LAW REFORM AND THE ROAD TO INDEPENDENCE

"the most crucial (prerequisite
to empowering Aboriginal people)
is the desire and capacity of Aboriginal people
to put an end to their disadvantaged situation
and to take control of their own lives.
There is no other way." [1]

THE CALL IS NOW FOR THE MOST FUNDAMENTAL CHANGE

Although justice for Aborigines has been a long time coming, and is still yet to come, there has always been a section of the Australian community calling for improvement. In turn, there has always been pressure on the authorities to find the solutions, prompting the observation that Aborigines must surely be one of the most investigated peoples in the world. Reforms have been agonisingly slow, but steady. They have been instigated by people with good intent, although perhaps lacking in foresight. It is easy, with the wisdom of hindsight, to look back on these efforts and denounce them for being paternalistic, opportunistic and in many instances, downright racist.

A look at just two such reforms can help to make the point. In its day the 1967 referendum gave Aborigines the right to be counted and to vote. It was undoubtedly seen as a momentous victory for providing the impetus for improving the circumstances of Aboriginal people, as unquestionably it did. It brought the Federal Government into the play, and as a result the social welfare needs of Aborigines were improved. Yet the repercussions of the referendum have returned to haunt that section of the Aboriginal movement wanting to build on that improvement by removing the dependency of Aborigines on the Australian Government. Because the referendum installed Aborigines as " Australians ", [2] it firmly provided both the legislative and moral grounds for closing the door on any Aboriginal moves for self- government. The Government moved quickly by introducing further legislation relating to the status of Aborigines. It has since relied on the dishonourable argument that as

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[1] ROYAL COMMISSION into ABORIGINAL DEATHS in CUSTODY final report, 1.7.9., A.G.P.S.

[2] Aborigines were deemed to be mere citizens under the common law. However, this appears to have arisen seriously in the courts only when the courts were protecting white gains against Aboriginal need. The courts in fact, have shown great leadership in being strongly pro-white on some fundamental questions.

Aborigines had pushed for the 1967 referendum, they were now bound by its consequences, including any change in their status.

Although the 1984 amendment to the Electoral Act making it compulsory for Aborigines on the electoral rolls to vote, was not quite as far reaching as was the '67 referendum, it was undoubtedly more opportunistic - it was introduced to help the A.L.P. come into office by coercing Aborigines to vote, anticipating that they would prefer Labor to the others. The Act has now become a notorious political weapon in the Federal Government's armoury, allowing for its civil service to coerce Aborigines into participating in the white political structure for fear of being prosecuted for not voting. Aborigines are then damned if they do, and damned if they don't.

Taking these two reforms as an illustration, they show that unless each step toward positive change is part of the greater plan to allow Aboriginal people to run their own agenda, they will at best add confusion to the issues and at worst make for greater difficulties in giving complete control back to Aborigines.

The Law Reform Commission's report on Aboriginal customary law, completed prior to the beginning of the Royal Commission's inception and which has gathered dust on the Government's shelves ever since, took up this point when considering the response of the law to the substantive needs of Aborigines :

> " Recognition of Aboriginal customary laws by the general law has continued to be erratic, uncoordinated and incomplete...It is true that such recognition [where it does occur] tends to be limited and and to represent specific response to particular situations or needs. "

Those comments clearly apply beyond the corridors of the law courts. Having critically analysed the historical abuse of Aboriginal selfdetermination by government,the Royal Commission insisted that the implementation of its recommendations were entirely dependent upon governments negotiating a final settlement with Aborigines, an approach it saw as " ...the fundamental question without which polices cannot succeed. "

As if to hammer home this point to Government the Commission, when dealing with the history of Aborigines since the invasion, lashed out more pointedly :

> " Aboriginal people have a unique history of being ordered, controlled and monitored by the State. "

and very relevantly noted:

"...the deliberate and systematic disempowerment of Aboriginal people starting with dispossession from their land and proceeding to almost every aspect of their life...Aboriginal people were made dependent upon non-Aboriginal people. Gradually many of them lost their capacity for independent action, and their communities likewise. With loss of independence goes a loss of self esteem."

Interference with a people by another on such a wide and fundamental scale requires a good deal more than the tokenistic and paternalistic style of assistance given to Aborigines to date. By inference, the Commission lacked confidence in governments to approach the task on the right basis and accordingly laid down the 339 recommendations, tactically giving governments little scope for ignoring the report.

The recommendations need to be read in conjunction with the introductory remarks made in the final report. For it is there that the essence of the Commission's well thought out conclusions are contained. The Commission states :

> "But running through all of the proposals that are made for the elimination of these disadvantages is the proposition that Aboriginal people have for two hundred years been dominated to an extraordinary degree by the non-Aboriginal society and that the disadvantage is the product of that domination. The thrust of this report is that the elimination of disadvantage requires an end of domination and empowerment of Aboriginal people; that control of their lives, of their communities must be returned to Aboriginal hands. "

Hence the Commission calls on governments to give up their control over Aboriginal people by withdrawing and conceding jurisdiction over Aboriginal lands, and its people, thus allowing Aborigines to begin the process of redeveloping and re-establishing structures appropriate to their future needs. The commission then provides 339 interim steps as a basis for transferring control back to Aborigines.

EMPOWERING ABORIGINAL PEOPLE

Relying on Aboriginal self-determination as the foundation for its policy direction the Commission, consistent with that philosophy, stopped short of spelling out what it saw as the end result. It appears that the Commission did not want to be seen as pre-empting that decision which it obviously saw belonged to Aboriginal people alone. If this is so, then the approach of the Commission toward implementation of its recommendations takes on just as much importance as the recommendations

themselves. For it would mean that unless Aborigines decide themselves what they wish the future to hold for them, then government policies will be seen as being imposed and therefore not endorsed by the Commission.

PUTTING FORWARD A MODEL FOR DEBATE

The Aboriginal Provisional Government has as its platform, the demand that enough territory in this country be returned to Aboriginal people sufficient for their needs as a Nation of people. More particularly, those lands commonly referred to as crown lands would essentially form the basis of the territory over which Aboriginal people would exercise their own form of government. Other lands currently classed as private land and which is either in such proximity to land to come under the control of Aboriginal people that it would be senseless to exclude it, or had such significance to the Aboriginal people, would conclude the territorial boundary. The Federal Government's refusal to meet with the Provisional Government infers a rejection of this model.

The Commission, whilst limiting what it regards as sufficient territory for self-determination, nevertheless gave qualified endorsement of the A.P.G. proposal in its call for governments to comprehensively address the land needs of Aboriginal people by " restoring unalienated Crown land... on the basis of cultural, historical and/or traditional association ", or where that was not sufficient,to provide "... an accelerated process for the granting of land title **based on need.** " (My emphasis.)

AT THE LOCAL LEVEL:

Notwithstanding the extent to which Aboriginal people have had to endure the domination and intrusion into their local communities by whites, the ongoing existence of these communities is testimony to their resilience (which can be relied on) and ability to hold onto their various forms of community organisation. As the Law Reform Commission found -

" In many, if not all, Aboriginal communities there exist methods for social control and the resolution of disputes...In some localities reliance is placed on the accepted authority of older men and women, and there are long established procedures for resolving dispute."

Even allowing for variation on the different communities, it would take little effort or imagination to have community control mechanisms firmly in place.

RAISING AN ECONOMY

Government revenue and expenditure figures show that approximately $2,000 million covers all essential living costs, including special programs, for Aborigines. The same source suggests that an Aboriginal Government would have $6,196 million

available to distribute amongst its people, or putting it another way, three times more to spend on Aboriginal people than do white governments!

Annual government revenue figures suggest that approximately $700 million is set aside for the welfare needs of Aborigines, not including other costs such as pension and unemployment figures. Those same figures show a total expenditure of $10,300 millions is allocated to these other costs for general distribution, making fairly safe the estimate of $1,000 million of this being distributed to Aborigines. To ensure that there is no under-estimation of any other unknown costs, rounding off the total amount at $2,000 million as an amount to cover all current costs to keep Aborigines alive would not be far from the mark.

The 1986 census shows that 33% of the Aboriginal population is in the rural community, 42% in towns of less than 100,000 people, and the remainder live in the urban areas.

Government revenue raised from mineral royalties in rural areas amounted to $788million. Add to that a mere 10% of revenue raised from property income ($7,581 million) and only another quarter of the Aboriginal budgetary requirements need be found. Government revenue is boosted by both company and individual income tax to the tune of $93,000 million a year, at least 5% of which ($4,650 million) must derive from Aboriginal territory, giving an Aboriginal Government access to no less than $6,196 million annually.

The issue here is not so much whether Aborigines ought to rely on existing revenue raising mechanisms when forging their own independence, but that there seems ample scope for the development of an economically sustainable Aboriginal Nation based on available figures.

LAW AND ORDER

Aboriginal political and economic independence are likely to take place only when whites give up their belief of having the divine right to maintain their control over Aborigines. One of the best indicaters of a shift will be the withdrawal of claims of legal jurisdiction, whether made gradually or with haste, allowing for community control at that most basic but critical level.

Perhaps more than any other people in the world, Aborigines are deserving of a break from a legal regime which has so systematically terrorised and demoralised them. The Aboriginal Provisional Government has laid out a program to transfer jurisdiction back to Aboriginal communities as follows:

1. Immediately identifying and separating those areas which fall into one of three categories -

(a) lands likely to be returned which are currently occupied by an Aboriginal community ;

(b) lands likely to be returned but which not occupied by an Aboriginal community;

(c) areas of occupation by Aboriginal communities but which are not likely to be returned.

2. Providing a timetable for both the application of Aboriginal law (in whatever form), enforced by the Aboriginal community over category (a) lands.This process would be coincidental with the removal of white jurisdiction as we know it. The time frame for this process should be limited to 5 years.
This proposal is subject to each local community's desire.

3. Providing a timetable for the changeover of jurisdiction from whites to Aborigines for category (b) lands, allowing sufficient time for Aborigines to determine who are the appropriate custodians. Again, and subject to local desire, the process should have a maximum 5 year cut-off date.

4. Category (c) lands will generally concern urban situations which will remain the province of the white legal system. Accepting the principle that Aborigines residing within these areas cannot expect to carry their laws upon their shoulders, conversely the deprived cicumstances of Aborigines living in that environment should mitigate against the rigidity of the application of the white laws.

The Commission's recommendations for reducing the impact of white laws in this situation through diversionary mechanisms are important. The Commission supports :

(a) the decriminalisation of a number of petty offences, and a greater reliance on community service orders ;

(b) educating police to protect Aborigines from racial taunts and physical abuse;

(c) the reliance on work, training and education programs as an alternative to Aboriginal youth inevitably being scarred by early contact with police and the criminal justice system.

One other advantage of Aboriginal independence is the reshaping of the basis upon which geater lenience towards Aborigines living in the cities is given by the law. At present the call for change is founded only on compassion, placing Aborigines in the "beggar" category. With the advent of an independent Aboriginal Nation within which many whites would desire to live,

the call for some softening of punishment of ex-patriots becomes reciprocal, and thus provides the organisations in the cities and towns with a sound bargaining position.

Detailing the structures possibly operating under an Aboriginal Nation are not entirely necessary when debating the merits of independence for Aborigines. Unfortunately those who oppose such development have a tendency to seize on anything to aid their cause, including the failure to put forward an outline of the practical steps and structures involved in the process. It is that in mind that some attempt has been made here to remove that temptation.

CONCLUSION

Reform of the legal system without a thorough re-examination of the over all relationship Australia has with Aborigines would be just another meaningless exercise in self-gratification. The Royal Commission was firmly of this view. In the response to the Commission, the Federal Government stated very positively that the Australian Government's goal "...is to create the means by which Aboriginal and Torres Strait Islander people can take control over their own lives".

However, the Government then very disappointingly qualified this by stating that:

' This involves a renewed comitment to existing policy.",

which is to promote A.T.S.I.C., provide for better education and push ahead with reconciliation. In short, more of the same. Perhaps it was this response that was anticipated by the Commission when it ominously quipped -

> “Every step of the way is based on an assumption of superiority and every new step is a further entrenchment of that assumption.”

What is clear is that leadership in this area will not come from governments. They will respond to the pressures exerted by Aborigines and our supporters who ever so quickly need to come to grips with the real issue to be put on the table.

To expect Aborigines to be "empowered" and to have control of our own destiny whilst leaving control of the political, economic and legal structures (which affect our ability to become empowered) in the hands of white governments, is incredibly naive. Promotion of "reconciliation" will be at the expense of action to immediately move towards real self-determination. If the hold on government moves towards Aboriginal sovereignty is because of disbelief that that is what Aboriginal people want, then they should undertake a referendum of Aboriginal people only, and commit themselves to standing by the outcome.

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