queensland laws vs aboriginal rights

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A lot can be said about Queensland's laws for Aborigines and Islanders. They effect a lot of people – about 50,000 – in a lot of important ways. I have, in fact, said a lot about these laws in a report for the International Commission of Jurists (Australian Section) and published under the title "Out Lawed. Queensland's Aborigines and Islanders and the Rule of Law". My detailed reasoning can be found there. Here I shall try to present a few of my conclusions on the situation as I see it at present.

Consultation, Enactment and Commencement

The Acts were passed in December 1971. They were passed too quickly. Most Parliamentarians had the Bills for less than a week. Non-parliamentarians had even less time to consider the Bills before they were passed. Were the Aborigines and Islanders consulted? The Minister, Mr. Hewitt, said in Parliament that the Bills had been drafted after consultation with the chairmen of reserve councils who were "totally representative of the people" to be affected. But there is considerable doubt whether these chairmen actually saw drafts of the Acts – Senator Bonner didn't. And, anyway, the chairmen only represent reserve communities (to the extent they do that) whereas the Acts also effect many people who do not live on reserves.

Strangely, having been rushed through Parliament, the Acts were allowed to sit on the shelf for a year until their commencement was gazetted on December 2nd 1972. One wonders why they remained in limbo for so long, and also, whether it is only a coincidence that the gazettal date was the same date as the Federal elections which returned the Labor Government to office?

The McMahon – Bjelke-Petersen Memorandum

Mr. McMahon as Prime Minister had taken a softer line with the Queensland Government about its Aboriginal laws than his predecessor, Mr. Gorton, had done. In April 1971 Mr. McMahon and Mr. Bjelke-Petersen agreed on nine points to be observed in the framing of the new laws. Of these nine points, four were not fully implemented in the new Acts: (1) the new Acts did not give control of access to reserves by

new Acts did not give control of access to reserves by reserve councils — the Administration retained veto powers. (2) They did not give freedom of choice to Aborigines and Islanders whether to have their property and earnings managed by the Department — freedom of choice was given only for the future; people whose property was under management under the 1965 Act continued under the new Acts; and they could not opt out without the Director's consent, subject to reference to a Magistrate. (In November 1974 the Queensland Parliament did give a right to opt out.) (3) Similarly the Acts did not give freedom of choice in transactions — there are strong Departmental controls over transactions by people under property management; and also new control powers effecting people whose property is not being managed. (4) And residents on reserves were not given full freedom of choice whether to have a liquor canteen — the Department, again, retained control powers.

On the other hand, four of the points were fulfilled:

1) The Torres Strait Islanders were given a separate Act.
2) S.4(1) (ii) of the Vagrancy, Gaming and Other Offences Act was repealed which made it an offence to lodge or wander in company with any Aboriginal native.
3) More significantly there is, now, freedom of movement off reserves — it is no longer an offence to "escape" from a reserve.
4) The McMahon — Bjelke-Petersen memorandum promised that special consideration would be given to wage rates for inexperienced, slow or retarded Aboriginal workers. The Act says nothing on this score but the regulations make provisions which appeared to be reasonable.

As to the ninth point, it is hard to say whether it was fulfilled or not. It promised review of Aboriginal and Islander representation on reserve councils. To promise review, promises nothing further. The Acts say nothing. But the regulations provided that three of the five members of the Reserve Councils shall be elected. Previously it was two out of two. I suppose this was an advance. (In April 1974 the Queensland Government gazetted new regulations which, for the future, provided that reserve councils should be fully elective).

There were other good things about the new Acts. The 1965 Act defined four categories of Aborigines, two of part-Aborigines and four categories of Islanders, and did so by clumsy and unscientific references to "preponderance" or "strain" or percentages of "blood". This is now abandoned.

Another good thing is the departure of the old Regulation 70. This allowed for six months dormitory detention — renewable — to be imposed on reserve residents for offences against discipline (defined broadly), escaping, immoral acts, etc. etc. It would be hard to find a more arbitrary power outside the statute books of South Africa and the Soviet Union, and its

books of South Africa and the Soviet Union, and its departure is welcome.

power

What remains? If you look at the Acts they tell too little. One serious complaint about the Acts as enacted by Parliament is that they delegate power too extensively to the Administration, with inadequate prospect of any real Parliamentary control. Whether the Acts are to continue beyond five years is left to proclamation by the Governor in Council. Neither Acts nor regulations indicate who "the trustee of the reserve" is to be — yet important powers are vested in this mythical officer in regard to mining on reserves. The Governor in Council decides what happens to profits of the Island Industries Board. The establishment, powers and constitution of Aboriginal Councils and the whole matter of Aboriginal courts are left entirely to regulations. The Director is delegated major powers concerning disposition of the estates of deceased or missing Aborigines and Islanders.

human rights

The main source of complaint that remains is a series of major and minor violations of fundamental human rights as defined in the Universal Declaration of Human Rights and successive pronouncements by bodies such as the I.C.J.

Some examples: No one has a duty to remain on a reserve, and that's a good thing. Conversely, no one has a right to stay there. In Debate the Minister suggested that people already living on reserves would not need a permit, but the Acts clearly provide to the contrary. Residence is a privilege, revocable at any time by the Administration. This situation infringes Article 9 of the Universal Declaration of Human Rights — "No one shall be subjected to arbitrary exile". Article 12 "No one shall be subjected to arbitrary interference with his ... family" and Article 13(1) recognising "freedom of movement and residence within the borders of each state".

Aborigines on reserves can still be required to work for token wages. Provisions for Departmental management of property and earnings, and for Departmental disposition of estates of deceased or missing Aborigines or Islanders, infringe Article 17(1) "everyone has the right to own property ... (2) No one shall be arbitrarily deprived of his property". Article 23(2) "Everyone, without any discrimination, has the right to equal pay for equal work. (3) Everyone who works has the right to just and favourable remuneration ...". Further there are strong fears among Aborigines and Islanders, apparently well-based in some instances, that they are actually cheated of their earnings in the administration of the Trust system.

Transactions entered into by Aborigines and Islanders whose property is being managed must be approved and witnessed by Departmental officers. Agreements made by people whose property is not being managed may be cancelled or varied by the Director. The purpose is to

by people whose property is not being managed may be cancelled or varied by the Director. The purpose is to protect blacks, but the powers are so wide, and so subjectively worded, that it will probably be very difficult to persuade anyone to enter into any sort of agreement with an Aboriginal or Islander, no matter how beneficial it may be.

Provision for Aboriginal courts would not be accepted by white Australians. The constitution, jurisdiction, procedures and appeal are left to be dealt with by regulation. Article 11(1) of the Universal Declaration of Human Rights is violated in that representation is permissible "subject to the consent of the court". The courts are part of the closed reserve system and can deal with matters which, elsewhere in the State, would come under very different patterns of adjudication — a departure from Article 7's promise of equality before the law. And it is hard to say that Article 10's ideal of an independent and impartial tribunal is met by a court consisting of unsalaried J.P.s from a closed community or of the Council for such a community. There is a right of appeal to a District Officer. The District Officer will frequently be the clerk of the Magistrate's Court.

discipline

Lastly let me talk about discipline.

Disciplinary offences are created both by regulations and by-laws.

Regulations: *Regulation 11 Aborigines/ 7 (Islanders) requires every resident on or visitor to a Reserve or community to "conform to a reasonable standard of good conduct and refrain from 'any behaviour detrimental to the well-being of other persons thereon".*

Regulation 10/8 requires residents and visitors to "obey all lawful instructions of the Director, District Officer, Manager, Councillors or other officers of such Reserve or Community".

Regulation 12/9 provides that every resident or visitor who does "any act subversive of good order or discipline on such Reserve or Community . . . shall be guilty of an offence".

Regulation 14/11 requires that a person authorised to be on a Reserve "shall conduct himself properly and to the satisfaction of the Aboriginal/Island Council and Manager or District Officer . . ."

Regulation 15/12 provides that "a person shall not bring or attempt by any means whatsoever to bring on to a Reserve or Community anything which in the opinion of the Aboriginal/Island Council, Manager or District Officer is likely to disturb the peace, harmony, order or discipline of such Reserve or Community".

Such provisions are excessively broad and excessively vague, and some might well be void for uncertainty. The International Commission of Jurists in its Declaration of Delhi (1959) insisted that "it is always important that the definition and interpretation of the law should be as certain as possible, and this is of particular importance in the case of the criminal law, where the citizen's life or

certain as possible, and this is of particular importance in the case of the criminal law, where the citizen's life or liberty may be at stake". This aspect of "the rule of law" is clearly infringed by some at least of the regulations noted.

By-Laws. *By-laws can be a further source of disciplinary regulation. It is instructive to consider a slection of the by-laws which, apparently, take a standard form for all Aboriginal reserves:*

Chapter 3 — *"All able-bodied persons over the age of fifteen years residing within the Community-Reserve shall unless otherwise determined by the Manager perform such work as is directed by the Manager or person authorised by him".*

Chapter 4.1 — *"A person . . . shall not:*

(h)carry tales about any person so as to cause domestic trouble or annoyance to such person".

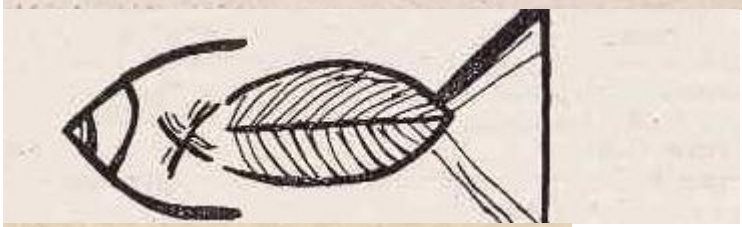
Chapter 6.10 — *"A householder shall wash and drain his garbage bin after it has been emptied by the collector. If necessary disinfection of the bin by the householder may be directed by an authorised person".*

Chapter 8.3 — *"The occupier of a building shall not use the building nor permit the building to be used for any improper, immoral or illegal purpose".*

Chapter 8.6 — *"A householder shall allow an authorised person to enter his house for the purpose of inspection".'.*

Chapter 9.3 — *"A person using a gate or any other opening in a fence capable of being closed shall close it unless instructed by an authorised person to leave it open".*

Chapter 10.1 — "A person swimming and bathing shall be dressed in a manner approved by the Manager".



Chapter 13.2 — *"A person shall not use any electrical goods, other than a hot water jug, electric radio, iron or razor, unless permission is first obtained from an authorised officer".*

Chapter 24.3A — *Parents shall bring up their children with love and care and shall teach them good behaviour and conduct and shall ensure their compliance with these By-Laws".*

Some of the By-laws might conceivably be justified as a code of community conduct. But they are more than that. Reg. 46(a) and (b)/reg. 22(a) and (b) vest jurisdiction in Aboriginal and Island courts to adjudicate on complaints of offences against both Regulations and By-Laws.

Quite apart from the issues of morality and justice at stake, as represented by the Universal Declaration of Human Rights, it is difficult, at a pragmatic level, to contemplate a regime less calculated to achieve the objectives so often avowed by the Queensland Government for its Aboriginal and Island citizens. The administration of Aboriginal reserves in particular has in the past created, not independence, but a repressive and demoralised dependence. The laws may have been not only unjust, discriminatory and wrong, but also ineffective to achieve their declared goals. The new legislation offers some improvement, but only marginally. It seems predictable that administrators will proceed in much the same way as they have done in the past, and that residents of Reserves will respond accordingly.

developments

As mentioned above, in 1974 the Queensland Government itself moved to improve the situation. In April it gazetted new regulations which provided that, for the future, Aboriginal Reserve Councils should be fully elective. In 1971 it had flatly refused to accept an Opposition amendment to this effect.

More significantly, late in the year the Queensland Parliament enacted the Aborigines Act and Torres Strait Islanders Act Amendment Act 1974. It repeals the provisions in the 1971 Acts for termination of property management, and it is now provided that an Aborigine or Islander "if he desires to do so, may terminate the management of his property" . . . in accordance with this section. Sub-section (2) sets out the procedure — the Aborigine or Islander can terminate management of his property simply by giving the district officer concerned notification that management is terminated. The notification shall be in writing and signed by the Aborigine or Islander by signing or making his mark witnessed by a Justice of the Peace.

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The intention seems fine. Any Aboriginal or Islander now has the right to opt out of the system of property management. Is this enough? It should be enough for those (if any) who, under the 1971 Acts, or earlier, gave initial consent to the Departmental Management of their affairs and now choose to withdraw it. But the 1971 Acts also continue the system for those people whose property was being managed prior to the commencement of the 1971 Acts and their consent was not necessary to the assumption of property management. Now they may indicate that they wish management to cease. Should they have to? Or should no person's property be managed for him unless he has given his positive consent? The Australian Government takes the latter view, and there is much to be said for it. From this point of view the new Queensland provision does not go far enough.

I have another reservation, a reservation about the procedure for terminating property management. To most of us the requirements of writing and of witnessing by a J.P. may seem to present no problem. I wonder whether it might present a problem to an under-educated Aboriginal or Islander in a remote part of Queensland where J.P.s may not be thick on the ground? More to the point, writing and witnessing are not required by S.37 of the Aborigines Act or S.61 of the Torres Strait Islanders Act for the commencement of property management, which seems to me a much more significant event than its termination. So I raise the question whether these procedures may constitute a significant hurdle for Aborigines and Islanders in practice, and whether, in fact, they are really necessary?

Subject to this reservation the new Queensland provision does establish that all Aborigines and Islanders whose property is under departmental management are now at liberty to terminate that situation at their option.

It does not finally establish, however, that positive consent is a precondition to property management. The full achievement of this objective was the aim of clause 10(3) of the Racial Discrimination Bill, currently before the Australian Parliament. It was also the concern of Clause 5 of the Aboriginal and Torres Strait Islanders (Queensland Discriminatory Laws) Bill which the Senate passed on 10th December last.

The Racial Discrimination Bill, if enacted, will have other implications for the continued validity of the Queensland laws. Such implications will not always be direct and it is probably pointless to comment on the possible impact of the Bill unless and until it takes final form as an Act of Parliament.

By contrast, the Aboriginal and Torres Strait Islanders (Queensland Discriminatory Laws) Bill is, of course, totally direct in its intended effect on Queensland legislation. The Bill is very simple and very specific. It singles out a selection of issues on which, in

specific. It singles out a selection of issues on which, in my view, the Queensland laws violate basic human rights, and it sets out to override those provisions.

I have already mentioned Clause 5 which goes beyond the new Queensland provision by saying that "any property in Queensland of an Aboriginal or Islander shall not be managed by another person without the consent of the Aboriginal or Islander". Sub-section (2), of course, leave open the possibility of non-consensual property management under the general law, e.g. in situations of bankruptcy, mental illness and the like.

Clause 6 is of interest on the issue of privacy. Section 11 of both 1971 Queensland Acts provides for visiting justices to visit every reserve at least once every three months and, *interalia*, to inspect all accommodation premises. And S.7 of both Acts gave the Director himself (or his delegate) a power of inspection which included, by S.13, power to enter and inspect any premises.

For these reasons I would welcome Clause 6 of the Aboriginal and Torres Strait Islanders (Queensland Discriminatory Laws) Bill. It provides in effect that premises on reserves occupied by Aborigines or Islanders shall be subject only to the general law as to the right of any person to enter unless, of course, the occupants consent to entry. This should solve all problems in this area.

Clause 7 deals with courts established for Aboriginal and Island Reserves, and to the criminal jurisdiction of those courts.

Sub-clause (1) gives a right to representation by a legal practitioner to an Aboriginal or Islander against whom proceedings are instituted in such a court for an offence. This is necessary because Aborigines Regulations, Reg. 53(2) and Torres Strait Islander Regulations, Reg. 30(2) leave representation "subject to the consent of the court" in partial violation of Article 11 of the Universal Declaration of Human Rights.

Clause 7(2) is designed to ensure that an Aboriginal or Islander shall not be liable to conviction of an offence by a reserve court unless he has available the same rights of appeal against, or review of, the conviction as he would if convicted by a Magistrate's Court under the general Queensland law.

This is important because Aborigines Regulations, Reg. 55 provided only for appeal to the District Officer (who might simply be the clerk of the Magistrate's Court) with a possible further appeal to the Visiting Justice.

Clause 7 is concerned only with guaranteeing the safeguards of legal representation, and appeal or review, in the case of the **criminal** jurisdiction of reserve courts. The feeling may be that the informal patterns of adjudication and appeal provided by the Queensland legislation may be adequate for the work of reserve courts in adjudicating **civil** disputes. This may merit further consideration.

Clause 8 of the Bill as passed by the Senate is directed against the proposition that "Aborigines on reserves can still be required to work for token wages". Clause 8

still be required to work for token wages". Clause 8 seems at first sight to meet this situation adequately.

Clause 9 of the Bill as passed by the Senate goes on more generally to speak against wage discrimination against Aborigines or Islanders, whether on reserves or not. The 1971 Queensland Acts left these matters to be dealt with by regulation. The regulations enacted in 1972 did provide for equality in wage rates, but not for those employed on Reserves and not for those Aborigines classified as aged, infirm or slow workers under Aboriginal Regulations, Regs. 69 – 70. Between them, Clauses 8 and 9 would appear to be effective to overcome the Queensland legislation's violation of Article 23 of the Universal Declaration of Human Rights.

I have, of course, been speaking of the Aboriginal and Torres Strait Islanders (Queensland Discriminatory Laws) Bill as it passed the Senate. As introduced into the Senate it contained two additional clauses which were rejected at the Committee stage and which, I understand, the House of Representatives voted to restore.

Clause 6 of the original Bill attempted to confer on Aborigines and Islanders a positive right to be on Reserves and to eliminate the power of Reserve Councils or the Director to refuse or to revoke permits. The McMahon – Bjelke-Peterson memorandum had promised that control of access to reserves would be vested in reserve councils, but the 1971 Acts in fact gave an equal and even overriding power to the Director.

I do not really know the Queensland reserve communities well enough to advise on the question whether there should be fully open access to the reserves. A genuine testing of Aboriginal and Islander views might assist in the making of the right decision.

Lastly, I can see no justification whatsoever for the deletion of Clause 7 of the original Bill. This sought to preclude a situation where an Aboriginal or Islander was liable to ejectment from a Reserve or to some other penalty "by reason only that he has conducted himself in a way that is not to the satisfaction of an authority" or other official person "if his conduct was not unreasonable in all the circumstances of the case", and the burden of proving such unreasonableness should lie on whoever alleges it.

At the date of writing, however, none of the proposed Commonwealth legislation has yet been enacted.

conclusion

To summarise, Queensland's laws for its Aborigines and Islanders are open to criticism on several broad grounds.

1. *Lack of consultation with the people most directly affected, namely the Aborigines and Islanders themselves.*
2. *Excessive delegation by Parliament of legislative and*

themselves.

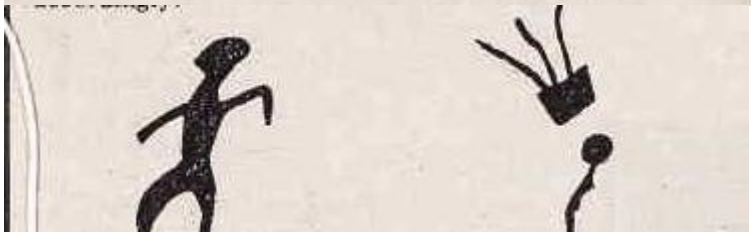
2. *Excessive delegation by Parliament of legislative and other powers to the Administration with inadequate limitations and little real prospect of any effective Parliamentary review.*
3. *A series of major and minor violations of fundamental human rights as formulated in the Universal Declaration of Human Rights and in successive pronouncements of the International Commission of Jurists.*

No one can say, of course, that the problems of Queensland's Aboriginal and Island citizens would be solved by the instant repeal of the legislation and the disbanding of the Department. Even if, as in other States, adverse discriminatory legislation was abandoned, the Aborigines would presumably remain, as they do elsewhere, at the bottom of the socio-economic ladder.

Overall, my view today is that the much-vilified Queensland system is finally being dragged, bit-by-bit, into the twentieth century. The Queensland Government itself (admittedly under pressure) has recently moved two objectionable features. The Aboriginal and Torres Strait Islanders (Queensland Discriminatory Laws) Bill, if enacted, will accelerate progress in most important ways. In particular, if Clause 7 of the original Bill and Clause 6 (in whole or in part) are restored, all but points 4 and 5 of the McMahon–Bjelke-Petersen memorandum will be honoured, and most (though not all) of the major violations of the Universal Declaration of Human Rights will be eliminated.

But I detect no sign of willingness by the Queensland Government to move further or faster. And if, for some reason, the Australian Parliament does not intercede, then I would repeat in an updated form the comment with which I concluded my report to the International Commission of Jurists:

> "... issues of justice, of equality of status and of responsibility must be at the heart of all efforts towards Aboriginal and Islander advancement. Only when people regard themselves as first-class citizens can they acquire the motivation to improve their own position in society. It is precisely in regard to such issues that the Queensland laws, even as recently amended, are deficient. There can be no justification in 1975 for continuing, with only minor modifications, a pattern on law and administration which still so clearly displays its roots in a 19th Century philosophy of blanketing paternalistic control. There can be no justification in 1975 for countenancing continued widespread infringements of fundamental human rights"




LISTEN MATE, I'LL DRINK WITH A BLACK FELLA ANYTIME!
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QLD. ACT