A MATTER OF MANAGEMENT? THE PROSPECT FOR QUEENSLAND'S ABORIGINALS AND ISLANDERS

BY GARTH NETTHEIM*

Early this year the Commonwealth Government came into serious confrontation with the Queensland Government over the latter's decision to take over, from the Uniting Church in Australia, the management of the Aurukun and Mornington Island Aboriginal Reserves. This decision set in train a series of moves and countermoves by both governments, interspersed by attempts at compromise. These events were not concluded at the time of going to press, so that appraisal would be premature. However, the fact that one step taken by the Commonwealth was the enactment of legislation for "self-management" of Aboriginal and Islander communities was significant in itself. In this article Professor Garth Nettheim considers the administration by Queensland of its Aboriginal and Islander communities in terms of clear conflict between the law and practice, and also in terms of choice between current policies of "managing" those communities and the alternative of autonomy.

I INTRODUCTION

In 1973 I wrote, for the Australian section of the International Commission of Jurists, a critical analysis of the Aborigines Act 1971 (Qld) and the Torres Strait Islanders Act 1971 (Qld) and the regulations made thereunder.[1] Both Acts commenced operation on 4 December 1972 and were due to expire at the end of five years (that is, December 1977) unless continued by Proclamation by the Governor in Council.[2] Official mechanisms for review and consultation were set up only during 1977 and the Acts were continued for an extra twelve months beyond their due expiry date.

My report for the International Commission of Jurists included an Appendix setting out what I perceived to be significant infringements by the legislation of the Universal Declaration of Human Rights. By late 1975 it was possible to report that most of the offending legal provisions had been superseded.[3] The Queensland Government had

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[1] Nettheim, *Out Lawed: Queensland's Aborigines and Islanders and the Rule of Law* (1973).

[2] S. 2(1).

[3] Nettheim, "Queensland's Laws for Aborigines" (1976) 1 *Legal Service Bulletin* 321.

amended its Aborigines Regulations 1972 in April 1974, to make Reserve Councils fully elective;[4] later in that year it had passed an Act to permit Aboriginals and Islanders to elect not to have their property and earnings managed for them by the Department.[5] More significantly, the Commonwealth Parliament cut a swathe through the Queensland Acts by enacting the Aboriginal and Torres Strait Islanders (Queensland Discriminatory Laws) Act 1975 (Cth). (The Racial Discrimination Act 1975 (Cth) also has some relevance to the Queensland situation.)

With the major objectionable provisions of the Queensland laws now repealed or overridden, one could be forgiven for assuming that there are no further matters concerning Aboriginals and Islanders to engage the attention of the human rights lawyer in Queensland at the legislative and governmental level. However, to change the law is not necessarily to change the practice. In *Out Lawed* I commented about the 1971 Acts: "Presumably the same pattern of administration—and the same administrators—will continue as in the past".[6] The "pattern of administration" referred to was described as a pattern which still clearly displayed its roots in a nineteenth century philosophy of blanketing paternalistic control.[7] Similar caution was expressed in noting the overriding 1975 Commonwealth legislation: "[O]ne waits eagerly to learn whether life is becoming markedly better for Queensland's black citizens as a result".[8]

In 1978 life *has* become markedly better in several ways. For example, it seems that few people now have their earnings handled for them by the Department under the old, hated Trust Fund system. In other ways the same basic problem continues. In 1965 the old Department of Native Affairs (D.N.A.) became the Department of Aboriginal and Islander affairs (henceforth D.A.I.A.). In 1975[9] it was given a more positive title, the Department of Aboriginal and Islanders Advancement (still D.A.I.A.). Aborigines who know full well the currrent title are still prone to refer to the Department as the D.N.A.—not in error but to make a sardonic point. People on State-administered Reserves are still made to feel dependent on Departmental management and control. I shall return to this point later. First, it is somewhat astounding to discover that in at least two respects the D.A.I.A. has simply ignored the Commonwealth legislation of 1975.

II WAGE RATES

Section 11 of the Aboriginal and Torres Strait Islanders (Queensland Discriminatory Laws) Act 1975 (Cth) says unequivocally that no

[4] *Qld. Gov. Gaz.* 13 April 1974, No. 58, 1476.
[5] Aborigines Act and Torres Strait Islanders Act Amendment Act 1974 (Qld).
[6] Note 1 *supra*, 27.
[7] *Id.*, 114.
[8] Note 3 *supra*, 325.
[9] Aborigines Act and Other Acts Amendment Act 1975 (Qld).

Aboriginal or Islander shall be employed anywhere in Queensland on terms, conditions and wages less favourable than those accorded non-Aboriginals and non-Islanders. The D.A.I.A. pays Aboriginals working on Reserves less than award wages.[10] The standard adult rate in July 1977 on Palm Island Reserve was $73 for males and $59 for females. (A few people, such as leading hands and gangers received more.) The rates may possibly be higher on some Reserves, lower on others.[11]

The D.A.I.A. employs directly nearly 200 people on Palm Island. Others are employed by the canteen, the hospital, the State school, the church school. Many are unemployed. Those employed directly by the Commonwealth Government get full award wages and, all told, some 90 people get full pay. Lorna Lippmann reports that recently the medical practitioners on the island wished to pay increased wages to Aboriginal nursing aides who then earned between $40 to $60 a week (white nursing aides received $90 to $110) but the Director of Aboriginal and Islander Advancement turned down the application of the Department of Health on the basis that this would place the aides out of parity with other Aboriginal workers on the island. On Yarrabah Reserve near Cairns, the big majority of the 150 or so people employed are paid at under award rates.[12]

Several things should be noted. One is that Aborigines on Palm Island pay low rent for accommodation—something like $3 per week for "old" houses (some of which are condemned, while others ought to be) or between $5 and $7.50 for new houses. On Yarrabah rent is about $6 per week. A second matter to note is that there appear to have been (at least in percentage terms) substantial increases in wages over recent years averaging $5 every six months. Possibly, Departmental policy is to move to wage parity in a series of graduated stages.[13] A further consideration is that most Aboriginals and Islanders now seem actually to get the money rather than having it held for them by the Department. However, the fact remains: The law says that Aboriginals employed on Reserves should get full award wages. Those employed by the Department do not.

III RESERVE COURTS

Section 9(2) of the Aboriginal and Torres Strait Islanders (Queensland Discriminatory Laws) Act 1975 (Cth) provides that Aboriginals

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[10] A case from Yarrabah was reported in the *National Times* 9-14 January 1978, 14.

[11] Lippmann, "Discrimination Against Aborigines by the Queensland Government", a paper presented at the Monash University seminar on "Law and Aborigines: Critical Issues" noted *supra*, 8, 14.

[12] *Id.*, 8.

[13] A letter to the Director, Mr P. J. Killoran, enquiring whether this was in fact the Department's policy, was not answered.

or Islanders shall be convicted for offences by courts established for a Reserve only if they would have the same right of appeal or review as would attach to a conviction in the Magistrates' Court (if that court had jurisdiction).

Aboriginal Courts were established for the major Reserves by the 1965 Regulations and continued by the 1971 Act.[14] The constitution and jurisdiction of such courts are dealt with in the 1972 Regulations.[15] Such courts are to be constituted by two or more Aboriginals who are Justices of the Peace, provided that if a court cannot be so constituted it shall be constituted by three or more members of the Council for the Reserve. The courts are given jurisdiction to deal with offences against the regulations or by-laws by Aboriginal residents of the Reserve and to deal with disputes between Aboriginal residents where the amount involved does not exceed $200. Appeals from decisions of such courts may go to the District Officer (who may be the Clerk of the Magistrate's Court) constituting a court of appeal, and further appeal may be taken to the Visiting Justice.[16] The counterpart provisions for Torres Strait Islanders establish Island Courts constituted by the Island Council with appeal possibilities to the Group Representative, then to the Island Advisory Council and then to a Stipendiary Magistrate.[17]

Section 9(2) of the 1975 Commonwealth Act is not in opposition to the principle of community courts. Such courts have the potential (realised on some Reserves, though on others they are regarded as "kangaroo courts") to operate with considerable effectiveness and sensitivity in resolving community matters within the community, as an alternative to having Aboriginal or Islander defendants taken to the nearest town for formal trial by the white magistrate. The effect of section 9(2) would be, in fact, to enhance the status of these courts by placing them on the same level as Magistrates' Courts so that any appeal would lie directly to a judge. The failure of the Queensland Government to date to revise appeal provisions in line with section 9(2) is unfortunate, to say the least. The failure to do so renders unlawful any exercise of criminal jurisdiction by these courts. In several cases charges have been dropped following representations made by Legal Aid Service lawyers. Otherwise the Reserve Courts continue to function as before despite the Commonwealth Act. It is estimated that 400 people appear each month before the twelve Aboriginal community courts; it is impossible for the Aborigines and Torres Strait Islanders Legal Service (Qld) Ltd to represent most of these defendants.[18]

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[14] S. 32(1).

[15] Regs 45 and 46.

[16] Reg. 55.

[17] Torres Strait Islanders Act 1971-1975 (Qld), ss 42-45.

[18] Johnston, "Queensland Aboriginal: His life and the law", (1976) 2 *Legal Service Bulletin* 147.

In these two respects, at least, the Queensland Government has simply chosen to ignore overriding Commonwealth law. In another respect it seems that the spirit of the law is effectively undermined.

IV COUNCILS

The avowed aim of the Queensland Government in its 1971 legislation was to encourage Aboriginal and Islander people "to make full use of their many talents and capacities" and to further "their social, economic and political advancement".[19] It seemed implicit in this philosophy that Aboriginals and Islanders would be assisted to achieve autonomy, independence and responsibility for their own affairs.

The system of Councils for the major Reserve Communities, like the system of Reserve Courts, has the potential to further community autonomy. The 1972 Regulations[20] provided that Aboriginal Councils should have three elected members and two appointed by the Director. The Government's decision in 1974 to make the Councils fully elective[21] removed at least one basis for Departmental dominance of the Councils.

Yet the possibility of dominance continues through the overall system. The Councils are not consulted about the appointment of Reserve Managers (or other white staff); indeed the Councils are responsible *to* the Manager.[22] Lorna Lippmann states that the "Reserves are run as managed institutions with a gulf between white staff and black inmates, and with all power resting in the hands of the manager, as a delegate of D.A.I.A."[23]

The Manager hires and fires Aboriginal police.[24] The office of the Council Chairman commonly adjoins that of the Manager who thus can see who comes to visit the Chairman and, possibly, hear what is said. On Palm Island the Council phone goes through the D.A.I.A. office switchboard.[25] The D.A.I.A. run Reserve post offices and Lorna Lippmann reports allegations of interference with communications between Aboriginal Councils and the legal aid personnel.

One such example of an alleged interference began with events of 13 July 1976, when the Aboriginal Field Officer of the Cairns Aboriginal Legal Service telegraphed the chairman of the Aboriginal Council at the Edwards River Reserve, seeking permission from the Chairman, Councillors and Manager to visit the Reserve and seeking an urgent reply to the request. A reply was received on the same day saying that a visit at present would be inconvenient, this was over the signature of

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[19] Qld Parl. Deb., 17 November 1971, 1922.
[20] Reg. 18(1).
[21] Aborigines Act and Torres Strait Islanders Act Amendment Act 1974 (Qld).
[22] Reg. 19.
[23] Note 11 *supra*, 7.
[24] Reg. 64.
[25] Note 11 *supra*, 14.

the Chairman of the Edwards River Aboriginal Council. Despite this, the Field Officer visited the Reserve immediately, meeting with the Chairman and other Council Members, finding only one of them fully literate, another semi-literate and the Chairman illiterate. They informed her that they did not know of either telegram and that they would be happy for her to visit at any time.

The Field Officer then requested and was refused a copy of the by-laws from the Manager; the Aboriginal Council Members claimed to have no knowledge of their existence, despite the provision of regulation 26 of the Aborigines Regulations of 1972, which says that a copy of all the relevant By-Laws are to be kept at the office of the Council. Still on 13 July at 3.30 p.m. the Field Officer sent the solicitor at the Cairns Aboriginal Legal Service an urgent telegram, marked and paid for as such. It was received in Cairns one and a half days later, that is at 9.30 a.m. on 15 July—normal transmission time for such a telegram being a few hours. The Field Officer had left the Reserve on 14 July. As Lorna Lippmann notes: "All telegrams sent from the five northern reserves are transmitted through the D.A.I.A. Office on Thursday Island. People on these Reserves therefore have no direct means of communication with the outside world".[26]

Most serious of all, there have been allegations of irregularities concerning at least three Reserve Council elections. Under regulation 41 the Minister has a discretion ("may") to dissolve a Council on petition of at least two-thirds of the electors "if in his opinion it is necessary to do so". The Manager of the Reserve at Yarrabah is said to have disenfranchised a number of electors simply by closing the polling booth at 3 p.m. though it normally stayed open till 6 p.m. A petition of protest signed by two-thirds of the population, in accordance with regulation 41 under the Queensland Act, was sent to the Minister for Aboriginal and Islander Advancement regarding the Council so elected, but also as a result of the regulation the Minister did not have to heed the petition.[27] A further complaint that has been made is that the Manager refused to allow scrutineers into his office at the time of counting votes.

The Palm Island Aboriginal Council was dissolved by the Queensland Government in 1974 on receipt of a petition from some resident Aborigines. The Council and its Chairman had been outspokenly critical of the Queensland Government and particularly of the Aborigines Act and the administration generally. The solicitor, who investigated the petition on behalf of the deposed Council, alleged 115 signatures to the petition were forged. Many Islanders still believe the replacement Council was aided into office by the Queensland Government and

[26] *Id.*, 16.
[27] *Id.*, 9.

church authorities; this Council accepted tutelage from the Queensland Government.[28]

Campbell J. in the Supreme Court found that many of the signatures were in the same handwriting but that the onus was on the person challenging the petition to establish that the person writing the signature lacked the authority of the person whose name appeared.

The Badu Island Council elections of 30 January 1976 gave rise to allegations of irregularities and 99 residents signed a petition to this end. In a signed statement the former Council Chairman made three allegations. First, he was not advised until 8 p.m. 29 January 1976 that the election was to occur. Secondly, a potential candidate was refused nomination without being given an adequate reason. Thirdly, postal votes were not allowed. These allegations were supported by complaints of irregularities from a number of people in other communities.[29]

There is another difficulty. Under regulation 36 "[a]n Aborigine who has attained the age of eighteen years and who resides on the Reserve or Community in respect of which an election of a Council is held, other than by virtue of a permit granted under section 24 of the Act shall be qualified to vote as an elector at such an election", unless he is undergoing sentence of imprisonment. The reference to a section 24 permit is to a permit to visit a Reserve for a period less than one month granted by the Aboriginal Council or by the Director.

The effect of section 6 of the Aboriginal and Torres Strait Islanders (Queensland Discriminatory Laws) Act 1975 (Cth) is to override for Aboriginals and Islanders any permit requirement to reside on a Reserve. The effect on regulation 36 would be to confer the vote on any Aboriginal over 18 years who in fact is residing on the Reserve and who is not in prison. Nonetheless, it is alleged that many Aboriginals residing on Reserves are denied a vote and only those regarded by the Department as having a right to reside there are allowed to vote. Once again it appears that the Commonwealth Act is being ignored.

V LAND RIGHTS

The Queensland Government has expressed its opposition to the idea of vesting ownership of Reserve lands in (or in trust for) the Aboriginal and Islander residents, as has been conceded in other Australian States and Territories, and has also opposed a suggestion that Reserves be protected from excision.[30] It has also refused to permit the transfer of leasehold properties to Aboriginal groups.[31] Land rights claims have

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[28] *Id.*, 18.

[29] *Ibid.*

[30] Qld Parl. Deb., 24 November 1971, 2176-2178.

[31] Qld Parl. Deb., 8 December 1976, 2208-2209; *National Times*, 14 February 1977; H.R. Deb., 7 April 1978, 1231-1234.

been regularly denounced as "apartheid".[32] Not surprisingly, the Whitlam Government proposal for a Commonwealth take-over of Queensland Reserves to give land rights to their inhabitants was bitterly opposed by Queensland Ministers.[33] Many Aboriginal communities have feelings of uncertainty about the extent of their Reserves and about their future rights of occupancy.

The Mossman Gorge Reserve comprises some 66 acres of Government-owned land north of Cairns, occupied by some 90 people in 13 dwellings. Their tribal land was in Daintree, but they moved when the mission there was closed down and turned into cane farms. The shacks are very run-down. The people pay no rent and the Government declines to repair the shacks as it is attempting to get the people to move into the town. The people are unwilling to move as they regard themselves as a community and give each other emotional and economic support. In May 1975 an Aboriginal housing association attempted to buy private land adjoining the Reserve, but the Queensland Government compulsorily acquired the land instead.[34] The fact that the Reserve land has considerable tourist potential may not be irrelevant.

Palm Island is one of a group of eight islands. The status of the other islands and of Palm Island itself is a matter of uncertainty to the Reserve residents. In 1971 the then acting Minister, Mr Hodges, announced that the Cabinet had approved the calling of tenders for the development of the islands as a tourist centre.[35] These plans did not proceed. However, in 1976 the then Minister, Mr Wharton, issued a series of press statements[36] denouncing rumours that Palm Island was to be turned into a tourist resort as "a cruel trick by advocates of Aboriginal land rights" arising from a conference on Aboriginal land rights held in Adelaide and as "a deliberate scare tactic of deceit to confuse and divide the people". In May 1977 a portion of Orpheus Island, one of the Palm Island group, was offered for auction sale as perpetual leasehold for tourist development. Apparently the reserve price was not reached.[37] The status of another island in the group, Fantome, is quite unclear.[38]

Insecurity by residents about their future on Reserves is understandably much greater when mineral resources occur in the neighbourhood. Bauxite deposits appear to have been the major factor in the recent series of issues concerning the Aurukun community. The decision of the Queensland Government in March 1978 to take over management

[32] *E.g.*, press statement by the then Minister, Mr Wharton, 26 July 1976.

[33] *Courier-Mail* 21 September 1974.

[34] Note 11 *supra*, 11.

[35] *Australian* 17 June 1971.

[36] 7 September 1976, 22 November 1976.

[37] *Telegraph* 28 May 1977.

[38] *The Palm Islander* 4 February 1977; 18 February 1977.

of the Aurukun and Mornington Island Reserves and, in particular, its sudden abolition on 7 April of their status as Reserves, will have been noted by the residents of all other Queensland Reserves.

While the Queensland Reserves do continue to have Reserve status, Aboriginals and Islanders now have in law greater security to come and go as they wish than they did under the 1971 Acts. Section 6 of the Aboriginal and Torres Strait Islanders (Queensland Discriminatory Laws) Act 1975 (Cth) makes it clear that Aboriginals and Islanders, unlike other people, do not need permits to be on a Reserve. However, a Reserve Council can give a direction to prevent an Aboriginal or Islander being on a Reserve. In law this removes the power of the Director to deny access to Aborigines and Islanders.

The influence of the Department, through the Manager, over Reserve Councils has already been noted. However, in some cases it is alleged that the Department itself has denied access. In August 1976 one Aboriginal claimed that D.A.I.A. staff had prevented him from returning to the Edwards River Mission by the expedient of advising North Queensland Air Services not to fly him in. The press reported that he had been attempting to move his people from the mission back to tribal lands. An outspoken Aboriginal woman delegate to the North Queensland Land Council claims to have been removed from Mornington Island by order of the Department. Lorna Lippmann cites a case in June 1976 of an Aboriginal being denied permission by the Manager to return to the Lockhart River Reserve. She also reports two cases (May 1976, November 1975) of Aboriginals being charged by the D.A.I.A. with being on Reserves (Normanton, Weipa South) without permission; charges were dropped after the Legal Aid Service intervened.[39]

VI FUNDS

Aboriginals and Islanders have expressed over the years considerable uncertainty about funds held on their behalf by the Department. Various funds are mentioned in the Acts and Regulations but individuals and communities frequently feel that they do not receive a proper accounting for the administration of those funds.

1. *Trust Funds*

These funds comprise moneys held for the benefit of individual Aboriginals and Islanders. The Trust Account system was a major operation when the earnings of a substantial proportion of Aboriginals and Islanders were paid to the Department. Frances Lovejoy[40] records

[39] Note 11 *supra*, 16-18.

[40] Lovejoy, "The Legal and Economic Status of Aboriginal Workers in Queensland 1897-1971" (unpublished), 11; "The Economic Control of Aborigines under the present Queensland Act" (unpublished), 8.

the following official figures for the wages trust account for assisted Aboriginals and Islanders for the respective years:

Year	*Deposits $*	*Withdrawals $*	*Balance $*	*Interest transferred to Welfare Fund $*
1967-1968	3,229,505	3,310,623	1,929,166	18,505
1968-1969	3,908,012	4,011,438	1,869,972	26,356
1969-1970	4,127,313	4,104,135	1,852,782	20,986

The last item apparently represents the difference between savings bank levels of interest credited to individual accounts[41] and the actual interest derived from the Government's investment of a proportion of the moneys held in long-term securities at a rate of interest somewhat higher than savings bank interest.[42]

Problems in regard to Trust Funds are likely to diminish now that apparently few Aboriginals and Islanders have their property and earnings managed for them by the Department. This has been the result of the enactment by the Queensland Parliament of the Aborigines Act and Torres Strait Islanders Act Amendment Act 1974, reinforced by section 5 of the Aboriginal and Torres Strait Islanders (Queensland Discriminatory Laws) Act 1975 (Cth) and section 10(3) of the Racial Discrimination Act 1975 (Cth). However, Aboriginals and Islanders have had difficulty getting a proper accounting for moneys paid into the Department on their behalf in the past. Some of these difficulties were referred to in debate on the 1971 Acts.[43]

Perhaps the "leading case" is that of Johnny Belia, a stockman in Western Queensland whose pay slips from various cattle stations, showing amounts deposited directly with the D.A.I.A., failed to reconcile with the much smaller amounts shown as deposited in his D.A.I.A. passbook.[44] To sort out the situation, the first essential was for Mr Belia to apply under section 45 of the Aborigines Act 1971 (Qld) to terminate Departmental management of his property. The Director denied the application and, under section 46, the matter was referred to a Stipendiary Magistrate. Mr Belia was legally represented. The magistrate was not greatly impressed by Mr Belia's arithmetical skill, as revealed in some money transaction questions put to him by the D.A.I.A. representative; but he expressed himself as even less impressed by the Department's own arithmetic as revealed in the documents and he granted the application. It is understood that after considerable further effort, Mr Belia was finally permitted to inspect his records in the

[41] Reg. 5 provides that no less than savings bank interest shall be credited to individual accounts.

[42] Permitted by reg. 4(1)(a).

[43] Qld Parl. Deb., 25 November 1971, 2252, 2256.

[44] An accountant's investigation of the matter is set out by Christophers and McGuinness, "The Queensland Aboriginal Wage System", in Stevens (ed.) *Racism: The Australian Experience* vol. 2 (1972) 171, 181-183.

Brisbane D.A.I.A. office and that some reconciliation of the accounts was eventually established. It appears that he was owed $2,376.82 being deposits which should have been made between February 1966 and August 1970 and which should have been recorded in his passbook —during that time only $54.04 had been deposited.[45] (Others have been less systematic in keeping records, less persistent or less supported by skilled advisers and advocates.[46] Whether justified or not, many Aboriginals believe that they have been defrauded by the system.)

Some apparently have been defrauded. In October 1968 a police sergeant in North Queensland, as representative of the Department, was arrested and charged with 60 counts of forgery, bail being set at $31,000. Again, the principal complainant was a stockman who had kept a detailed account of his employment record over a two-year period. The charges against the police officer involved cashing cheques in the individual's name and the false witnessing of payments at times when the person was able to prove that he was not in town.

Frank Stevens[47] has itemised a number of other methods whereby Aboriginals have allegedly been defrauded. These include the placing of a withdrawer's thumb print on multiple blank withdrawal forms though only one was being used at the time of signing, allowing the officer concerned to fill out the others in his own time and to retain the amounts concerned. Similarly, multiple thumb-printing of blank order forms for stores has occurred. These blank order forms may then be filled in at the pleasure of the storekeeper. In some instances where the receiver of the goods is illiterate the storekeeper may complete the "goods provided" section of the order form so that the receiver was charged for more than was actually received. Applicants for funds may be "short changed" as the money is being passed from the recipient. The sum determined by the officer in his discretion may be entered into the Aboriginal's account for the sale of commodities between Departmental officers and their charges.

Stevens also discusses several further though more indirect ways by which sums due to Aborigines were not credited to them; these practices were largely associated with their employment since officers of the Department rarely visited properties to investigate the situations their charges are in, little information about their earnings is available to the Department. Consequently, the employer was usually the sole arbitrator of a net sum for which he would assume responsibility on the employee's part. Money due to Aboriginal employees, except for

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[45] *Identity* July 1975, 8.

[46] Mr Belia had the assistance of the Federal Council for the Advancement of Aborigines and Torres Strait Islanders (F.C.A.A.T.S.I.), a tenacious friend Mrs Ruth Kaplan and a sympathetic solicitor.

[47] Stevens, "Aboriginal Wages and the Trust System in Queensland" (unpublished, 1969), 2-3.

some "pocket money" and deductions for goods supplied, was paid to the Department's area representative by one cheque covering all the employer's "assisted" employees. All too often this was done without any itemisation or detailed information being given to the employee. Two other major ways by which the sums involved may not be equal to amounts earned and due are (1) the deduction of items from the wages of station employees that were in fact not received by them, and (2) the payment of an Aborigine at a lower rate of pay than was owing for services rendered.

Stevens goes on to say that all these methods of defrauding had been at the time of his writing (1969) recently used. He also argued that their widespread use was the only logical explanation for the continued complaints by Aborigines that their expectations and the amounts in the accounts controlled by the Department did not tally. Furthermore, he suggested that where the district officer was the defrauding party, Aborigines could neither check for themselves nor authorise anyone to do so on their behalf. Stevens gives the example of one of his informants who sought to establish the amount of his account—he was initially forwarded an incomprehensible copy of a ledger, and written enquiries with respect to his account remained unanswered after two years.

If such practices did occur it is very difficult for most Aboriginals to ascertain where the money has gone, especially as the D.A.I.A. appears reluctant to disclose its head office information to claimants. If records "in the field" are unavailable, the problem becomes almost insurmountable. There have been reports over the years of several outback police stations mysteriously burning down. It would be interesting to trace the subsequent careers of the officers who had been stationed there at the time.

2. *Estate Funds*

Section 40 of the Aborigines Act 1971-1975 (Qld)[48] provides for the administration of estates of deceased or missing Aborigines. Sub-section (b) gives the Director power to determine entitlement to the estate of such a person "in the absence of a testamentary instrument duly made" and if it should prove "impracticable" to ascertain persons entitled to succeed to the estate. The reference to a "testamentary instrument duly made" has to be read in conjunction with section 41[49] which provides that an instrument made while a person's property is being managed under the Act has to be approved of and witnessed by a district officer or other authorised officer. Under section 5 "instrument" includes a testamentary instrument. The result is that a deceased Aboriginal or

[48] The counterpart provision for Islanders is s. 64 of the Torres Strait Islanders Act 1971-1975 (Qld).

[49] For Islanders, s. 65 of the Torres Strait Islanders Act 1971-1975.

Islander, who leaves a will which would otherwise have been valid, becomes effectively intestate if the will was not approved or witnessed by an officer. This requirement is clearly discriminatory.

The Director's conclusive power of certification of entitlement under sub-section (2) must also be noted.

> This is a highly arbitrary power by which persons who, otherwise, would be entitled to succeed on an intestacy may be excluded solely on the basis of the Director's determination, which is "conclusive", that it is "impracticable" to ascertain who they are. It comes close to an arbitrary deprivation of property within Article 17(2) of the Universal Declaration of Human Rights.[50]

Under the 1965 Regulations such moneys were initially placed in "The Assisted Persons Estates Trust Account". (There is no reference in the 1972 Regulations to any similar account.) Officially disclosed balances for the respective financial years under the 1965 Regulations were $106,324 for the period 1967-1968; $114,550 for 1968-1969; and $121,150 for 1969-1970. These balances would probably not represent the full amounts paid into the account as moneys might be transferred into the Aborigines' Welfare Fund.[51] Attempts to get a more detailed breakdown of the administration of section 40 (and its predecessors) have produced some further information. A question on notice in the Queensland Parliament and the reply of the Minister, Mr Wharton, appear in the Hansard for 10 March 1976.[52]

It was there revealed that $27,326.12 was involved in 61 estates of deceased Aborigines administered by the Department and that did not include those being processed at that time by the Public Curator or other executors. Furthermore, the number of beneficiaries was said to be conditional upon evidence of succession in accordance with any testamentary instruments, the laws of intestacy or as the legislation otherwise provides. The answer to a subsequent question revealed that $59,268.94 from 77 estates of deceased Aborigines had been paid into trust for the 16 years from 1960. It was also said that this amount and any amount held is so identified as a contingent liability in the event of any complainant demonstrating an entitlement. It was further claimed in the reply to the question, that to locate the beneficiaries (who were said to be established by the will or current legislation) Departmental records are searched, friends consulted and general inquiries are made in the area formerly lived in. Mr Wharton's reply continued "[i]t is only after years of fruitless exhaustive inquiry that funds are transferred from the Estate Account". In response to Mr Wright's request for further information, the Minister advised that "an amount of $96,476.40

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[50] Note 1 *supra*, 75.

[51] Lovejoy, "The Economic Control of Aborigines under the Present Queensland Act" (unpublished) 4.

[52] Qld Parl. Deb., 10 March 1976.

has been transferred to Aboriginal Welfare Fund since January 1945 being the balance of 174 estates".[53]

It thus appears that over a 30-year period a sum close to $100,000 held by the Department on behalf of Aboriginals who have died (or disappeared), has been transferred into the general-purpose Aborigines' Welfare Fund on the basis of "intestacy" and impracticability of ascertaining persons entitled to succeed. This seems remarkable, particularly in view of the extended family consciousness shown by most Aboriginals. It is even more remarkable in view of the Director's power, when it proves impracticable to ascertain persons entitled to succeed to the estate in law, to determine for himself persons entitled to succeed.

The Minister's answers about the administration of section 40 are curious. He talks about entitlement to succeed to an estate being based on any testamentary instrument, the laws of intestacy "or as otherwise provided by legislation". However, the only "otherwise" legislation is section 40 of the Act itself which simply leaves the Director a virtually untrammelled discretion in the matter.

The questions answered on the second occasion seem clearly to have been intended to refer to—and to have been accepted as referring to—the situation arising under section 40(3) of the Act, that is, where no person is held entitled to succeed to the estate or part of an estate. That the Minister should say "[i]n accordance with legislation the amount is held identified for all time as a contingent liability in the event of any claimant demonstrating entitlement", is puzzling as section 40(3) provides unequivocally that such moneys "shall vest in the Director who shall pay the sum into the Aborigines' Welfare Fund for the benefit of Aborigines pursuant to s. 36 of this Act". It is difficult to ascertain the basis for the Minister's response.

The practice may be more revealing. One current case concerns the estate of the late Willie S. Mrs Lena M (formerly Lena H) of Palm Island claims to be a close relative of the deceased and believes that some money was left to her by will. Her husband claims to have been advised by a Departmental officer at Yarrabah that the will had been placed on file there but that it would take "several years to finalise". Subsequently, both the Yarrabah office of the Department and the Brisbane head office denied any knowledge of a will. In June 1971 Senator Keeffe wrote about the case to the Director Mr Killoran, who replied on 16 June 1971 by saying that Willie S had died intestate on 30 April 1959 in Charters Towers and that no evidence could be found to support the claim that Lena M was related to the deceased. The Minister further said that all efforts to trace blood relatives had met with no success and consequently the estate was being held in the "Aboriginals Protection and Property Account". A letter held on file

[53] I am indebted to Mrs Ruth Kaplan for this information.

contains a statement from a man who knew the deceased well—the man states that the deceased was widely known as Johnny H and that he had two children "a girl named Lena and a boy named Neville"; the man states also that he had supplied this information to the D.A.I.A.[54] Efforts to get some resolution of this case, and of a number of similar claims, are still continuing, and may result in litigation.

There appear to be two major sources of difficulty. One is the legal requirement that even if an Aboriginal makes a will, it is ineffective unless it is approved and witnessed by a Departmental officer. Few Aboriginals would be aware of this and most, therefore, would die intestate. The second problem is that Aboriginals often have difficulty in formally proving relationship to a deceased person—the Director's certificate that persons are or are not entitled to succeed is by law "conclusive" and would, apparently, be beyond legal challenge.

It would seem essential in new legislation to delete altogether the requirement for Departmental approval and witnessing of wills. Furthermore, the special powers given to the Director by section 40 seem unnecessary and consideration should be given in new legislation to deleting them altogether. There seems little reason why Queensland Aboriginals should not now be subject to the ordinary Queensland law of succession.

3. *Community Funds*

Quite apart from disquiet over practices associated with Trust Accounts and Estates held on behalf of individual Aboriginals and Islanders, there have also been expressions of concern from time to time for Community Funds which are "maintained and managed by the . . . Aboriginal Council . . . subject to the Director as Trustee".[55]

One such focus of concern is that moneys which it is believed ought to go to the Community are directed instead to the state-wide all-purpose Aborigines' Welfare Fund which is "controlled by the Director and maintained for the general benefit of Aborigines".[56] This concern finds expression particularly in relation to mining developments on Reserves. Under section 29 of the Aborigines Act 1971-1975 (Qld) the approval of "the trustee of the reserve" or the Minister is required for the grant of a mining lease over an area within a Reserve; similarly a person who seeks to enter on a Reserve for the purpose of prospecting or mining must apply to the "trustee of the reserve" for a permit. (The "trustee of the reserve" appears from the Queensland Land Acts to be the Director of D.A.I.A.) Under section 30 the "trustee of a reserve" or the Minister may either as a condition precedent or in relation to his granting a permit, require the applicant and any other persons to enter into such

[54] See also *Identity* April 1976, 27.
[55] Regs 42-44.
[56] Reg. 4.

an agreement as the trustee or, in some cases, the Minister thinks fit. Such an agreement may provide that the trustee or any other person is able to participate in the profits of a mining venture or ventures allowed on the Reserve by the grant of the permit, for the benefit of resident Aborigines or other Aborigines as the agreement may provide. At first glance, section 30 appears to grant the administration a complete discretion as to whether or not to require such an agreement; whether or not such an agreement should make any provision for participation in the profits; and whether or not such profits should be for the benefit of Aboriginals resident on the Reserve or Aboriginals generally.

Particular controversy has surrounded the proposed development of bauxite deposits at Aurukun. In 1975 the Queensland Parliament passed the Aurukun Associates Agreement Act 1975 (Qld) with what was claimed to be inadequate consultation with the Aurukun Aboriginal community and inadequate opportunity for the community to assert its own interest in the profits.[57] Legal action was brought and on 5 October 1976 the Queensland Full Supreme Court overruled a legal objection to the Aboriginals' challenge to the validity of the agreement on the basis that the Director owed a special obligation to the community. The Director then instituted an appeal to the Privy Council which, on 20 January 1978, reversed the Supreme Court decision and held that there was no obligation on the Director to make any particular provision for the community.[58] (In the meantime it appears that the Federal Government has indicated that export licences will be withheld from the mining companies until an agreement is reached which is satisfactory.)[59]

The system of beer canteens established under the 1971 legislation (replacing the previous total ban on liquor on Reserves) is one source of community funds. Regulation 84(10) allows appropriation of profits "to the general welfare of Aboriginal inhabitants on the Reserve in such manner as the Council from time to time determines". Under section 34 the business of selling and supplying beer at premises established on a Reserve "shall be conducted by the Director and his servants". An Opposition amendment in 1971 to give Aboriginal Councils some control over the conduct of canteens was not accepted. In moving the amendment the Opposition spokesman said that "for too long most members of Aboriginal communities have not been sure where moneys from projects they have undertaken have been spent", and he expressed himself as satisfied by the Minister's assurance that the profits would remain on the respective Reserves.[60]

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[57] *Identity* April 1976, 5-10.

[58] *Director of Aboriginal and Islander Advancement* v. *Peinkinna* (1978) 17 A.L.R. 129.

[59] Sen. Deb., 15 March 1978, 610. This issue was fairly obviously a factor in the Queensland Government's decision on 13 March 1978 to take over direct management of the Reserve (and Mornington Island) from the Uniting Church in Australia.

[60] Qld Parl. Deb., 24 November 1971, 2181.

On Palm Island settlement profits from the Beer Canteen Account over two and a half years were sufficient to allow the opening on 8 February 1977 of a $160,000 hotel and beer garden to replace the previous ramshackle canteen. Future profits may be used to restore the old premises as a recreation centre and build new shops.[61] Again, there are suspicions that profits may somehow elude the community. A Departmental system under which canteen managers are not given receipts for proceeds deposited with the D.A.I.A. (they are pasted in a book retained by the Manager) serves to enhance a widespread belief on some Reserves that some of the money mysteriously disappears.

4. *Aborigines' Welfare Fund*

The predecessor to the current Fund dates back to the early years of the century when an important component was a compulsory percentage deduction from wages to be used for the provision of welfare services for other Aboriginals or Islanders. This scheme ceased only in 1966. In 1971 Frances Lovejoy commented[62] on the change in purpose of the Welfare Fund over the years. She notes that it was originally a trust fund for the relief of destitute Aborigines, financed by a levy on the wages of other Aborigines. Now it is, according to Frances Lovejoy, basically a Profit and Loss Account for the D.A.I.A. once the areas of expenditure such as officials' salaries, reserve maintenance, major capital works, Commonwealth Government grants for health, education and housing, and the Island Industries Board have been excluded. Ms Lovejoy suggests that it may be seen as a series of Profit and Loss Accounts for activities such as reserve retail stores, reserve farming enterprises, reserve "curio" production and Aboriginal housing.

It seems that the amounts generated on one Reserve are not necessarily redeployed on that Reserve. The Department appears notably reluctant to publish profit and loss statements for activities on particular Reserves. As already noted, the Welfare Fund also receives interest on Trust Accounts and undistributed estates of deceased or missing Aboriginals.

In total, one gains the unmistakable impression that there is widespread distrust by Aboriginals of the Department's handling of the various funds which it operates. There have been too many stories of individuals failing to get a satisfactory accounting of moneys held for them or being unsuccessful in claims to the estates of deceased Aboriginals. There is considerable strength of feeling that money generated within communities should be available to the communities and not deployed via the Aborigines' Welfare Fund.

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[61] *Courier-Mail* 8 February 1977.

[62] Lovejoy, "A Financial Analysis of the Queensland Aborigines' Welfare Fund" (unpublished, 1971), 7.

Various allegations and suspicions may, in the long run, prove to be without justification. There may turn out to be legitimate and adequate explanations. However, at present there seems to be widespread suspicion of possible corruption—if not by individuals, at least by a system which appears over-ready to transfer to general Departmental purposes funds on which individuals and communities believe they have a claim. The Department must bear some responsibility for the fact of such suspicion as long as it maintains its characteristic air of defensive secretiveness about its procedures.

VII CONCLUSION

This article does not pretend to be a comprehensive account of law and administration affecting black Queenslanders. I have simply selected a handful of issues on which I have some information and my information, even on these, may be incomplete. However, the information on these issues does suggest that despite the legislative changes of 1974 and 1975, despite even the removal (in law) of the principal defined violations of human rights, the central issue remains as it was when the current Acts were passed in 1971: "[I]t 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 demoralized dependence".[63] With some modification, that assessment remains substantially relevant in 1978.

The pages of an interesting fortnightly newspaper *The Palm Islander* are revealing. Beneath its title it carries the slogan "Prepare now for the day big brother goes away". The policy of the paper, and of the Adult Education Centre from which it sprang, is to make people aware of the manner in which they are living and to encourage them to gain control of their lifestyles, and to this end conforming to the D.A.I.A. policy of the missions losing their dependency on the Department "step by step".[64]

A news story in *The Palm Islander* on 18 March 1977 is illuminating on the question of permitted initiative. The previous issue had said that these people could repair any damage to their homes if the damage had occurred through their own fault. The journal was later told and so published in their edition of 18 March 1977, that this was not in fact permitted by the D.A.I.A. rules because the repairs might be substandard and the D.A.I.A. itself might be held to be responsible for anyone injured by faulty repairs.

In December 1976 *The Palm Islander* published responses to a survey of adult members of the community on the question of land rights.

[63] Note 1 *supra*, 101.
[64] Editorial, 19 August 1977.

Responses to the survey included the comments that the people wanted to lose their feeling of dependency on Europeans and see themselves advance; that the D.A.I.A. should leave, allowing the people to run the land themselves, and that in particular, the Councils should run the Reserves; and that some assistance should be given by qualified white people such as doctors, though they should also be answerable to the Council.

The Department has conceded some ground and even tolerates now some degree of critical comment. (The future of *The Palm Islander* will bear watching.) However, in regard to the Reserves, their resources and their inhabitants, the Department still seems to see its role as one of management, control, even proprietorship. Genuine "advancement" for the people in terms of initiative, responsibility and autonomy will require from the Government a fundamental shift in attitude. The preparation of new legislation could provide the opportunity for a radical and fruitful rethinking of the relationship of the Queensland Government with its Aboriginal and Islander citizens.

A first essential step has to be consultation. A four-person Aboriginal and Islander Commission has been established to play a role and first meetings of the Aboriginal and Island Advisory Councils have been called. (The Aboriginal Advisory Council consists of the Chairmen of Aboriginal Reserves; the Island Advisory Council consists of the three representatives of Torres Strait Island groups.) However, reports of the first meeting of the Aboriginal Advisory Council on the new legislation are less than encouraging. Permission was denied for an Aborigines and Torres Strait Islanders Legal Services (Qld) Ltd solicitor to observe and advise Chairmen. According to one report, the Director of D.A.I.A. bluntly put the proposal that Commonwealth funds for Aboriginal and Islander housing should be paid into the Queensland Department, adding: "Any objections?" Chairmen were caught so "off guard" that none spoke and when a member of the Commission subsequently interjected she was told by Mr Killoran that she was there as an observer and had no right to speak. Afterwards many of the Chairmen indicated that they did not want Commonwealth funds to be channelled through D.A.I.A., but the minutes of the meeting will presumably show unanimous support for the proposal. If this report is correct then the mechanisms for consultation being adopted will be perceived as a sham.

It seems that the only way by which adequate consultation can be seen genuinely to occur would be through a programme in which independent teams would visit each Reserve to talk at length with the people about the law and about options for change—and to listen to the people. The Aborigines and Torres Strait Islanders Legal Services

(Qld) Ltd has recently completed an exercise along these lines in conjunction with the Foundation for Aboriginal Islander Research Action.[65]

The options for change to be discussed with the people should include options for change at the fundamental levels of philosophy, policy and structure. The avowed aim of "advancement" will not be achieved within a reasonable time-scale if the discussion proceeds solely in terms of better management, more handouts or less restrictive controls. The Department has some considerable achievements to its credit; but its prospects for being of use to the people will be enhanced only if it ceases to operate as a mechanism for control and adopts instead the role of provider of skilled advice and resources to Aboriginal and Island communities who are given genuine autonomy and responsibility for their affairs. A more positive future role for Reserve Councils might be more easily achieved by renaming them Community Development Associations.

Pending a change of heart at Queensland Government level, one additional piece of Commonwealth legislation may have continued relevance. This is the Aboriginal and Torres Strait Islanders (Queensland Reserves and Communities Self-Management) Act 1978. It was introduced particularly to thwart the proposed Queensland take-over from the Uniting Church of management of the Aurukun and Mornington Island Reserves. It passed through all stages in the House of Representatives on 5 April and the Senate on 6 and 7 April.[66] It received the royal assent and commenced operation on 10 April. In the meantime its principal purpose had been effectively thwarted by the Queensland Government abolishing the Reserve status of both Reserves.[67]

The Act, however, has continuing potential for other Queensland Reserves and communities whereby, on request, the Commonwealth Minister for Aboriginal Affairs may make a declaration, subsequent to which substantial powers of self-management are conferred on the community in disregard of the State administration. Not many Aboriginal and Islander communities are likely to invoke this Act with the experience of Aurukun and Mornington Island fresh in memory—at least until the issues concerning those communities are seen to be

[65] Joint Submissions of Aborigines and Torres Strait Islanders Legal Service and Foundation for Aboriginal and Islander Research Action Concerning Review of the Aborigines Act 1971-1975 and Torres Strait Islanders Act 1971-1975. This submission, in three volumes, was presented on 30 July (*Courier-Mail* 31 July 1978). A summary of the wishes of the 1800 Aborigines and Islanders surveyed is set out as an Appendix to this article.

[66] H.R. Deb., 5 April 1978, 1011-1055; 6 April 1978, 902-969, 984-1018.

[67] *Sydney Morning Herald* 8 April 1978, 1.

satisfactorily resolved. The wish for self-management may be strong but so is the need for security of the Reserve lands.[68]

If there is to be merely a further bout of tinkering with the existing structures, there is a perceivable danger that Aboriginal patience may wear thin and that race relations could get worse rather than better. While new law, less law, better law is necessary, the real changes required are less in terms of law than administrative attitudes. The barriers must come down between "them" and "us", the managers and the managed. If the Department is not prepared to show real trust in the Reserve peoples, it cannot expect to be trusted by them. The degree of distrust, cynicism and frustration shown by many Aboriginals in Queensland are danger signals for the future which the Government would be unwise to ignore.

APPENDIX

Joint Submission of Aborigines and Torres Strait Islanders Legal Service and Foundation for Aboriginal and Islander Research Action concerning Review of Aborigines Act and Torres Strait Islanders Act—pp. 109-111.

SHORT SUMMARY OF RESULTS

A survey was conducted of nine hundred and twelve (912) adult Aborigines and Islanders living on Reserves in Queensland and of eight hundred and seventy-nine (879) adult Aborigines and Islanders living in towns in Queensland. The survey was undertaken by the Aboriginal and Islander Legal Service in conjunction with the Foundation for Aboriginal and Islander Research Action.

Indigenous research officers were used to conduct the interviews.

The survey was prompted by the need to review the Aborigines Act and the Torres Strait Islanders Act which were to expire in December 1977 but which have been extended.

The results of the survey of Aborigines and Islanders *on Reserves* indicated that an overwhelming majority of Reserve residents wanted:

[68] The Queensland counter-move was predictable at the time. It was also predicted as long ago as July 1974 in a remark by Aboriginal activist Denis Walker at a Monash Conference on "Aborigines and the Law": "In Queensland we are concerned that the Commonwealth may knock out the State legislation and the blacks may then be turfed off reserves into urban ghettoes. The Commonwealth legislation would be defective if it did not give us land rights, if it did not give us self-determination. Bjelke-Joh may look at the Commonwealth legislation and say—'there goes the Queensland Act and there goes the niggers out the door' ".

1. The Commonwealth Government to replace the State Government as the body responsible for making laws (73.1%).
2. Land ownership of the Reserves to be in the hands of Aborigines and Islanders on Reserves (85.6%).
3. The Community Council on each Reserve to control decision making on the following matters:
   — housing on Reserve (78.3%)
   — business enterprises on Reserve (80.4%)
   — employment of staff on Reserve (76.0%)
   — who is allowed to be on Reserve (86.2%)
   — the Aboriginal Police Force (72.0%)
   — liquor on Reserve (73.9%)
   — mining on the Reserve (79.5%)
   — waterways and forests on the Reserve (81.8%)
4. A law to punish anyone who discriminates against Aborigines or Torres Strait Islanders (93.0%).
5. The control of Community Council Elections to be in the hands of the State Electoral Office (54.9%).
6. Voting to be compulsory in Community Council elections (83.5%).
7. More power for the Aboriginal Court to deal with small stealing and assault charges (90.1%).

The survey of Aborigines and Islanders living in Queensland towns indicated that a majority of these people wanted:

1. The Commonwealth Government (45.2%) or Someone Else (43.7%) to be responsible for making laws about Aboriginal and Islander Reserves in Queensland, instead of the Queensland Government (6.5%).
2. Control of who is allowed to be on Reserves placed in the hands of the Community Council of the Reserve (74.7%).
3. Law to punish anyone who discriminates against Aborigines or Torres Strait Islanders (92.9%).
4. To go to live on a Reserve if that reserve were run by the Aboriginal people (69.1%).
5. Houses presently owned by the State Department of Aboriginal and Islander Advancement to be sold to the people living in the houses (54.4%).