

BOOK REVIEW

The Recognition of Aboriginal Customary Laws, The Law Reform Commission, Australia, Report No.31. Vol.1 (xxxix, 507 pp.), Vol.2 (xvi, 248, 150 (Appendices), 17 (Index) pp.), Summary report (xvii, 104 pp.). Australian Government Publishing Service, Canberra, 1986.

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In February 1977 the Attorney-General of Australia referred to the Law Reform Commission the question "whether it would be desirable to apply either in whole or in part Aboriginal customary law to Aborigines, either generally or in particular areas or to those living in tribal conditions only...." By May 1986 when the Commission completed its Report on the reference there had been three successive Commissioners-in-Charge, ten other Commissioners had at various times worked on the reference, as well as many staff and external consultants, there had been 17 field trips by or on behalf of the Commission in Australia, four trips overseas, more than 70 hearings, and written submissions from more than 500 individuals and groups, and the Commission had studied published writings which are listed in a bibliography which runs to 40 pages.

Work by a committee of changing membership, answerable to a bureaucracy, might not be expected to result in a report of great academic distinction. In the case of this Report the expenditure of effort and resources is fully justified not only by the bulk but also by the quality of the final product, largely, I would judge, because of the ability and dedication of the Commissioners, staff and consultants who worked on it in the final years. Therefore, while the Summary Report is an object-lesson in skilful abridgement, the full Report should be read by anyone seriously interested in the ethical and political issues, the legal techniques, or the social effects involved when state law is adjusted to recognize parts of one or more systems of customary law. The one gap - admittedly large - in the comprehensiveness of the Report arises from the fact that Aboriginal land claims were outside the Commission's terms of reference. Study of the Report may be assisted by noting that at the end of every

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Part except the first there is a summary of recommendations, and that Chapter 37 consists of a consolidation of all of these.

Some of the central issues of the inquiry were mentioned in an earlier review in this Journal (23: 225-230) of the Research Papers relating to the reference. The present review will merely list the heads of subject-matter of the final Report and comment on a few recommendations. The term 'state law' will be used to refer to the laws of the modern state in Australia, both of the Commonwealth (federal) government and of the constituent parts of the federation, most of which are called 'states' in a narrower sense.

After a survey of the historical background to the reference (Part I), the Report examines the 'general principles' of recognition, considering the various arguments of domestic and international policy for and against recognition, and making a preliminary survey of categories of 'recognition' (Part II). It indicates here that the recommendations will be for functional, not categorical recognition. The former means that "the precise form of recognition may vary with the context and with the problems being addressed..." The Commission considers that "the approach to be adopted must be flexible ... and must pay regard to the practicalities of the situation" (pp. 150-151).

Part III examines recognition with regard to marriage, children and family property. The discussion of the general approach to be adopted to recognition of traditional Aboriginal marriage (Chapter 13) illustrates the implications of the Commission's rejection of categorical, or general recognition. Such recognition in regard to marriage would entail a rule that Aboriginal marriage be treated as equivalent to marriage under general (state) law. This would attach to Aboriginal marriage all the consequences of marriage under state law, many of which are at variance with the consequences of Aboriginal marriage under Aboriginal law. The Commission rejects also a programme of enforcement by state law of all Aboriginal marriage rules. 'Functional recognition' as recommended will entail regarding Aboriginal marriage as equivalent to marriage under state law only for specific, selected purposes. Thus it will be recognised as marriage for the purposes of inheritance and social security laws, but not of property rights on divorce or rape in marriage. It is noteworthy that the possibilities of recognition which are discussed would all foster a trend towards more detailed state domination of Aboriginal social orderings. Categorical recognition, as defined, would have produced a sustained effort to replace the Aboriginal law consequences of Aboriginal marriage with the state law consequences which now follow from state marriage.

The functional recognition recommended will also produce such a process, although it will be applied only to some aspects of Aboriginal law. Recognition of all aspects of Aboriginal marriage law would have produced the least deliberate change, but the Commission acknowledges that in this case state enforcement would ultimately undermine Aboriginal control of Aboriginal law, and, as African experience of customary law in state courts shows, would have led to a remolding of Aboriginal law in terms of the concepts and policies of state law.

On property in the family the Commission recommends *inter alia* that the courts be empowered to order, on application, the distribution of intestate Aborigines' estates according to customary law, and to allow claims for family provision by Aborigines who under customary law could have expected support from the deceased even though under current state law they could not claim. The effects of these recommendations will depend on how the courts exercise their discretion in practice. There is no other significant recommendation for the recognition of Aboriginal customary law in this field. In contrast, the recommendations as to child custody, fostering and adoption (Chapter 16) go far towards meeting many of the criticisms of existing laws and practices. (On these, see especially Chisholm 1988; Sansom and Baines 1988.)

Issues in Criminal Law and Sentencing (examined in Part IV) were given prominence in the detailed, explanatory parts of the terms of reference. The long and continuing history of discriminatory treatment of Aborigines in the state criminal law system is the reason for the importance of this area. But the Commission finds it to be universally accepted that Aborigines should remain subject to the general criminal law of Australia. In most criminal cases involving Aborigines, it notes, there are no traditional elements, and so the broad sentencing issues at the heart of much of the current disquiet about the system were largely outside the Commission's terms of reference. The issue which needed consideration was the extent to which the state criminal law should "take into account or allow for" Aboriginal customary law and traditions. This form of modification of state law could be effected in the substantive law, for example by the introduction of new defenses. But the Commission concludes that few such amendments would be desirable. It favours development rather in the mode of application of the existing law in cases involving Aborigines, for example in the exercise of existing discretions. The Report contains many detailed recommendations in this respect.

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Questions of evidence and procedure (Part V) are a varied set. They concern among other topics: criminal investigation and police interrogation; proof of Aboriginal customary laws in litigation; and the taking of evidence about Aboriginal societies in circumstances where Aboriginal law imposes restrictions on what persons may properly say and what information may be divulged.

The Commission finds that the question of recognising or introducing local justice mechanisms for Aboriginal communities (Part VI), like the question of recognising Aboriginal marriage laws, raises issues of autonomy, in this case in law and order matters. The underlying problem here seems to be that deep social changes produced by the impact of white Australia have already created pressing law and order problems in Aboriginal communities, to control which they need outside assistance; but that the provision of this assistance will inevitably produce further changes in those societies. There is no completely satisfactory solution, but the Commission suggests that varying approaches should be designed to meet the varied problems and desires of each locality. It urges approaches which will respect Aborigines' own perceptions of their situations, and will be enlightened by knowledge of experiences in meeting such problems in other countries. However, it finds that perhaps the only overseas instance which offers many relevant lessons is that of village courts in Papua New Guinea.

Part VII, on the recognition of traditional hunting, fishing and gathering rights, contains a compendious account of the intricate variety of current laws in Australia. It makes recommendations according to a scheme of priorities which gives primacy to conservation of resources, then recognises traditional rights for purposes of subsistence (including ceremonial exchange and satisfaction of kin obligations), and then considers commercial and recreational interests of both Aboriginal and white Australians. The moral claim of Aborigines to the natural resources of what was once their land, for all purposes including commercial, was not considered to carry weight. In any case, it must at present be politically unacceptable.

The concluding Part VIII includes a discussion of the issues of implementation arising from the division of governmental powers in the federal Constitution, and a final chapter on "Implementation and the Future". The latter sets out some of the underlying principles on which the Commission has acted, and resumes the discussion of the autonomy issues. Showing a respect for the independence of the subjects of the Reference which is wholly appropriate but regrettably unusual in such governmental inquiries, the Commission states that,

despite its extensive and carefully considered consultation with Aboriginal people, it does not claim to speak on their behalf. Noting the developments in Canada towards self-government (see e.g. Bayly 1988; Morse 1988; Richstone 1988), it observes that

the Canadian developments do demonstrate the potential for resolving problems through agreement on measures of self-government in particular fields, and thus help to put this Reference into proper focus. The Commission's proposals are presented not only, or even principally, as a concession to Aboriginal claims or demands.... The recommendations are primarily a response to the legal system's search for justice in dealing with the Aboriginal people of Australia, a people with distinctive traditions and ways of life.

It concludes by recommending against the establishment of a permanent official agency to implement the Report and keep under review the need for further developments, saying that this

would be to pre-empt the more basic issues of self-determination or self-government. An official agency, established by government or at its instigation, carries the risk that these basic issues become in effect a matter for unilateral determination rather than negotiation. An 'expert' body might effectively take over a decision-making role, with the result that any action would not be a reflection of Aboriginal views, priorities or initiatives.

There is a clear implication that, after the implementation of the Commission's recommendations, attention should be turned to the issues of self-determination. It is to be hoped that white Australia can rise to the challenges posed both by the explicit, detailed recommendations, and this pointer towards a more distant and enlightened future.

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