

reform

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the recognition of aboriginal customary laws

In Aboriginal affairs we have tried practically every possible '-ism' or '-ation' word in the book: 'pacification', 'exploitation', 'segregation', 'protection', 'assimilation', 'integration', 'cultural pluralism', 'symbiosis', 'self-determination' (Whitlam) and 'self-management' (Fraser).

'Assimilation' is the pervasive outlook still widespread in theory and practice [...] The alternative philosophy, as yet untried in Australia, is a serious effort at 'accommodation', the opposite to 'assimilation'. It is a process of specification, not generalization.

Colin Tatz, *Aborigines & Uranium*, 1982

wide ranging report tabled. The Australian Law Reform Commission's Report: *The Recognition of Aboriginal Customary Laws* was tabled in Federal Parliament on 12 June 1986. It completes the largest and longest enquiry ever conducted by the Commission. It is also the most extensive report yet produced into many aspects of the law which affects Aboriginal people. The Commission's recommendations cover such areas as marriage, custody, family property, the criminal law, sentencing, problems of evidence and procedure, local justice mechanisms for Aboriginal communities, and the recognition of traditional hunting, fishing and gathering rights.

retaining their culture. With very limited exceptions, Aboriginal customary laws have never been recognised by Australian law. On British settlement in 1788 Aborigines were, in theory, if not always in practice, treated as British subjects, subject to British laws and with no legal recognition given to their laws or traditions. The Commission's proposals for recognition reflect the continuing reality of customary laws as a significant influence in the lives of many Aborigines. The recommendations support the right of Aborigines to retain their own lifestyle, culture and identity should they wish. They reflect the fact that non-recognition can produce injustice and can undermine traditional authority structures. Recognition acknowledges the effectiveness in many communities of customary laws in maintaining law and order.

achieving justice. The Commission's proposals are framed from the point of view of the general legal system, with the aim of achieving justice in cases where Aboriginal customary laws and traditions are relevant. These proposals are made after extensive discussions with Aboriginal men and women and Aboriginal organisations around Australia. But the Commission does not claim to speak on behalf of Aboriginal people and its advice to the Federal Government and Parliament in no way commits Aboriginal people.

The Commission does not propose that Aboriginal people be exempt from the application of the general Australian law. Instead the proposals seek to reduce or mitigate conflicts between the two systems of laws, for example, through the exercise of sentencing discretions and the creation of a partial customary law defence (reducing a charge of murder to manslaughter in some cases). They provide special protections for Aboriginal people in those areas where failure to recognise their traditions and customs has produced injustice (for example recognition of child care responsibilities and protections in relation to evidence and procedure). They allow for the recognition of customary laws to take place without incorporating Aboriginal customary laws as part of Australian law and without enforcing customary rules as such. For example, traditional marriages are recognised for certain purposes, but Aboriginal marriage rules are not directly enforced.

aboriginal control. The precise form of the Commission's proposals was chosen to ensure that where possible Aboriginal control over their laws was maintained and that secret matters were protected. The Commission has taken account of the need to accommodate the variety of Aboriginal experience and lifestyle. Care has been taken to ensure that the Commission's proposals were not discriminatory, and to ensure that they accord with the fundamental values of equality and other human rights.

the proposals. The Commission's proposals include:

- Support for a partial customary law defence similar to diminished responsibility, which would reduce a charge of murder to manslaughter in those cases where an accused acted in the well-founded belief that the customary laws of his or her Aboriginal community required the act which constituted the offence.
- Legislation to provide that Aboriginal customary laws and traditions should

be taken into account where relevant in determining criminal intent and in establishing whether a defence (for example provocation, duress) to a criminal charge is made out.

- Guidelines to ensure Aboriginal customary laws are appropriately taken into account in the exercise of a sentencing discretion.
- More sensitive practices in the policing of Aboriginal communities.
- The creation of special rules to protect Aboriginal suspects under police interrogation, to help ensure the reliability and voluntariness of any admission or confession. Admissions or confessions obtained in consequence of contravention of these rules would not be admissible unless the Court is satisfied that in the circumstances, the suspect understood the caution, understood the nature of the questions and did not answer merely out of deference to authority or under the influence of suggestion.
- The recognition of traditional marriages for the following purposes:
 - legitimacy of children;
 - adoption, fostering and child welfare laws;
 - distribution of property on death including intestacy and family provision;
 - accident compensation including workers compensation, compensation on death, criminal injuries compensation and repatriation benefits;
 - statutory superannuation schemes and private superannuation schemes established in the future;
 - for the purposes of the Social Security Act 1947 (Cth);
 - spousal compellability and marital communications in the law of evidence;
 - unlawful carnal knowledge charges provided both consent and traditional marriage are proved;
 - the spouse rebate under the Income Tax Assessment Act 1936 (Cth) and related legislation.
- Recognition of traditional marriages is not recommended for the following purposes:
 - variation of maintenance and property rights during a relationship or on divorce;
 - bigamy;
 - rape in marriage;
 - powers under the Family Law Act 1975 (Cth) to grant injunctions with respect to domestic violence;
 - the Family Court's jurisdiction with respect to principal and ancillary relief.
- Legislative endorsement of an Aboriginal child placement principle requiring preference to be given, in decisions affecting the care or custody of children (in the absence of good cause of the contrary) to placements with a parent of the child, a member of the child's extended family, or other members of the child's community (in particular persons with responsibility for the child under the customary laws of the community).
- Legislation to provide that an Aboriginal defendant may give unsworn evidence unless the court finds that the defendant will not be disadvantaged by giving evidence.
- Legislation to confer specific powers to hear evidence in camera, to exclude certain persons from the court or to take other steps to protect secret information about Aboriginal customary laws where this is necessary.
- The Commission does not recommend a general scheme of Aboriginal courts to be established throughout Australia, but spells out criteria to apply to any local justice mechanisms that may be established in Aboriginal communities.
- Guidelines to ensure that traditional hunting and fishing interests are accorded appropriate priority under

conservation legislation and under legislation relating to the commercial regulation of fisheries. Further guidelines to enable Aboriginal people to have access to non-Aboriginal land for the purposes of traditional hunting.

legislation. It is recommended that these proposals, with two exceptions (those relating to local justice mechanisms and to traditional hunting and fishing principles) be implemented by Commonwealth legislation which does not exclude the concurrent operation of State or Territory legislation which complies with the recommendations.

other factors. The Commission's report also discusses in detail other factors impinging on the recognition of Aboriginal customary laws including common law recognition, the settled/conquered colony debate, questions of discrimination, equality and pluralism, ways in which basic human rights may be ensured, and questions of Commonwealth constitutional power.

extensive research. The Report is based on detailed research into Australian law and its operation and into the law and practice of many overseas countries including Canada, United States, Papua New Guinea, New Zealand, other Pacific and African countries. The Commission consulted with Aboriginal countries and organisations throughout Australia and with judges, magistrates, lawyers, police, anthropologists, linguists, historians and government authorities. Some 15 Research Papers, 3 Discussion Papers and 9 Field Reports were produced.

the report. The Commission's report consists of both a Summary Report and a Full Report. The latter consists of two volumes including proposed draft legislation. Copies may be obtained from Australian Government Publishing Service bookshops around Australia. (See advertisement on back page of this issue).

matrimonial property – new developments

The law regulating the spouses' property relations is fundamentally an index of social relations between the sexes.

Kevin Gray

The continuing world-wide upheaval in relationships between the sexes in the home and in the workforce produces a flow of legal and political developments affecting family law, which press for attention even as the Commission's work on its reference on Matrimonial Property reaches its closing stages.

Recent Australian developments bear upon some inter-related policy issues:

- is there appropriate scope for judicial discretion in the adjustment of spouses' property upon the breakdown of a marriage?
- In adjusting property, how should the future needs of the spouses and their children be balanced against the spouses' respective contributions during the marriage?
- How should responsibility for the support of needy members of the family be allocated between other members of the family and the taxpaying public?

the *norbis* case – discretions and guidelines. In *Norbis v Norbis* [1986] FLC 91 – 712, decided on 30 April 1986, the High Court, for the first time since *Mallet's case* (1984) 58 ALJR 248, confronted the quandary that is endemic to the wide discretionary jurisdiction to adjust spouses' property under s79 of the Family Law Act. As Brennan J put it, 'An unfettered discretion is a versatile means of doing justice in particular cases, but unevenness in its exercise diminishes confidence in the legal process'.

rules and presumptions. In *Mallet's case* the High Court held that a judge's discretion under s79 could not be fettered by rules or presumptions unauthorised by the Act. A ma-