RECOGNITION OF INDIGENOUS CUSTOMARY LAW

the way ahead

On 18 October this year a forum on indigenous customary law was held at Parliament House, Canberra. Speakers included federal Attorney-General the Hon Michael Lavarch, ATSIC Chairperson Lois O'Donohue, Social Justice Commissioner Mick Dodson and ALRC President, **Alan Rose AO** who delivered the following address.

• • • • • • • • • • • • •

Indigenous customary law in Australia is the body of rules, values and traditions which are accepted by the members of an Aboriginal or Torres Strait Islander community as establishing standards or procedures to be upheld in that community.

These rules, values and traditions are a real force and influence in the lives of Aborigines and Torres Strait Islanders and they seek recognition of the importance of customary laws among their communities because it is fundamental to reconciliation within the Australian community and a foundation of Aboriginal dignity.

Recognition can and should be done, in a way acceptable to the communities and individuals concerned and in a way which is not inconsistent with fundamental human rights.

The ALRC inquiry

The Australian Law Reform Commission (ALRC) was asked by former Attorney-General, Bob Ellicott on 9 February 1977 to inquire into and report on whether it would be desirable to apply either in whole or in part Aboriginal customary law to Aborigines, either generally or in particular areas or to those living in tribal conditions only.

Specifically the terms of reference asked the ALRC to report on whether in criminal cases existing courts should be able to apply Aboriginal customary laws to Aborigines, and whether Aboriginal communities should have the power to apply their customary laws in the punishment and rehabilitation of Aborigines.

The Recognition of Aboriginal Customary Laws (ALRC 31) was given just after passage of the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth), and six years after *Milurrpum v Nabalco Pty Ltd* (1971) 17 FLR 141 in which Blackburn J concluded that the 'doctrine of communal native title ... does not form and never has formed, part of the law of any part of Australia' (p 244–245).

The ALRC decided within its terms of reference to limit the scope of its inquiry by not considering the law of real property or that with respect to intellectual property matters as they affected Aboriginal and Torres Strait Islander art and craft.

Report No 31 was delivered in three parts early in 1986. It concluded that Aboriginal and Torres Strait Islander customary laws should be recognised in appropriate ways by the Australian legal system and that the extent and method of such recognition needed to be considered separately from any arguments about the federal system.

The ALRC considered a number of different approaches to recognition :

- codification or specific enforcement of customary laws
- specific or general forms of 'incorporation' by reference

- the exclusion of the general law in areas to be covered by customary laws
- the translation of institutions or rules for the purposes of giving them equivalent effect (eg marriage or adoption)
- accommodation of traditional or customary ways through protections in the general legal system.

The ALRC did not believe that, as a general principle, codification or direct enforcement were appropriate forms of recognition of Aboriginal customary laws. Nor, except in limited circumstances, was the exclusion of the general law. It believed specific, particular forms of recognition were to be preferred to general ones, and that as far as possible, Aboriginal customary laws should be recognised by existing judicial and administrative authorities, avoiding the creation of new and separate legal structures, unless the need for these is clearly demonstrated.

The ALRC made specific recommendations in areas such as Family Law, Criminal Law, Evidence and Traditional Hunting, Fishing and Gathering Rights and included in Volume 2 of its report drafts of legislation which might be considered in the implementation of its specific recommendations.

The ALRC at the end of its report also addressed the question of approaches that might be taken to implementation and concluded that 'the welfare of Aboriginal people in Australia is a national issue and one that should, as far as possible, be dealt with through a coherent national policy. This is particularly so at the level of the basic standards to be applied. The Commonwealth has a clear legislative responsibility, in cases where State or Territory laws do not establish adequate or appropriate rules responding to the special needs of Aboriginal people. This is the case even though it may be more efficient for the implementation of these standards to remain with existing State or Territory officials or bodies.

Thus the recognition of Aboriginal customary laws as recommended in this report should be carried through by means of a federal Act applicable in all States and Territories and relying on the full range of the Commonwealth's constitutional powers. This view was generally supported by Aboriginal people and their organisations. A federal Act should not, however, preclude the operation of State and Territory laws which are capable of operating concurrently with the federal legislation'.

In the ALRC's view general federal legislation was not appropriate in two areas:

- new Aboriginal community justice mechanisms
- the recognition of traditional hunting, fishing and gathering rights.

In relation to community justice mechanisms a range of options was put forward for consideration by Aborigines and their organisations, and by State and Territory legislators. No one model was considered appropriate for all of Australia, and the Commonwealth's powers in this area are limited.

In relation to hunting and fishing it was the orderly management of the resource that was important, and special laws dealing with one aspect of resource use in isolation from either laws for the management of the resource in question were accordingly undesirable. In this case certain guiding principles were suggested which could form the basis of State and Territory legislation, and amendments were proposed to various Commonwealth Acts in respect of resources which the Commonwealth manages or controls, which reflected these principles.

The ALRC stressed that, in carrying through an implementation program the need for continuous and appropriate consultation with Aboriginal and Torres Strait Island peoples was important.

Major events since ALRC 31

Four major and relevant events have occurred since the delivery of the report (ALRC 31):

- Royal Commission into Aboriginal Deaths in Custody (1992)
- *Mabo v Queensland (No 2)* (1992) 175 CLR 1 and the passage of federal and States Native Title legislation
- 'Justice under Scrutiny', a report by the House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs of December 1994
- Prime Minister's Justice Statement of May 1995.

The Royal Commission, among other things, recommended implementation of the recommendation of ALRC 31 and Mabo (No 2) held that the common law of Australia recognises a form of native title in accordance with the laws and customs of indigenous people where:

- those people have maintained their connection with the land
- their title has not been extinguished by acts of Imperial, State, Territory or Commonwealth governments.

In the course of their judgments the majority of the High Court rejected the traditional doctrine of *terra nullius*.

The *Native Title Act 1993 (Cth)*:

- recognises native title rights and sets down some basic principles in relation to native title in Australia
- provides for the validation of past acts which may be invalid because of the existence of native title
- provides for a future regime in which native title rights are protected and conditions imposed on acts affecting native title land and waters
- provides a process by which native title rights can be established and compensation determined, and by which determinations can be made as to whether future grants can be made or acts done over native title land and waters
- provides for a range of other matters, including the establishment of a National Aboriginal and Torres Strait Islander Land Fund.

The 'Justice Under Scrutiny' Report endorsed the Royal Commission's recommendations 2 and 3 for the establishment of Aboriginal Justice Advisory Committees (AJAC's) in the state and territory Attorney-General's Departments.

In the Prime Minister's Justice Statement, among a number of initiatives focussing on the advancement of Aboriginal and Torres Strait Islanders, the Commonwealth committed $1.5m over 2 years to fund a national inquiry by HREOC into the impact on Aboriginal and Torres Strait Islander families of the policy of removing their children, and an additional $1.3m for the Aboriginal and Torres Strait Islander Social Justice Commissioner.

The Commonwealth has also subsequently agreed to financially support national meetings of State and Territory Aboriginal Justice Advisory Committee representatives. A National AJAC has not yet been established. Further representations on this matter were made at the most recent SCAG meeting held in Adelaide in November 1995.

Implementation of ALRC 31

There have obviously been considerable changes in the law and in relevant areas of federal and State law and administration of policy towards advancing the position of Aboriginal and Torres Strait Islanders since 1986.

Some may suggest the ALRC's work has as a consequence been overtaken by events. It is timely therefore to recall the arguments in favour of recognising customary law, considered by the ALRC. Such recognition:

- acknowledges the relevance and validity of these laws for many Aboriginal and Torres Strait Islander people and responds to their desire for recognition of those laws in appropriate ways
- reflects their rights, recognised in the government's policy on Aboriginal and Torres Strait Islander Affairs, to choose to live in accordance with their customs and traditions. This implies that the general law will not impose unnecessary restrictions or disabilities upon the exercise of those rights
- corrects the injustice inherent in non-recognition in a number of specific situations (for example, in the context of non-recognition of aboriginal kin ties in aboriginal child placement)
- expresses the wider community's respect for the ways and rights of indigenous people and contributes to the national reconciliation process
- accords with Australia's international human rights obligations. Article 1 of the ICCPR and Article 1 of the ICESCR declare the rights of peoples to self-determination and the rights of cultural minorities are to be protected under Article 27 of the ICCPR.

Various difficulties about recognising customary laws were raised with the ALRC and have continued to be raised in the community. These include:

- the problem of unacceptable rules and punishments
- the secret aspects of some customary laws
- the possible loss of control by Aboriginal and Torres Strait Island communities over their laws
- the position of women under some customary laws
- the community divisiveness it is sometimes claimed that recognition could cause

- that some customary laws have changed and no longer exist in their pristine form
- a perception of declining importance of customary laws
- difficulties in defining customary laws.

Response to these arguments against recognition

The ALRC's view was and remains that these issues and arguments are not generally valid as objections to recognition of customary laws. The ALRC sees these objections as failing to recognise the fundamental rights of indigenous peoples to have their laws recognised and as being based on the pre Mabo legal and philosophical reasoning based on an approach of charity, assimilation and special treatment of Aborigines and Torres Strait Islanders. Rather these issues should be regarded as considerations that should be taken into account in framing the particular proposals for implementing recognition.

All too often however these issues and arguments are used as excuses for inaction rather than as factors that need further investigation. Perceived and real difficulties can be used, as the ALRC indicated in their report, as a catalyst for developing real dialogue and negotiation among and with indigenous communities.

The ALRC did not believe that a single pristine law could be developed to recognise customary laws. There is no single pan-Australian customary law. Rather customary laws can take different forms among different Aboriginal and Torres Strait Islander communities. In the same way as the common law is not the same in different jurisdictions into which it was introduced. It has not remained static. Customary laws are also continually evolving and developing along with their communities.

The approach to consideration and implementation of the recommendations of ALRC 31 has so far been sporadic and suspended somewhat as a shuttle cock from time to time in a game of badminton between federal and State legal and Aboriginal affairs administrations.

After initial consideration of the recommendations of ALRC 31 by SCAG in late 1988 Attorneys-General agreed to make a number of recommendations and refer major policy considerations to the Australian Aboriginal Affairs Council.

There does not appear to have been any major effective implementation steps between that time and the completion in mid-1994 of a Report on Responses of Commonwealth Agencies to the Australian Law Reform Commission's Recommendations for the Recognition of Aboriginal Customary Law prompted by the Federal Government's obligation to report on progress with implementing Recommendation 219 of the RCIADC.

In November 1994 SCAG heard presentations from the ATSIC Deputy Chair, Mr Charles Perkins and Mr Mick Dodson, Aboriginal and Torres Strait Islander Social Justice Commissioner on Aboriginal Justice Issues.

One outcome of that discussion was the preparation for the February 1995 meeting of SCAG of a Schedule identifying each jurisdiction's response to the recommendations of ALRC 31. Preparation of this document was a significant step in taking hold of the project nationally.

The Minister for Aboriginal Affairs, Robert Tickner in his address to the Justice Forum on 23 August 1994 also proposed for consideration by all Australian Government's that :

> *Aboriginal and Torres Strait Islander customary law shall be recognised and applied to the extent that it continues to be traditionally practised by indigenous people provided that such application by the courts shall be reasonable and in accordance with Australia's international obligations.*

At the July 1995 meeting of the SCAG Attorneys-General considered the Schedule of progress and recommendations from officers on the categorisation of recommendations into 4 categories

- those considered implemented
- those that could be implemented with some further work
- those for which further study and report by officers was required
- those that should not be supported.

Somewhat parallelling this most recent consideration by SCAG has been the deliberations of the federal Interdepartmental Committee (IDC) convened by the Minister for Aboriginal Affairs and comprising also members of the Minister's staff, representatives of the Attorney-General's Department, ATSIC, the Office of Indigenous Affairs and the ALRC. The IDC has met on two occasions in June and August this year.

The IDC as well as noting progress in the SCAG discussions also agreed an overall approach commencing with the Minister for Aboriginal Affairs' approaching each of his Ministerial colleagues with specific suggestions for the implementation of recommendations which federal authorities such as those dealing with hunting and fishing rights within national parks had under their control.

It now appears that there is a measure of committed co-ordination through these approaches to consideration and implementation of the recommendations of ALRC 31.

The question now is what more needs to be done.

For these processes to result in significant law reform it will require an ongoing commitment from the parties involved to work alongside Aborigines and Torres Strait Islanders as opposed to dictating the direction of the process.

The ALRC is concerned that an overly narrow view of what is required to implement its recommendations should not prevail.

In the ALRC's view too much reliance so far has been placed on the existence of administrative arrangements as a method of recognition. Many of these administrative arrangements do not adequately meet the recommendations as they continue to reflect the pre Mabo philosophy that Australia was terra nullius and are based more on a social welfare approach rather than recognition of the rightful place of customary laws on an equal footing with other Australian laws as part of one legal system.

For example in regard to the Aboriginal child placement principle, the States have said that implementation has occurred, yet not all States and Territories have given legislative recognition to the principle and only two have recognised the role of aboriginal child care agencies. Ineffective implementation of the Aboriginal child placement principle is currently a chief concern among many Aboriginal and Torres Strait island communities.

This is a matter which could quite appropriately be revisited following the HREOC inquiry into the separation of Aboriginal and Torres Strait Island children from their families which commenced last month.

The ALRC's current reference on children in the legal process may also have cause to consider whether, despite acceptance now of the wrong that was done and the terrible legacy of past child removal policies in Australia, we still have a long way to go to change inappropriate legal and administrative approaches to issues of Aboriginal and Torres Strait Island children's welfare.

In the case of other recommendations, for example those in favour of partial customary law defences, special rules for voluntariness of confessions and admissions from Aboriginal suspects, the admissibility of evidence of customary law and the ability to give that evidence in camera, it is not sufficient to leave it to the courts to develop an appropriate legal system response. This will differ from jurisdiction to jurisdiction and from time to time and is overly dependent on where and when actions are brought. It is also not appropriate to say that allowing cultural background or cultural diversity to be taken into account adequately deals with the issue of recognition of customary laws.

Recognition of customary law as an original part of the Australian legal system is not equivalent to being sensitive to or making allowances in the Australian legal process for the cultural differences of the various ethnic groups now making up multicultural Australia. In the post Mabo era it is important to understand that legislative and community recognition of customary laws is because those laws are the laws of Aborigines and Torres Strait Islanders as the first people of this country. Their laws are part of the law of Australia. It serves the Australian legal system best as well that that recognition and the substantive and procedural rules of customary law be incorporated now as the ALRC suggested and not result from the vagaries of particular outcomes from High Court decisions over a period of time.

Recognition of indigenous customary law is more than simply mitigating the adverse consequences of non-recognition eg with respect to recognition of traditional marriages this is not achieved simply by acknowledging a traditional marriage as a de facto relationship for the purposes of allowing a rebate or benefit.

The way ahead

Aboriginal and Torres Strait Islander groups should be in a position to negotiate with Governments as to the ways in which indigenous customary laws should be recognised.

Mere consultation by the government with indigenous peoples on this process is not enough. As the House of Representatives Standing

Committee on Aboriginal Affairs report, *'Our Future Our Selves Aboriginal and Torres Strait Islander Community Control Management and Resources'* indicates 'consultation is a process whereby the initiative and power lies almost entirely on one side, that side proposes, listens to responses and then decides by itself'. By contrast it identified negotiation on the other hand as being 'to bring about by discussion and settlement of terms'.

In the final report of the Royal Commission into Aboriginal Deaths in Custody Commissioner Johnston stated in relation to the 99 deaths investigated by that Commission *'No matter what their age at death they all had files — in many cases hundreds of pages of observations and moral and social judgements on them and their families. Welfare officers, police, court officials and countless other white bureaucrats, mostly unknown and rarely seen by the persons concerned, judged and determined their lives. The officials saw all, recorded all, judged all and yet knew nothing about the people whose lives they controlled'.*

It is this type of top down process and perpetuation of wrong assumptions based on pre-Mabo thinking about the nature of Australian law which have demonstrably failed over the last 200 years to give Aboriginal and Torres Strait Islander peoples and their customary laws their rightful place in Australia. If the recognition of customary laws is to have relevance and real meaning for Aborigines and Torres Strait Islanders they must be involved directly in the process of recognition.

One example of this negotiation process from a grassroots perspective can be seen in the work of the Queensland Aboriginal Justice Advisory Committee. The Committee established in response to the recommendations of the Royal Commission into Aboriginal Deaths in Custody consists of four Aborigines and one Torres Strait Islander drawn from various Queensland communities. The Committee's role is to provide the Queensland Attorney-General with recommendations on the affect of the criminal justice system on Aborigines and Torres Strait Islanders.

An AJAC has also been established and associated with the Attorney-General's Department in New South Wales. AJAC's not associated with Attorney-General's have been set up in Victoria, Western Australia and South Australia. Local level advisory committees have also been established and are operating effectively in the Northern Territory and the ACT. No Committee exists in Tasmania.

The importance of the work of the AJAC's lies in the fact that it is Aboriginal and Torres Strait Islanders developing recommendations for themselves, consulting amongst their own communities and then negotiating with the government for implementation. Such bottom up approaches are far more likely to succeed than those too closely directed and dictated by officials. At their meeting in Perth in 1994 leaders from AJAC's in each State and Territory called for the establishment of a National AJAC with a Secretariat in the federal Attorney-General's Department. The SCAG at its February and July 1995 meetings endorsed the NAJAC but without final agreement on resources. I understand resource issues were discussed at the NAJAC meeting in Adelaide at the end of October 1995.

Organisations like the ALRC have an important but essentially supportive role to play in this evolving grassroots and national process. The process is both complex and sensitive but the ALRC stands ready to help in any way it can to assist in implementing its recommendations for the recognition of customary laws.

Perhaps a way forward is to resource adequately a National AJAC associated with the federal Attorney-General's Department and to ensure that it and each State/Territory and local area AJAC have effective working level relations particularly with federal and State legal officers. Such a consultation and negotiation network would be able to give continuous and concentrated attention to the ALRC's recommendations. Progress could be reported and priorities identified at the relevant Government level and through the SCAG processes and those of the federal IDC established by the Minister for Aboriginal Affairs. And finally at the parliamentary level it might be that the Legal and Constitutional Affairs Committee of the House of Representatives in the next Parliament might report on progress throughout Australia in recognising Aboriginal and Torres Strait Islander customary laws as part of a major review.