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Commission news

ALRC members & staff

The ALRC congratulates Commissioner Brian Opeskin, who was promoted to Associate Professor at Sydney University with effect from January.

Legal Officer Paula O'Regan resigned from the ALRC in December, to accept a position with the Australian Securities and Investment Commission.

Principal Legal Officer Michael Barnett also left the ALRC in December after a lengthy period of service. Michael began working with the ALRC in mid-1987, and worked on numerous references, including inquiries into the police complaints systems and the federal civil justice system; the review of the *Judiciary Act*; and the review of federal civil and administrative penalties.

Legal Officer Helen Dakin left the ALRC in April this year. She is now working with the Copyright Council.

Three new staff members have been welcomed by the ALRC.

Isabella Cosenza joined the civil and administrative penalties team on 15 April as a Senior Legal Officer. Isabella most recently worked at ASIC as a senior lawyer in the Enforcement Branch and, while there, undertook a secondment to the Commonwealth Director of Public Prosecutions in the Commercial Prosecutions Branch.

Carolyn Adams, a Senior Legal Officer, began work with the genetic information team on 29 April. Carolyn most recently worked at the NSW Cabinet Office, and prior to that had many years' service in senior positions within the Commonwealth Attorney-General's Department, with special emphasis on information, privacy and discrimination law.

Legal Officer Imogen Goold joined the genetic information team on 29 April. Imogen is finalising her Masters thesis at the University of Tasmania in the area of regulating human tissue in Australia. She is a first class honours graduate in Arts from the University of Tasmania, and has held academic and research positions there.

References & publications

The Attorney-General has extended the deadlines for both of the ALRC's current inquiries.

The reporting date for the inquiry into the use of civil and administrative penalties has been extended to 30 November 2002, from 1 March 2002.

The civil and administrative penalties reference team released its Discussion Paper, *Securing Compliance: Civil and Administrative Penalties in Australian Federal Regulation* (DP 65), in early May.

The ALRC made the proceedings of its major conference *Penalties: Policy, Principles and Practice in Government Regulation* available in CD-Rom format. The CD of conference papers was distributed free to all delegates to

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the conference, which was held in June 2001. Non-delegates can purchase the conference papers from the ALRC.

In recognition of the enormous public interest in the joint inquiry on the protection of human genetic information, and the need for widespread public consultation, the Attorney-General and the Minister for Health & Ageing extended the inquiry's reporting deadline by nine months until 31 March 2003.

In November last year, the ALRC and the Australian Health Ethics Committee produced an Issues Paper, *Protection of Human Genetic Information* (IP 26), which was widely distributed ahead of a series of public meetings and consultations.

Public meetings and consultations

The ALRC's recent public focus has been the series of free public meetings, held as part of the joint inquiry with the Australian Health Ethics Committee into the protection of human genetic information.

The ALRC and AHEC hit the road immediately after the release of their IP in November, staging public meetings in every State and Territory. Meetings were held in each capital city, as well as in numerous regional centres.

In addition, in recognition of the global dimensions facing the genetic information inquiry, ALRC President Professor David Weisbrot and Commissioner Brian Opeskin have undertaken a limited program of overseas consultations. Professor Weisbrot presented a paper at the Human Genome Organisation's conference in Shanghai, China in April this year. Associate Professor Opeskin held a series of meetings with genetics experts in Denmark, Sweden and the Netherlands in March. For further information on the progress of the national genetic inquiry see the article '*Engaging the public – community participation in the genetic information inquiry*' on page 53.

As an extension of the public information and consultation program on genetic information, the ALRC has collaborated with the Legal Information Access Centre of NSW to produce an issue of its publication *Hot Topics* on human genetic information. *Hot Topics* provides a plain English overview of important legal issues, making it a great tool for secondary and tertiary students or the general public with an interest in a particular subject. Issue 36 on Human Genetic Information is due for release in early May.

International visitors

The ALRC has hosted several international delegations with an interest in law reform. These included meetings in October with senior officers from the Indonesian Ministry of Justice and Human Rights, and a group of senior academics from Trisakti University, Indonesia. A further delegation from Indonesia – this time comprising judges with an interest in class actions – was met in February.

In November, the ALRC hosted a meeting with Mr Charlie Trost, a Commissioner of the United States National Conference of Commissioners of Uniform State Laws (NCCUSL), to develop an understanding of the purpose and operations of the NCCUSL and generally discuss models for developing uniform laws. Attendees included representatives of a number of Australian law reform bodies and others with an interest in law reform. The ALRC President, Professor Weisbrot, then met with the Deputy President of the NCCUSL, Mr Howard Swibel, in Sydney in March to further develop the cross-Pacific relationship between the two bodies.

In February, the ALRC meet with Ms Elsie Leung, Justice Secretary of Hong Kong and

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President of the Law Commission of Hong Kong, and senior officers of the Hong Kong Department of Justice.

In relation to the genetic information inquiry, the ALRC hosted a visit from Professor Ryuichi Ida, Chair of the International Bioethics Committee of UNESCO, and colleagues Dr Morisaki Takayuki and Dr Kato Kazuto from Japan. A meeting of various Sydney-based professionals with an interest in bioethics issues provided stimulating discussion.

Dr Alison Stewart, Chief Knowledge Officer of the Public Health Genetic Unit, Cambridge visited the ALRC in April this year, meeting with the team working on the inquiry into the protection of human genetic information.

New website

Visitors to the ALRC's website at <www.alrc.gov.au> will have noticed a marked change in the appearance of the site, with a fresh new design. The new site is fully compliant with all federal government requirements, including those regarding accessibility. It also provides increased access to information on past and present ALRC inquiries.

Internship program

The ALRC has continued to accept a number of talented law students into its competitive internship program, enabling these students to undertake research on current inquiries. Five students undertook full-time internships during the 2001-02 summer, and a further five students are working part-time during the university semester from March-June 2002. The students have included undergraduate and postgraduate students from the Universities of Melbourne, New South Wales, Sydney, Wollongong, and the University of Technology Sydney.

International students are also accepted into the program where places are available. These students invariably provide a different perspective for comparative research tasks. A law student from the University of Munich will be working full-time with the ALRC from June to August. Information on the ALRC's internship program is available on our website.

Past report update

Managing Justice – ALRC 89

Recommendation 12 of ALRC 89 *Managing Justice* called for both Houses of Parliament to develop a protocol governing the receipt and investigation of serious complaints against federal judicial officers. In his initial response in Parliament to allegations made by Senator Heffernan regarding Justice Michael Kirby (which subsequently were proved to be false), the Prime Minister made reference to this recommendation. He said that Recommendation 12 is under active consideration by the government.

Another of the recommendations in ALRC 89 *Managing Justice* was for the establishment of a Council on Tribunals as a national forum for tribunal leadership, involving the heads of federal and state tribunals engaged in administrative review and the President of the Administrative Review Council (ARC). The Administrative Review Council has undertaken consultation with relevant tribunals regarding the proposal and drafted a constitution for the proposed body. Following support from the relevant tribunals, the Council of Tribunals is expected to meet for the first time in June 2002 in conjunction with the AIJA Tribunals Conference. See the Administrative Review Council's article in

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Not just payback: indigenous customary law

*By Geoff Clark**

"When I was very young my father would take me to this place of the banyan tree. We would always stop here as we walked across Gumatj land. The spirit marked by that tree was respected and it was felt truly in our hearts. We often spoke about Yolngu people as that tree. Strong and firm and fixed to the land. He told me Yolngu people were stuck deep into the land."

– G Yunupingu AM[1]

The battle to preserve Aboriginal and Torres Strait Islander culture and identity began with the first days of settlement. Introduced systems of administration, land and water use, and livestock and plant cultivation rapidly overran their indigenous equivalents. Imported social diseases such as influenza, smallpox and alcoholism ripped through the indigenous population with a devastating impact, while the imported social order of colonialism enforced with frontier militarism proved just as virulent in ripping the fabric of indigenous community structures.

Settlement in Australia was prosecuted in a particularly racist manner. In comparable colonies like New Zealand and North America, the sovereignty and social order of indigenous communities was recognised (however imperfectly) by way of treaties. However, settlers in this land proceeded on the racist assumption of *terra nullius* – arbitrarily designating indigenous communities as occupiers of land, not owners.

In fact, we were neither.

The indigenous relationship with land – mutual dependence – is unknown in the European context. With this lack of understanding, indigenous systems and populations were deemed to have no legal consequence – unless

we misbehaved, in which case the rule of law was applied solely as retribution. There was no shortage of misbehaviour.

Within two years of settlement in Sydney Cove, the great resistance leader Pemulwuy led his people into a 12-year campaign rejecting invasion and colonial rule. Other resistance movements developed throughout the country as settlement spread. Pemulwuy's principal

"...indigenous people maintain a strong desire to see the formal recognition of indigenous customary law as a valid and independent source of law alongside general Australian law."

targets were economic and tactical – the buildings, crops and livestock that were consuming lands that otherwise supported hunting and gathering. He demonstrated superior knowledge of, and skill with, the land that his people had tended for generations – yet this was not recognised as evidence of a complex and ancient system of land management.

Thus was set the context and justification for the widespread policies of dispossession, dispersal and denial that followed – both those sanctioned by the authorities and those (murder, rape, kidnap and poisoning) practised by settlers in areas beyond the reach of colonial administration.

Dispossession is the cancer that erodes cultural practice from the inside. Dispersal breaks down family and community cohesion, while denial constrains our attempts to seek recognition and redress.

Within this framework, the scope for practising customary law has withered along with our people's ability to sustain healthy communities.

> *"Some observers, many of them Aboriginal, look with distress on the decline in self-discipline and traditional authority in Aboriginal communities. They see the ineffective way in which our Western laws and punishments have sought to deal with social breakdown. In these circumstances they ask the question whether the recreation of respect for Aboriginal customary laws would give fresh stability to Aboriginal society and protection against the erosion of Aboriginal identity."*[2]

Justice Michael Kirby, the then Chairman of the Australian Law Reform Commission (ALRC), made this radio broadcast three years after the ALRC embarked on an inquiry into the feasibility of applying indigenous customary law 'in whole or in part' and with specific reference to the operation of the criminal courts.

The final report, *The Recognition of Aboriginal Customary Laws*,[3] was delivered in 1986 and stands as the most comprehensive study of Aboriginal and Torres Strait Islander customary law to date.

In the years since then, the issue of the recognition of indigenous customary law has advanced usually only in response to emerging principles – such as the *Mabo* decision,[4] which prompted the federal government to devise a regime to quarantine native title claims from common law processes. Overall, the federal government has referred the matter of customary law to the States and Territories to resolve in terms of specific legislative issues such as sacred site and heritage protection, and land rights legislation.

Yet indigenous people maintain a strong desire to see the formal recognition of indigenous customary law as a valid and independent source of law alongside general Australian law. This would achieve two things:

- recognition of the place and rights of indigenous people;
- access to culturally relevant systems to restore community harmony and discipline communities, which is unachievable under the introduced system.

Justice Kirby, in his 1980 broadcast, said 'the law is a force for cohesiveness, order and peace in society'. This is the role that Aboriginal and Torres Strait Islander people want for customary law in our communities.

Not just payback

In this article, it is not my intention to assess the wide range of views on customary law or to repackage ALRC documents. I will instead present an indigenous perspective and, in passing, make summary reference to some of ATSIC's reports and submissions.

The first thing to be said is that customary law can have wide application in indigenous communities – not only those with a thriving traditional heritage (such as in Central and Northern Australia) but also those whose lands have largely been alienated and who have engaged more closely with non-indigenous communities.

Customary law should not be seen only in terms of the traditional tribal punishments of spearing, banishment and payback. Customary law should be seen principally and more positively as the application of cultural values and principles to indigenous community life. It can provide the framework for systems of authority, discipline, administration and conflict resolution. It should be both the source and the shield of our indigenous identities, while taking account of the historical circumstances of communities.

In Western Victoria, Aboriginal people no longer carry spears but we maintain a very strong sense of our cultural identities nonetheless. Our links to clan, land and water are robust – each of us knows where we belong, who we belong to and what our responsibilities are. We maintain our cultural practices and affiliations even though these mostly are constrained by the invasive force of development, backed by British law. The strength of these links was recognised in the *Aboriginal Land (Lake Condah And Framlingham Forest) Act 1987* (Cth) that delivered the old Framlingham mission reserve back into the hands of my community. But there is no question of re-introducing spearing and payback to community life in rural Victoria (if, in fact, these were ever practised). Like every community with a strong sense of heritage – immigrant or otherwise – we are looking at blending cultural values to provide a more workable model.

To borrow Justice Kirby's words for one last time:

> *"Just as our legal rules change, so we should expect Aboriginal laws to change and adapt. Whilst rejecting oppressive elements ... we may still find in Aboriginal traditional law answers that will restore acceptable social control to at least some Aboriginal communities."*[5]

For the vast majority of indigenous communities, this remains the key issue – restoring acceptable social control. The extent of community dysfunction is well known but imposed external responses have shown they do not deliver improvements. Our survival as communities and the survival of our indigenous identities relies on us finding the internal responses that are appropriate to our needs.

Law vs Law

> *"In the early 1960s, when the Gove bauxite mine began we began our fight. Yolngu tribes from North East Arnhem Land took what is known as the Bark Petition to Canberra ... It could be likened to the Magna Carta of Balanda law because it was the first time Yolngu had ever set our law down for others to see ... We had given them the secrets of our law and they still refused to act."*[6]

Acknowledgement of the role of customary law did not occur in Australian courts until 1971. Justice Blackburn of the Northern Territory Supreme Court observed in *Milirrpum v Nabalco Pty Ltd and the Commonwealth* that indigenous law was 'a subtle and elaborate system highly adapted to the country in which people lived their lives, which provided a stable order of society and was remarkably free from the vagaries of personal whim or influence ... a government of laws not of men.'[7]

"Customary law should be seen principally and more positively as the application of cultural values and principles to indigenous community life."

The Yolngu peoples took legal action to protect their lands and cultures when the federal parliament dis-

missed their conciliatory gesture with the Bark Petition. Despite his acknowledgement, Justice Blackburn found no basis for enforcing customary rights to land against the Crown without support from a legislative or executive act. (It is worth noting that the weight of scholarly analysis since then criticises Justice Blackburn's judgment as illogical, inconsistent with common law and a misinterpretation of tenurial law.)

In 1975, two pieces of Commonwealth legislation recognised customary law.

The *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) established a process for granting land to Aboriginal communities that could demonstrate traditional use of the area under claim. 'Aboriginal tradition' is defined under section 3(1) as:

> *"... the body of traditions, observances, customs and beliefs of Aboriginals or of a community or group of Aboriginals, and includes those traditions, observances, customs and beliefs as applied to particular persons, sites, areas of land, things or relationships."*

The *Aboriginal Council and Associations Act 1976* (Cth) established a scheme for incorporating indigenous community associations and councils under their own constitutions and rules. Section 43(4) states:

> *"The Rules of an association with respect to any matter may be based on Aboriginal custom."*

The next significant event was the ALRC inquiry from 1977.

Setting the agenda on customary law

> *"The Commonwealth Government should ensure that effective processes are put in place for addressing the recommendations of the Australian Law Reform Commission Report on Customary Law Reform which would include:*
>
> *a. oversight by a committee comprising the Minister for Aboriginal and Torres Strait Islander Affairs, the Attorney-General and the Chairperson of ATSIC; and*
>
> *b. extensive consultations with traditional law men and women."*[8]

In 1994, the Labor federal government produced a *Report on Commonwealth Implementation of the Recommendations of the Australian Law Reform Commission* as its response to Recommendation 219 of the Royal Commission into Aboriginal Deaths in Custody (1987-91).[9] It also formally rejected the recommendation on overriding federal legislation.

In March 1996, the Attorney-General of the Coalition federal government gave tentative support to formal recognition of customary law in legislation on condition that the States and Territories took responsibility for doing so.

Other developments – such as the *Mabo* decision, the development and amendment of a native title regime, and issues pursued under the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth) – have focused attention on customary law matters, but not often in a positive way.

Formal recognition of customary law as a valid source of law alongside general Australian law has yet to be realised.

In *Recognition, Rights and Reform,* ATSIC argued that customary law is an integral and central part of Aboriginal and Torres Strait Islander culture and identity. ATSIC said that in many parts of Australia, Aboriginal and Torres Strait Islander peoples are bound by customary systems of legal, social and religious rules and obligations which govern relationships between themselves and with their land. We expressed concern at the tendency to try to accommodate the ALRC recommendations under general provisions of law rather than to legislate specifically or to allow recognition to occur through the common law process. The result is ad hoc and uneven outcomes, and the shifting of government responsibility onto the judiciary. Today, some 16 years after the ALRC issued its report (and eight years after we made the same point in *Recognition, Rights and Reform*) there has been no comprehensive response from government.

The major hurdle seems to be the reluctance by all governments to recognise the unique legal position that indigenous people hold in this country. Ministers speak of respecting the cultures of all minority groups but this is avoiding the issue.

Aboriginal and Torres Strait Islander peoples are not members of an immigrant society that has exercised choice in where and under which legal system it has agreed to live. We have a special status as indigenous peoples – a distinction that has long been recognised in comparable countries such as the United States and Canada.

International trends

Australia continues to ignore or misunderstand developments that see increasing recognition for customary law in international instruments and in the work developed by the United Nations.

For example, Article 8 of the International Labour Organization's *Convention No 169* states that indigenous peoples:

> *"...shall have the right to retain their own customs and institutions, where these are not incompatible with fundamental rights defined by the national legal system and with internationally recognized human rights."*

Article 9(1) provides that, subject to the same limitations:

> *"...the methods customarily practised by the peoples concerned for dealing with offences committed by their members shall be respected."*

The principal relevant UN forum is the Working Group on Indigenous Populations (WGIP), which meets annually in Geneva to review and discuss indigenous issues. In 1993 the WGIP completed a *Draft Declaration on the Rights of Indigenous Peoples*, which is currently under consideration by a special working group of the Commission on Human Rights. The Commission hopes to complete its review of the Draft Declaration in time for adoption by the General Assembly in 2004 – the final year of the current International Decade of the World's Indigenous People.

ATSIC holds consultative status to the UN's Economic and Social Council, which entitles us to send delegations to a wide range of international and intergovernmental conferences and attend WGIP sessions. We support the Draft Declaration and we will seek to preserve its integrity during current UN review processes.

Six articles of the Draft Declaration deal with indigenous customary law and practices, among which are the following:

> *Article 26*
>
> *Indigenous peoples have the right to own, develop, control and use the lands and territories, including the total environment of the lands, air, waters, coastal seas, sea-ice, flora and fauna and other resources which they have traditionally owned or otherwise occupied or used. This includes the right to the full recognition of their laws, traditions and customs, land-tenure systems and institutions for the development and management of resources, and the right to effective measures by States to prevent any interference with, alienation of or encroachment upon these rights.*
>
> *Article 33*
>
> *Indigenous peoples have the right to promote, develop and maintain their institutional structures and their distinctive juridical customs, traditions, procedures and practices, in accordance with internationally recognized human rights standards.*

In Australia, government interest in remaining abreast of international trends continues to be negligible, if not reluctant.

Incremental developments occur when the court and law enforcement systems sometimes take customary law into account:

- in New South Wales, the Northern Territory, South Australia and Victoria, adoption legislation recognises traditional indigenous marriages;
- in NSW, traditional indigenous marriages are recognised in legislation as de facto relationships;
- in the Northern Territory, traditional indigenous marriages are recognised for most purposes;
- child and community welfare legislation in a number of jurisdictions requires that every effort is

made to place indigenous children for care or adoption with extended family or Aboriginal people who have the correct relationship with the child in accordance with customary law;

- in the area of criminal law, indigenous law, culture and tradition may be relevant to defences of provocation, duress and authorisation; applications for bail; issues of fitness to stand trial and in sentencing indigenous defendants;

- the common law in the Northern Territory has made it clear that judges can take customary law into account in sentencing an Aboriginal person for a criminal offence.

Community justice initiatives

I recently held informal discussions with federal government officials on the prospect of supporting customary law and traditional authority structures to assist and strengthen indigenous communities against the problems of violence they are experiencing.

I was pleased there was interest in the idea and a commitment to a cooperative process of developing national principles for best practice Indigenous Community Justice Mechanisms and community governance structures.

Violence within indigenous communities is linked to the unacceptably high over-representation of indigenous people at all stages in the criminal justice system – from arrest to incarceration. Despite some minor change in the patterns of over-representation since the Royal Commission into Aboriginal Deaths in Custody reported in 1991, the over-representation of indigenous people at all stages in the criminal justice system remains an issue of critical national significance.

The amount of violence, particularly family violence, in our communities is enormous. Our young people face a high risk of being injured or becoming involved in perpetuating the cycle. A wide range of diversionary initiatives and interventions are possible under an Indigenous Community Justice system, including:

- regular meetings between the police and Justice Groups to develop strategies to address youth crime, petrol sniffing and alcohol abuse with minimum police intervention;

- alternatives to court appearances such as a Justice Panel;

- court participation by indigenous elders with input into sentencing procedures;

- early intervention with child and youth offenders;

- sending offenders to out-stations for cultural learning and/or stockwork or punishment;

- various shaming techniques and admonishment in front of peers.

These are measures that begin to return to communities a sense of control, influence and renewed identity.

As a matter of priority, we need to make an investment in the restoration of structures that support cultural authority and anchor our people in the sense of who they are and what they can achieve. We will do most of the work in our own communities. We will take charge and change the ways in which our communities function.

But we need the support of government to ensure commitment and consistency – and this means legislative or constitutional measures to guarantee longevity and independence for the recognition of our customary law.

It is a process that still needs to be researched, debated and developed. It is a process that will complement the existing legal system – not replace it or rival it.

Aboriginal and Torres Strait Islander people are keen to take up our social responsibilities, but the pattern of history to date consists of denial and dismissal. The ALRC and other bodies have provided the research and other nations have provided the example. Governments now have the relatively straightforward task of taking steps towards implementing policies of recognition and inclusion.

**Geoff Clark is the Chairman of the Aboriginal and Torres Strait Islander Commission.*

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Aboriginal customary law in Western Australia

*By Harry Blagg, Neil Morgan and Cheri Yavu Kama Harathunian**

It is almost 16 years since the Australian Law Reform Commission (ALRC) published its groundbreaking report *The Recognition of Aboriginal Customary Laws.*[1]

In the intervening period, much has occurred to strengthen the report's fundamental arguments; namely, that forms of customary law continue to influence the lives of many Aboriginal people and that recognition of Aboriginal forms of law (and we would emphasise the plurality here) would be invaluable both in healing some past wrongs and in assisting Aboriginal communities in maintaining order and social harmony. However, most of the report's key recommendations still await implementation across the country.

In December 2000, the then Western Australian Attorney-General, Mr Peter Foss QC MLC, gave the Law Reform Commission of Western Australia a reference to inquire into customary law in Western Australia. The reference is timely and important, offering an opportunity to revisit the work of the ALRC in the light of subsequent developments in law, research and policy; to 'regionalise' the ALRC's work by developing a better understanding of Aboriginal law in the specific context of Western Australia; to facilitate processes for implementation by creating space for a dialogue with Aboriginal people on the potential parameters and models for recognition; and to explore the possible expansion and operation of indigenous community justice mechanisms.

The current landscape

The landscape has altered very significantly since the ALRC report and it is apparent that customary law must now be discussed within a framework of meanings that is

more diversified and variegated than the early 1980s. The ALRC report itself marked a significant stage in these landscape changes. Then, in 1991, the Royal Commission into Aboriginal Deaths in Custody handed down its final report.[2] Although debates continue as to how far the Royal Commission's recommendations have been implemented[3] there is no doubt that the report significantly influenced thinking about Aboriginal justice issues. Shortly afterwards, in mid-1992, the High Court handed down its landmark decision in *Mabo and Others v Queensland (No 2)*,[4] which engendered a radical reconfiguration of ideas about the significance of land and culture within Australian law.

Despite these important legal landmarks, we continue to face enormous difficulty in resolving some fundamental dilemmas with respect to relationships between Aboriginal and non-Aboriginal peoples. These dilemmas cut across traditional legal boundaries but are most acute and obvious in the law enforcement area. On the one hand, Aboriginal people continue to be incarcerated at a rate that is far above the non-Aboriginal rate; indeed, in most Australian jurisdictions, the Aboriginal imprisonment rate now exceeds what it was at the time of the Royal Commission.[5] On the other hand, there is a growing body of evidence that Aboriginal victims are unable to access support services or receive 'justice' to the same extent as non-Aboriginal people. The increasing 'coming to voice' of indigenous women and, linked to this, a growing awareness of extreme levels of violence (including sexual violence) in some Aboriginal communities, have prompted a number of recent and ongoing inquiries. The 2000 *Aboriginal and Torres Strait Islander Women's Task Force on Violence*,[6] the 2001 *Cape York Justice Study*[7] in Queensland and the ongoing Gordon Inquiry into sexual abuse and family violence in Western Australia[8] are just three examples. These inquiries follow on from research into Aboriginal family violence, attesting both to the significant degree of suffering within Aboriginal communities and to the profound limitations of non-Aboriginal forms of intervention to deal with the problem.[9]

"Despite these important legal landmarks, we continue to face enormous difficulty in resolving some fundamental dilemmas with respect to relationships between Aboriginal and non-Aboriginal peoples."

The past 15 years also has seen the emergence of various 'hybrid' and 'alternative' models of justice, often classified under the heading of 'restorative justice'. Debates on restorative justice in Australia have been given particular impetus by developments in societies such as New Zealand and Canada, where debates about indigenous justice tend to be more advanced. These models include practices such as Family Group Conferencing and Circle Sentencing, to which the New South Wales Law Reform Commission has also made recent reference.[10] There remains significant uncertainty as to whether these practices – at least in the form presented by many advocates – are appropriate for Australia's indigenous peoples.[11] Nevertheless, it remains true to say that they (and the underpinning philosophies of restorative justice) provide a potential bridge for the transport and exchange of ideas between Aboriginal and non-Aboriginal people, and may invigorate discourse about future directions and community justice initiatives.

The terms of reference

The terms of reference for the Commission's research are extremely wide-ranging, excluding only Native Title and the *Aboriginal Heritage Act 1972* (WA). The reference stipulates that the research should inquire into how customary law is:

1. ascertained, recognised, made, applied and altered;

2. who is bound by those laws and how they cease to be bound; and,

3. whether these laws should be recognised and given effect to; and, if so, to what extent, in what manner and on what basis.

In considering the third point, the Commission is requested to consider whether customary law should be recognised in Western Australia and, if so, what modifications and amendments should be made to court practices and procedures, the civil and criminal law, and other relevant provisions. The

Commission is required to traverse relevant Commonwealth legislation and international obligations as well as state laws and to 'have regard to' matters as diverse as criminal law, civil law, the law of domestic relations, personal property law, inheritance law, evidence and procedure. The reference is also to have regard to issues surrounding Aboriginal notions of the sacred, cultural concerns and sensitivities around gender, and recognise the centrality of Aboriginal people's 'views, aspirations and welfare' in the research process.

Clearly, the meaning and scope of some of these terms of reference remain open to further interpretation, discussion and fine-tuning. For example, what exactly is encompassed, in the context of customary law, by the legal concepts of 'personal property' or the 'law of domestic relations'? In this sense, the terms of reference may appear, at first sight, to be somewhat uncertain and potentially unruly. However, it should be stressed that the Commission's primary objectives are set out in points 1 – 3 above. While it must 'have regard to' a wide range of areas of law, it is not required to provide a detailed exposition of all those specific topics.

Furthermore, the breadth of the terms of reference may well prove to be a positive rather than a negative feature. The project aims to adopt a holistic approach and, in so doing, to reflect the fact that indigenous perceptions of law are unlikely to accord with current legal categorisations, including the interface between civil and criminal wrongs. However, it seems inevitable that, as the project develops, some facets will be accorded greater weighting. Crucially, in taking decisions about such weighting and about the general direction of the project, the Commission will take advice from key indigenous advisers under the structure outlined below. In this way, the terms of reference give room for the incorporation of indigenous perspectives, classifications and priorities.

The project structure & research team

The Commission, on advice from representatives of the indigenous community, has appointed Ms Cheri Yavu-Kama-Harathunian of the Crime Research Centre at the University of Western Australia as the full-time project manager. Cheri is the Centre's first full-time Aboriginal Research Fellow and a woman of the Cubbi Cubbi clan (North Queensland). She has significant experience working in the justice system, including establishing culturally appropriate treatment options for violent offenders in Western Australia's correctional system.

The Crime Research Centre has an established reputation for its research on indigenous justice related issues, having produced a series of works on issues such as family violence, sentencing (including mandatory sentencing), probation and parole, youth justice, crime prevention, policing, Aboriginal night patrols and restorative justice.[12] The Centre also acts as the 'warehouse' for criminal justice related data in Western Australia, a position which ensures that its policy related research is empirically grounded. The Centre enjoys good working relationships with indigenous justice bodies such as the Aboriginal Justice Council of Western Australia and the Aboriginal Legal Service, and peak bodies such as the Aboriginal and Torres Strait Islander Commission (ATSIC). It is also particularly well linked with a diversity of relevant agencies (including Aboriginal organisations, the courts, the Director of Public Prosecutions, police, justice agencies and family services) through its multi-disciplinary research profile and its Advisory Board.

Given the complexity, sensitivity and importance of the project, many of the foundations are still being laid. Crucial issues of protocol and procedure must be considered and the project manager is working with the Commission to ensure that the project structure fully and properly reflects such considerations. Although some details are still to be finalised, it is anticipated that two Indigenous Special Commissioners will be appointed (one male and one female) and that an Aboriginal Research Reference Council will be established. This Council will comprise of men and women elders, community representatives and relevant representatives of key indigenous agencies and peak bodies. The Council and the Special Commissioners will provide ongoing leadership and direction to the project from the indigenous community. Within this framework, consultations with Aboriginal communities (urban, rural and

remote) will anchor the project. It is impossible to envisage a credible process of consultation and effective project management unless the project first engages with Aboriginal people.

Intersecting with the consultation process, there will be a series of commissioned papers on topics linked to the terms of reference. In the criminal justice and related areas, to choose one example, it is likely that these papers will cover a diversity of issues, including sentencing and punishment, language and evidence, and the role of alternatives such as restorative justice. Particular attention will be paid to community justice mechanisms that assist in actively keeping the peace in indigenous communities (as opposed to simply correcting offenders), such as self-policing initiatives like night patrols and warden schemes. Consideration will also be given to the potential for such community justice mechanisms – originally developed in the criminal justice context – to take on a broader role. The issue of how to intervene more appropriately and effectively in family violence will also need to be addressed and this will inevitably involve liaising with the work of the Gordon Inquiry.[13]

Another layer of indigenous input (and empowerment) will be the employment of indigenous researchers and writers. The Crime Research Centre is again well placed to coordinate such input and the human resources are far in advance of those that were available in the mid-1980s. In this context, mention should be made of the fact that both the University of Western Australia (UWA) and Murdoch University have pioneered programs to enhance the access of indigenous students to law degree courses. This, along with the increasing success of indigenous students in other key discipline areas, has provided a new pool of research talent. The changes are nothing short of remarkable. In 1988, UWA had only one Aboriginal law graduate and two enrolled students and the Murdoch Law School had only just started. At the end of 2001, more than 20 indigenous students had graduated in law from UWA and around 35 students are currently enrolled. More than six students have graduated from Murdoch and more than 12 are enrolled in the LLB program, with more than that again currently enrolled in the BLS program.

The full terms of reference for the Law Reform Commission of Western Australia's inquiry into Aboriginal customary law are available on the Commission's website at <www.wa.gov.au/lrc>. Inquiries about the Aboriginal customary law project should be directed to:

The Law Reform Commission of Western Australia
4th Floor, Hartley Poynton Building
141 St George's Tce, Perth
WA 6000
Ph: (08) 9264 6116
Fax: (08) 9264 6115
Email: lrcwa@justice.wa.gov.au

Conclusion

The Commission's inquiry is of immense significance and preliminary discussions have already revealed a readiness for such a project within the indigenous community and an expectation that it will lead to concrete results. Undoubtedly, the time is therefore 'right' for the project. The challenges are enormous, including the recognition of pluralities and regional differences and balancing the expectations and aspirations of different groups. However, the project creates a good window of opportunity for dialogue and the long-term development of practical regionalised initiatives.

** Harry Blagg, Neil Morgan and Cheri Yavu Kama Harathunian are from the Crime Research Centre at the University of Western Australia.*

Endnotes

1. Australian Law Reform Commission, The Recognition of Aboriginal Customary Laws ALRC 31, (1986) AGPS, Canberra.

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Indigenous community justice groups: the Queensland experience

*By Michael Limerick**

In a number of Aboriginal and Torres Strait Islander communities in Queensland, community justice groups are proving to be an effective means for addressing serious community concerns around law and justice.

While some of the activities of these groups represent a rare example of the practical application of indigenous customary laws and processes, they have a more fundamental significance as an exercise of self-determination and a vehicle for community empowerment. Most importantly, in addressing deep-rooted justice issues, community justice groups are succeeding where the mainstream justice system is not.

Recognition of customary law

The recognition of customary law has always been a central theme of the policy dialogue around indigenous justice reform. The traditional trajectory of this dialogue has often led to a failure to appreciate the importance of community-based justice mechanisms in improving justice outcomes in indigenous communities.

For example, in discussions about the recognition of customary law, there has often been a tendency to conceive of customary law primarily as a body of rules and customs that governed indigenous society before colonisation, in much the same way as common law and statute law governs non-indigenous society today. From this viewpoint, the recognition of customary law is seen in terms of how these rules and customs can be given effect in appropriate circumstances in a contemporary context. What is overlooked in this approach is an appreciation that customary law is as much about a *process* of governing social relations as it is about the *content* of rules and customs that might be

considered to make up a body of law. Understood in this way, the challenge of recognising customary law can be seen as the challenge of empowering customary processes or mechanisms by which indigenous communities can maintain social order.

A second shortcoming in much of the discussion around indigenous justice reform is that the obsession with the issue of recognition of customary law often

"Following the ALRC report, there was an increase in the impetus for developing community-based responses to crime and justice in indigenous communities."

obscures the more fundamental concern of giving effect to the right to self-determination. The exercise of an indigenous community's right to self-determination in respect of justice might involve the reinstatement of customary processes to maintain social order. However, it might equally involve the development of contemporary justice mechanisms (controlled by the community), adapted or modified customary processes, or simply processes for greater community input into the mainstream justice system. It is too often assumed that the recognition of customary law is the principal aspiration of indigenous communities regarding justice. The reality is that greater autonomy and capacity to internally maintain social order (using customary law and process or otherwise) is usually the overriding goal for these communities.

The monumental Australian Law Reform Commission (ALRC) report, *The Recognition of Aboriginal Customary Laws*, looked at the issue of local justice mechanisms for Aboriginal communities.[1] However, the ALRC was limited by the traditional focus in the terms of reference on the question of mechanisms to apply customary law, rather than mechanisms to enable greater Aboriginal control over law and order generally.[2] Despite these limitations, the ALRC did consider a number of existing local justice mechanisms and possible options. It came to the conclusion that:

> *"In many Aboriginal communities, unofficial methods of dispute resolution operate alongside the general legal system. Local resolution of disputes in these kinds of ways should be encouraged and supported."*[3]

The ALRC also looked at schemes to divert offenders to community processes, and concluded that:

> *"Formal diversionary machinery, to divert offenders from the criminal justice system, is of limited relevance in customary law cases, though it may well be of value in the case of many minor offences (not necessarily involving customary laws) occurring in or involving members of Aboriginal communities."*[4]

In taking a narrow view of customary law, this recommendation appears to overlook the fact that, if an offence is diverted to a customary *process*, this is indeed a relevant mechanism in recognising customary law.

Community justice groups

Following the ALRC report, there was an increase in the impetus for developing community-based responses to crime and justice in indigenous communities. Nancy Williams' study of dispute resolution among Yolngu people in Arnhem Land demonstrated the way in which these communities differentiate between matters that should be dealt with by traditional justice processes and those that should be dealt with by the criminal justice system.[5] Kayleen Hazlehurst also made the case for governments to support community justice mechanisms to divert offending and community grievances away from the criminal justice system, 'providing a more relevant and meaningful settlement within the Aboriginal community and avoiding the consequences of fines and imprisonment'.[6] The Royal Commission into Aboriginal Deaths in Custody in 1991 recognised the importance of community-based justice strategies, making a number of recommendations calling for the greater involvement of indigenous communities in administering justice processes.[7]

Since the Royal Commission, a number of community justice programs have been initiated around Australia, many from government funding directed at implementing the report's recommendations. Chris Cunneen has recently commented in relation to these types of programs that:

"In many cases where Aboriginal community justice initiatives have flourished there have been successes in reducing levels of arrests and detention, as well as improvements in the maintenance of social harmony. The success of these programs has been acknowledged as deriving from active Aboriginal community involvement in identifying problems and developing solutions."[8]

Community justice groups in Queensland indigenous communities were one such initiative that derived from the response to the Royal Commission. The concept was originally piloted in three communities under a collaboration between the Yalga-binbi Institute for Community Development and the then Queensland Corrective Services Commission. Under the pilot, the Palm Island and Kowanyama Justice Groups were established in 1993 and the Pormpuraaw Justice Group was established in 1994.

Following the pilots, a state-wide program for supporting community justice groups was established by the Office of Aboriginal and Torres Strait Islander Affairs, now the Department of Aboriginal and Torres Strait Islander Policy. The guidelines for this program, the Local Justice Initiatives Program (LJIP), espouse the underlying principle that it is the members of indigenous communities themselves who are best placed to plan and implement effective strategies to address their crime and justice issues. Through this approach, the LJIP seeks to achieve the overall goal of reducing the over-representation of indigenous people in contact with the criminal justice system. Since 1996, the LJIP has overseen the growth of community justice groups across Queensland to more than 30, ranging from remote communities such as those in Cape York or the Torres Strait, to regional centres such as Mackay and Cairns, and even urban areas of Brisbane.

Composition

Community justice groups are established through a process of community-based planning in which the community determines the way its justice group is to be constituted. Members are generally elders and respected community members, although in an urban context, some justice groups have had representation by young people. While there is representation from both genders, there are typically more women than men.

The effectiveness and legitimacy of community justice groups has been dependent on the degree to which all significant interests within the community are represented. Some communities constitute their community justice groups on the basis of tribal or clan representation. In Kowanyama, for example, the group is made up of three men and three women elected by the three major clans, Kokobera, Kokomenjena, and Kunjen. The LJIP provides flexibility to indigenous communities to set up structures that are appropriate to the particular cultural make-up of a community and to incorporate traditional decision-making processes in their operations.

The LJIP has an annual budget of about $1.5 million. Grants to each community vary depending on the scale of the initiative, but average around $50,000 per annum. This generally pays for a facilitator, lease of a vehicle and basic operational expenses. Members are volunteers.

Activities

Community justice groups have opportunities for intervention through utilising customary law and traditional dispute resolution as well as through involvement in the formal justice system. For example, they typically take an active role in using traditional authority to prevent people from coming into contact with police. At Kowanyama, some of the older women on the community justice group conduct 'barefoot night patrols' to break up fights, resolve disputes and return children who are at risk of offending to their homes. Their status as elders in the community gives them an authority, which in many circumstances proves more

"...it is the members of indigenous communities themselves who are best placed to plan and implement effective strategies to address their crime and justice issues."

effective than that of the police. The Kowanyama Justice Group has recently reported that:

> *"The Kowanyama Justice Group has been very effective in the area of dispute resolution. We believe the Community is a better place because this avenue is available and people use it on a regular basis."*[9]

Peena Geia, spokesperson for the Palm Island Justice Group, has stated that the concept of 'shaming' is central to the way the justice group operates:

> *"It sure has an impact because they know it's a shame thing with our people. Many of our people know that they can misuse the white man's law, but they know they can't do it amongst their own. They know the Murri law is stronger, it always was and it always will be."*[10]

Also central to the way community justice groups operate is the concept of 'restorative justice', the need for a justice process to restore balance and harmony in a community and the need for an offender to 'make good' the crime to the victim and the community. In appropriate cases, state police refer matters to the community justice group to be dealt with using a 'restorative' approach, rather than charging the offender and invoking the 'retributive' justice the criminal courts impose. The community justice group counsels the individual involved as to their responsibilities to others (often called a 'growling'), and may decide on an appropriate course of action for the offender to make good the offence.

Apart from using a variety of methods to divert community members from contact with the police and courts, community justice groups have also become involved in the formal justice system in a number of ways. At Palm Island, the group has been active in providing pre-sentence reports to the visiting Magistrate, and in ensuring that offenders complete any community service ordered by the court. Sentencing legislation for adults and juveniles has recently been amended to require courts to take into account the views of community justice groups in sentencing offenders. A number of community justice groups provide advice to correctional authorities about the suitability of offenders for return to the community on parole. Some community justice groups conduct visits to community members in prisons and youth detention centres. There are numerous other opportunities for community justice groups to become involved in the formal justice process.

A further function of community justice groups has been to address the underlying factors leading to offending behaviour, such as substance abuse, truancy, boredom, unemployment and lack of recreational opportunities. These initiatives, which can be characterised as crime prevention, have included activities to develop employment opportunities, run youth camps and sporting carnivals, and put in place strategies to reduce alcohol abuse.

Effectiveness

The positive impact of community justice groups has drawn comment in a number of official reports and program reviews in recent years.[11] In 1999, an interim

> ***"The cost of funding a community justice group for a year is about the same as the cost of incarcerating one person for a year."***

assessment of community justice groups found that, while the potential of the recently-established community justice groups was yet to be realised, 'there is significant evidence of improved justice outcomes from the long-standing community justice groups in Kowanyama, Palm Island and Pormpuraaw'.[12] The assessment found that in these communities, the number of juvenile appearances in the local court had on average been reduced to one third of the levels prior to establishment of the community justice group. There had also been significant reductions in the level of reported property crime. From a government service delivery point of view, a significant finding was that the success of community justice groups in crime prevention and diversion of offenders results in significant savings in the cost of administering the mainstream justice system. The cost of funding a community justice group for a year is about the same as the cost of incarcerating one person for a year.

A District Court judge from north Queensland recently reported to a government review of justice in Cape York communities that community justice groups 'play an important role in assisting to make the experience in the mainstream justice system more meaningful and relevant for indigenous offenders and ultimately, in helping to divert indigenous offenders from the mainstream system where appropriate'.[13]

In the same review, the Uniting Aboriginal and Islander Christian Congress (UAICC), a church-run community development organisation with extensive experience working with community justice groups, made the following comments:

> *"When they are properly established and effectively resourced with appropriate personnel, the Justice Groups, through the LJIP, provide a mechanism for Aboriginal communities to take action to bring about more effective social control in various areas of community life.*
>
> *Most notably, they have been able to set (and partially enforce) standards of social behaviour, take preventative action to stop situations of offending and conflict becoming much larger problems, deal with young offenders and reduce juvenile offending rates, mediate local disputes and resolve conflict.*
>
> *They have been able to support women and children at risk.*
>
> *When linked to a community corrections role, they have, as at Palm Island, been able to effectively supervise community service orders and make such orders a more viable alternative penalty than fines or detention.*
>
> *They are able to recommend, from a local indigenous point of view, appropriate options for judges to consider in their judgement and sentencing of particular cases."*[14]

While community justice groups have been widely acknowledged for their positive impact, it is also recognised that the process of community empowerment and capacity-building is gradual, and that justice groups in many communities are still in their infancy. The need for better levels of resourcing, support and training for community justice groups has been raised in a number of official reports.[15] More importantly, a key factor in the success of community justice groups has been the degree of integration and collaboration with justice agencies such as police, courts and correctional authorities. These partnerships are often dependent on innovation and flexibility on the part of government personnel and have often been frustratingly slow to develop.

A legislative basis

A critical issue surrounding the future direction of the community justice group initiative in Queensland is whether the groups should have a formal legislative basis and powers. There have been a number of calls from justice groups and other commentators in recent years for legislation to give formal authority to community justice groups to deal with offences and implement sanctions, including those based on customary law.

To date, the authority of community justice groups has derived from the status of their members in customary law, or the respect and integrity of their members within the community. The former coordinator of the Palm Island Justice Group has noted that 'the core members of the group continue to enjoy a general sense of moral authority based on personal integrity'.[16] The UAICC puts it as follows:

> *"[Community justice] groups are able to express power within the Aboriginal domain because of their own collective standing as authoritative individuals, their ability to use processes of mediation and social control that work and have meaning within Aboriginal society and are in accordance with Aboriginal law and custom."*[17]

In the absence of a legislative basis, community justice groups have exercised de facto legal authority through the partnerships they create with agencies of the justice system. For example, some community justice groups have forged a role in the supervision of correctional orders through collaboration with correctional authorities. At Palm Island, justice group members were appointed as convenors for the purposes of conducting community conferences under juvenile justice legislation.

A uniform legislative basis for community justice groups has not been possible to date, largely because of the diversity across justice groups. For any particular community justice group, it is not possible to make any assumptions about the appropriate scope and degree of authority to deal with offending behaviour, because this depends on a range of local issues. Relevant factors include the degree of respect and traditional authority commanded by the particular community justice group and the capacity and skills of the members of the group. Furthermore, many justice groups have not sought the authority to deal with offenders at all, but have instead focused on crime prevention.

For the moment, the precise role and authority of community justice groups will continue to be determined through negotiations at the local level between community justice groups, members of the community and relevant justice agencies. To provide more certainty about these matters, it has recently been suggested that the negotiations should be formalised in community justice agreements.[18] Such an agreement would spell out in detail the scope of a community justice group's authority to deal with breaches of the law, the circumstances in which offences will be diverted to the community justice group, and the types of sanctions that a community justice group could enforce. It would also detail the exact nature of the role of the justice group where an offence is to be dealt with by the criminal justice system (for example, the provision of sentencing advice or the supervision of community-based orders). The chief executive of the relevant justice agencies, as well as representatives from the community justice group and other community organisations, would sign off on this agreement. This would represent a clear indication of the commitment of the criminal justice system to acknowledge and allow a specific role for a community justice group and, where appropriate, a space within which the group could exercise its customary or community-derived authority.

Legislative recognition in sentencing

While a uniform legislative basis for community justice groups is problematic, there are opportunities to recognise a formal legal role for justice groups for specific purposes. For example, legislation has already formalised a role for community justice groups through a provision in sentencing legislation that requires courts to take the views of a community justice group into account in sentencing indigenous offenders.[19]

At a conference of community justice groups in 1998, (then) Magistrate Sarah Bradley explained how she had encouraged involvement of the Palm Island Justice Group in sentencing by the Magistrates Court.[20] She said it was particularly important in offences involving the community, such as assaults arising from family fighting or offences involving council property:

> *"[In appropriate cases] with the offender's consent I will defer sentencing ... and send the offender to appear before the community justice group ... and ask the group to report back. ... As part of the report, I ask for any recommendations they make in sentencing. I'm pleased to say that in all the cases so far, I have been in full agreement with the recommendations that they've made in regard to sentencing and that's the sentence I've imposed ... the report I get back is very impressive, it's very reasonable and realistic and I've used it in every case so far."*

The rationale for these amendments is that the community justice group can provide advice and assistance to the court about relevant cultural and historical issues, particular circumstances in their community, and background information about the offender and his or her behaviour. The community's input is particularly important in remote communities, where magistrates hold circuit court for only half a day every month or two months and cannot be expected to understand the local circumstances and cultural background for each community they visit. In addition, the community justice group can make suggestions about appropriate sanctions for the offender, including the availability of community-based sentencing options for rehabilitating the offender, such as local rehabilitative programs supervised by community elders, or programs on community outstations.

The input of the justice group provides an opportunity to advise the court in relation to customary law aspects of the offence and potential punishments. The involvement of community members in sentencing also

increases the community's respect for, and the legitimacy of, the adjudication process.

Conclusion

The success of community justice groups in Queensland has demonstrated the continuing relevance and value of customary law in contemporary indigenous communities, particularly in terms of traditional mechanisms for dispute resolution and social control. Furthermore, through the input of community justice groups into sentencing decisions, there is an opportunity for the specific content of customary laws to be taken into account in the judicial process.

However, of deeper significance than their role in reinvigorating customary laws and processes, community justice groups have been valued most of all in their communities as a practical expression of the right to self-determination. In communities still struggling with the legacy of dispossession and colonisation, and which have suffered (and continue to suffer) injustice at the hands of the criminal justice system, community justice groups have been a source of pride and empowerment.

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6. KM Hazlehurst, 'Resolving conflict: Dispute settlement mechanisms for Aboriginal communities and neighbourhoods' (1989) 21 Australian Journal of Social Issues, 309.

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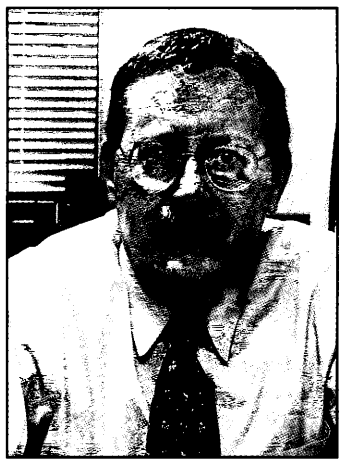
Reconciling modernity & tradition: PNG's *Underlying Law Act*

*By Bruce L Ottley**



"Upholding our culture and beliefs is about our roots, our identity as true Papua New Guineans, from a traditional society that was handed down by our forefathers. Our village lifestyle must never be forgotten as we move into the new millennium. Our cultures and traditions must go side by side with the education we have gained so that we can unite them."

– Sir Michael Somare[1]

On 13 April 2000, as Papua New Guinea was preparing to celebrate the 25th anniversary of independence, its Parliament took the most important step toward defining the country's post-colonial legal system when it enacted the *Underlying Law Act*.[2] During the colonial period (1884-1975), Britain and then Australia created distinct legal systems for the separate territories of Papua and New Guinea based, in part, on their own metropolitan legal systems. Included in those colonial legal systems were many of the principles and rules of the English common law and equity.

At independence in September 1975, Papua New Guinea's Constitution directed Parliament to declare the underlying law for the new country.[3] This was a mandate to establish rules for the development of the nation's own common law. Until Parliament acted, the Constitution directed the courts to look to indigenous 'custom' and to the English common law when deciding cases.[4] However, since lawyers and judges in Papua New Guinea

are trained in the thinking and methods of the Anglo-Australian legal system, they have tended to seek solutions to problems in the English common law far more often than from their country's own customary laws. Only the Village Courts, which do not involve lawyers or professional judges, consistently have applied custom rather than statutes or the common law to the disputes that villagers bring to them. However, with the passage of the *Underlying Law Act*, Papua New Guinea now has given customary law a formal, central role in its national legal system.

The *Underlying Law Act* is important not only for defining Papua New Guinea's legal system, but also as part of a much broader debate taking place in the South Pacific islands. Throughout the region there is a search for ways to balance the pressures from the 'modern' and 'global' world – in which the island States sell their natural resources and from which they buy consumer products, as well as receive aid and investment – with demands to give greater recognition to the various forms of 'traditional' cultures and create 'national' identities. Because 'modern' and 'traditional' are not clearly defined categories into which individuals and societies can be separated, people like former Papua New Guinea Prime Minister Sir Michael Somare have stated that the two 'must go side by side'. However, despite the view that these forces must be reconciled, they often exert conflicting tensions that affect all areas of life in the islands, including the legal systems.

Papua New Guinea's *Underlying Law Act* has the potential to alter that country's legal system and to serve as a model for the role that customary law can play in national legal systems. This article provides an overview of the provisions of that Act and examines briefly the debate over modernity and tradition and the attempt of Papua New Guinea's Parliament to reconcile those forces in the *Underlying Law Act*.

An overview of the Act

The *Underlying Law Act* (the Act) begins by stating that the sources of the country's underlying law are 'customary law' and 'the common law in force in England immediately before the 16th September, 1975' (the date of independence).[5] The principles and rules of the English common law on that date remain applicable in Papua New Guinea despite their modification by amendment or alteration by a statute in England, unless the modifying statute also is adopted in Papua New Guinea.[6] The evolving nature of 'customary law' is reflected in its definition in the Act as

> *'... the customs and usages of the indigenous inhabitants of the country existing in relation to the matter in question at the time when and the place in relation to which the matter arises, regardless of whether or not the custom or usage has existed from time immemorial.'*[7]

Although both customary law and the English common law are part of the underlying law, the intent of the Act is to give customary law clear precedence in Papua New Guinea's legal system. This is reflected in provisions stating that, when deciding a case, a court shall apply customary law unless the law is inconsistent with the Constitution or a written law.[8] However, a court *shall not* apply a rule of the common law unless the rule is consistent with the Constitution, a written law or customary law, or is applicable to the circumstances of the country.[9] Only after a principle or rule of customary law or common law has met these tests of applicability does it become part of the underlying law.[10]

The Act places the duty on the courts to ensure that the underlying law 'develops as a coherent system in a manner that is appropriate to the circumstances of the country'.[11] To ensure this coherence, the Act creates an *order of application of law* and rules for *formulation of law* by the courts. The first source of law for a court in this hierarchy is written law.[12] If written law does not apply to the subject matter of the dispute, a court must apply the underlying law.[13] If the underlying law does not apply to the subject matter of the proceedings, a court must apply customary law which has not yet become part of the underlying law, unless the parties intended that customary law would not apply to the proceedings or the matter is unknown to customary law and cannot be resolved by analogy to a rule of customary law without causing injustice to one or more of the parties.[14] Only if the underlying law and customary law do not apply to the subject matter of the proceedings may a court consider applying the common law.[15]

The Act places a duty on the parties to a court proceeding to produce evidence to assist the court to decide whether to apply customary law, the common law or formulate a rule of underlying law.[16] If the underlying law, customary law and the common law do not apply to the subject matter of the dispute, a court must formulate a rule, appropriate to the circumstances of the country, as part of the underlying law.[17] In addition, if the Supreme Court or National Court determine that a rule of underlying law no longer is appropriate to the country, it may formulate a new rule as part of the underlying law.[18] Whenever a court formulates a new rule of underlying law, it must consider the *National Goals and Directive Principles and Basic Social Obligations* established by the Constitution, the basic human rights guaranteed by the Constitution, analogies from relevant statutes and customary laws, and laws of foreign countries which are relevant to the proceedings.[19]

If a court other than the Supreme Court or National Court formulates a rule of underlying law, a copy of the decision must be sent to the Chief Justice and to the Chairman of the Law Reform Commission. The Chief Justice may refer the decision to the National Court for review. The National Court may vary the decision and state what it considers to be the appropriate rule of the underlying law for the case. A person aggrieved by that decision may appeal to the Supreme Court.[20] Similarly, if the Chairman of the Law Reform Commission considers that the decision of the lower court was inconsistent with the proper development of the underlying law, he or she may refer the matter to the National Court.[21]

In an important break from the practice during the colonial period and since independence, the *Underlying Law Act* states that the question of the existence or content of a rule of customary law is a question of law which a court may decide on its own and not a question of fact which must be proved by the parties.[22] However, when the application of customary law is an issue in a matter, counsel have a duty to help the court by calling evidence and obtaining information that will assist the court in determining the nature of the relevant rules of customary law and whether or not to apply those rules to the proceedings.[23] In making a decision about the applicability of customary law, a court may consider the statements of the parties and other persons with knowledge about customary law, as well as books, articles and reports on the relevant customary law.[24]

"With marriages and business relationships now involving persons from different parts of Papua New Guinea, a question has arisen as to which customary law the court should apply..."

With marriages and business relationships now involving persons from different parts of Papua New Guinea, a question has arisen as to which customary law the court should apply in a matter if there is a conflict. Where the parties belong to different communities with different customary law rules on the subject, the Act directs the court to look to the particular customary law that the parties intended to govern the matter. If that cannot be determined, then the court must apply the customary law that is, in the court's opinion, 'most appropriate to the subject matter'.[25] However, where the matter concerns a question of succession, the customary law of the community to which the deceased belonged applies – except with regard to interests in land, where the customary law of the place where the land is located applies.[26]

Modernisation & tradition

The forces of modernisation and globalisation that have provoked so much controversy in the rest of the world also have been the subject of debate in the South Pacific islands. In recent decades the debate has focused on efforts aimed at nation-building and on preserving or changing the cultural traditions of the island states. However, this debate is not new – it dates from the beginning of the colonial period when 'modernisation' was one of the justifications for colonialism and the islands were pulled into the 'global' orbit of their distant colonial powers. The ideologies, ways of life and laws that were introduced in the name of modernity have had a lasting impact on the traditions and identities of the South Pacific island states.

Since independence, the desire to create modern states and respond

to the demands of globalisation has resulted in the South Pacific islands modelling their political and economic systems on those of their former colonial powers. It also has meant the retention of much of the Western-style legal systems created during the colonial period. Equally important, many of the colonial attitudes toward what constitutes 'law', whether customary law is *really* 'law', and the relationship between Western law and customary law also have continued.

Those who feel that the South Pacific islands must adjust to the realities of modernisation and globalisation view legal systems as a crucial means of creating the environment necessary to attract the international business community and foreign aid donors. Since Western law has been posited as the necessary link to economic, political and social development, supporters of modernisation seek to restrict the role of customary law to family relationships (for example marriage, divorce, adoption). At the same time, however, those who are concerned with preserving or regaining the distinctive cultural identities of the societies that constitute the island states emphasise the role tradition can play in these processes. They support giving customary methods of social regulation and dispute resolution a greater role in their state legal systems, and believe that this is a prerequisite to achieving the social and political stability necessary for advancement, even in Western terms.

Papua New Guinea's *Underlying Law Act* is an attempt to reconcile the forces of modernity and tradition. By combining its Constitution, Acts of Parliament and the English common law with a formal recognition of customary law, Papua New Guinea seeks to create a national legal system that will satisfy the perceived needs of its modernised and globalised sectors while, at the same time, giving a major role to the traditions of its people. By enacting the *Underlying Law Act*, Papua New Guinea has set for itself an obligation that goes further than any other state in mandating the formal recognition of customary law within its national legal system.

The exact shape that Papua New Guinea's legal system ultimately will take will be determined not only by the provisions of the Act but, more importantly, by the attitudes of lawyers and judges toward customary law and the English common law and their place in the country's economic, political and social systems. As important as the *Underlying Law Act* is to Papua New Guinea's legal future, it is impossible to ignore the 90 years of colonial history. During that time very specific attitudes toward customary law and the English common law developed which lingered after independence. The crucial question for Papua New Guinea is the extent to which its colonial history and attitudes will continue to define its post-colonial legal system.

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He formerly was an academic and magistrate in PNG, and maintains a continuing research interest in the development of PNG's legal system.

Endnotes

1. *Sir Michael Somare, former Prime Minister, Papua New Guinea, 'Culture, Education: Both vital for PNG' The National Online, 4 October 2000 <http://www.zipworld.com.au/~national/1004/n7.htm>.*

2. *Papua New Guinea Parliament, Act No 13 of 2000.*

3. *Constitution of the Independent State of Papua New Guinea (Constitution), Article 20. Although a Bill to create the underlying law was drafted by the Papua New Guinea Law Reform Commission in 1976, legislation was not enacted until 2000.*

4. *Constitution, Schedule 2.*

5. *The Underlying Law Act (the Act), s 3(1).*

6. *The Act, s 3(3).*

7. *The Act, s 1(1).*

8. *The Act, s 4(2).*

9. *The Act, s 4(3).*

10. *The Act, s 4(5).*

11. *The Act, s 5.*

12. *The Act, s 6.*

13. *The Act, s 7(1).*

14. *The Act, s 7(2).*

15. *The Act, s 7(3).*

16. *The Act, s 11.*

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& human rights in PNG

*By Owen Jessep**

Lying directly to the north of Australia, Papua New Guinea is a Pacific nation with a population of over four million people. It was formerly an Australian colony, becoming independent in 1975.

A distinguishing characteristic of Papua New Guinean family law is the contrast and conflicts which are evident between family law legislation, on the one hand, and customary family law, on the other.[1] The statute law is mostly old Australian colonial legislation, which continues to operate despite a quarter of a century of independence. At the same time, customary family law is also recognised (subject to certain qualifications) under the Constitution and several other statutes. In the result, in some areas of family law a 'dual' system operates, in which persons can choose whether to follow statute or custom. In relation to marriage, for example, a person may either make a monogamous statutory marriage by satisfying the formalities of the *Marriage Act* (Chapter 280 of the Revised Laws), or instead make a customary marriage formed in accordance with the relevant custom.

Customary family law, then, is an integral part of the Papua New Guinea legal system, and customary claims can be instituted at all levels of the court hierarchy, from the Village Courts[2] to the District Courts and even (depending on the amount and issues involved) in the National Court. In recent years, nevertheless, the constitutional and statutory 'qualifications' placed upon the recognition of custom have received increasing attention in the courts, often in cases where the custom in question is said to be oppressive and to infringe upon the legal rights of women.[3] It may be noted that similar issues have attracted attention in other parts of the Pacific and in various African jurisdictions.[4] In this article I will consider the effects of this emerging human rights jurisprudence in Papua New

Guinea in the customary family law context.

Constitutional and statutory provisions

Under s 9 of the Papua New Guinea Constitution, the laws of the country include the Constitution itself, various categories of legislation, and the 'underlying law'. According to s 20 and Schedule 2 of the Constitution, the two principal sources of the underlying law are custom, and the common law. In relation to custom, however, Schedule 2.1(2) requires that the custom not be inconsistent with any constitutional law, or inconsistent with a statute, or 'repugnant to the general principles of humanity'. Further, according to s 3(1) of the *Customs Recognition Act* (Ch 19 of the Revised Laws), custom may not be recognised or enforced in a particular case or situation if to do so would result in injustice, would not be in the public interest, or would not be in the best interests of a child under the age of 16 years.

It can be seen from this brief summary that the recognition of customary family law is not automatic; rather, there are a range of constitutional and statutory requirements that represent potential obstacles to its acceptance and enforcement in a particular case. In practice, these requirements may often overlap. For instance, the same considerations that are claimed to make a custom inconsistent with a provision of the Constitution, or repugnant to the 'general principles of humanity', may simultaneously found an argument that to enforce the custom would cause 'injustice', or 'not be in the public interest' and so on. In the past decade, a number of National Court judges have been prepared to refuse to acknowledge and enforce elements of family custom, on the basis that certain of these constitutional or legislative safeguards have been infringed. Some examples of this judicial activity will now be given.

Challenges to customary family law

In the 1991 case of *Re Wagi Non*, the husband had left his wife and their four children in the care of his relatives when he travelled to another province for employment. After having heard nothing from the husband for more than five years, the wife eventually formed a relationship with another man. The husband's relatives then obtained a Village Court order against her for compensation for adultery. When she failed to pay the amount required, the Village Court ordered her imprisonment. In the National Court, Woods J ordered her release, stating (among other reasons) that the custom relied on by the relatives of the husband should not be recognised, as it infringed s 55 of the Constitution. In substance, this section provides that 'all citizens have the same rights, privileges, obligations and duties irrespective of race, tribe, place of origin, political opinion, colour, creed, religion or sex'. In the opinion of the court:

> *"The facts of this case suggest that this woman is bonded, almost in slavery, to the husband even when the husband neglects her. This must clearly be a denigration of the woman's humanness."*[5]

Again, in *Re Kepo Raramu*, a Village Court had sentenced a woman to a term of six months' imprisonment for commencing a new relationship after her husband had died. On appeal, the National Court ordered her immediate release. One of the grounds relied on for this decision by Doherty J was the following:

> *"I am well aware of the custom in many areas that says women whose husbands have died are not to go around with another man. ... I do not know of any equivalent custom that says a man whose wife died is not allowed to go around with other women, and, as such, I consider this custom strikes against the basis of equality provided in s 55 of the Constitution."*[6]

Other Village Court decisions, such as those concerning the law of customary divorce, have also been the subject of National Court appeals. The former Chief Justice, Kidu CJ, heard several cases in 1991 in which he asserted the freedom of wives to leave their husbands, regardless of any rule of custom to the contrary. One example is that of *Re Raima*. There, a woman had been imprisoned by a Village Court

after being unable to pay the 300 kina compensation (at that time about $A300) ordered in favour of her former husband, whom she had left. Kidu CJ upheld several objections to both the compensation order and the sentence of imprisonment, stating:

> *"Whether under introduced law or customary law a woman has the right to break her marriage. ... If a woman breaks her marriage the village court only has the right to consider the repayment of bride price according to customary law. A village court has no power to penalize her for breaking the marriage."*[7]

Although the basis for this holding is not spelled out in the brief judgment, it is likely that considerations of equality between the sexes were in the mind of Kidu CJ. The clear implication of his statement is that any custom that denied the woman the right of divorce would not be recognised, and any court order enforcing such a custom would similarly be invalid.

Despite the lack of any clear judicial definition in Papua New Guinea of what might be meant by 'the general principles of humanity' (a legislative expression with a long colonial history), the notion of 'repugnancy' to these principles has featured in several National Court family law cases. The first such instance occurred in 1991 in *Re Kaka Ruk*, on facts notably similar to those in *Re Wagi Non* (see above). The court reached an identical result, that the custom relied on could not be upheld because it 'denigrated women', and added:

> *"People in Papua New Guinea must come to terms with the law that women are not chattels that can be bought and thus bonded forever. They are equal participants in the marriage and in society ..."*[8]

"In a number of these cases, the National Court felt obliged to intervene to protect women from discriminatory treatment and excessive punishment at the hands of Village Courts."

A final illustration, also with reference to the 'repugnancy' doctrine, is found in the 1994 case of *Ubuk v Darius*. This was a dispute over custody of an ex-nuptial child aged 20 months. The father relied on evidence of local custom to the effect that if an informal relationship did not progress to the status of a customary marriage, the father was entitled to automatic custody of any child born in the meantime, subject to a payment of compensation to the woman for having borne the child. The court was not impressed. In the words of Sevua J, who awarded custody to the mother:

> *"Whether one views it subjectively or objectively, the woman is a sex object. So where is the morality and value of humanity in this woman? ... I consider [these] customs repugnant to the general principles of humanity and, therefore, inapplicable to the present case."*[9]

Miriam's Case – *Re Willingal* (1997)

In cases like those so far mentioned, the court typically relied on one or another of the requirements of Schedule 2.1 of the Constitution, or of s 3 of the *Customs Recognition Act*, to deny recognition to some aspects of family custom. In a number of these cases, the National Court felt obliged to intervene to protect women from discriminatory treatment and excessive punishment at the hands of Village Courts.[10] The 1997 case of *Re Willingal*, in contrast, reached the National Court after publicity in one of Papua New Guinea's national newspapers, which in turn led to the institution of proceedings by a non-governmental human rights organisation. These proceedings featured a whole battery of challenges against a custom requiring a woman's forced marriage.

The unfortunate woman was Ms Miriam Willingal, an 18-year-old high school student from the western Highlands area of Papua New Guinea, who was being made the unwilling participant in a complicated compensation settlement between two kin groups. At the trial, there was some disagreement over the details of the customary compensation claim, but the broad outlines of the claim referred to 25 pigs, 20,000 kina in

cash, and two women.[11] Injia J found that Miriam was objecting to the idea of being used as a form of payment, and that she had already been subjected to pressure to accept the planned marriage. Turning to the relevant law, Injia J had no doubt that Miriam's constitutional rights had been infringed, and gave multiple reasons for this conclusion. His general approach to the issue of recognition of custom appears in the following passage:

> *"The traditional customs of the people of [this area] like the rest of PNG have existed from time immemorial and they serve complex value systems which only they themselves best know. It is not easy for any outsider to fully understand the customs and the underlying values and purposes they serve. ... But it is clear to me that the framers of our Constitution and modern day legislators were thinking about a modern PNG based on ethnic societies whose welfare and advancement was based on the maintenance and promotion of good traditional customs and the discouragement and elimination of bad customs as seen from the eyes of an ordinary modern Papua New Guinean. No matter how painful it may be to the small ethnic society concerned, such bad custom must give way to the dictates of our modern national laws."*[12]

The court accordingly held that a number of provisions of the Constitution and of other statutes would be infringed were the custom to be enforced. To begin with, s 32 of the Constitution, which guarantees basic freedoms in accordance with the law, would be infringed if Miriam was not free to choose whom to marry.[13] Further, a forced marriage in these circumstances would amount to a breach of s 55 (here, discrimination on the basis of sex), 'because there is no evidence that the same custom which targets young women from the deceased's tribe also targets eligible men from the [other] tribe'.[14]

Turning to other legislation, the court found that the proposed marriage would also breach s 5 of the *Marriage Act* (Chapter 280 of the Revised Laws), which was designed to protect women from being pressured into customary marriages. As to the criteria and requirements of s 3 of the *Customs Recognition Act* (Chapter 19), the court found that the custom in question was not only repugnant to the general principles of humanity, but would also, if carried out, produce injustice and be contrary to the public interest. For example, the custom was repugnant to the general principles of humanity because 'living men or women should not be allowed to be dealt with as part of compensation payments under any circumstances'.[15]

"The court ... held that a number of provisions of the Constitution and of other statutes would be infringed were the custom to be enforced."

On all of these grounds, the court then proceeded to issue permanent injunctions and restraining orders against the various groups and their members. With such an array of provisions all leading to the same result, the court stated that it was therefore unnecessary to consider additional arguments presented on behalf of the plaintiff. These further points turned on whether the relevant custom also infringed other provisions in the Constitution, such as s 36 (freedom from inhuman treatment); s 42 (liberty of the person); s 49 (right to privacy); and s 52(1) (freedom of movement).[16]

Discussion and conclusion

I have outlined a number of cases arising in the past decade in Papua New Guinea in which courts have been prepared to strike at aspects of family custom. These cases have variously concerned differing expectations about spousal behaviour in a customary marriage, parental custody rights, customary divorce, proper behaviour as a widow, and forced marriage. There is little doubt that the most recent of these decisions, *Re Willingal* (1997), will be a leading case for years to come whenever aspects of customary family law are in issue. In such a context, the case contains a bundle of potential weapons for future litigants seeking to prevent the enforcement and recognition of particular customs. The reasoning in *Re Willingal* drew on earlier decisions of the National Court, but at the same time extended the range and scope of the arguments available to challenge family custom, especially where the custom appears to be one-sided, oppressive

or patriarchal in its application. The possibility of additional forms of argument is also suggested in those points upon which the court in *Re Willingal* found it unnecessary to rule.

It is interesting to speculate briefly as to the possible implications of Miriam's case for other aspects of customary family law. For example, in recent years the most controversial family law topic in Papua New Guinea (to a greater extent even than the constant debates about customary bride price) has been that of polygamous marriage.[17] While polygamy (which in practice means polygyny, that is the right of a man to have more than one wife) is virtually unknown in many parts of the country today, it remains a relatively common practice among leaders from the Highlands provinces. In legal terms, a polygamous customary marriage has generally been regarded as valid by virtue of section 3(1) of the *Marriage Act* (Chapter 280), which allows customary marriages 'in accordance with the custom prevailing in the tribe or group to which the parties or either of them belong or belongs'.

Against advocates of the practice, who rely on the Constitution's support for traditional customs, objections (and calls for legislative intervention) based variously on social, moral and legal grounds have come from community and church groups, as well as magistrates, judges, other legal representatives, and members of parliament. Among the different forms of argument used in the debate, claims have been made that polygamy is actually 'unconstitutional',[18] or otherwise vulnerable on legal grounds.

Conceivably, then, a court in Papua New Guinea might one day be faced with an objection to some aspect of customary polygamous marriage, based upon one or more of the arguments considered in *Re Willingal* and earlier cases. Leaving aside the possibility of an outright constitutional challenge, such a claim might be made in any context in which a party's rights or responsibilities will vary according to whether the marriage is legally valid or not (such as spousal maintenance, property claims, inheritance, fatal accidents, and so on). In brief, the argument might then be that the customary expectations and practices relating to polygamy in that particular community are inconsistent with s 55 or with other rights guaranteed to women by the Constitution, or might produce injustice or be contrary to the public interest (thereby infringing the requirements of the *Customs Recognition Act*, or related legislation). A court's decision invalidating, on any of the grounds mentioned, a particular polygamous marriage would not automatically spell invalidity for all polygamous marriages, but would obviously have significant implications for other cases.

To conclude, it has been frequently argued that various aspects of customary family law in Papua New Guinea reflect entrenched gender discrimination against women. As illustrated by the decisions outlined above, some National Court judges in the past decade have begun to take the initiative by refusing to acknowledge and enforce elements of custom that are found to denigrate or oppress women. In future cases, it is possible that other challenges will be mounted, even to relatively fundamental practices such as polygamy or the payment of bride price. If so, and if counter arguments are presented to justify and provide support for the importance of the custom concerned in the social life of the community, the courts will then be faced with the difficult task of attempting to reconcile and balance those parts of the Constitution which emphasise respect for traditional custom, with other constitutional and statutory provisions which emphasise norms of equality and human rights for all citizens.

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Endnotes

1. See generally O Jessep and J Luluaki, Principles of Family Law in Papua New Guinea, (1994, 2nd Ed) UPNG Press.

2. Village Courts, now regulated by the Village Courts Act 1989, were first established in 1975. The magistrates are legally untrained, appointed from the local community, and paid a small stipend for their work. They have both a civil jurisdiction in matters arising from custom, and a criminal jurisdiction designed to help keep the peace at the local level.

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Wisdom & worthy customs: customary law in the South Pacific

*By Jennifer Corrin Care**

The geography of the small island countries of the South Pacific region ranges from the large, mountainous and mainly volcanic islands of Solomon Islands, Vanuatu, and Fiji Islands to the small atolls which make up Kiribati, Marshall Islands, Tokelau and Tuvalu.

On ethnic, cultural and linguistic grounds, these countries fall broadly into the sub-regions of Melanesia, Micronesia and Polynesia and are home to a multitude of customs and cultures. A simple illustration of this diversity is the number of languages spoken within the region. In Solomon Islands alone, about 65 vernacular languages and dialects exist.

In the 1960s, most South Pacific island countries emerged as sovereign states. New constitutions displayed a desire to return to traditional values in preambles containing declarations of pride, for example, in the 'wisdom and worthy customs of [their] ancestors' and pledges to 'cherish and promote the different cultural traditions'.[1] As far as the law was concerned, these desires were given substance by constitutional recognition of customary law. However, introduced laws, in force prior to independence, were 'saved' as a 'transitional' measure, to fill the void until they were replaced by locally enacted laws. In general, this introduced law included legislation and common law in force in England up to a particular 'cut-off' date, and 'colonial' legislation.

While the constitutional status accorded to customary law acknowledged its importance for the indigenous population, its precise relationship with introduced laws was not specified. The doubts that surrounded the nature and operation of customary law provided a rationalisation for its avoidance by courts that were more comfortable applying introduced law.

A survey of the type of questions that have arisen in the South Pacific may be relevant to the debate on recognition of customary law in Australia. However, care must be taken to distinguish between the contexts of this debate. In par-

ticular, self-determination is not an issue in independent nations whereas, in Australia, it may be seen as an important part of any dialogue on customary law. Further, there is an obvious difference between countries where the vast majority of the population feels bound by customary law and the position in Australia where they do not. This article looks at some of the questions that have arisen regarding the operation of customary law in a selection of South Pacific island countries, and at some of the reasons why it has not obtained the prominence intended for it at independence.

What is customary law?

One of the biggest obstacles to the effective operation of customary law within the formal legal system is the absence of a universally accepted definition. Confusion has arisen between 'custom', which might be said to refer to all normal behaviour within a group, and 'customary law', which is usually taken to refer to rules governing that behaviour. However, in practice, this distinction is not always clear.[2]

The term customary law is not comprehensively defined in regional constitutions, and definitions that do exist are often unsatisfactory. For example, in Cook Islands, a definition dating back to the *Cook Islands Act 1915* describes customary law as 'the ancient customs and usages of the Natives of Cook Islands'. A literal interpretation of the definition would disqualify more recent customs and usage, and invites questions as to the meaning of 'ancient'. Definitions introduced at independence are more palatable. The Constitution of Papua New Guinea defines custom to include 'the customs and usages of the indigenous inhabitants of the country existing in relation to the matter in question at the time when and the place in relation to which the matter arises, regardless of whether or not the custom or usage has existed from time immemorial'.

A related question is how widespread customary rules must be to warrant recognition. This question is particularly pertinent in Melanesia where customs differ from island to island and even from village to village. The definition in the Papua New Guinea Constitution recognises local or regional rules, however, most constitutions are silent on this point. Until local parliaments give some guidance, it is left to the courts to decide how widespread a custom must be before it is recognised.

There is also the question of whether customary law can be applicable in disputes between people from different customary groups or between indigenous and non-indigenous people. This point has become more pertinent as Pacific island societies have changed. In urban areas particularly, new cultural values have emerged to suit new social and economic relationships and the coexistence of indigenous and non-indigenous inhabitants.

The central debate has also been obscured by argument as to whether customary rules may properly be classified as law at all. Lawyers in the formal system, generally trained in Western law only, feel more comfortable with law that is written down. They have reacted with suspicion to the more elusive concept of customary law.

Where customary law has purportedly been applied there has been a tendency to distort it by moulding it to fit within the common law framework. Formal law and legal systems are usually taken as the benchmarks in the description and analysis of customary law. This approach is illustrated by the use of common law terms to describe customary concepts. Daly CJ issued the following caution against this in the High Court of Solomon Islands:

> *"... how can one express customary concepts in English language? The temptation which we all face, and to which we sometimes give in, is to express these concepts in a similar manner to the nearest equivalent concept in the law received by Solomon Islands from elsewhere, that is the rules of common law and equity."*[3]

Prominent examples may be found in the use of the words 'trustee' and 'beneficiary' to describe the relationship between signatories to timber rights agreements and customary landowners,[4] and the terms 'primary and secondary rights' to describe relationships with customary land in Solomon Islands.[5]

The inability to reach a satisfactory definition of customary law or customary concepts may suggest

that it is so different in nature from introduced law as to be incompatible. In other words, it could be argued that attempts to integrate customary law into the formal system are misguided, as they do not provide for the fundamental differences between the two types of law.

How is customary law proved?

The difference in nature between customary law and introduced law has been highlighted by the debate as to how customary law is to be proved within the formal system. One view is that it must be proved as a matter of fact as provided, for example, in the *Customs Recognition Act 2000* of Solomon Islands.[6] The opposing view, adopted by statute in Papua New Guinea, Kiribati and Tuvalu is that it must be proved as a question of law.[7] Proving customary law as a question of fact involves adducing evidence on point. Apart from being a costly exercise, this brings into play complicated rules of evidence, designed for the adversarial system rather than the resolution of customary matters. Proving law, on the other hand, does not require evidence to be adduced. It also puts customary law on the same level as other sources of formal law. However, customary law is mostly unwritten, and it may be difficult for the court to decide whether a particular custom does amount to law or not.

Should customary law be written down?

A related problem surrounds the recording of customary law. The common law system results in custom, once proved, being recorded as a precedent for future cases. Preference for written laws has also led to initiatives to incorporate customary law in legislation, as has been done in Fiji Islands. However, one of the perceived advantages of customary law is that it is flexible and changes in response to social circumstances. Arguably, once it is recorded as a precedent or statute, it ceases to be customary law at all and becomes part of the common law or statutory law. The position is compounded by the courts' tendency to interpret legislation governing customary matters by reference to common law concepts, as in the 'trustee' example given above.

Should customary courts be established?

Difficulties in administering customary law within the formal system, such as those mentioned above, have led to the establishment by legislation of separate 'customary' courts, existing alongside Western-style courts. In particular, such courts have been established to deal with customary land and minor civil and criminal matters. However, while these courts may attempt to administer customary law, they are often not customary at all, as they are established on the adversarial model and are bound by inappropriate rules of evidence and procedure. Further, appeal often lies to a higher court within the formal structure, and even where this is restricted to questions of law, questions of fact are often dressed up so as to gain re-entry into a system ill-equipped to deal with questions which should be decided in accordance with customary law. To some extent, customary courts have reinforced the idea that introduced law is the appropriate law to be administered in the Western-style courts, whereas customary law should be confined to the 'customary' courts.

Outside the formal system, disputes in which customary law is the obvious choice are still normally dealt with by traditional means. In two notable instances, attempts have been made to integrate traditional dispute resolution and the formal court system. In Solomon Islands, the *Local Courts (Amendment) Act 1985*, introduced a prerequisite to the exercise of jurisdiction by Local Courts in customary land disputes. It became necessary for the applicant to show that:

- the dispute had first been referred to the chiefs;
- all traditional means of resolving the dispute had been exhausted; and
- the chiefs had made no decision wholly acceptable to both parties.

This landmark legislation seeks to have ownership of customary land decided in a customary way, rather than in a 'customary' court established on a Western model. However, there are difficulties with the procedure, not least the unwillingness of unsuccessful parties to abide by the chiefs' decision. There have also be difficulties in ascertaining who are the 'chiefs' in some

areas. Both the right of appeal to the High Court (via the Local Court and the Customary Land Appeal Court) on matters of law and the identity of chiefs have been used to divert questions of customary land ownership away from tribunals better able to deal with them.[8] Sadly, the end result appears to be more litigation involving customary land cases than before the introduction of this Act.

The other example of the integration of traditional dispute resolution into the formal system is the village *fono* (councils) in Samoa. The *Village Fono Act 1990* recognises the authority of the long existing village *fono*, 'meeting in accordance with the custom of the village', to impose fines or work orders for breaches of customary law and violations of council regulations, in accordance with custom and usage. However, the Act may have limited the power of the *fono* rather than enhanced it, as it sets out available penalties and thereby implicitly prohibited the *fono* from imposing other sanctions.

Is customary law superior to common law?

Assuming customary law can be identified and proved, there is a distinct lack of guidance as to where customary law fits into the formal system. As with most constitutional provisions, those recognising customary laws provide little operational detail. Regional constitutions do make it clear that the constitution is the supreme law. Statute enacted by local parliament is generally specified to be next in the hierarchy, although the position of introduced statute is not so clear. In some countries, such as Papua New Guinea and Solomon Islands, the intention appears to be that customary law is superior to common law, but, generally, their relationship is obscure. Parliaments have not provided guidance, even where mandated by the constitution to do so.[9] Instead, the courts have been left to work it out on their own. Without clear guidance, courts that are uncomfortable with customary law are unlikely to promote it. In *Allardyce Lumber Company Limited v Laore*,[10] Ward CJ of the High Court of Solomon Islands went so far as to suggest that the courts should not be dealing with customary law until parliament had provided for its proof and pleading as required by the Constitution.

Local circumstances

While particulars of the operation of customary law are vague, most regional constitutions specify that introduced law, both in the form of statutes and precedents, applies, 'so far only as the circumstances ... [of the country] permit' and 'subject to such qualifications as local circumstances render necessary'.[11] If customary law is regarded as part and parcel of 'local circumstances', it should prevail over introduced statutes and common law, offering the opportunity for harmonisation with local culture. Unfortunately, South Pacific courts have largely ignored this requirement. There is, perhaps, an exception in customary land cases, particularly in countries where the Constitution specifically states that customary land disputes are to be determined in accordance with customary law.

A telling example of the application of common law without consideration of its relevance to local circumstances is *Teitinnong v Ariong*,[12] a case decided in Kiribati. There, the plaintiff was banished from the village because he had broken an agreement concerning the commercial sale of pandanus thatches. The High Court granted an injunction on the basis that the defendant had committed the tort of unlawful interference with the exercise of the plaintiff's legal right to freedom of movement. The court ignored the fact that banishment was an accepted punishment in customary law, and said that:

> *"Any breach of any agreement or rules made by the old men can only be enforced in the constituted courts of the land. The defendants or the old men of the village cannot take the law into their own hands to enforce their rules."*

No consideration was given to whether a tort developed in England was applicable in the context of village life in Kiribati.

Has the objective test been distorted?

In numerous areas of common law an objective test is applied to determine whether conduct falls within a prescribed category or whether a particular intention has been demonstrated. It is often necessary to deter-

mine whether a person's behaviour was reasonable. The attitude of many regional courts has been to assess reasonableness without reference to local context. A graphic example is *R v Loumia and Others*.[13] The defendant admitted killing members of a rival customary group, but argued on the basis of provocation[14] that this only amounted to manslaughter. At the time of the killing, the defendant had just seen one brother killed and another seriously wounded in the same fight. It was argued that any reasonable villager from the Kwaio area of Malaita province would have responded as the defendant did. Further, it was argued that the defendant came within s 204 of the Penal Code, which reduced the offence of murder to manslaughter if the offender 'acted in the belief in good faith and on reasonable grounds, that he was under a legal duty to cause the death or do the act which he did'. As customary law was part of the law of Solomon Islands, it was argued that the words 'legal duty' in s 204 included a legal duty in custom. Evidence was adduced from a local chief that Kwaio custom dictated the killing of a person who was responsible for the death of a close relative. The Court of Appeal upheld the defendant's conviction for murder on the basis that the customary duty to retaliate was inconsistent with s 4 of the Constitution, which protects the right to life. In fact, it was never argued that the defendant's action was lawful. What the court was being urged to do was to take account of local circumstances both in the form of customary law, which recognised a duty to 'payback' and in the form of customary life style. The Kwaio area is one in which villagers live in accordance with customary principles, and community values and duties dominate. The defence of provocation should have been considered in the context of local circumstances and been applied as an extenuating factor. Had this been done, policy considerations might still have been accommodated by way of a deterrent sentence, while reducing the offence to manslaughter.

Traditional recognition of customary law

While customary law has not fulfilled the potential role opened up for it by constitutional recognition in island States of the South Pacific, its importance outside the formal system remains. In 1996, the Law Reform Commissioner of Solomon Islands explained the lack of support for law reform by the fact that the majority of the population 'already had local customs to regulate their daily lives'. 'Whiteman law' was 'not their business'.[15] There is ample evidence that customary law is still the most relevant law for the indigenous population in most South Pacific countries, irrespective of whether or not it is formally recognised by the constitution. The force of customary law rests not in its recognition in written laws or by the courts, but on the fact that members of the customary group feel themselves bound by it.

However, the movement by many people away from village life, into an urban environment for the purposes of work, education, or family commitments, has led to the weakening of traditional customary authority. In urban areas, for example, criminal conduct is out of the hands of tribal leaders and is dealt with by the police and the formal courts. As this trend continues, it becomes increasingly important to address the role and operation of customary law in society as a whole.

Conclusion

It was not the intention of South Pacific constitutions to bind regional countries to English law forever. This is emphasised by preambles that stress the importance of indigenous values and by the 'cut-off' dates imposed to prevent continued application of transitional laws. However, there is little evidence of 'localisation' through national parliaments. Nor is there an identifiable move towards a regional jurisprudence. Any departure from English common law has normally been in favour of Australian and New Zealand precedents rather than in acknowledgement of the status of customary law.

Within the formal system, lawyers have little or no training in customary law. Expatriate and indigenous judges, trained overseas in the common law tradition, no doubt gain reassurance from handing down decisions that conform to those of their overseas peers. However, this prevents exploration of the boundaries of the applicability of common law and inhibits the freethinking required to establish a regional jurisprudence befitting the individual circumstances of independent nations.

Lawyers wishing to fulfil the constitutional mandate to promote customary law as a formal source of law are faced with the difficulty inherent in transferring fundamentally different concepts from one legal system into another. Uncertainty as to how this should be done has led to the relegation of customary law to a law of last resort. Questions of definition and provenance had been allowed to obscure the fact that customary law is *the law* for the majority of people in the community and that the written law is a foreign concept founded on foreign values. If customary law is to be promoted, the mode of application must be addressed. This is unlikely to happen until the common law is abandoned or, at least, restricted to cases where it is inarguably applicable to local circumstances.

Where customary law is dealt with in customary forums, compatibility of process is not an issue and expansion of traditional dispute resolution might reduce cultural conflict within the legal system. Barring access to the courts in relation to certain domestic or private matters or making the exhaustion of traditional processes a prerequisite to litigation might be ways of achieving this goal. Safeguards would have to be built in to ensure compliance with public policy and fundamental rights, assuming that such policy and rights have been developed and agreed upon in a local context.

Both common law and customary law have the advantage of flexibility. Common law may be moulded and adapted to accommodate local circumstances, just as customary law may be developed beyond the bounds of the subsistence economy in which it developed. Use of this shared quality of flexibility may offer an opportunity to meet the demands of the independent societies of the region. However, there is a need for extensive research to develop a rational and consistent approach to the application of customary law within the legal systems of the South Pacific region.

Customary law is increasingly appearing on the undergraduate and postgraduate curriculum in law schools, both within the region and in Australia and New Zealand. Armed with the ability to question the superiority of introduced law, the next generation of lawyers may be better equipped to grapple with the conflicts inherent in legal pluralism. Legal and general education may also quash the notion that accommodation of customary law, within the South Pacific and Australia, requires the rejection of human rights benchmarks and common law standards. What it does require is the acknowledgement and consideration of competing cultures, with the reservation of the right to reject elements of law or procedure (whether substantive or adjectival) from any source, if good grounds exist.

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Endnotes

1. Preamble to the Constitution of Solomon Island s 1978.

2. The Constitution of Vanuatu uses both terms.

3. Lilo and Another v Ghomo [1980/81] SILR 229.

4. Allardyce Lumber Company Limited and Others v Attorney General and Others [1988/9] SILR 78 at 97. Compare Lilo and Another v Ghomo [1980/81] SILR 229 at 233-234; Kasa and Another v Biku and Another [2001] 1 LRC 133 at 137-142; Harry v Kalena Timber Co Ltd [2001] 3 LRC 24 at 31.

5. Kofana and Others v Aute'e, unreported, High Court, Solomon Islands, land case 001/1998, 10 September 1999.

6. This Act has not yet been brought into force and local sources suggest that it will not be.

7. Underlying Law Act 2000 (PNG), s 16(1); Laws of Kiribati Act 1989, s 5(3), sch 1, para 1; Laws of Tuvalu Act 1987, s 5(3), sch 1, para 1.

8. See, for example, Nelson Lauringi and Others v Lagwaeano Sawmilling and Logging Limited and Others, unreported, High Court, Solomon Islands, cc 131/97.

9. The Underlying Law Act 2000 (PNG) is an exception, but difficulties in interpretation could be said to create more problems than the Act solves. See further, Corrin Care, J and Zorn, J, 'Legislating Pluralism: Statutory Developments in Melanesian Customary Law',

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American Indian law: tribal courts & tribal justice in the US

*By Sidney L Harring**

In Australia, as in most other nations with substantial tribal minority populations, the issue of 'self determination' in local matters, including the administration of law, is regularly put forward.

This demand becomes especially important in nations where tribal minorities are identified as having high rates of crime, alcoholism, family disorganisation, and other social problems. The argument for this position is that the legal institutions of the dominant society are, for various reasons, unable to operate effectively in tribal communities. This could be for any number of reasons ranging from simple cultural differences and insensitivity, to overt accusations of racism, political domination, and neo-colonialism. The discussion of the wisdom or appropriateness of the clear policy option of the devolution of law and justice to indigenous communities then proceeds along these lines. At its most basic level, however, there is an underlying lack of understanding about the basic 'workability' of native court and justice systems. How can it work?

One way to proceed is to simply describe one model of tribal law: in the United States, the Indian nations have the basic legal right to their own courts and to use their own law, both criminal and civil. Modern developments have structured and limited this basic right, but at present, over 250 Indian communities (out of about 400 outside of Alaska) have a functioning system of law and justice on their reservations. These legal systems operate on a regular basis, and hand down many thousands of judgments a year that are fully accepted by both the participants and the broader American legal system. Under the basic principle of comity, the judgment of a tribal court must be recognised by all other American courts. Various appellate procedures exist but, by and large, the final judgments of tribal courts can only be appealed within the tribal legal system, and not to the parallel state or federal courts. Thus, the system of tribal law is a complete legal system.

US tribal courts - the legal history

American federalism began when the States and the people created the Constitution in 1787 and ceded to the federal government clearly delineated and limited legal powers. All powers not ceded to the federal government were 'retained' by the States and the people. Although no one apparently thought about it at the time, the Indian tribes, at the making of the Constitution, exercised full legal authority over both their members and their physical territories. While there was a certain amount of legal chaos through the early 1800s with different States dealing with tribal law in different ways, by the 1830s the United States Supreme Court, in a series of opinions now called the 'Cherokee cases', held that the Indian tribes were 'domestic dependent nations' entitled to govern their own internal matters under their own law.[1] This is still the basic paradigm, and has survived many thousands of legal opinions.

The 'domestic dependent nations' language, however, is oxymoronic – nations are ordinarily neither 'dependent' (but they sometimes are) nor 'domestic', although there were some models in post-Napoleonic Europe at the time. By the end of the 19th century, in response to a 1883 case, *ex parte Crow Dog* – in which a Brule Sioux killed his chief in a political struggle over accommodation with the United States government and had his death penalty conviction overturned by the United States Supreme Court on the ground that the tribe, and not the federal government, had criminal jurisdiction – Congress enacted the *Major Crimes Act* (1885) taking federal jurisdiction over major felony crimes in 'Indian country'.[2] This statute was upheld in 1886 by the US Supreme Court in *ex parte Kagama* in a reading of the 'domestic dependent nation' language, which held that tribal sovereignty was an anomalous kind of sovereignty because of their 'dependency'.[3] Therefore, Congress, for their welfare, could choose, unilaterally, to limit that sovereignty. This is now called the 'plenary power doctrine', and it has survived parallel to the 'domestic dependent nations' doctrine in a tenuous relationship that essentially means that the Indian nations retain their sovereign powers unless Congress clearly and unambiguously limits them. While this means that Congress could abolish the legal and political function of the Indian nations, it has not done so. In fact, the specific policy of the federal government since the 1960s is to promote and defend tribal sovereignty in order to strengthen and maintain vital Indian communities.[4] This policy is, somewhat amazingly given the polarisation of American politics, bipartisan, with Republicans often as committed to tribal sovereignty as Democrats.[5] There is, however, substantial resistance to these policies in the rural West. The current United States Supreme Court has been hostile to extensions of tribal sovereignty into such traditionally state government areas as taxation and regulation, but has basically left internal tribal jurisdictional matters alone.[6]

Tribal courts in operation

With this legal basis, about 250 Indian communities, mostly the larger reservations in the West, but also all over the country, maintain their own legal systems. This also means that over 100 other Indian communities do not do so, a set of issues that I will return to. The basic requirement for an Indian community to maintain its own law is that it must apply its law within 'Indian country', which now, more or less, means a designated reservation, although Indian villages in Alaska are clearly in 'Indian country' without holding reservations. 'Indian law' only applies within 'Indian country': because about half of all American Indians live off reservation, in neighbouring communities or farther away in major cities, these Indians all live under the same law, state or federal, as any other person.

The 200 Indian communities with their own law can operate their courts in any way they choose, based on any law adopted by tribal authorities. In general, there are three distinct types of legal systems. Some number of tribes, at least 20 or 30, and mostly in the south-west, still apply 'customary law' through customary legal processes. This means that the chiefs and councillors are also judges and juries, meeting in any form they choose and applying an unwritten 'customary law' as they understand it. Since these tribes do not have to account for their law to anybody, because it is largely unwritten, and because there is no

appeal from the decisions of these bodies, we know relatively little about these legal processes. It is clear, however, that this 'customary law' has become an evolving law, which works effectively in keeping community conflicts within manageable limits. These tribes are maintaining a continuity in their law, dating back to time immemorial.[7]

A second type of tribal legal system is the few remaining Bureau of Indian Affairs (BIA) Courts of Indian Offenses. These courts were originally set up by the BIA, an agency of the federal government, under the authority of individual Indian agents to 'train' Indian tribes in self-government and to maintain order. The Indian agent appointed 'judges', who held 'trials' in much the same way as a school, for example, might have 'disciplinary tribunals'. In a federal court case, *ex parte Clapox*, in fact, the Court held that these tribunals were analogues to school disciplinary bodies and their judgments not appealable to federal courts.[8] That these courts even still exist is anomalous, because they truly are remnants of 19th century colonialism, but some number – more than 20 – still exist for a number of reasons. A few small tribes have such systems. Others have histories of political struggle that have impeded setting up a tribal government. Others choose not to cooperate with the federal government in creating a tribal government, leaving these historical BIA institutions in control.

Most tribal court systems, more than 150 of them, are administered by tribal governments under the *Indian Reorganization Act* of 1934 (IRA). The IRA was the Roosevelt administration's 'new deal' for Indians. While it is still controversial, the essential model was one of municipal self-government in order to 'encourage' Indian tribes to develop self-responsibility and avoid models of dependence. Indian tribes were required to organise elections, then elect a chief and councillors, who were, in turn, responsible for local self-government. This local government included tribal courts, organised on the model of municipal courts. Judges were either elected or appointed, and applied a 'legal code' passed by the tribal council.

"While it is still controversial, the essential model was one of municipal self-government in order to 'encourage' Indian tribes to develop self-responsibility..."

These 'tribal codes', in turn, are most often copied from other American jurisdictions. The federal government, in fact, distributed copies of 'model' tribal codes for the various tribal councils to adopt. Thus, the tribal criminal codes often look very much like the state criminal codes of adjacent non-Indian communities. As tribal government became more well organised, tribes moved on to take control of civil law, state environmental, family, traffic, and hunting and fishing codes were also modified and adopted. The Navajo Tribe has even adopted most of the Uniform Commercial Code. But the exact character of 'Indian law' is complex and the subject of much discussion. Even when the formal 'law' appears to resemble that of other American jurisdictions, tribal courts may apply indigenous values or meaning to those rules.[9]

While the substantive law applied in these IRA tribal courts is very similar to the substantive law of the States, it does not have to be. Each respective tribal council makes its own legal and political decision as they address the legal problems of their respective tribes.[10]

Tribal legal procedures are also, perhaps not surprisingly, similar. The *Indian Civil Rights Act* of 1968 imposed many provisions of the US Constitution's Bill of Rights on the tribes. Accordingly, a defendant in a tribal court has the right to a jury trial in 'non-petty' cases, the right to counsel, the right to confront his accusers and call witnesses. Observing a modern tribal court in operation is not much different than observing a criminal court in a small town. Some tribes operate appellate courts, but most do not. The decisions of tribal courts cannot, ordinarily, be appealed to state or federal courts because they do not operate under state or federal law. Rather, they operate under tribal law.

While this has given tribal courts a great deal of legitimacy, it has also raised a criticism that tribal courts should consciously be more 'Indian' and apply tribal customs and values in their decisions. Specifi-

cally, an argument is that they should be more concerned with native values such as collective unity and harmony, and more interested in securing restitution and rehabilitation in criminal cases rather than in routinely imposing jail sentences not unlike might be imposed in non-Indian courts.[11]

Perhaps most importantly, the *Indian Civil Rights Act* limited the jail term a tribal court could impose to six months. This provision clearly weakens the scope of tribal authority in more serious cases. The *Major Crimes Act*, now applying to 14 serious crimes – basically everything more serious than car theft and felony assault – effectively removes all serious offences to federal courts. This means that the Federal Bureau of Investigation (FBI) functions as a 'local' law enforcement agency in Indian country, investigating ordinary felony crimes and making routine arrests. These 'major' criminal cases are prosecuted by United States attorneys in federal district courts. Federal jurisdiction is based on the fact that the Indian tribes and their lands are under federal protection and supervision.

Since this system has now been in place well over 100 years, it ordinarily operates quite efficiently. But, in describing it to people who do not understand it, it looks complex and unwieldy. A big bar fight, for example, might involve both federal and tribal jurisdiction. If one of the parties drove off drunk and hit somebody over the reservation border, it would also involve state jurisdiction. But, the reality of modern American criminal justice is that competing jurisdictions are everywhere and it is up to the respective authorities to 'sort it out'. It is clear that tribal and federal jurisdiction is concurrent, therefore, even if the *Major Crimes Act* has been violated, if the FBI does not choose to make an arrest, tribal police can. Therefore, even cases of homicide may be tried in tribal courts – as long as the sentence imposed is no more than six months. In many cases, this result is routine. For example, although cases of car theft are under federal jurisdiction, routine car theft cases, especially involving youths, are often left to the tribal courts on the theory that a six-month sentence is probably sufficient and the tribal legal process is cheaper and more efficient.

"...the reality of modern American criminal justice is that competing jurisdictions are everywhere and it is up to the respective authorities to 'sort it out'."

These competing jurisdictions, called 'checkerboard' jurisdiction, becomes even more complex because it is now clear that the tribal courts have no jurisdiction over whites and non-resident Indians (although they do have jurisdiction over resident Indians who are members of different tribes).[12] The respective States retain jurisdiction in such cases. Using the bar fight as an example again, tribal police have jurisdiction over tribe members and resident Indians, until the crime charged becomes federal under the *Major Crimes Act*. If a non-Indian or non-resident Indian is involved, they are under state jurisdiction, whether the crime is petty or not. Thus, the bar fight might be prosecuted in three courts, and the fighters subject to three different sets of penalties. The law of 'equal protection' does not apply to the legal status of Indians because it has been held to be a constitutionally recognised political status, so the respective offenders cannot appeal against their unequal sentences on this basis. This logic has already come to its most extreme result: in a felony murder on an Indian reservation, the Indian offender did not face the death penalty because there is no federal death penalty for the offence, but the white offender, because the State did provide for a death penalty under those circumstances, did. While this is clearly not fair, this routinely happens everywhere when offences are prosecuted in different jurisdictions.

Indian communities without tribal courts

As outlined above, of the roughly 400 Indian reservations in the continental United States, only about two-thirds live under any form of tribal court, although informal community-based 'peacemaker courts' may still function outside of tribal government. Most of the eastern tribes do not have tribal courts, although a few do. Many of these reservations are very small in population, often with only a few

hundred residents. In such communities, there may not be either sufficient population, or a sufficient economic base to support the courts.[13] Others may be occupied by Indian communities that have long been acculturated into local legal systems. A few have a level of poverty and social disorganisation that makes it impossible to establish and maintain a court system.

In about 10 States, mostly in the east, but also including California, state law was extended over most Indian communities by federal statute, mostly in the 1940s and 1950s. Some of these tribes, like the Seneca in New York and the Menominee in Wisconsin, have had their tribal court systems restored after having lost it for some period of years. For those tribes without their own court systems, law enforcement is a matter for federal authorities unless Congress has specifically put the tribe under state jurisdiction. The plenary power doctrine has permitted Congress to make a wide range of provisions for tribal law, varying from tribe to tribe and State to State.

Conclusions

In general, the operation of tribal courts in the United States is so well established that it simply is not much of an issue. This is not to say that small town and rural whites in the West do not resent or criticise the tribal courts, because they certainly do. Within legal circles, however, the system operates efficiently. No scholar of Indian law fails to recognise that the tribal courts are a positive force in Indian communities.[14] At the simplest level, it means that minor criminal matters, probably more than 95 per cent of all criminal cases, are dealt with at the community level by a tribal judge, and tribal court officials. Even if jail terms are applied, they are spent in a tribal jail, tended by Indian jailers. All of this matters.

At a broader level, few would also question that it strengthens Indian communities to operate their own political and legal systems. It is empowering. Having legal responsibility for your own community is a powerful force in human society. Similarly, the legitimacy of the courts is beyond question: they are not imposed from outside, but are composed of the neighbours of the defendants. Tribal courts also carry clear economic benefits: Indian communities with few jobs might have 10 or 20 people working in law enforcement and for the tribal courts.

While the tribal courts have been criticised for operating too much like American courts in general, they have also carved out some uniquely Indian jurisprudence. Studies of tribal courts conclude that there are differences in the way that cases are disposed of.[15] Tribal courts have taken a leading role in diverting drug and alcohol addicted defendants into their own tribal treatment institutions. There have been experiments with using community leaders and elders actively in probation or jail diversion programs with young people. Beyond criminal law, the involvement of tribal courts in family law matters has been credited with assisting in efforts to strengthen Native American families, particularly in the area of adoption law. Tribal regulation of hunting, fishing, and the environment has largely been successful. Indians involved in civil lawsuits can expect more help and support in tribal courts than in the local non-Indian courts.

Law is a powerful force in the social life of any community, and it is deeply interrelated with all other aspects of human life. If tribal communities are to be supported in a multicultural society, expected to not only survive but to prosper, they need real power in determining what happens in their communities. The law is powerful in many ways: not only do tribal police officers directly intervene in problem situations, but tribal judges hold the offender to account the next day. These actions are unequivocal symbols of the tribe's vitality. One Monday morning in the Navajo Tribal Court the usual crowd of troubled young people were brought up from jail after a Saturday night binge. The judge addressed each prisoner first in Navajo. One young man snapped back in a hostile tone, "I don't speak Navajo." The judge just stared at him for a long, silent moment, and then said in a low measured tone in English, "Well, then I will speak to you in your language." The symbolism was evident: whatever language that young man spoke, he was a defendant in a Navajo court – and you can be assured that he knew it.

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Reforming customary family law: the South African experience

*By Professor I P Maithufi and Geraldine-Maureen Moloi**

The recognition of customary family law — in particular polygamous or potentially polygamous marriages and the enforcement of their consequences — has been a thorny issue in South African law.

On 15 November 2000, the *Recognition of Customary Marriages Act 120 of 1998* came into operation, after an investigation by the South African Law Commission of the legal position of customary marriages.[1] Before this enactment, customary marriages were not recognised as valid marriages for all intents and purposes of the law.

The basis for the non-recognition of customary marriages was that they were polygamous in nature. Polygamous or potentially polygamous marriages were, in terms of the then South African legal system, regarded as against principles of public policy or natural justice.[2] Even consequences flowing from these marriages could not be enforced as this was regarded as an indirect recognition of these marital relationships.[3] The only marriage that was recognised by the law was a civil marriage which is defined as:

> *"... the legally recognised voluntary union of one man and one woman, to the exclusion of all others while it lasts."*[4]

Any form of marital relationship that did not comply with this description was not recognised nor could its consequences be enforced. A civil marriage was granted more protection than all other forms of marital relationships in the sense that where parties to these marriages contracted a civil marriage with each other, this had the effect of dissolving the previous marriage between them. In the same manner, if one of the parties to these marriages

contracted a civil marriage with another person, the previous marriage was dissolved.[5]

The position outlined above continued to exist until the passing of the *Recognition of Customary Marriages Act*. The purpose of this legislation, as set out in its long title was to:

(a) accord recognition to customary marriages;

(b) specify requirements for valid customary marriages;

(c) provide for the equal status and capacity of the spouses;

(d) provide for proprietary consequences of customary marriages; and

(e) regulate registration and dissolution of customary marriages.

Eventual recognition

The main aim of the Act was to bring to finality the long overdue question of the recognition of customary marriages for all intents and purposes. This was necessitated by the present constitutional dispensation, which provides for equality of all men and women and people of all races.[6] The Constitution also provides for the enactment of legislation aimed at recognising the following forms of marital relationships:

(a) marriages concluded under any tradition, or systems of religious, personal or family law;

(b) systems of personal and family law under any tradition or adhered to by persons professing a particular religion.[7]

The Act now provides that a marriage that is valid at customary law and existing at the date of its commencement is recognised for all purposes. The Act also lays down the requirements for the validity of customary marriages. It provides that a customary marriage contracted after the date of commencement is recognised for all purposes as a valid marriage, provided it complies with these requirements. A prohibition is placed on a person who is already married by custom contracting in a civil marriage with another person. Spouses in a customary marriage may, however, contract a civil marriage with each other.

In terms of the Act, customary marriages are in community of property and of profit and loss, unless the husband is a spouse to more than one customary marriage. These consequences may be excluded by means of an ante nuptial contract. A husband who wishes to contract another customary marriage has to make an application to court to approve a written contract, which will regulate the future patrimonial consequences of his marriages. If the application is granted, the court must terminate the matrimonial property system applicable to the existing marriage and effect a division of the joint estate in the case of a marriage in community of property, or a marriage that is subject to the accrual system. The court is furthermore empowered to effect an equitable distribution of property and to take into account all relevant circumstances of the family groups that would be affected if the application is granted. The court is also authorised to refuse the application.

The spouses to customary marriages have equal status and capacity. This is in keeping with the Constitution, which provides for equality before the law and equal protection and benefit of the law.[8]

Customary marriages are now dissolved by a decree of divorce on the ground of irretrievable breakdown. A decree of divorce may only be granted if the court is satisfied that the marriage relationship between the parties has reached such a stage of disintegration that there is no reasonable prospect of the restoration of a normal marriage relationship between them. Previously, a customary marriage could be dissolved without an order of court.

Customary marriages are in terms of this Act placed on the same footing as civil marriages. They have the same consequences and can only be dissolved by order of a competent court. The spouses to these marriages have the same capacity and status as spouses of civil marriages.

It is also worth mentioning that the South African Law Commission is presently investigating the legal position of Islamic marriages.[9] It is hoped that in the not too distant future these marriages will also enjoy the same legal recognition and protection as civil marriages. Another investigation closely connected to this

relates to domestic partnerships.[10] An Issue Paper in this respect has been published by the Commission and a report will be finalised once public comments have been received and evaluated.

Reform of the customary law of succession

The law of succession is inextricably linked to marriage in the sense that the reform of one inevitably demands that the other has to be reformed too. Immediately after the reform of the law relating to customary marriages, the South African Law Commission commenced an investigation aimed at reforming the customary law of succession. As in the case with customary marriages, the purpose is to reform the customary law of succession in accordance with the new constitutional order. The reform is necessary as the application of the customary law of succession appears to be discriminatory on the basis of gender and age.[11] In a landmark decision in this respect, the court held that the rule of primogeniture applicable in the customary law of succession did not unfairly discriminate on the grounds of gender and age as the heir was obliged to maintain the widow(s) and other children of the deceased.[12] The heir to the deceased estate is the eldest surviving male relative who in the normal course of events is the eldest son. The other children of the deceased and their mother(s) do not have the right to succeed according to this rule.

Furthermore, as a result of South Africa's obligation under the Convention on the Elimination of All Forms of Discrimination Against Women, the legislature is under a duty to amend any of its laws that may infringe the principle of gender equality.[13] The duty is once more repeated in the *Promotion of Equality and Prevention of Unfair Discrimination Act of 2000*.[14]

"...reform is necessary as the application of the customary law of succession appears to be discriminatory on the basis of gender and age."

The Constitution also provides that customary law must be applied subject to the Constitution and to any legislation that specifically deals with customary law.[15] Thus customary law has to be read and interpreted subject to the Bill of Rights[16] and any relevant legislation.

The investigation

The investigation into the reform of the customary law of succession was launched with the publication of an Issue Paper entitled *Succession in Customary Law* in April 1998. The Issue Paper generated immediate public interest and elicited oral as well as written responses.

As a result of the public interest shown and responses to this paper, the Department of Justice was placed under severe pressure to develop a draft Bill entitled the Customary Law of Succession Amendment Bill of 1998. The Bill sought to extend the principles of succession embodied in the *Intestate Succession Act of 1987*[17] to all persons in South Africa irrespective of race, gender or age. A decision was, however, taken not to proceed with the Bill after it received a hostile reaction from interested persons, particularly traditional leaders.

At the same time, the South African Law Commission was preparing a Discussion Paper on the same issue. In the meantime, litigation relating to the constitutionality of the application of the customary law of succession continued. This was in the case of *Mthembu v Letsela*,[18] which began in the Transvaal Provincial Division and finally culminated in the decision of the Supreme Court of Appeal.[19]

In all these hearings, the dispute revolved around the constitutionality of the customary rule of succession that, on the basis of male primogeniture, prevents women from inheriting. As already indicated above, the court found that the rule was not unfairly discriminatory because of the concomitant obligation of the heir towards the widow and the rest of the dependants of the deceased. The court declined an invitation to develop the customary law rule in accordance with section 35(3) of the interim Constitution in such a way

that it does not discriminate between men and women and commented as follows:

> *"Any development of the rule would be better left to the legislature after a full process of investigation and consultation, such as is currently undertaken by the Law Commission."*[20]

This investigation is currently at an advanced stage. Comments have been received from all interested parties and workshops held all over the country. The Commission envisages that a report will be finalised during the course of this year.

The recommendations

Among the most important recommendations of the Commission with regard to the reform of the customary law of succession is the amendment of the *Intestate Succession Act of 1987*. The proposed draft Bill provides that upon a person's death, the estate has to dissolve in accordance with that person's will or where there is no will, according to the law of intestate succession prescribed by the *Intestate Succession Act*. This would apply to all intestate estates including the estates of persons who had contracted a customary marriage that subsisted at the time of death.[21] In terms of these recommendations, the surviving spouse will be entitled to inherit the deceased's house and personal belongings. Where the deceased owned more than one house, it is recommended that the surviving spouse inherit one house of such spouse's choice.[22]

In terms of the present *Intestate Succession Act of 1987*, the surviving spouse of a customary marriage is not an heir to the intestate estate of his or her deceased spouse. It is thus recommended that the definition of a spouse be extended to include also a spouse or spouses of customary marriages.

If the deceased is survived by a spouse but not a descendant, the spouse will inherit the intestate estate. Where the deceased is survived by more than one spouse, the spouses will inherit the estate in equal shares.[23]

The draft Bill contains the following recommendations in the case of a deceased who is survived by a spouse or spouses and a descendant or descendants:

(a) Where the deceased is survived by one spouse and a descendant or descendants, such spouse will inherit a child's share of the intestate estate or so much of the intestate estate as does not exceed in value the amount fixed by the Minister by notice in the Gazette, whichever is greater.

"In the case of polygamous marriages, surviving spouses would be entitled to a child's share only and a house each."

(b) Where the deceased is survived by more than one spouse and a descendant or descendants, such spouse will inherit a child's share of the intestate estate or so much of the intestate estate in equal shares as does not exceed the amount fixed by the Minister by notice in the Gazette, whichever is greater.[24]

The amount fixed by the Minister in terms of the *Intestate Succession Act of 1987* is currently R150,000. In the case of a large estate, the surviving spouse would thus be entitled to this or more. In the case of estates worth less than this amount, the surviving spouse would be the sole beneficiary to the exclusion of other dependants of the deceased. As customary marriages are in community of property and of profit and loss, the surviving spouse will also be entitled to a half of the joint estate in addition to a child's share in the case of a monogamous marriage. In the case of polygamous marriages, surviving spouses would be entitled to a child's share only and a house each.

The Draft Bill for the Amendment of the Customary Law of Succession also recommends the abolition of any rule of customary law that obliges an heir to maintain the dependants of the deceased and to settle the debts of the deceased. This is understandable as all dependants of the deceased, including the spouse or spouses, will be regarded as heirs without any distinction as to age and gender. The proposed draft Bill also recommends the repeal of all acts and proclamations dealing with the customary law of succession.

Continued on next page

Conclusion

South Africa is in the process of reforming its family law to reflect the rich cultural diversity it is identified with. As it is faced with a plurality of legal systems, which before the adoption of the present constitutional dispensation did not enjoy the same status, the Constitution now empowers the legislature to adopt legislative and other measures to end any form of discrimination based on culture, tradition, race, ethnic origin, gender, sexual orientation, religion or language.[25] The *Recognition of Customary Marriages Act of 1998* is one of the attempts to achieve this goal. The legal position of Islamic marriages is also receiving the attention of the South African Law Commission. Furthermore, great progress has been made with regard to the reform of the customary law of succession as indicated in this discussion. It is envisaged that this reform process will enable the legislature to enact legislation that reflects the views, needs and aspirations of the majority of the South African population.

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Endnotes

1. *See South African Law Commission Report on Customary Marriages (1998) The Commission, Pretoria.*

2. *Ismail v Ismail 1983 1 SA 1006(A); Nkambula v Linda 1931 1 SA 377(A).*

3. *Seedat's Executors v The Master (Natal) 1917 AD 302. See, however, Ryland v Edros 1997 2 SA 690(C).*

4. *J Sinclair The Law of Marriage Vol 1 Juta 1996 305; Hyde v Hyde and Woodmansee (1886) LR 1 P&D 130 133.*

5. *Malaza v Mndaweni 1975 BAC (C) 45.*

6. *Republic of South Africa Constitution Act 108 of 1996, Section 9.*

7. *Ibid, Section 15(3).*

8. *Ibid, Section 9.*

9. *See South African Law Commission Islamic Marriages and Related Matters Discussion Paper 101 (2001) South African Law Commission, Pretoria.*

10. *See South African Law Commission Domestic Partnerships Issue Paper 17 (2001), South African Law Commission, Pretoria.*

11. *Act 108 of 1996, Section 9.*

12. *Mthembu v Letsela 1997 2 SA 937(T); 1998 2 SA 675(T); [2000] 3 All SA 219(SCA). See also Zondi v President of the Republic of South Africa 2000 2 SA 49(N) and Moseneke v Master of the High Court 2001 2 SA 18(CC).*

13. *Article 13.*

14. *Act 4 of 2000.*

15. *Act 108 of 1996, Section 211(3).*

16. *Ibid, Chapter 2.*

17. *Act 81 of 1987.*

18. *Mthembu v Letsela 1997 2 SA 937(T); 1998 2 SA 675(T); [2000] 3 All SA 219(SCA).*

19. *Mthembu v Letsela [2000] 3 All SA 219(SCA).*

20. *Ibid, 230.*

21. *Proposed Draft Bill for the Amendment of the Customary Law of Succession, Section 2(1) and (2).*

22. *Ibid, Section 2(3)(a) and (b).*

23. *Ibid, Section 3(a) and (b).*

24. *Ibid, Section 3(c).*

25. *Act 108 of 1996, Section 9(2).*

Syariah law in contemporary Indonesia & Malaysia

*By M B Hooker**

As a preliminary to this article it is as well to dispose of two issues. First, the study of Islamic law can be highly charged both at the personal and political level. The reason for this is to be found in historical memories on both the Muslim and non-Muslim sides.

The Crusades have not been forgotten, nor has the past 200 years of successful Western imperialism. On the other hand, the words 'Palestine' and 'Islamic Jihad' have an immediate resonance in the West. There is a more subtle dimension to this. It is that while the syariah has 1,400 years of a sophisticated technical scholarship, the European scholarship of the past 200 years has, as a consequence of a successful imperialism, imposed its own intellectual imperialism. Western scholarship has defined the agenda for syariah in the modern nation state in the past century. Naturally, the internal Muslim response has been to regain this loss by a return to purity of doctrine. The most strident effort toward 'purity' is the proposition that one can make or recreate an 'Islamic state'. Iran, Pakistan and Sudan are the examples. The success or otherwise of these attempts is not an issue here; the point is that the politics of Islam impinge directly on syariah.

The second preliminary is that the syariah does not distinguish between ethics, morality and prescription. The function and purpose of the syariah is the working out of divine will in terms of the obligations one owes to God and one owes to one's fellow human beings. There are two important implications. First, obligation, in the sense of prescription, is expressed differently throughout the Muslim world. Obligations are the same but the forms in which they appear are socially conditioned. However, and second, this does not lead to an excessive fragmentation within the syariah because the methods of legal reasoning are taught and implemented everywhere. The same classes of action[1] are the irreducible minimum through-

out the Muslim world. Having said this, we should also realise that societal differences are becoming less sharp in the modern world and the classical forms of legal reasoning are being overtaken by methods derived from Western legal thought. Both do still remain important, as we shall see below, but the emphasis has now shifted to the politics of law and religion.

Syariah and the Nation State

By the 1850s, Muslim populated lands were either under the direct rule of or dominated by Western powers. This was the case for Malaysia[2] and Indonesia.[3] The modern forms of syariah in both States are the direct outcome of the respective colonial heritages. We can see the respective colonial legal policies as crucial.

To take the British first: the policy was founded in 1781 in Warren Hasting's Bengal Regulation:

> *"The law of general application is English law subject to the religions, manners and customs of the Native inhabitants, provided not repugnant to Justice, Equity and Good Conscience."*

The result was the invention of Anglo-Muhammadan (and Anglo-Hindu, etc) law, which consisted of:

- restricting manners and customs to family law and trusts; and
- selecting principles of classical syariah and putting them into statute and precedent.

This is actually a limitation, indeed trivialisation, of 1,400 years of *fiqh* (technical prescription), but it was and is a workable system. However, it rests upon an acceptance of the state as the primary source of law. Islam, as revealed, became an object to be mined or manipulated for the purposes of the state, a subjection from which it has never really recovered.

The Dutch reached the same end but by a quite different route. The established legal policy from the 1850s was to apply separate legal regimes, to each of the racial groups in the Netherlands East Indies (NEI). Thus, Dutch law applied to Europeans and those assimilated to this status. For the natives (inlanders) the law was *adat* (custom) of which there were 19 named law groups. For the foreign oriental the law was Chinese law, although by the late 1920s the Chinese had become mostly assimilated to the European group.[4] Islamic law as such had no separate existence in law except to the extent it was recognised in *adat* and to a limited extent in betrothal and marriage from the 1930s. The Dutch rationalisation was that *adat* governed the legal life of ordinary natives who, although they were Muslim, in fact did not follow or adopt the syariah. This view, plus the racially defined legal regimes, suppressed syariah at the state level and its only real, continued existence was in the traditional religious training institutes (*pesantren*) and in *fatwa* (legal opinions). Neither of these two forms of existence was binding on or of interest to the colonial authority, except from a security or public order perspective. However, the Japanese occupation (1942-45) radically altered the position of Islam. The Japanese recognised Muslim groups and Islam received a form of political recognition, which has been maintained into the post-independence period.

"Islam, as revealed, became an object to be mined or manipulated for the purposes of the state, a subjection from which it has never really recovered."

Contemporary Indonesia

The 1940s saw a bloody war for independence and an intense debate as to what the foundations of the new independent republic should be. The proponents of an Islamic republic lost the argument though this does not mean to say that the argument has gone away; it has not and it surfaces regularly. Now, in fact, is one of those times.

But coming back to the 1940s-1980s. These 40 years saw both the maintenance of the colonial position on syariah and also some significant advances from the Muslim point of view. Thus, Muslim political parties were recognised instead of being proscribed as in the Dutch era, and a Ministry of Religion was established (in 1946), thus assuring Islam of an enduring bureaucratic presence, which it retains to this day. However, on a negative note, while existence of separate legal

regimes based on race was done away with in 1945, the rather minimalist scope of syariah under the Dutch was maintained. Thus, while the colonial religious court (*Pengadilan Agama*) system was extended to all of the Republic of Indonesia, its very limited jurisdiction was maintained. This in fact restricted the court to betrothal, marriage and divorce; it could not enforce its own judgments but had to rely instead on the secular courts and they often refused – especially in favour of *adat,* and particularly if property was an issue. One can see the contradictions; a political presence, a powerful bureaucratic establishment, but a severely limited judicial system.

Combined with these there was (and is) an active educational movement in state Islamic institutes, universities, *pesantren* and *madrassah*. In addition, the worldwide reform or renewal movements in Islam were known and eagerly copied in Indonesia. The result of all this was that by the early 1980s some attempt at reform or, at least, minimising contradictions had become pressing. The Ministry of Religion had in fact taken over much of the judicial function through its own bureaucratic processes. The syariah was totally mired in formulaic red tape.

There were two responses which, between them, constitute the modern form of syariah in Indonesia.

1. The law on religious justice (1989)

This is a formal enactment of the House of Representatives. Like all such laws it is drafted in very general terms quite unlike a statute in Australia. The Indonesian practice is to leave the detail to be determined by the appropriate Ministry; hence a series of executive orders. In this case the institutions involved are the Ministry of Religion, the Ministry of Justice and the Supreme Court. The respective jurisdictions are not clearly defined.

The law is in five parts; first, a general section on definitions – there is nothing of interest here. Second, there is a long section on organisation. It sets out the hierarchy of courts (district, provincial appeal and Supreme Courts) and the appointment of officers (that is, bureaucrats) and the appointment of judges. Readers of this article will find the latter the most interesting. A judge must be a citizen, a Muslim, 'devoted to God', loyal to the *Pancasila*[5] and the Constitution of 1945, free from involvement in communism, a graduate of a law faculty with a major in Islamic law and honest and impartial. The essential qualification is loyalty to the Constitution. The *Pancasila* is now somewhat problematic. However, there is one rather disturbing feature in this list: it is not required that a judge be formally qualified in classical Islamic jurisprudence. What this means is that the religious courts are now staffed by judges who are trained at 'second hand', by this I mean trained in Western forms of legal reasoning *about* syariah but not in legal reasoning from *within* syariah. In other words, the syariah has become secularised.

This view is born out by the third part of the law – it is the longest and is wholly on divorce. The religious court is essentially a divorce court (75-80 per cent of all cases). There are other subjects – inheritance, wills, trusts for charitable purposes – but between them they make up only 15-20 per cent. It might appear strange to an Australian reader that divorce should be dealt with in a procedural code but the emphasis here is on the administration of the different types of divorce available for Muslims in Indonesia.

2. The Compilation of Islamic law (1991)

The Compilation is the state version of what syariah consists of in contemporary Indonesia. It is almost wholly on family law; marriage and divorce are the main subjects. It is a short summary written in the context of the secular state. It is important to remember the context, which includes the secular Marriage Law of 1974. That law attempts to provide a comprehensive law for all Indonesians, including Muslims. The Compilation is a partial exception applicable only to Muslims. These two pieces of legislation are in fact inconsistent – one emanates from the Indonesian parliament, the Compilation from Presidential Decree – and there is no defined line of jurisdiction between them. Equally important, the respective sources of actual rules are irreconcilable; on the one hand a secular European-derived code and, on the other, a rationalist abstraction from God-given prescription as interpreted in 1,400 years of legal writing.

The judges in the religious courts are in an impossible position.

There is no guidance as to how inconsistency can be dealt with. The older generation of judges tend to look to the classical texts; the younger to the written laws. The actual machinery for enforcement of judgments is poor and, in some cases, ineffective. I should point out that we just do not know how the religious courts work, although there is an Australian Research Council funded project on the subject now underway. Results will be available in three years' time.

There is one final version of syariah in Indonesia and this, the *fatwa* or legal ruling/opinion, actually takes us back to the classical syariah of the pre-modern period. There are collections of *fatwas* from the 1920s to the present – several thousand opinions have been given. Many merely repeat known answers but a significant minority (about eight per cent) deal with difficult issues, which include the position and status of women, medical science (contraception, organ transplants) and offences against religion (interest-based banking, drugs, superannuation/pensions). A *fatwa* is not binding but can be immensely persuasive socially and politically. By its nature it is independent of state authority and the method of reasoning owes nothing to Western concepts of law. The reasoning is in the methods of classical jurisprudence. The *fatwa* is thus the only form in which the classical jurisprudence now exists anywhere in the Muslim world.

Contemporary Malaysia

When the Federation of Malaya became independent in 1957, the Constitution of that year declared Islam to be the 'religion of the Federation' (Art 3). Though this provision has remained to haunt successive governments, it has no direct consequences for syariah. Instead, the Ninth Schedule of the Constitution lists Islam and all matters pertaining to the religion to be a state and not a federal matter. Each state in the Federation, therefore, has its own Department of Religion, and Administration of Islamic (or Muslim) Law Enactment, the earliest dating from 1952.

This legislation has been much elaborated over the past years, especially from the 1980s to the present. It builds on the British colonial legal legacy, the policy of which was to:

- allow syariah in the limited fields of family law and trusts; but
- to subordinate both by putting them into statute and precedent.

The result is an 'Anglo-Muslim' law,[6] which still exists. Essentially, this is the contemporary form of syariah in Malaysia.[7] While recent legislation has become increasingly complex, the whole deals with the following matters.

First, each of the states has a Majlis Islam. This is a deliberative body, which issues *fatwas*, and acts as an appeal board in disputed issues of syariah. It is also an administrative body charged with oversight of Muslim finance (charities, taxes), the administration of the religious court and the appointment of religious judges.

Second, the legislation establishes religious courts and prescribes jurisdiction. On the civil side this includes betrothal, marriage, divorce, custody, maintenance and claims to property arising out of marriage. On the criminal side, the court has jurisdiction to take prosecutions for matrimonial offences, unlawful sex, consumption of alcohol, non-attendance at Friday prayers, non-payment of Muslim taxes and the preaching of false doctrines.

The third common element in the legislation, and generally the most extensive, is a restatement of basic principles of family law, especially marriage and divorce. The rules are taken from the Shafi'i school but written to be incorporated into the requirements demanded by a modern state bureaucracy. These include registration, the issue of certificates, payments of fees, penalties for non-compliance and so on. An Australian lawyer reading the legislation would find much that is familiar. The same is true where the issue is property distribution arising from death or divorce. The classical rules in an amended form are applied although difficulty still persists in matters of custom (*adat*). New forms of property, such as insurance policies and pension/superannuation funds, remain problematic in syariah inheritance rules and the courts (secular and religious) have yet to develop a consistent jurisprudence.

It is clear that the whole syariah system in Malaysia is Anglo-Muslim and this has become apparent to the religious authorities at both state and federal level. Islam, of course, also has a political

dimension and the only effective opposition to the national government has been offered by the PAS – the Islamic party. The jurisdiction and administration of syariah is wholly political, with each side attempting to demonstrate its Islamic credentials. The result has been that the federal government amended the Constitution in 1988.

The new Article 121(1A) says that in matters of religion only the religious courts have jurisdiction. The reference is to Islam as defined in the Ninth Schedule of the Constitution and the intention of the Article is to do away with:

• Anglo-Muhammadan (Muslim) precedents; and

• forbid the secular courts from exercising jurisdiction in Islamic matters.

It has failed. As to jurisdiction, the secular courts actually make the decisions as to what is 'religious' and they do this because they are superior courts. The religious courts exist only through state legislation, which is dependent on the Constitution. The religious courts do not define 'Islamic'. It has to be said, however, that the cases so far show the secular courts acting scrupulously in their discussion of jurisdiction.

There is one further and equally important point. A survey of the religious courts in Singapore and Malaysia[8] for the years 1988-98 shows that the actual method of legal reasoning is derived from English law. The substantive law being applied comes from classical sources including Qur'an, sunna and textbooks but it is now formulated in terms of 'binding' or 'persuasive' precedent, which is 'distinguished' or 'followed'. The canons of classical syariah (required, permitted, forbidden) make no appearance. The result is an Anglo-Muslim jurisprudence.

Concluding remarks

Because the religion of Islam is expressed in legal form, it is truly an alternative to the laws of the nation state. The syariah does not in fact require a state because it draws its authority from God as His commands are understood in the scholarship of the learned. This is not a position that any colonial or modern state could or can tolerate – the state is the ultimate source of legal authority. The examples of Indonesia and Malaysia demonstrate two methods of controlling syariah. Essentially both involve (a) the re-definitions of some parts of syariah into secular terms and (b) its judicial and bureaucratic administration in European form. The result in both cases is a hybridised law.

This is not to say that the classical syariah does not exist. In both Indonesia and Malaysia the classical texts are still studied but it is an open question as to how important they are in the religious courts. Again, both states have *fatwa* issuing bodies, which rely on the classical material. These are certainly important in Indonesia but in Malaysia the *fatwa* has been co-opted by state and federal governments and has become totally politicised. Because of this they are poor examples of classical legal reasoning.

In both countries one hears calls for the 'Islamic' state, and Iran and Pakistan are often held up as examples of what should be done. Apart from the fact that neither has any possible relevance for South-East Asia politically, legally or sociologically, 'Islamic' remains undefined. This does not mean these calls are going to cease. What it does mean for Australia is that people here must realise that religion determines how people think about law; and the syariah, in whatever form, is a fact of legal life in Indonesia and Malaysia.

That legal life encompasses purity of doctrine, the repair of impurity, an accommodation with the state, the perceived threat of Western 'rationalism' (now globalisation) and the fact that God has spoken to man through the Prophet and that the Prophet's message is the final message.

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Endnotes

1. There are five normative classes of action; required, recommended, permitted, permitted but reprehensible and forbidden. The result is that an action is either valid, void or irregular (ie repairable).

2. Comprising British Malaya, the Straits Settlements and British Borneo.

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Engaging the public – community participation in the genetic information inquiry

By Brian Opeskin*

"Whatever form it takes, the consultation process gives the reform process a democratic base which ... amounts to a real empowerment of the many groups or individuals who want an active voice in the law reform process."[1]

It would be possible to produce a law reform report in the cloistered environment of an ivory tower, surrounded by published texts and journal articles penned by learned judges, practitioners and academics – *possible*, but not desirable. A fundamental characteristic of the methodology of most law reform bodies in Australia is that they are participatory in nature, with an emphasis on community engagement of individuals, groups and organisations. This methodology was strongly influenced in Australia by Justice Michael Kirby, the founding Chairman of the Australian Law Reform Commission (ALRC), and it has been a central feature of the ALRC's work ever since.

This article reviews the reasons for, and forms of, public participation in the work of the ALRC, with particular regard to its current reference on the protection of human genetic information. That reference was given to the ALRC in February 2001 as a joint inquiry with the Australian Health Ethics Committee (AHEC). The original reporting date of 30 June 2002 was recently extended to 31 March 2003 to facilitate the processes of public consultation and discussion. This is especially important in a reference such as this one, which has the potential to affect many individuals in a wide variety of contexts such as employment, insurance, criminal justice, and the provision of health services by medical practitioners and hospitals.

Why involve the public?

Governments seek and obtain policy advice from many quarters. Chief among these are government departments. Yet, despite their frequent involvement with detailed legislative reform, departments are often not well suited to engaging in the tasks of inquiry and reporting given to law reform bodies. Extensive processes of consultation are often beyond the capacities of many government departments because of constraints of time and resources.[2] Moreover, because the ALRC is an independent statutory authority, many members of the community seem to feel able to speak frankly (and sometimes confidentially) to the ALRC in circumstances in which they may not be willing to speak directly to 'government'.[3]

The desirability of engaging the public in the process of law reform may be explained in many ways. For convenience, these can be divided into three groups:

- benefits for those consulted;
- benefits for the process of law reform; and
- benefits in terms of enhanced effectiveness of the law once reformed.

Benefits for those consulted

An ancient republican virtue is that of engagement in civic life. Aristotle observed that 'man is by nature a political animal': an individual's contribution to the functioning of the polity is an important part of civic life. Public consultation enables individuals to fulfil their role as 'political animals' by contributing to the formulation of laws governing the community. In a speech given in 1995 to celebrate the 20th anniversary of the ALRC, the then Attorney-General, Michael Lavarch, described this democratic function of the ALRC as an 'invaluable bridge' between people and the law.[4] As described below, civic participation is possible through many channels, including public meetings and making submissions.

An additional benefit for those consulted is the educative function of public consultation, both in relation to the process of law reform and the substance of the law under review. This has been an important feature of the genetic information reference because of its challenging scientific basis and the recency of many of the relevant scientific advances. Some members of the community were educated before the Nobel Prize winning discovery in 1953 by Watson and Crick of the double helix nature of DNA, which has become part of the common culture. Even for those who have been educated more recently, the speed of scientific development in the field of genetics regularly demonstrates the need for lifelong learning. The ALRC recognised this in formulating its Issues Paper for this reference, *Protection of Human Genetic Information* (IP 26). The Issues Paper devotes substantial space to explaining the background to emerging issues in human genetics, as well as providing a 'genetics primer' for the uninitiated. The structure of public consultations to date has reflected the importance of the educative function of broad community participation. At least half of each public meeting has been devoted to explaining key attributes of genetic information and identifying the challenges that these pose for society, and for law reform in the context of the present reference. Judging by the responses so far, these efforts have been much appreciated and have achieved the goal of laying a foundation of understanding for those who have attended.

Enhancing the law reform process

Public consultation also yields many practical benefits for the process of law reform. Reading the statute book and reported judicial decisions often gives an incomplete account of the way in which the law operates in practical situations. For example, legislation currently permits life insurers to discriminate among insurance applicants on the basis of their known genetic test results in most cases. Yet a reading of the

"The structure of public consultations to date has reflected the importance of the educative function of broad community participation."

statute book cannot reveal the important role of insurance agents and brokers in influencing the decisions of individuals in applying, or not applying, for insurance where there is a family history of a particular genetic disorder. Those with day to day experience of the law can indicate how current law and practice actually affects them.[5] In this way, the contribution of the public through the consultation process can help orient thinking, stimulate further work, keep the focus on practical considerations and lead to the refinement or modification of positions taken during the course of an inquiry.[6]

In addition to this broad benefit, public engagement also provides detailed technical advice by relevant professionals. A law reform body such as the ALRC is periodically thrown into different areas of law by the receipt of new references from the Attorney-General. A quick perusal of a list of the Commission's past reports shows that the topics vary widely from quite technical references (such as marine insurance – ALRC 91) to those of broad social policy (such as equality before the law – ALRC 69).[7] The references also span many different fields from commerce, to medicine, to crime. It is important that the ALRC be able to 'skill-up' quickly in difficult and diverse areas of law. The establishment of an advisory committee – a panel of experts – at the commencement of each reference is an important part of this process. The consultation program is another important plank. In the genetics reference, the ALRC and AHEC have been able to draw on the technical advice of leading Australian geneticists, bioethicists, privacy and discrimination lawyers, and so on. Moreover, the establishment of links with relevant overseas bodies has facilitated the flow of comparative material into the inquiry's processes of deliberation. This has been enhanced by a modest program of consultations in Europe. For the purpose of assessing the 'global dimensions' of these issues, as the terms of reference require us to do, further consultations are planned for the United Kingdom and North America.

A further benefit of public consultation is that it helps to identify competing interests in relation to any proposed reform. The methodology of law reform is generally one of analysing the relevant law, identifying its weaknesses, considering alternative models of regulation, documenting community and expert opinion in relation to those models, and providing a carefully reasoned argument in favour of a preferred approach. This methodology has considerable advantages for government – it enables different groups to comment on proposed reforms and it permits an examination of different ways in which a desired end can be achieved *before* governments commit themselves to a particular legislative program.[8] This is not always possible when reforms are developed within government departments. The process undertaken by law reform agencies can make the passage of reform initiatives smoother for government, and therefore more achievable, because the interests of different groups are already known and have been assessed.

Effective reform outcomes

Public consultations also play a key role in ensuring that suggested reforms are effective in practical terms. Sometimes the mere fact that a law reform body is inquiring into a particular field and soliciting public opinion on reform encourages changes in current practices. Benson and Rothschild, writing of the experience of Royal Commissions of inquiry, have remarked that the 'fact that a [review] has been appointed creates a climate of opinion which can often be effective in bringing about changes of thought and attitude ... which would not have happened if the [review] had not been appointed. Some hold the view that this is the major benefit ... and is of more practical value than the subsequent decisions which may or may not be taken.'[9]

It would be potentially misleading to claim that the inquiry into the protection of human genetic information has precipitated identifiable changes in the practices of key stakeholders. However, it is worth noting that contemporaneously with this inquiry the life insurance industry, under the auspices of its peak professional body, the Investment and Financial Services Association, has been reviewing its policy on the use of genetic information in assessing risk for mutually rated insurance. Similarly, various medical research institutions have been reviewing the nature of the consent forms used in relation to taking genetic samples from human subjects. While such changes may, in some instances, pre-empt the need for ALRC and

AHEC recommendations, they demonstrate the value of the inquiry process in focusing a spotlight on contentious issues of public policy.

An additional attribute of effective reform relates not merely to the initial adoption of changed laws, codes of practice or ethical guidelines, but to the success of those changes in altering practical patterns of behaviour in the longer term. A significant benefit of public participation is that communities may offer a qualitatively better source of policy ideas. As two commentators recently observed, 'policy processes that involve those upon whom they will impact are more likely to gain the support necessary for successful implementation' because the policies are more likely to be relevant to the needs that they purport to address.[10] An example of this in the genetic information reference is the regulation of genetic samples for human medical research. At present, publicly funded research is regulated by ethical guidelines established under the auspices of the National Health and Medical Research Council (NHMRC). Because successful implementation of any reform will depend on the adoption of appropriate ethical practices by medical researchers, it is clearly desirable to seek the views of that constituency in formulating recommendations for reform.

However, it is important to strike a note of caution here. To say that reforms are more effective when they have the support of those affected is not to say that law reform should take place by a process of plebiscite. Public opinion is not always the preferred basis for social action, since the public is sometimes inadequately informed or misinformed about issues surrounding a particular area of law or contentious public policy. On the other hand, it is an important function of a law reform agency to ensure, through the public consultation process, that recommendations for reform are not too far out of step with popular conceptions of morality.[11]

Forms of public participation

The mode of public participation in the law reform process can vary significantly from one law reform agency to another, and from one inquiry to another. The level of resources is a significant factor in the choice of form. Extensive public consultations are expensive, particularity for a national agency such as the ALRC, which must carry out its activities on an Australia-wide basis.

The nature of the inquiry is also important. Some inquiries do not lend themselves to broad consultation with the general community because their subject matter is specialised, technical or narrow.[12] The ALRC's report on the *Judiciary Act 1903*, which was tabled in Parliament in 2001, was such a reference. Although many meetings were conducted with experts in the field during the course of the inquiry, public meetings would not have been useful in grappling with this technical area of 'lawyers' law'. By contrast, the genetic information reference has a very broad base in the community. This is reflected in the formal terms of reference, which charge the inquiry to 'ensure widespread public consultation'.

The most important components of the public consultation program for the genetic information reference have been:

- the 22-member Advisory Committee, which has met twice so far, and the Working Group on Law Enforcement and Evidence, which has met once;
- public meetings, which have been held in every state and territory capital as well as in many large regional centres, including Newcastle, Wollongong, Byron Bay, Townsville, Cairns and Alice Springs;
- submissions from individuals and organisations, of which there are now more than 140; and
- targeted consultations with relevant professionals, organisations, and community groups of which there have been almost 90, involving many hundreds of people.

These elements do not exhaust the available forms of public consultation. In other public policy settings, use is sometimes made of opinion surveys, focus groups and deliberative conferences. However, the methods currently being used for the genetic information reference are both diverse and sufficient for the purposes of the inquiry. It is worth noting that the inquiry has had the benefit of quantitative and qualitative survey data on biotechnology collected by other organisations, such as the federal government agency, Biotechnology

Australia. The findings of those surveys are reported in the Issues Paper.[13]

Effective public consultation, whatever its form, requires substantial effort in getting the message out to the community so that members of that community can provide comment and feedback to the inquiry. In the genetic information inquiry this has been achieved in several ways.[14] The ALRC and AHEC have printed 3,000 copies of the Issues Paper, 9,000 genetics brochures, and 45,000 postcards, which have been widely distributed. In addition, the work of the inquiry has been discussed in at least 130 newspaper articles around Australia, as well as in more than 40 radio interviews and four television interviews. Members and staff have also contributed articles to journals and magazines, delivered conference and seminar papers, and spoken to community organisations (such as Rotary) and educational institutions.

Keys to successful public participation

The success of a program of public consultation does not flow automatically from establishing appropriate *forms* of consultation. The *process* of participation must also be conducive to a full and frank dialogue between the participants and the law reform agency. The most important elements of this process are as follows.

Confidentiality

The law reform process is an open and transparent one. However, despite the importance of openness, it is vital to respect the confidentiality of those who wish to provide information to an inquiry without the fear of public exposure. The strict maintenance of confidentiality could not be more important than in an inquiry such as that on the protection of human genetic information, where people have been willing to share intimate details about their own, or a family member's, medical history or personal circumstances. In practice, the overwhelming majority of submissions are public submissions. To date, over 140 submissions have been received in this inquiry, but only about 20 have been given in confidence.

Continued next page

Issues Paper 26, *Protection of Human Genetic Information*, is the first document to be produced by the inquiry. It is available online from the ALRC's website at <www.alrc.gov.au>, or can be ordered free from the ALRC in hardcopy or CD-Rom format.

Please contact the ALRC with your full contact details, stating which format you require, and we will send an Issues Paper to you.

The inquiry would like to hear your views on any matter relevant to the inquiry. Submissions can be made by post, email or over the phone. Your submission to the inquiry can be kept confidential, if you specifically request this.

A second formal consultation document, a Discussion Paper, is expected to be released in August 2002. This Discussion Paper will contain an indication of the inquiry's thinking in the form of proposals – specific reform options to which the community can respond. The ALRC and AHEC will then undertake a further round of consultations to consider these proposals.

The report of the joint inquiry, containing our final recommendations (with supporting reasoning), is due to be presented to the Attorney-General and the Minister for Health and Ageing on 31 March 2003. Once tabled in federal Parliament the report becomes a public document.

Contact the ALRC/AHEC genetic information inquiry at:

Australian Law Reform Commission
GPO Box 3708
SYDNEY NSW 2001

Ph: (02) 9284 6333; Fax: (02) 9284 6363;
Email: genetic@alrc.gov.au
Website: www.alrc.gov.au

Flexibility

The ALRC and AHEC also have sought to make public consultation more effective by reducing the barriers to public contribution. While parliamentary committees often receive evidence from the public in formal hearings, which may be intimidating to some members of the public, the ALRC has long maintained the importance of allowing multiple channels of approach. Some submissions to the ALRC and AHEC do indeed take the form of lengthy written submissions, addressing nearly every point raised in the inquiry. Other submissions provide the text of detailed published articles or, in one recent submission, a university thesis. At the other end of the spectrum, many submissions identify a single concern through a brief handwritten note, a phone call, or a few emailed dot points.

Staged contribution

Those who are familiar with the law reform process will be aware of the staged approach that is taken to the production of a final report. In the case of the ALRC, this usually involves the production of three separate documents over the life of a reference – an Issues Paper, which outlines the background to the inquiry and the principal issues that it is thought to raise; a Discussion Paper, which provides additional detail and makes tentative proposals for reform; and a final report, which contains the final recommendations to the Attorney-General. This staged approach was pioneered by the English Law Commission in the 1970s and has been described by its first Chairman, Lord Scarman, as perhaps the greatest contribution to the public life of the nation made by the Commission. This process was said to have opened up 'over a wide field the hitherto secret business of preparing legislation for the consideration of Parliament'.[15] A principal advantage of this staged approach is that it calls forth comment and reaction while ideas are in the process of formulation and before they have crystallised into unshakable recommendations. For example, since the genetic information Issues Paper was released in November 2001, a number of submissions have identified significant problems with the regime for DNA parentage testing, which had been dealt with only briefly in IP 26. These are now the subject of detailed investigation by the inquiry. Moreover, once proposals have been formulated and published in a Discussion Paper (expected in August 2002), the public will have a further opportunity to consider the practicality of concrete reform proposals and to make further submissions.

Utilising existing networks

In inquiries that affect individuals or consumers in a direct way, it is sometimes difficult to get the law reform message out to those affected, and to solicit adequate feedback at a grassroots level. This is the common problem of disaggregation of individual interests. The ALRC has found it invaluable in these circumstances to tap into existing networks of communication within the broader community. For example, there is little possibility that the ALRC and AHEC could inform every person who suffers from a genetic disorder about the existence and progress of the genetic information inquiry. However, there are many genetic support networks in Australia that cater to the needs of those with particular disorders – and many of these have international links. In some states, such as Victoria, there are also umbrella organisations that provide a coordination function for the many condition-specific organisations. Through these organisations, the ALRC and AHEC have been able to tap into the experiences of many individuals who might not otherwise be embraced by the public consultation program.

** Brian Opeskin is a Commissioner of the Australian Law Reform Commission. He is working on the joint inquiry into the protection of human genetic information.*

Endnotes

1. M Tilbury, 'The Changing Fortunes of Law Reform Commissions' (1994) 19 Alternative Law Journal 202.

2. T Carney, 'Reforming Child Welfare: Diverting By-ways on the Road to Utopia?' (1985) 18 Australian & New Zealand Journal of Criminology 238.

3. M Lavarch, 'Law in Australia: Continuity, Consultation and Change' (1995) 48(16) Canberra Survey 1.

4. Ibid.

5. P North, 'Law Reform: Processes and Problems' (1985) 101 Law Quarterly Review 338, 339.

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Securing compliance

*By Lynne Thompson**

Defining the focus of the Australian Law Reform Commission's inquiry into the use of civil and administrative penalties has been challenging.

The terms of reference for the inquiry direct the ALRC to consider how best to achieve effective and efficient regulation and supervision and to counter regulatory contraventions with a fair, effective and practical system of decision making and enforcement. The ALRC must consider the balance that ideally should be maintained between the use of the criminal justice system and administrative and civil penalties to deter and punish wrongdoing in regulatory and supervisory regimes.

The ALRC has used the general term 'regulatory penalties' to define penalties imposed for contravention of federal laws. Regulatory penalties are broadly concerned with facilitating social and economic activity. Contravention of regulatory requirements is not necessarily morally wrong, but is punished because it reduces the integrity and efficiency of the regulatory system.

A major concern throughout the inquiry has been the difficulty in categorising penalties as criminal, civil or administrative. While the difference between criminal and civil *penalties* is often simply a question of whether an offender might be sentenced to a term of imprisonment, distinguishing between the *conduct* giving rise to criminal and civil regulatory penalties can be more difficult.

Corporations & the criminal/civil distinction

Defining the nature of contraventions in respect of which regulatory penalties may be imposed has required the ALRC to reconsider the need to retain a distinction between regulatory contraventions with criminal and civil consequences. This distinction is particularly problematic in relation

to corporations since they cannot be imprisoned and demonstration of a 'guilty mind' is difficult to establish.

The idea of the use of civil penalties as a tool for social and regulatory control, particularly in relation to ongoing activities, has some validity. In general, the focus of non-criminal regulatory contraventions is on the physical elements of the contravention – the fact of pollution; or the effect of the contravention; or the distortions in prices – rather than on the intent of the person responsible for the contravention. Non-criminal penalties are particularly suited to contraventions involving corporations because they do not generally require proof of the corporation's intent, and they can have flexibility to address systematic and long-term contraventions as well as imposing punishment for past offences. Non-criminal regulatory offences often lack an essentially 'criminal' element. They are a means of ensuring compliance with government policy

"What needs to be considered further is the use of a greater range of sentencing options, especially in relation to corporate crime."

regulating a wide range of activities that have a public impact, or they are minor breaches of the law.

Most commentators support the need for a criminal/civil distinction. While many caution against the over-use of criminal sanctions because indiscriminate use of the criminal law for non-serious conduct would diminish its value as an indication of society's condemnation, most commentators support its use for the most serious of offences. The ALRC considers there is no compelling reason to do away with the criminal/civil distinction and develop a continuum of offences.

There are cogent arguments in favour of retaining the criminal law for those offences that, in relation to individuals, concern dishonesty or fraud or, in some circumstances, reckless behaviour. The parallels are with the general criminal law. Where individuals have been implicated in corporate criminal behaviour there is a role for criminal prosecutions. For corporations there are sound arguments for use of the criminal law where the behaviour of the corporation has caused, or is capable of causing, significant harm to others.

Some offences described as 'regulatory' nevertheless fall to be dealt with by criminal law if the consequences of a breach are sufficiently serious. The purpose of the use of criminal law in these circumstances is to indicate society's concern about and condemnation of the behaviour of the corporation.

The major formal distinction between civil and criminal regulatory penalties is that only criminal penalties can take the form of imprisonment. Where the regulatory penalty is a financial one, there is no distinction in principle between the purposes of criminal and civil regulatory penalties. Both are imposed in retribution for a contravention of legislation; both are calculated by reference to the level of 'badness' of the conduct and the aim of deterring further such conduct. However, the procedural, social and other consequences flowing from a penalty categorised as civil may be very different from those of a penalty categorised as criminal.

Even if the outcome is really little more than symbolic for the corporation, in that it cannot be imprisoned and would face a monetary penalty whether its conduct were criminal or non-criminal, the use of the criminal law is a mark of its wrongdoing and has implications for the corporate officers who might be charged with aiding and abetting. Examples of serious regulatory offences might be intentionally dumping toxic waste where it will cause harm, or knowingly selling unsafe goods. What needs to be considered further is the use of a greater range of sentencing options, especially in relation to corporate crime.

To ensure that the criminal/civil distinction has integrity, there must be clear principles determining where it is appropriate for legislators to provide for criminal penalties for regulatory contraventions. The ALRC cautions about the use of the criminal law for regulatory penalties unless the conduct being proscribed is regarded as deserving of moral censure – either because of its parallels with the general criminal law or because of the seriousness of its effect.

The role of fault

Criminal offences should generally depend on proof of the necessary mental state or the commission of an act so serious that parliament is prepared to make it a strict or absolute liability offence. Penalties should also be identified as 'criminal' where a prison sentence may be imposed as part of the punishment, or where a prison sentence may follow a failure to pay a pecuniary penalty.

Unless there are compelling reasons to make fault an ingredient, the general principle should be that a non-criminal regulatory contravention should consist only of a physical element. If fault is to be an element, the ALRC recommends that, unless there are strong reasons otherwise, it should be recklessness or negligence. The chief focus of penalties for such contraventions should be to promote compliance with the relevant legislation by deterring the offender and others from non-compliance.

Civil penalties — a role for punishment?

Generally, penalties serve a variety of purposes such as punishment, specific or general deterrence, compensation, protection, education, and most serve more than one. An issue is how far penalties for non-criminal regulatory offences should be used to punish.

It has been argued that the increasing availability of civil penalties is a means of imposing penalties equivalent to criminal fines in circumstances where there are difficulties with proving intention, and the procedural defences and protections afforded to defendants are reduced. Civil monetary penalties are not necessarily lower, and are sometimes higher, than criminal penalties. The more a penalty is seen as having retributive elements, the more the courts will seek, with good reason, to insist on procedural protections equivalent to those afforded by criminal procedure. However, if the aim of a penalty is ultimately to compensate loss or to require a disgorgement of profits, there is less concern about procedural protections such as the privilege against self-incrimination, as this looks more like a traditional civil action.

Because penalties in the criminal arena increase with the perceived seriousness of an offence, reflecting a wish to demonstrate retribution and moral opprobrium, there is an understandable perception that the higher the civil penalty, the higher the element of retribution, particularly where the penalty is not obviously linked to the damage that has been caused or the profit that has been made.

Equally, where retribution is not regarded as the purpose of the penalty, even though the outcome may be serious, the courts are less likely to move towards quasi-criminal procedural protections. Although the focus of 'general deterrence' is to influence the behaviour of others in the regulated community, it is difficult to escape the conclusion that 'specific deterrence' has some punitive aspects. The penalty is set at a level such that the offender will be deterred from repeating the conduct. In both cases, it is important to maintain the integrity of the penalty scheme by ensuring that any penalty is proportionate to the offence.

Corporate and individual defendants

The growth in the use of civil penalties can be ascribed in part to the difficulties with corporate prosecutions: imprisonment of the corporation is not possible and, if the corporation has no body, mind or soul, a criminal punishment cannot serve its true shaming purpose. One issue for the ALRC, therefore, is whether to recommend a distinction between corporate defendants and individual defendants, reserving the criminal law for individuals who are reckless or intentionally dishonest intending to gain an advantage but using civil penalties for corporate defendants. This would both recognise the role of individuals in corporate misconduct and also give individuals the procedural protections of criminal proceedings that, it might be argued, are not necessary for corporate defendants.

Procedural consequences

Another major issue identified by the ALRC is the procedural consequences of classification of regulatory penalties as criminal, civil or administrative. There

are a number of distinctions between criminal and civil actions both in the proceedings themselves and in the consequences that follow. Perhaps the most important difference is that criminal proceedings result in a criminal conviction with the attendant consequences. The consequences of a criminal conviction are far more serious for individuals than for corporations, not only because a corporation cannot be imprisoned, but also because of the ramifications for an individual of a criminal conviction in matters such as holding public office or corporate directorships. Additionally the stigma of a criminal conviction falls more heavily on an individual. However, the ALRC's consultations have revealed support for maintaining criminal liability for corporations as well as for individuals.

The difficulty arises then in determining how corporate culpability should be demonstrated and how penalties imposed on corporations can have a 'shaming' element. The use of adverse publicity orders has been suggested. Many commentators criticise the reliance on monetary penalties as the dominant form of corporate penalty.

As part of its inquiry into the use of civil and administrative penalties in Australia, the ALRC has published a Discussion Paper, *Securing Compliance: Civil and Administrative Penalties in Federal Regulation.*

The Discussion Paper is free. It is available online at <www.alrc.gov.au> or in CD or book format by contacting the ALRC.

The ALRC invites submissions on the issues raised and preliminary proposals for reform contained in the Discussion Paper.

For further information, see the ALRC website, or contact us:

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The ALRC considers that there is a need to ensure that a range of penalties is available to ensure that corporations are sanctioned appropriately.

Choice of proceedings

Much of the legislation under review in the inquiry allows criminal and civil proceedings to be undertaken simultaneously or sequentially in respect of the same conduct. The need to prove fault, or the mental element, is usually an important difference between criminal offences and civil contraventions, with criminal proceedings generally requiring proof of the mental element making up the offence together with the relevant physical element.

Where legislation distinguishes between criminal offences and civil contraventions on the basis of fault, the ALRC believes that it is important that there be transparent and clear guidelines governing the choice of proceedings and proposes recommending that regulators make such guidelines available through websites and other publicly accessible means. Similarly, to avoid confusion, the ALRC proposes recommending that where parallel or sequential proceedings are possible, there should be no role for fault as an element in the non-criminal regulatory contravention. That is, in the case of parallel or sequential proceedings, the non-criminal contravention should be made up of the physical element only.

Fairness

The Discussion Paper sets out the ALRC's proposed approach to applying general principles of fairness to penalty schemes. What has become clear from the ALRC's review of federal penalty schemes is that the increasing use of administrative penalties raises significant issues about fairness in the processes used to impose and determine penalties.

Issues of particular concern to the ALRC include the availability of guidelines as to how penalty powers will be exercised in order to allow members of the regulated community to clearly understand the regulator's expectations about compliance. Guidelines may also facilitate consistent exercise of discretion by regulator staff.

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ALRAC 2002: *Expansion or Contraction?*

Darwin 18-21 June 2002

Preparations for the Australasian Law Reform Agency Conference in Darwin, to be held on 18-21 June 2002, are now well advanced. The theme *Expansion or Contraction?* has already attracted interest. Law reform agencies should always be ready to justify their existence. Quite plainly and bluntly, if they cannot do so they should not exist.

The organisers are confident that those attending the conference will come away with an increased awareness of the importance and usefulness of law reform agencies and, to that end, an impressive array of speakers from Australasia and other parts of the common-law world will assembly in Darwin. In addition, it is hoped that the suggestion for the formation of an Association of Commonwealth Law Reform Agencies, which found favour at the Perth Convention in 2000, will move forward to a successful conclusion.

We are particularly delighted that the Lord Justice-Clerk of Scotland, the Honourable Lord Gill, has agreed to deliver the keynote speech on 'Law Reform Issues for the 21st Century'. His Lordship has been a lecturer in law, and has actively practised at the Scottish and English Bar, taking silk in 1981.

He is the author of numerous articles in legal journals, is author and editor of legal textbooks, has been Chairman of the Scottish Law Commission and now occupies the distinguished office of Lord Justice-Clerk of Scotland.

Many other distinguished judges, jurists and practitioners will be attending and their names, achievements, and the subject on which they propose to speak are set out in the brochure which is being distributed widely throughout legal circles. If you have not received a conference brochure, please contact:

Convention Catalysts International
GPO Box 241
DARWIN NT 0801

Email:
<convention.catalysts@norgate.com.au>.

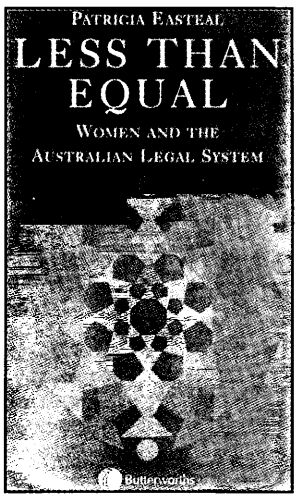
Another highlight of the conference will be a presentation by Lieutenant-General Peter Cosgrove, who will speak to delegates on army and defence matters. Lieutenant-General Cosgrove is well-known, well-liked and greatly honoured in Australia for his inspiring leadership of the INTERFET forces in East Timor. He has had a most distinguished military career, and the ALRAC conference organisers believe this interlude, in which the delegates can move away from the main conference theme to an unrelated but highly significant subject will allow delegates to gain a broader view of their host country and add to the variety of recollections with which they will depart.

Darwin is at its best in June and we can guarantee warm tropical days and cool tropical nights. We believe delegates will find the conference relevant and significant, but also friendly and enjoyable. We look forward to introducing you to Darwin – a vigorous, cosmopolitan and fascinating city.

– Northern Territory Law Reform Committee

Reviews

Less than Equal: Women and the Australian Legal System by Patricia Easteal, Butterworths, 2001; pp254; $49.00.



Less than Equal discusses Australian women's experiences with the law as victims of crime, defendants, parents, workers and members of the legal profession. Easteal takes a sociological rather than strictly legal approach to the topic, focusing on the cultural perspectives, language and power relationships that operate within Australian society throughout the different areas discussed in the text. Easteal aims to identify the cultural context of law, challenging its basis in European, middle class, male experiences. Topics covered include the treatment of women who kill violent partners, single parent payment fraud, sexual assault law reform and the effectiveness of anti-discrimination legislation.

As this is a lot of ground to cover, the chapters are reasonably brief, serving to highlight key issues, and with a strong emphasis on documenting case studies and individual stories. Easteal has written extensively in the area of rape law reform and this chapter is particularly strong. Her inclusion of a chapter on single parent fraud is timely and interesting and an area of women's interaction with the law that is sometimes overlooked in a publication of this sort.

Easteal's final chapter outlines many of the steps needed to change women's less than equal experience of the law. These include:

- challenging so-called 'objective' legal tests, such as the 'reasonable person';
- educating jurors, judges and practitioners so that they are better able to place themselves in the 'multi-faceted shoes of the accused';
- reforming legal processes to allow for easier arrangements to obtain domestic violence orders and greater access to interpreters; and
- placing domestic violence within a criminal law, rather than private, context.

The book is intended not only for students and academics but also for the general public. However, Easteal's cultural studies vocabulary may limit the book's accessibility, for example, her use of terminology such as the 'dominocentric kaleidoscope'. On the other hand, the use of diagrams and breakout boxes greatly enhances the text's readability.

Less than Equal succeeds in identifying how gender and cultural stereotypes interact with the Australian legal system and impact on women's experience as defendant, victim or practitioner. In doing so, it also provides a thorough and up-to-date overview of case law, legislation and personal experiences across all the areas it discusses. The exercises contained at the end of each chapter are thought provoking and useful. *Less than Equal* would be an excellent resource for students and academics, as well as being of interest to practitioners and general readers.

– Kate Connors

Cannabis & Cancer: Arthur's Story by Pauline Reilly, Scribe Publications, 2001; pp110; $19.95.

While the subtitle of this book is 'Arthur's Story' it is also the story of his wife Pauline Reilly and her quest to relieve his pain and suffering in the final stages of prostate cancer. This quest led the Reillys to cultivate marijuana plants in their garden and make cannabis biscuits, even though they knew it was illegal. The book operates at two levels – on one level it is Arthur's story of his illness and rejuvenation once the effects of the biscuits took hold. On another level it describes the Reillys' campaign to have cannabis decriminalised for medical purposes, particularly for pain relief. Following Arthur's death in November 2000, Pauline continued with her research and lobbying for decriminalisation.

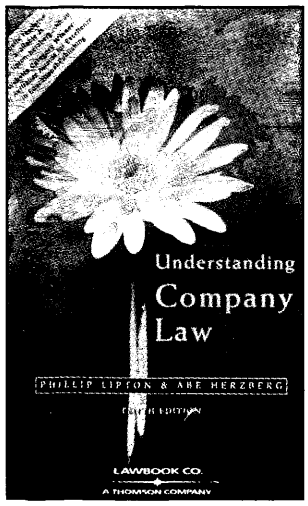
The book is extremely easy to read and not very long at 110 pages. Each chapter contains boxed information about various aspects of cannabis use and control, such as the historical use of cannabis as a pain reliever, types of cannabis, the movement to reform the law regarding cannabis use and the opinions of various experts. There is also a list of references at the end of the book.

I would recommend this book to anyone interested in the decriminalisation of marijuana and health law and policy.

Postscript: In February 2002, the United Kingdom government announced it was studying the use of cannabis as a painkiller and had set up trials to assess the use of cannabis in people with multiple sclerosis and post-operative pain.

– Toula Louvaris

Understanding Company Law (10th edition) by Phillip Lipton & Abe Herzberg, Lawbook Co. 2001; pp778; $94.60.



This is one of the new breed of law textbooks, and a vast improvement on those I encountered at law school in the mid 1990s. The textbook is published in conjunction with a website resource at <www.lipton-herzberg.com.au>, which in itself is very valuable for anyone studying or researching company law.

The book's structure is familiar and logical, shadowing the structure of the legislation to a large extent. Its real strength is in the way information and exercises are presented. Each chapter begins with a short list of 'Key points' – perfect for starting one's exam revision notes – and topics are divided into succinct and logical subheadings. These are indeed so succinct that paragraph numbers are not necessary and are not used.

The writing style is clear and uncluttered, outlining the salient points and the context in which they take place. The integration between text and website allows the text itself to provide a very readable overview of the law and cases, while the website links scattered through the text provide layers of information and analysis for those wanting to take a topic further.

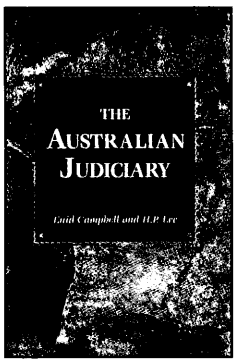
The other major use of the website is to facilitate students' practical engagement with the requirements of corporations law. Students are asked to answer questions on practical issues such as registration requirements, or on topical questions such as developments in views of directors' duty of care, and encounter links that direct them to appropriate pages within websites.

It might be argued that this approach is akin to 'spoon-feeding' students, and I confess to feeling some twinges of envy as I looked through these materials. It certainly represents a great deal of work by the

authors in the interests of making things easier for students. But I wholeheartedly approve. This book and the associated website provide an accessible and well thought out introduction to a difficult and very important topic, and at the same time to the increasingly large and complex world of internet research. Anyone using these materials will emerge with an understanding of the elements of company law and something of its practical effects, and an awareness of the range of useful information on the internet and how to find it. That has to be a good thing.

– Helen Dakin

The Australian Judiciary by E Campbell and H P Lee, Cambridge University Press, Victoria, 2001; xxii + 298pp; $75.00



A drafter of the United States Constitution, Alexander Hamilton, once described the judiciary as the weakest of the three branches of government – one in continual jeopardy of being overpowered by the executive and the legislature. Yet, despite its proclaimed weakness, the courts have long formed an elemental part of our system of government. Their capacity to invalidate both legislative and executive action, when measured against the yardstick of the Constitution, ensures their continued importance, as well as the inevitability of controversy.

Despite the patent institutional importance of the courts, there has been surprisingly little academic writing in Australia until recently about the way in which courts discharge their functions. This dearth is particularly apparent when viewed against the stream of literature emanating from the United States investigating every facet of judicial life.

Australian judges have, of course, been frequent contributors to law journals on particular aspects of the judicial function, especially the importance of judicial independence. Moreover, a number of institutions (such as the Australian Institute of Judicial Administration) have begun in recent years to explore practical aspects of the administration of justice. Yet, until the publication of *The Australian Judiciary*, little had been published by way of comprehensive study. This study, by two eminent constitutional lawyers, provides a well-crafted, interesting analysis of the judicial branch from a uniquely Australian perspective.

The book is wide-ranging in scope. Its core chapters examine the role of judicial independence in maintaining public confidence in the judiciary; the manner in which judges are selected and appointed; the way in which they may be disciplined or removed from office; the contribution of judges to the community through non-judicial professional work; the web of laws designed to protect judicial institutions; and the ways in which judges are accountable for their conduct.

This book has been published at a time of changing public attitudes toward the courts and judges – attitudes that are more questioning and less respectful than in times past. In the introduction to the book, the Australian Bar Association is quoted as saying: 'The institutions of a democratic society require careful guardianship. Even Australia, with its rich democratic tradition, cannot assume that the foundations of its liberty are impregnable.'

Current events continue to demonstrate the veracity of this assessment. In March 2002, Australians witnessed an extraordinary attack by a Senator on the integrity of a Justice of the High Court. The accusations, made under the cloak of parliamentary privilege, were soon proved false and elicited an outpouring of public support for the judge in question. The incident may have done more harm to the institutions of Parliament than to those of the judiciary, but there is danger nonetheless in the gradual leaching of public support for key institutions. Campbell and Lee prophetically identify the nub of the matter in saying that any erosion of judicial independence must be viewed with great concern because the judiciary is pivotal to the functioning of the Australian democracy.

The authors of this book modestly state that their principal aim is to contribute to a better understanding of the Australian judiciary. This they certainly achieve. Their excellent book deserves wide readership within, but most especially beyond, the Australian legal profession.

– Brian Opeskin

Continued from Page 1: 'Comment'

The Australian Law Reform Commission is currently undertaking a major inquiry into the protection of human genetic information (conducted in association with the Australian Health Ethics Committee of the National Health and Medical Research Council), involving difficult ethical, social and legal issues raised by the rapid advances in genetic science and technology.

At public meetings around Australia, we have witnessed both strong public support for cutting-edge medical research that promises exciting medical breakthroughs in the diagnosis and treatment of serious diseases – as well as fears about the loss of control over the ethical and commercial boundaries of scientific research, and the potential for increased discrimination and loss of privacy.

The basic task for this inquiry is to strike a sensible and workable balance which recognises the need to foster innovations in genetic research, technology and practice serving humanitarian ends, while at the same time providing sufficient reassurance to the community that such innovations are subject to proper ethical scrutiny and control.

Although we have a long way to go, it is safe to say that meeting these challenges effectively will involve a mix of strategies and approaches. No doubt this may include some new or amended laws, but it also will require official standards and codes of practices (such as those promulgated by the NHMRC and the Privacy Commissioner); industry codes; better coordination of governmental (and intergovernmental) programs; a great deal of public and professional education; and, at all stages, mechanisms for involving the common sense of the community.

Before the explosion of legislation (and subordinate instruments) in relatively recent times, the 'common sense of the community' had a much greater role to play in social regulation – whether expressed as the development of the common law or jury decisions in English-speaking Western societies, or as customary law in more traditional societies.

The integration of customary laws and processes into inherited, formal, Western legal systems has been a major challenge for post-colonial societies, including most of the Pacific Island states, as well as Asian countries which recognise a role for Islamic Sharia law. The issue is also an important one for Australia, and for the advancement of the reconciliation process – with one question being the status and role of Aboriginal customary law and community justice mechanisms.

Following a long and detailed inquiry, the ALRC published its two-volume report on *The Recognition of Aboriginal Customary Laws* (ALRC 31) in 1986. No government since that time has responded to the report or the many recommendations contained in it. This is clearly not for any lack of public interest, however.

The ALRC's latest website usage statistics for the three-month period to November 2001 show nearly 33,000 'hits' downloading material from ALRC 31. Despite the age of the report, this means it is the ALRC's most requested document by a very long way – outstripping by a factor of four or five each of the next most-requested documents: ALRC 26 on evidence law; ALRC 92, the recent review of the *Judiciary Act*; ALRC 69 on women and equality before the law; and ALRC 89, the *Managing Justice* report. (Tellingly, the ALRC-AHEC Issues Paper on genetic information made the top 10, despite being available for only the last two weeks of the survey period.)

It is now commonplace for Western political leaders to lament the loss of social cohesion, and the decline of the family (and 'family values'), religion and the sense of community. Similarly, indigenous leaders have called for a greater role for customary law and processes in improving the quality of life in Aboriginal and Torres Strait Islander communities.

Resistance to this stems from two areas of unresolved tension. First, there is the conflict between communitarian and individual rights approaches to law and social regulation. This imposes a basic political and ethical choice – what sort of society do we want, and what are we willing to give up to have it? If greater emphasis is placed on group and community rights, we may get more social order and cohesion, but at the expense of the individual rights that have underpinned the basic social, legal and economic structures in the liberal Western democracies since Magna Carta. At a time when Western political philosophy overwhelmingly tilts towards small government, human rights,

free trade, privatisation, entrepreneurship, and so on, there is little or no prospect of a basic, society-wide shift towards more communal approaches. (Of course, there always will be sensible, targeted exceptions, such as Australia's community-rated system of private health insurance.)

So could there be greater experimentation with group or communal responsibility at the local level? It should be possible to develop community justice mechanisms that do not unduly infringe upon the basic human rights guaranteed to all Australians. However, there is always the perceived threat (at least) of legal pluralism becoming a divisive factor, in contrast to the unifying force of the common law and formal Western legal institutions. In ALRC 31, the Commission was careful to distinguish the position of indigenous communities in Australia, which pre-exist the advent of Western law, from the position of all other migrant communities in Australia – whose voluntary arrival may be said to amount, in effect, to acceptance of the existing legal regime, subject only to the general right to pursue reform through the ordinary political processes.

The many authors in this edition of *Reform* are to be congratulated for providing much food for thought about these difficult, but important, jurisprudential issues.

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the *Reform Roundup* section of the journal, starting on page 74, for further information.

Confiscation that Counts – ALRC 87

The Proceeds of Crime Bill 2001, largely based on the recommendations on ALRC 87, was distributed for public comment prior to introduction to federal Parliament in September. A slightly modified version of the Bill was re-introduced in March 2002 as the Proceeds of Crime Amendment Bill 2002 (the earlier Bill having lapsed as a result of the 2001 federal election) together with a miscellaneous amendments Bill. Passage of these Bills would result in substantial implementation of the recommendations in ALRC 87. The Bills were referred for inquiry to the Senate Legal and Constitutional Legislation Committee – a report from that Committee was expected in April 2002.

Personal Property Securities – ALRC 64

The ALRC released an interim report on personal property securities in 1993. The report was widely criticised by legal practitioners and the finance industry. Some of this criticism related to minor technical aspects of the report. However, a substantial portion of the criticism disagreed with the Commission's approach in two areas: the use of a functional definition to determine exactly what is a security and the Commission's decision to depart from Article 9 of the United States Unified Commercial Code, which has provided the basis for legislative reforms in several other countries. Many critics argued that departing from Article 9 required unnecessary effort and posed an unnecessary risk.

Since that time the US Unified Commercial Code has been revised, and there has been ongoing debate regarding the most appropriate reform. The Banking and Financial Services Law Association of Australia and New Zealand (BFSLA) has taken a leading role in the debate and, together with the Banking and Financial Services Committee of the Business Law Section of the Law Council of Australia, has drafted a Personal Property Securities Bill which is based on the revised US law. Professor Anne Finlay from the ALRC will attend a workshop at Bond University in late April to discuss the Bill. The workshop will be attended by members of the BFSLA and the Law Council of Australia, together with representatives from the Standing Committee of Attorneys-General and a number of law reform agencies, including those of New Zealand, the United Kingdom and Canada.

Continued from page 10: 'Not just payback: indigenous customary law'

Endnotes

1. G Yunupingu, AM, We know these things to be true, 3rd Lingiari Memorial Lecture, 20 August 1998.

2. M Kirby, Guest of Honour program (January 1980) ABC Sydney.

3. Australian Law Reform Commission, The Recognition of Aboriginal Customary Laws ALRC 31 (1986) Australian Government Publishing Service, Canberra.

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