evidence, 9/3/00, p. 18.
[88] Aboriginal Lands Amendment Bill 1999, p. 22.

> regulations and obtain the necessary medical certificates and permit."[89]

The *Cremation Regulations 1999* are amended by the Bill to provide for a cremation permit (to cremate the remains of a deceased person) and for all Aboriginal cremations to be registered by the Aboriginal Land Council of Tasmania.

Evidence provided by the Department of Premier and Cabinet indicates that amendments to allow for Aboriginal burials have not been included in the Bill as provisions in *the Local Government (Building and Miscellaneous Provisions) Act 1993* enable private burials to occur. There is no separate provision for the conduct of Aboriginal burials.

Further evidence suggests that :

> "… the main environmental concern is in regard to burials. One issue is the potential contamination of ground water and adjacent water courses. This is of concern irrespective of whether the body is buried in a cemetery or on private land.
>
> To overcome the issues surrounding the possible contamination of waterways and drinking water, the body is buried to a depth of 1.8 meters. It is the role of local council Environmental Health Officers to check the depth at which bodies are to be buried.
>
> Another environmental concern in respect to burials is the aesthetic impact of the burial site. This issue is considered during the application process and it is common practice for the burial site to be located where there is minimal aesthetic impact for neighbours and the public.
>
> In respect to Aboriginal cremations the main environmental concerns that will be considered by the Director of Public Health when giving site approval is the accessibility of the site by the public and its proximity to water courses."[90]

The issue of public access to the sites involved has also been considered by the Department of Premier and Cabinet and the Committee was advised that -

> "The conduct of Aboriginal cremations will only occur on Aboriginal land where public access is in accordance with the Aboriginal Lands Act 1995 and the Bill. The Director of Public Health will give consideration as to whether there is public access to the land as well as visibility of the cremation when approval for the cremation site is given."[91]

The Committee heard evidence from Mr Jay McDonald of the Tasmanian Aboriginal Centre indicating that it is possible that requests for either burial or cremation on almost any Crown Lands will be made.

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[89] Mr Richard Bingham, Transcript of Evidence, Chairman, Aboriginal Land and Cultural Issues Working Group, 1/2/00, p. 23.

[90] Letter dated 3 April 2000 from the Secretary, Department of Premier and Cabinet to the Committee Secretary, p. 3.

[91] Letter dated 3 April 2000 from the Secretary, Department of Premier and Cabinet to the Committee Secretary, p. 4.

> "If I was from the Ben Lomond tribe and that's not on proposed land that you've handed back at all; I'm an Aboriginal, I know I am and I want to be buried or have a traditional burial cremation on the crown land at Ben Lomond because that is where my ancestral remains are. That's where they've been buried, that's where they've been traditionally cremated and everything. I want to also do that … we want to be able to do what our traditional people have done, been buried..."[92]

In *The Aboriginal Tasmanians* by Lyndall Ryan, Michael Mansell describes how cremation would be undertaken in relation to the Aboriginal remains in the Crowther Collection[93] -

> "That the cremation would take place in accordance with Aboriginal custom, whereby the remains would be wrapped in natural fibres and face east."[94]

From researching historical documents it would appear that there are several and varying customs with regard to cremation, dependant on what tribal region the Aboriginal person belonged to. It is important therefore that such issues are taken into consideration when a request is put forward for a traditional cremation or burial to take place within the Aboriginal community and on Crown Land.

Conclusion

The Committee concludes that :

1. The Bill provides for strict guidelines and regulations with regard to applications for burials and cremations.

2. There are several and varying customs with regard to Aboriginal cremations and burials, depending on the tribal region to which the deceased person belonged.

Recommendation

The Committee recommends that :

Aboriginal burials and cremations as prescribed in the Bill be permitted.

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[92] Mr Jay McDonald, Tasmanian Aboriginal Centre, Transcript of Evidence, 9/3/00, p. 18.

[93] "The W.L. Crowther Library is a rich collection of books, pamphlets, maps, manuscripts, photographs, works of art and museum objects, largely relating to Tasmania but encompassing many other subjects – whaling, the history of medicine, Samuel Johnson and James Boswell, book-collecting, and works printed in Pacific Island languages". State Library of Tasmania – http://www.tased.edu.au/library/heritage/cropage.htm

[94] Lyndall Ryan, *The Aboriginal Tasmanians*, Queensland University Press, St Lucia, 1981, p. 273.