MONSTERS round the stomping-ground[1]

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An alternative dispute resolution proposal for indigenous communities in the Northern Territory.

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Almost without exception, Northern Territory government policy has interpreted the principle of 'equality before the law' to require that, across the self-evidently different and unequal communities of the Northern Territory, there should be 'one law for all'. This interpretation ignores the fact that there clearly do exist 'two laws' in the Northern Territory — or, more accurately, that indigenous people in communities across the Northern Territory are, with varying degrees of success, courageously maintaining a multiplicity of customary laws.[2] Some might argue that indigenous people are best left to manage their own legal affairs without official interference. Nevertheless, it seems clear that the hostility of the Northern Territory government towards the notion of recognition of 'two laws' has placed yet another barrier in the path towards indigenous self-management of culture and law. The results of such barriers are evident in police and prison cells, medical centres and domestic violence shelters across the Territory.

One limited exception to this is the recently released report to the Northern Territory Law Reform Committee, 'Alternative Dispute Resolution in Aboriginal Communities'. This report was completed in 1997, six years after the initial reference from the then Northern Territory Attorney-General. It recommends that an Aboriginal Community Justice Act should be passed giving legal recognition to the alternative dispute resolution processes already existing in a number of Aboriginal communities across the NT. It also recommends that Aboriginal communities be given the legislative authority to establish or adapt their own alternative dispute resolution (ADR) schemes, within certain limits set out in the Report. If enacted, this proposal would enable probably the most far-reaching legal recognition of Aboriginal customary law so far in Australia. At the same time the proposals are modest by many overseas standards, and modest also in that they generally do no more than formalise arrangements which already exist, often on shaky foundations, in many indigenous communities in the NT.

The purpose of this article is to consider how far the proposals in this Report might help to overcome problems which are endemic to many indigenous communities in the NT — problems such as substance abuse, domestic violence and the breakdown of traditional authority which have been exhaustively documented elsewhere.[3] It will also consider how far these proposals are consistent with the ideal of Aboriginal community self-determination and self-management.

In particular, the question arises of whether well-intentioned proposals such as these, which inevitably reflect a process of political compromise, may have the effect of 'freezing' indigenous customary law as part of the introduced legal system. Hence, they may contribute to community breakdown by further eroding the authority of traditional law. Related to this is the concern in some quarters that government may use the existence of ADR schemes in indigenous communities as an excuse to abdicate responsibility for community problems. The

response to this from government should not be that indigenous communities can not have it both ways. Rather, it should be to recognise that no two indigenous communities are alike, and hence that no quick-fix 'solution' can be imposed from above.

In considering the Law Reform Committee proposals, this article will follow approximately the order in which they are discussed in the Final Report, providing a brief summary of the major proposals, followed by critical comment.

An outline: the Aboriginal Community Justice Act

Summary

Following the term used in the 1991 Attorney-General's reference, the Report recommends that 'an Alternative Dispute Resolution Program should be established on Aboriginal communities in the NT' (Recommendation 1). This program, the Report states, should take the form of an Aboriginal Community Justice Act (ACJA), which would provide a framework for the establishment and recognition of various ADR schemes. Each community could develop its own 'community justice plan' (CJP), either following one of the 'model' options set out in the Act, or by independently devising its own plan.

The Report, however, foreshadows that there would need to be certain 'necessary limits' upon the CJP developed by each community. First, 'no community would be able to exercise jurisdiction in areas, particularly serious criminal matters, which would appear to infringe the principle of 'one law for all'. Nor could any community impose penalties in breach of international human rights standards'. Second, 'each CJP would need to be administered in the relevant community by a community-based council, which would need to be incorporated under the Local Government Act (NT) 1993'. The geographical boundaries of a community are as defined for the purposes of a community government scheme under the *Local Government Act* (Recommendation 4): hence, a community may not legitimately exercise jurisdiction outside those geographical boundaries.

Comment

A tension is evident between the phrase used in the Attorney-General's Reference, 'alternative dispute resolution program', and the term used in the Report, 'Aboriginal Community Justice Act'. This tension is fundamental and runs throughout the Law Reform Committee's Report. 'Alternative dispute resolution program' is non-threatening, suggesting mediation, co-operative arrangements between communities and police, and other possibilities which do not challenge the dominance of the introduced legal system or the principle of 'one law for all'. By contrast, 'Aboriginal Community Justice Act' has connotations of self-determination, non-state forms of justice[4] and recognition of 'two laws' within — or even potentially alongside — the introduced legal system.

The Committee was clearly aware of this tension. It was caught in the dilemma faced by many law reform agencies, between making recommendations which would pose a direct challenge to government ideology (in this case the notion of 'one law for all'), and arriving at a compromise set of proposals which would be non-threatening to government, and acceptable to indigenous people. It chose the latter course. Consequently, the potentially threatening idea that communities could obtain legal recognition of their own customary laws (via the 'community justice plan') is hedged about by limitations at every point where conflict might arise between indigenous and introduced laws. The result is the creation of a system many of whose fundamental features would be familiar and acceptable to non-indigenous legal observers. In the process it is arguable that — as will be noted further below — control of the system is taken away from indigenous hands.

The Committee's proposal that each CJP be administered by an incorporated community-based council raises similar considerations. Clearly, one purpose of this proposal is to give traditional elders and other indigenous people involved in the practical administration of a CJP a defined status under non-indigenous law. Without such a status, clearly, problems such as the following may arise for non-indigenous law:

- who has the authority in a community to administer customary law?
- when may a particular traditional punishment be considered 'bona fide', and when not?
- who has the responsibility in case of conflict, or if something goes wrong?
- can elders legitimately exercise jurisdiction over wrongdoers who flee the community?

The proposal is designed to distinguish 'legitimate' from 'illegitimate' exercises of traditional authority, and hence establishes a procedure which is, quite literally, a form of incorporation of indigenous into non-indigenous law.[5]

Scope of by-laws under the Aboriginal Community Justice Act

Summary

The Report provides brief outlines of a number of 'alternative dispute resolution' schemes which have been adopted or proposed in indigenous communities in the NT or elsewhere. These schemes are divided into four basic types: mediation schemes, magistrates' court advice schemes, wardens' schemes and community court or 'Elders' Council' schemes.[6] The schemes are outlined as models which individual communities may wish to follow, or to borrow from in developing their own CJP. For several of these options, particularly mediation schemes and magistrates court advice schemes, it is not necessary for communities to enact by-laws under the *Aboriginal Community Justice Act.* However some communities may, for various reasons, wish to obtain formal recognition of their indigenous customary law. With very significant limitations, the proposed ACJA provides a legal mechanism for a community to obtain such recognition.

The first limitation is that no community shall enact a by-law which permits physical sanctions which are in breach of international human rights standards, or of NT law (Recommendation 5). Second, a community may only enact by-laws which fall within one or more of the general classes, or heads of power, under which by-laws may be enacted. These cover a number of matters including traffic, prevention of damage, substance abuse, litter, control of dogs, and (interestingly) recognition of certain customs such as those governing ceremonies and sacred/significant sites. Most significantly, a community may enact by-laws which relate to property offences, but only if the value of the property damaged or lost is less than $20,000; and to assault, but only if the assault is common or non-serious.

The Report makes a number of recommendations designed to meet the criticism that, in allowing indigenous communities to enact 'by-laws' in certain areas, it is thereby facilitating the creation of 'two laws' for the Northern Territory. First, it provides that the general law of the Northern Territory shall continue to apply in all areas not specifically dealt with in the by-laws (Recommendation 7). Second, it provides that 'no community shall enact a by-law which makes legal an act which would be illegal under the general law' (Recommendation 8): thus, for example, physical sanctions or assaults of any kind remain illegal. Third, it provides that 'no sanction provided for in a by-law for a community shall exceed the sanction provided for that offence under the general law' (Recommendation 9). This recommendation is clearly designed to avoid legitimising the infliction of penalties which would be perceived by the general community as unduly harsh. At the same time, however, it provides that 'a community may provide for a sanction of a different type to that provided for an offence under the general law' (Recommendation 9).

Comment

The Report's central proposal, that each indigenous community be given the freedom to work out its own CJP according to its own customs and needs, is clearly of major importance to indigenous people who seek self-determination and community control. However, the Report is careful not to put the proposals in these terms. Rather, it seeks to portray the proposals as a logical response to community problems such as family violence, substance abuse and property offences, which are already well-recognised as a substantial drain on general community and government resources. Effectively, the community appears to be placed in the position of arguing that recognition of indigenous law is necessary as a cost-saving exercise! More generally, the Report appears to play down the causal link between non-recognition of customary law and community problems.

The ban on physical sanctions is clearly considered a political necessity. Partly as a result of the media, many non-indigenous people have come to associate indigenous customary law with spearings and floggings. Opponents of the ACJA would be given valuable ammunition if these were not expressly forbidden. It is interesting, however, that physical sanctions are not forbidden outright. Rather, physical sanctions are outlawed only if they are in breach of international human rights standards, or of NT law. Northern Territory law allows the consent of the victim as a defence to a charge — at least of common assault and probably of bodily harm. Only if the intent of the defendant is to inflict grievous harm is consent no defence.

Again, the Report regards it as politically and legally necessary to require indigenous laws under the ACJA to fit within certain classes or heads of power. The non-indigenous legal system requires this in the interests of certainty. Indigenous people must not be seen to be making and administering laws about whatever matters suit them: they must not be seen as 'a law unto themselves'. The introduced system retains the right to say whether a particular exercise of law-making power is legitimate. The clear danger for indigenous people here is, of course, that through this process their laws are appropriated by the introduced system: interpreted and incorporated into the dominant state, and their values made to resemble the values of mainstream society. At the same time, the Report places limits on the responsibilities allocated to indigenous people: they can deal with minor property offences and assault, but beyond that point the introduced system maintains control.

Some indigenous people have commented that sentences imposed by the general court system are too lenient, particularly for serious offences such as homicide and rape.[7] The proposition that sanctions imposed by indigenous laws under the ACJA not be permitted to exceed those imposed under the general law may not therefore be popular in some communities. It is precisely in order to be able to deal with offenders effectively that elders want legal authority returned to them. The Report, however, provides an avenue for communities to achieve this by stating that community sanctions may be of a different type to that provided for under the general law. Since there is no objective way of comparing the harshness of, say, a period of banishment with a fine, the provision that a community sanction may not exceed that provided under the general law is rendered of less practical importance.

Duties and powers of wardens

Summary

The Report sets out the maximum range of the proposed duties and powers of wardens under a CJP. Generally, the maximum range is broadly similar to the powers of the police. Wardens may thus identify the alleged offender, request name and address, issue and serve on the spot fines or summons, and confiscate prohibited substances or equipment, with the exception of motor vehicles. They also have a power to prevent the repetition or continuation of an offence, and to do all things reasonably necessary to this purpose. The Report proposes, however, that the powers of wardens should not include the power of arrest (Recommendation 10).

The Report proposes that 'the remuneration and working conditions of wardens should be appropriate to their level of responsibility.' They would not necessarily be the same as those of police. The issue of remuneration and conditions for wardens, together with the division of roles between wardens and police, would need to be resolved by negotiation with police and other interested bodies on each community. The Report states:

> a comparison would need to be made between the level of responsibility of wardens and the responsibilities of police, Aboriginal Community Police Officers and Aboriginal Community Corrections Officers. It should be noted that cost savings could be made in some cases by combining the roles of wardens with those of Aboriginal Community Police Officers or Aboriginal Community Corrections Officers.

Comment

The Report proposes a number of reasons for denying wardens the power of arrest. These are first, the complexity of the law of arrest and bail; second, the possibility of abuse of power; third, the lack of adequate arrest facilities on many communities; fourth, the fact that one of the aims of the ACJA is to reduce arrest and imprisonment rates; and finally, the fact that arrest is not a traditional sanction under customary law.

There is clearly a cultural conflict between the Western ideal of the 'independent' police officer or mediator, and the reality of dispute resolution on indigenous communities. In order to be respected a warden, like an elder or the judge of a community court, needs to have 'insider' status. However a

person who has direct involvement or interests in a dispute is not likely to be 'independent' in the Western sense: '[n]eutrality in relation to feuding is something you won't get Aboriginal people to understand or accept'.[8]

Despite these apparently powerful reasons for denying wardens the power of arrest, there is a danger that wardens will come to be seen as 'second-class' police officers without real authority: not respected as agents of either indigenous or non-indigenous law. The experience of the Village Court system in Papua New Guinea suggests a danger that the 'customary' system as a whole may fall into disrespect.[9] Wardens are not in fact playing a wholly 'customary' role: and, although arrest may not have been a sanction in pre-contact indigenous societies, indigenous people have certainly become familiar with it since then. It is essential that wardens have the ability to make their authority respected. For this reason the Report's recommendation that wardens have the ability to 'do all things reasonably necessary' to prevent the continuation or repetition of an offence includes the power to remove an offender physically from the scene.

The pay and working conditions of wardens are similarly important determinants of their status, and hence their ability to do their job. There is clearly a danger in any suggestion that cost savings could be made by requiring wardens to do two or more jobs, while potentially still receiving less pay than a police officer.

Procedure; appeal; penalties

Summary

In its discussion of the procedure appropriate for a community court, the Report seeks to strike a balance between competing considerations. On the one hand communities should be free as far as possible to determine their own procedure according to their needs and to customary law. On the other, the procedures established by the ACJA must meet general community expectations that any community court be 'fair'. This inevitably involves importing such Western notions as natural justice and the rights of the defendant. Thus, '[w]here a community chooses to establish a 'community court' as part of its CJP, that court shall respect the rights of a defendant in criminal proceedings to the same extent that they are already respected in NT law' (Recommendation 11).

Similarly, general community expectations led the Report to recommend that an appeal right be provided from a community court to a Court of Summary Jurisdiction (Recommendation 13).

Community courts are not able to impose a sentence of imprisonment on convicted offenders (Recommendation 14). The Report proposes a range of penalties which could be imposed by a community court, including fines up to a maximum of $750 for any single offence, community work orders, restitution of property, banishment, a power to order offenders to attend ceremonies, and confiscation of prohibited items except for motor vehicles.

The Report attempts to provide an incentive for offenders to observe penalties imposed by a community court. It does this by suggesting that communities, in developing their CJP, could provide that offenders who fail to respect the by-laws sanctions could be referred to the Court of Summary Jurisdiction for sentencing. If this occurred the sentence imposed could be harsher than that imposed by the community court. In addition, where a matter is referred or appealed to the general courts a conviction will be recorded. In contrast, convictions or penalties imposed by a community court do not count as prior convictions for the purpose of sentencing in the Court of Summary Jurisdiction or in the Supreme Court (Recommendation 15).

Comment

Again, the Report has found it necessary to curtail the powers of any proposed community court in order to meet non-indigenous expectations that justice, Western-style, must be seen to be done. Thus, the perception of independence and accountability is privileged over the power of the community court to act according to community law. Again, the danger is of creating a 'second-class' court system whose decisions will not be respected: or, to put it another way, of interpreting and incorporating non-state forms of justice into the state.[10]

Conclusion: a step towards self-determination?

The Law Reform Committee Report, if implemented, could represent a major step forward in enabling communities to deal with their own problems in their own way. To the extent that it allows communities to choose their own methods of dealing with disputes, it also represents a step towards self-determination or community self-management. It should be noted, however, that the goals of self-determination and community dispute resolution are inextricably linked. Without returning some political and legal control to indigenous communities, problems such as substance abuse and domestic violence will remain, since these problems are the result of both past and present indigenous disempowerment.

The barriers along the path towards overcoming these problems can seem almost insurmountable. Most of all, of course, they are difficult for indigenous people living in communities and faced with community problems on a daily basis. Lawyers and law-makers outside the communities are caught in a dilemma. On the one hand, people from communities are frequently crying out for assistance of all kinds from outside — as indeed they have a right to do, since the problems are primarily the result of both past and present colonial policies. On the other hand, almost any 'assistance' can easily become another form of control and disempowerment. This is as true of the Law Reform Committee's recommendations as it is of any other attempt to provide 'solutions' for community problems.

Simultaneously, the Committee has tailored its recommendations so that it can pay at least lip service to the government's 'one law for all' policy. In so doing, the Committee has taken the risk run by any law reform agency which attempts to strike a compromise with perceived political realities: that it will lose sight of the wood for the trees. On the other hand, if it had not made these compromises, its proposals would almost certainly have been ignored.

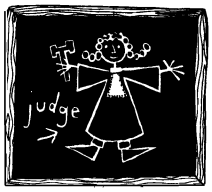
Over a year since the Report was released, the government has not yet provided any indication of its response.

References

1. 'Monster and Stomp them' — Shane Stone QC, former Chief Minister of the Northern Territory, referring to 'long-grassers' or itinerants around Darwin, the majority of whom are indigenous.
2. Such laws are often being maintained with the assistance or collaboration of non-indigenous people and institutions: note, for example, the Tangentyere Council Social Behaviour Project, the Katherine Community Aid Panel, the Yuendumu Night Patrol Scheme, the Ngukurr Warden Scheme, the Ali Currung Law and Order Plan.

However, such schemes have operated without official legal or statutory recognition. This situation contains several drawbacks. One of these is the fact that, with changes of practice or personnel, actions (such as traditional punishments) which were officially tolerated or approved may come to be considered a breach of the general law. For this reason many indigenous communities seek formal or legal recognition of aspects of customary law.

3. Most significantly, in the Final Report, Royal Commission into Aboriginal Deaths in Custody, 1991.
4. The term used in Nina, Daniel, 'Watch Out for the Native', (1997) 22(1) *Alt.LJ* 17. Nina examines the way in which non-state forms of justice may be appropriated by the state — and, at the same time, how in this process the state may become 'indigenised'. This clearly represents both the danger and the dream for indigenous people seeking recognition of customary law.
5. The Report notes that incorporation 'will enable the community to hold and receive moneys, make payments, employ staff and take out insurance, amongst other activities. This requires the Council to have a separate identity to that of its members'. These points are valid: however it should be noted that their purpose is to fulfil non-indigenous, not indigenous, expectations and laws.
6. Mediation may operate at an informal or preventative level (for example, the Tangentyere Council Social Behaviour Project), pre-trial (for example, the Aboriginal Mediation Project developed by Queensland's Department of Justice), or pre-sentencing (for example, the Katherine Community Aid Panel). Magistrate's Court Advice systems have operated, for example, in South Australia and in the NT at Groote Eylandt. 'Warden schemes' exist, for example, at Yuendumu and Ngukurr, and involve the appointment of people to perform part of the traditional function of the police, without usurping that function. Community court or 'elders' council' schemes may be considered the most 'radical'. They have existed in limited form in WA and Queensland, although both schemes appear to be little used. One of the clearest potentially applicable overseas model is the PNG Village Courts system.
7. For example, see comments recorded in Brennan, Frank, 'Self-Determination: The Limits of Allowing Aboriginal Communities to be a Law Unto Themselves', (1993) 16(1) *UNSW Law Journal* 245 at 246, 250-52.
8. Spencer, David, 'Mediating in Aboriginal Communities', (1996-97) 3 *Commercial Dispute Resolution Journal* 245 at 252, quoting Welsh, J., *Aboriginal and Islander Mediation Initiative*, Project Proposal, Department of the Attorney-General Queensland, 1992, p.26.
9. Young, Douglas W., 'Grassroots Justice: Where the National Justice System is the 'Alternative': The Village Court System of Papua New Guinea,' (1992) *Australian Dispute Resolution Journal* 31 at 40-41.
10. Nina, above, ref. 4.



LEGAL STUDIES

Evaluating the legal system

The following questions for discussion draw on two articles in this issue: 'Mandatory Sentencing and the Concentration of Powers' p. 211 and 'Monsters round the Stomping Ground' p. 216.

1. The Royal Commission into Aboriginal Deaths in Custody examined six Aboriginal juvenile deaths. The National Report commented that 'the cases investigated ... illustrate how the juvenile justice system prejudices the Aboriginal youth offender'. What are the ways in which the juvenile justice system demonstrates such 'prejudices'? Are all young people 'equal before the law'? Explain the reasons for your conclusions.

2. For some people in Australia, 'Prison is a death sentence'. What does such a statement mean? Do you agree? Why did the Royal Commission into Aboriginal Deaths in Custody recommended that incarceration be the punishment of last resort? How can this recommendation be reconciled with the reasons that underpin mandatory sentencing laws such as that of the Northern Territory?

3. It could be said that: 'Alternative dispute resolution undermines the doctrine of the rule of law, in Australia. To be effective, such programs must recognise Indigenous legal systems, and this would mean there will be two, or even more laws applicable to many actions — citizens will not know what actions might generate legal liability.' Do you agree? How would you assess the ADR proposal, will it enhance the effective and just operation of the legal system in the Northern Territory?

4. Compare and contrast the way mandatory sentencing and alternative dispute resolution proposals in the Northern Territory address the justice issues particular to Aboriginal youth. Evaluate the way the reforms and responses of the justice system evolved under each of the legislative schemes.

Further reading

C. Cunnen and Terry Libesman, *Indigenous People and the Law in Australia* Butterworths' Legal Studies Series, 1995.

C. Cunneen and D. McDonald, *Keeping Aboriginal and Torres Strait Islander People Out of Custody — An Evaluation of the Implementation of the Recommendations of the Royal Commission in Aboriginal Deaths in Custody,* ATSIC 1997.

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McRae, Nettheim and Beacroft, *Indigenous Legal Issues: Commentary and Materials* 2nd edn, 1997, LBC Services.

Web sites

ATSIC home page
http://www.atsic.gov.au/

Council for Aboriginal Reconciliation
http://www.austlii.edu.au/au/orgs/car/

NTU Faculty of Law List of Web Resources
http://www.ntu.edu.au/faculties/law/martin/subject.htm#Indigenous

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