

ABORIGINAL PEOPLE AND THE LAW by Penelope Andrews and Geoff Eames

*"As early as I can remember,
I was made aware of my differences,
and slowly my pains educated me
either fight or lose.
'One sided', I hear you say
Then come erase the scars from my brain,
and show me the other side of your face
the one with the smile painted on with the
colours of our sacred land you abuse."*

(Kevin Gilbert, *Black Australia*)

In late 1991 the Royal Commission into Aboriginal Deaths in Custody found that Australian Aborigines are apprehended and placed in police cells at a rate *29 times* that of other Australians. The principle of equality of all before the law, regardless of race or skin colour, clearly does not operate in practice. In many other ways, too, Aboriginal people suffer most in this society : their rate of unemployment is 6 times that of other Australians, their life expectancy is 15 to 20 years less, they are 6 times more likely to commit suicide, and their children are 3 times likely to die in infancy. As long as such basic differences persist, Australia can scarcely claim to be a cohesive society in which all people share common experiences.

How do we begin to explain the clear lack of equality? This paper will touch on a wide range of relevant issues as an introduction to further reading, suggestions for which are listed at the end.

In part, the high Aboriginal imprisonment rate results from the inappropriate way in which the law treats the minor offence of public drunkenness. More than one-third of the Aborigines in Australian jails are there for no other reason than that they have been intoxicated in a public place. Hence the Royal Commission's call for governments to abolish the offence of public drunkenness and to establish sobering-up centres as an alternative to cells, especially for Aborigines.

Another problem concerns police attitudes and behaviour. The Royal Commission found that racist language, rough treatment and cultural insensitivity too often characterise police relations with Aboriginal people.

The real reasons for the high rates of imprisonment and the other legal and social problems among Aborigines, however, go back to Australia's colonisation, and the way in which this continent's original inhabitants were displaced from their land and from their own long-established support systems.

An ancient civilisation

Aboriginal people and Torres Strait Islanders occupied and owned what is now called Australia for at least 40 000 years. Archeological discoveries at Lake Mungo since the late 1960's confirm that they were one of the world's earliest hunter-gatherer societies and perhaps the first to practice ritual human burial. At the time the British explorers first began arriving on these shores in the 1770's, the one million or more Aborigines who lived here had a material standard of life which compared favourably with that of many Europeans. However, their society began to crumble when, unlike earlier European visitors, the British decided to stay and to raise their flag and claim sovereignty over the land. Wrongly asserting that this continent was uninhabited and belonged to no one - which was the meaning of their doctrine of *terra nullius* - the British established their crown as the supreme power, and their law as a prime source of authority.

As the new settlers moved into the interior of the country, the Aboriginal people were forced from their land, often brutally. Their eviction was most thorough along the southern and eastern coastlines of the mainland and in the colony now known as Tasmania.

Despite great resistance their numbers were drastically reduced by disease. Denial of land deprived Aboriginal people of access to food and resources, and interfered with the ceremonial and religious practices which were an essential part of their culture and identity. White intrusion on the land made it difficult and in many cases impossible to protect sacred sites. The traditional systems of law, spirituality and kinship which had provided the basis of a cohesive Aboriginal society were disrupted and these once self-sufficient, nomadic

Penelope Andrews is a lecturer in Human Rights law.

Geoff Eames is a Justice of the Supreme Court of Victoria. He has worked for Aboriginal legal aid services and Land Councils in the Northern Territory and South Australia. He was Counsel for the Aboriginal People in the Maralinga Royal Commission and Counsel Assisting the Royal Commission into Aboriginal Deaths in Custody.

hunting people, who had lived in spiritual as well as economic harmony with the land, were made immobile by an alien system of law. Aborigines became dependent upon European food and welfare rations for survival and as a result their culture and society became vulnerable to European influences, in particular, alcohol.

According to the recent Royal Commission report, the original dispossession of the Aboriginal people, the continuing policies of colonisation and the traumatic upheavals these events caused, are the direct causes of the Aborigines' modern-day conflicts with white law and society.

Government policy

There have been five distinct phases of government policy towards Aborigines since the British colonisation of this country :

1. *Annihilation* : based on the idea that Aboriginal people would die out as a race;
2. *Protection* : by taking part-Aboriginal children away from their parents and placing them in the custody of missions or white families;
3. *Assimilation* : pursued up until the mid-1960's and based on the view that Aboriginal culture would not survive, and that Aborigines and Torres Strait Islanders should integrate into an "Australian way of life";
4. *Integration and advancement* : by, for example, anti-discrimination and land rights legislation (as discussed below); and
5. *Self-management* : the current government policy (also discussed in more detail below).

Long history of discrimination

Until 1967 any discussion about the legal status of Aboriginal people was complicated by the fact that each State administered its own legislation. The Commonwealth government was responsible for Aboriginal people in the Northern Territory, while State laws differed widely in the degree of control they exercised over their original inhabitants. This led to many disparities. Definitions of "Aborigine" varied, minimum wage rates differed and restrictions on liquor which were imposed on Aboriginal communities were not uniform.

It was only after a referendum in 1967 that an amendment to the Australian Constitution saw the

Over recent years many States have introduced anti-discrimination laws to protect disadvantaged groups, including Aboriginal people and Torres Strait Islanders, from unfair treatment in employment, housing and the provision of services and amenities. The legal status of Aboriginal people has thereby improved, but discrimination is still present both in people's attitudes and in the legal system's actual operations.

Land rights

A campaign by Aboriginal people to regain their traditional land and to have their title to it recognised in Australian law gathered momentum in the late 1960's and finally produced results in 1976, when the Fraser Government passed the *Aboriginal Land Rights (Northern Territory) Act*. This Act gave the traditional owners freehold title (the most secure title under Australian law) to all Crown land in the Territory which was then designated as 'Aboriginal Reserve Land'.

The Act also provided that Aboriginal people could gain freehold title to other land by demonstrating to the Aboriginal Land Commissioner (through a daunting and costly legal process) that they were the owners of that land according to spiritual tradition. The only land which could be claimed was land over which no one else held a lease or freehold title. Privately owned property was not covered. The Uluru (formerly Ayers Rock) National Park is one significant area of land which has been handed back under these provisions, and altogether some 34 per cent of all Northern Territory land has reverted to Aboriginal hands, although it is primarily less fertile land.

In both the Northern Territory and South Australia, freehold title carries with it the right to control mining and development on the land and to receive royalties from all past and present mines. The money thus obtained is distributed to the benefit of traditional owners and other Aboriginal people in the Territory or State. It provides the major funding source for the Aboriginal Land Councils in the Northern Territory, which have the statutory power to make land claims and to generally protect the interests of the traditional owners.

The sums gained through royalties and other payments are substantial for many traditional owners. However, the choice between the potential dislocation of their communities and damage to their land on the one hand, and the increased economic independence which profits from mining and other developments can offer on the other, is very difficult.

Elsewhere in Australia the land rights situation is very different.

In Queensland, the *Aboriginal Land Act 1991* has allowed the conversion of some Aboriginal reserves and unused Crown land to freehold title, but the Act does not empower Aborigines to control mining and development on this land, nor does it provide for them to receive royalties. Few areas of traditional land are still in fact available to claim. The traditions, ceremonies and knowledge of much of the land have been lost due to the destructive impact of British settlement. The only prospect which most Aboriginal people in Queensland and in other States have of actually gaining title to land is through purchase on the open market. However, unlike the New South Wales land rights legislation, which has brought some tangible benefits to Aboriginal people in that State, the recent Queensland Act does nothing to help urban Aborigines to buy land.

Under the 1983 *Aboriginal Land Rights Act* (New South Wales) Aborigines can purchase land as well as claim unalienated Crown land. A land rights fund (into which the government pays the equivalent of 7.5 per cent of all New South Wales land tax revenue) makes it possible for Aboriginal people to purchase property and to launch business enterprises.

In Victoria no land rights fund exists, and only some 32 square kilometres of freehold land have been transferred to traditional owners. This includes the former Aboriginal Reserves of Lake Tyers and Framlingham. Recent promises of new legislation to hand back national parks to the traditional owners and to create a land rights fund, have not been followed through.

In Western Australia and Tasmania no land rights legislation has been enacted.

At the Federal level the Labor Government in 1985 announced its intention to introduce Australia-wide land rights legislation. That proposal was strenuously opposed by a number of State governments, including the Labor Government in Western Australia, and by major industry groups which had interests in the development and exploitation of land which was potentially available to be claimed under such legislation. Faced with the opposition the Government abandoned the proposal for national legislation.

The issue of national legislation was rekindled as a result of a decision of the High Court of Australia in the *Mabo* case. In 1971 Mr Justice Blackburn, hearing a claim to land rights brought by Aboriginal people at Yirrkala in Arnhem Land in

effect that at the time of colonisation Australia was *terra nullius*, that is, empty or uninhabited land. That principle had been applied over many years to justify the extinguishing of native title throughout the common law world where it was decreed that any existing inhabitants were so uncivilised that their notions of land use and rights were entitled to be disregarded by the colonisers.

The Blackburn decision was a cause of great and continuing anger among Aboriginal people and the suggestion that, as a matter of law, Aboriginal people had no entitlement to claim land rights was a serious impediment in efforts to compel Governments to pass appropriate land rights legislation.

Mabo case

In June 1992 the High Court rejected the doctrine of *terra nullius* and brought down its landmark decision. The case had been brought on behalf of residents of Murray Island in the Torres Straits but had implications for Aboriginal and Torres Strait Islanders living throughout Australia. The plaintiffs in that case claimed that their customary traditions and traditional rights in land continued after annexation by the Queensland Government in 1879 and had not been invalidated by any subsequent legislation of any government.

The *Mabo* decision forced the Federal Government and State and Territory governments to respond to the situation that for the first time the courts had rejected the notion that Aboriginal and Torres Strait Islanders had not merely a moral right to land rights but a legal basis for that claim. Whilst the court held that existing native title was capable of being extinguished by legislation expressly so doing, the extinguishment of such rights would carry with it the potential to claim just compensation. Native title could be lost to particular areas of land where the association and usage of the land by Aboriginal persons descended from the traditional owners of the land had been broken.

The Federal Government introduced the *Native Title Act 1993* which led to considerable debate throughout Australia. Many interest groups opposed the legislation and sought to have the effect of the court decision overturned by legislation which extinguished rights to native title. Following much debate, the government negotiated a compromise between the various Aboriginal and non-Aboriginal parties interested in the outcome of the legislation.

The benefits of the Act for Aboriginal and Islander people are that it provides for the establishment of

What did *Mabo* decide?

- At the time of European settlement in Australia in 1788 the doctrine of *terra nullius* did not exist;
- At that time, the taking of Australia for England involved the exercise of sovereignty over the land but did not vest the beneficial ownership of the land in the Crown;
- It rejected the notion that Aboriginal people, the inhabitants of Australia, were "so low in the scale of social organisation" that their rights were to be disregarded; and
- The common law recognised Aborigines' rights of occupation of the land, a form of native title, and would protect those rights where occupation was shown to have continued and had not been abandoned or extinguished.

It is not known how many Aboriginal and Torres Strait Islander Australians will benefit from the *Native Title Act (Cth) 1993* given that native title for many communities has been extinguished forever. It is important, therefore, that the government remains true to its commitment to providing a social justice package and establishment of a land acquisition fund to provide for the many Aboriginal and Torres Strait Islander peoples who were dispossessed from their lands. It is likely that the issues of constitutional reform, including Aboriginal sovereignty and self-government, will continue to be debated vigorously in the future.

Self-management

A new phase of Federal Government policy commenced with the passing of the *Aboriginal and Torres Strait Islander Commission (ATSIC) Act* in 1990. Section 3 states that

"... the objects of this Act are ... to ensure maximum participation of Aboriginal persons and Torres Strait Islanders in the formulation and implementation of government policies that affect them ... to promote the development of self-management and self-sufficiency..."

According to the Act, local communities must elect representatives to regional councils. The regional councils vote for Commissioners who are responsible for formulating, implementing and evaluating programs, developing policy proposals

ATSIC aims to provide the communities with more than just an advisory role on Commonwealth programs serving them, and to allow genuine consultation, representation and input to government policy.

Conflicts between differing legal systems

Despite the political advances of recent decades, Aboriginal people still find themselves caught between two different systems. In part, this occurs because they are subject to two distinct laws : the laws made by Australian governments and their own customary laws handed down from their ancestors. An Aboriginal person who imposes physical punishment on another for transgressing Aboriginal laws may commit an offence under Australian law even though, according to his or her customs, the conduct is both justified and necessary.

This legal conflict can create great injustice. Not only might the person who is acting in accordance with aboriginal law be punished by the courts but the person who received punishment under Aboriginal law (for example by being speared as a 'pay-back' for a transgression) may then be punished again under non-Aboriginal law, and therefore be punished twice.

The Australian Law Reform Commission in its report on Aboriginal customary law in 1986 recognised the clash which often occurs between Aboriginal and Anglo-Australian law but no legislation (apart from the recognition of traditional Aboriginal marriages) followed from that report. The courts have, however, attempted to take into account the reality of traditional laws and practices, when sentencing Aboriginal offenders. This is particularly so in the Northern Territory where judges have said that whilst not condoning the use of physical punishment or retribution by members of an offender's own community, the courts must recognise the fact that such events occur and take that fact into account by reducing the sentence they impose. Courts are obliged to consider all relevant facts when determining a sentence, including those which arise from a person's membership of an ethnic or other group.

Allowance for the disadvantages which Aboriginal people experience in their dealings with the criminal justice system is also made in other ways. In 1976 the judges in the Northern Territory introduced rules, known as 'the ANUNGA Rules', relating to the interrogation of Aboriginal suspects by police. The rules recognised the fact that for many Aboriginal people English was not their first language and that, in addition, the racism and intimidation which had historically characterised

In many parts of Australia, most notably in Victoria and the Northern Territory, Aboriginal people have devised or participated in innovative projects, known as Community Justice programs, to improve relations with police and to try to divert Aboriginal offenders from the criminal justice system. There are encouraging signs that these programs are having some positive impact. However, the underlying conflict between white law and black culture remains unresolved.

International law

One field of law which has become increasingly useful to Aboriginal and Torres Strait Islander people consists of the international principles and procedures on human rights which have developed to deal with the situation of indigenous peoples since the Universal Declaration of Human Rights in 1948. In particular, questions of cultural and land rights and self-determination, have been given significant recognition in various United Nations documents. The Australian government, by signing or ratifying these principles, can extend its legislative power inside Australia and thus override State governments which have not done enough to remedy the unjust treatment of Aboriginal people. The "external affairs power" in the Australian constitution gives the Federal Government the power to legislate on human rights matters in a way which legally binds all the States.

Many argue that the Government can use this power to overcome the inequalities which Aboriginal people and Torres Strait Islanders suffer, once it summons the political will to enact adequate national land rights legislation. Even if the Government does not act, a proposed United Nations authority to monitor the progress (or lack

of it) by Australian governments in overcoming Aboriginal disadvantage is likely to keep up the international pressure in coming years.

The future

Aboriginal people and Torres Strait Islanders today make up little more than one per cent of the Australian population. Their minority status has made it extremely difficult for them to raise an effective political voice or gain a hearing from individuals and groups in positions of power and influence. In their attempts to change their conditions of poverty and dependence, and to participate fully in Australian society, they have to face an apathetic and sometimes hostile non-Aboriginal community.

There are clear signs, however, that Aboriginal people are having an increasingly positive influence on the agenda of Government.

Much of the success of recent land rights, education and health initiatives is due to the effectiveness of Aboriginal controlled organisations, and especially those concerned with the law and with land rights, have been instrumental in exposing Australia's treatment of Aboriginal people to international attention. The Report of the Royal Commission into Aboriginal Deaths in Custody demonstrates, however, just how much ground is yet to be made up before it could be said that Aboriginal people have equality with other Australians.

The prospects for further progress towards equality depend largely on whether non-Aboriginal people challenge their own uncaring attitudes, and overcome their inclination to block out the awful truth about the racial history of this nation.

Questions for classroom discussion

1. What are the facts concerning the legal and social position of Aboriginal people in Australia compared with non-Aboriginal people? Why are there such inequalities? Do you think that Australia can be regarded as a cohesive society when such inequalities exist?
2. Do you agree with the rule that courts must consider a person's membership of an ethnic group, and that group's customary laws, when determining sentences? Should this and other efforts to give Aboriginal people special attention be encouraged as a means of improving social cohesion by overcoming inequality? Or should such measures be opposed because they cause resentment about certain racial groups receiving special privileges?
3. What is the meaning of the term *terra nullius*? How and why did the British settlers use this concept?
4. In what ways has Government policy since British settlement excluded Aboriginal people from political participation and self-determination? How important has the legal system been in enforcing Government policy towards Aborigines?

likely to regain more of their traditional land in future? What are the factors working for and against further land rights?

6. Why is the decision in the *Mabo* case important? Who will benefit most from the decision? Whose interests were considered in the drafting of the *Native Title Act (Cth) 1993*?
7. Should the legal system be flexible, in order to take account of social and cultural differences in the community and people's experiences with differing legal systems? Or should there be one law for all, even if the actual effect of this is that some groups are more harshly treated than others?

Suggestions for further reading

On traditional Aboriginal culture and identity, see :

K. Gilbert, *Inside Black Australia*, Penguin, Victoria 1988

On white invasion and occupation, see :

C.D. Rowley, *The Destruction of Aboriginal Society*, Penguin, Victoria, 1970-1986

H. Reynolds, *Frontier*, Allen & Unwin, 1987

On resistance to this invasion and occupation, see :

R. Broome, *Aboriginal Australians : Black Responses to White Dominance, 1788 - 1980*, Allen & Unwin, Sydney, 1982

H Reynolds, *The Other Side of the Frontier*, Penguin, 1982

On how the legal system has denied Aborigines' rights and self-determination, see:

C. Cunneen (ed), *Aboriginal Perspectives on Criminal Justice*, The Institute of Criminology Monograph Series, No. 1 Sydney, 1992

P. Hanks & B. Keon-Cohen (eds), *Aborigines and the Law*, Allen & Unwin, Sydney, 1984

H. Reynolds, *The Law of the Land*, Penguin, Victoria, 1987

For material on land rights specifically, and how the doctrine of *terra nullius* was used to justify the dispossession of Aborigines, see :

A. Frost, "NSW as Terra Nullius : The British Denial of Aboriginal Land Rights", *Historical Studies*, vol 19, no.77, October 1982, pp 512 -23
Aboriginal Law Bulletin, Aboriginal Law Centre, Faculty of Law, University of New South Wales, PO Box 1 Kensington, 2033

For material on adapting the legal system to social and cultural differences in the community, see :

1986 Australian Law Reform Commission report on customary law

For VCCL publications on Aboriginal issues see :

Lores of the Land, A seminar for schools on Aboriginal and Torres Strait Islander Issues, May 1992

Mabo - In the National Interest! Seminar proceedings from a forum on *Mabo* conducted by the VCCL, Council for Aboriginal Reconciliation and Victorian Aboriginal Legal Service, February 1994