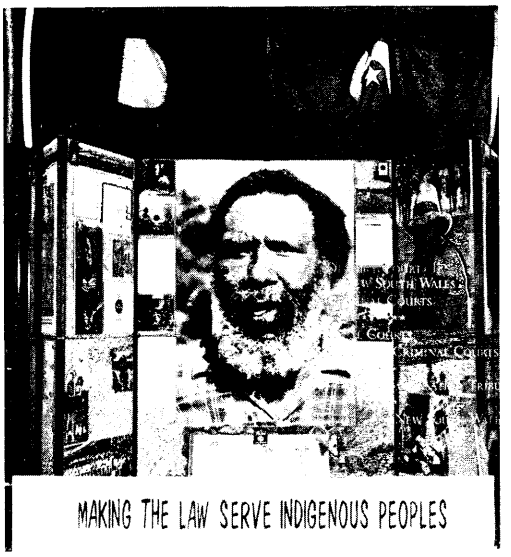
Mabo and the recognition of Aboriginal customary law



Seven years ago the ALRC reported on the recognition of Aboriginal customary law. Since then the Royal Commission into Aboriginal Deaths in custody has recommended implementation of the ALRC's recommendations, the Government has undertaken to respond to the ALRC's report and the High Court has discarded the notion of 'terra nullius'. **John McKenzie, principal solicitor at the Public Interest Advocacy Centre,** ***looks at the wider implications of the Mabo High Court judgement in the light of the Government's commitment to recognising Aboriginal customary law.***

The judgment of the High Court in *Eddie Mabo and Ors v The State of Queensland* (1992) may give renewed impetus to the calls for recognition of Aboriginal customary law. In his judgment Toohey J referred to the existence of a fiduciary duty owed by the Crown to Aboriginal and Torres Strait Islander people. Such a duty would impact upon not only the resolution of land claims but also upon questions of the propriety of the authorities' dismissal of Aboriginal customary obligations, duties and rights. It would not be difficult to prove the Crown's failure to act for the benefit of the holders of native title. As Professor Henry Reynolds points out in *The Law of the Land* (Penguin 1987), the colonial governors were made aware of the transgressions against the rights of the native people. For example, in February 1850, the Secretary of State, Earl Grey, informed Governor Fitzroy that it was illegal to force the Aborigines off cattle runs and that they had 'every right to the protection of the law from such aggressions'.

The *Mabo* decision has brought forth commentary, both informed and ill-informed, from disparate groups. The managing director of the Western Mining Corporation, Hugh Morgan, was quoted in the *Sydney Morning Herald* of 13 October 1992 as saying:

> *The significance of Aboriginal sovereignty as far as Mabo is concerned is that the Mabo decision effectively creates recognition of Aboriginal law, as if it were the law of a foreign country . . . found to operate within the Commonwealth of Australia.*

Such a reading of the judgments goes further than even the most optimistic Aboriginal commentators have so far traversed. However, it does serve to raise the issues of self-management and self-determination in terms of the recognition of customary law.

A discussion paper prepared by the Northern Territory Legislative Assembly's Sessional Committee on Constitutional Development noted a frequently expressed desire on the part of Aboriginal people for local self-management within the framework of the wider community, wherever possible based on links with the land, and with the preservation of customary law. The same discussion paper recorded considerable Aboriginal support in the Northern Territory for the proposal of autonomous Aboriginal local and regional self-government with direct links with the Commonwealth, and not as part of the Northern Territory.

The Royal Commission into Aboriginal Deaths in Custody considered these themes to be central to the future relations between Aboriginal and non-Aboriginal Australians as the following extract from its report demonstrates.

> *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 the empowerment of Aboriginal people; that control of their lives, of their communities must be returned to Aboriginal hands.

ALRC's recommendations

So as to more clearly understand the possible effects of customary law recognition, it may be useful to outline briefly the major areas of the customary law which were recommended for recognition by the Australian Law Reform Commission.

1. *Recognition of traditional marriage*

Patterns of traditional marriage continue strongly not only in the Northern Territory but also in parts of Western Australia, South Australia and Queensland. The Commission recommended that parties to traditional Aboriginal marriage should be regarded as married persons for the purposes of Australian law relating to

- status of children, adoption, fostering and child welfare laws
- distribution of property on death
- accident compensation
- statutory superannuation schemes
- the *Social Security Act* 1947 (Cth)
- spousal compellability and marital communications in the law of evidence, and
- spouse rebates under the *Income Tax Assessment Act* 1936 (Cth).

2. *Traditional distribution of property*

The Commission recommended that Aboriginal people should be able to apply to have an intestate estate distributed in accordance with the traditions of the community of the deceased. Legislation for family provision should allow for applications by persons related by blood, kinship or marriage to a deceased member of an Aboriginal community and who could at the time of death have reasonably expected support from the deceased in accordance with the customary laws of that community.

3. *Aboriginal child custody*

State intervention in Aboriginal families has been pervasive, making this an extremely sensitive issue for Aboriginal people. The Commission recommended that an Aboriginal child placement principle should be established by legislation, requiring preference to be given to placements with a parent of the child; a member of the child's extended family; other members of the child's community; and, where such placement is not possible, families or institutions for children approved by members of the relevant Aboriginal communities.

4. *Criminal law*

The Commission recommended there be legislative provision for the admissibility of evidence of Aboriginal customary law where issues of provocation or duress are raised in murder prosecutions. It also proposed the creation of a partial defence to murder, similar to a defence of diminished responsibility, as a direct acknowledgment of the conflicts that can occur between the general legal system and Aboriginal customary laws.

5. *Sentencing of Aboriginal offenders*

The Commission concluded that Aboriginal customary laws are already taken into consideration by courts in sentencing. Such consideration was to be encouraged, however it was specifically proposed that there be no incorporation by courts in sentencing orders of any customary law penalties or sanctions which are contrary to the general law.

6. *Traditional hunting and fishing rights*

Instead of advocating comprehensive federal legislation in this area, the Commission proposed a set of general principles to be adopted by the Commonwealth, State and Territory governments. The principles strive to reach an equitable balance between Aboriginal interests and other legitimate interests, including conservation, the effective management of natural resources, pastoral interests, commercial fishing and tourism. As a matter of general principle, Aboriginal traditional hunting and fishing should take priority over non-traditional activities, including commercial and recreational activities, where the traditional activities are carried out for subsistence purposes.

7. *Community justice mechanisms*

While the Commission supported and encouraged the local resolution of disputes in Aboriginal communities by unofficial methods, it concluded that there should be no general scheme of Aboriginal courts established in Australia. It set out basic requirements for the establishment or continuation of any special courts or similar official bodies, based on localised community control and preservation of individual rights. The Royal Commission into Aboriginal Deaths in Custody endorsed the Law Reform Commission's stated objective to return control over law and order issues to the grassroots level in Aboriginal communities.

To this end, the Royal Commission recommended support for Community Justice Panels, which are small groups of Aboriginal people working as volunteers with the criminal justice agencies to ensure the welfare of their community members in that system.

There is nothing radical or revolutionary about these recommendations. Some aspects have been incorporated either in the law or in practice at State level. The best example is the child placement principle, which has now found fairly wide recognition in Australian child welfare legislation. (The principle relates to the placement of Aboriginal children with members of their own community by state agencies.)

The inaction at the federal level is connected to the stringent objection of the States to federal legislation impinging on matters they see as their preserve, whatever the constitutional position may be. It would seem beyond doubt that the federal government has both the constitutional and political power to impose its own solution. This is especially so since it could do so contingent upon the states not taking equivalent measures themselves, a technique adopted in other areas such as the *Sale of Goods (Vienna Convention) Act*, 1987 (ACT and counterpart state legislation).

The fact that there has been such failure in the implementation of the recommendations speaks ill of the commitment of the government and society to any real efforts at reconciliation with Aboriginal people. It is to be hoped that the cause of customary law recognition is assisted by the numerous assessments of the *Mabo* decision currently taking place. It would be to Australia's shame were the Aboriginal people forced to litigate to secure the rudimentary recognition of their customary obligations, duties and rights which the Law Reform Commission proposed seven years ago.

This is an edited version of an article by John McKenzie which first appeared in the June 1993 issue of the Law Society Journal.