AUSTRALIAN INSTITUTE OF CRIMINOLOGY

IVORY SCALES: BLACK AUSTRALIA AND THE LAW

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The Hon. Justice Michael Kirby, CMG*

Famous Last Words: On 21 January 1788 [Aborigines] greeted Phillip and is party reconnoitring Botany Bay and Port Jackson with shouts of "Warra, warra!" (Go away).
Glenelg-Bourke, 30 November 1855 HRA 18: 208,
Cited R.J. King "Terra Australis: Terra Nullius aut Terra Aboriginum? (1986) 72 JRA Hist Soc 75.

INDIFFERENCE AND NEGLECT

A charitable interpretation of the relationship between the Australian legal system, post 1788, and the indigenous Aboriginal people of the continent is that it is a tale of indifference and neglect. A less charitable interpretation is that it represents a cruel assertion of power: sometimes deliberate, sometimes mindless, resulting in the destruction of Aboriginal culture, unparalleled rates of criminal conviction and imprisonment and massive deprivation of property and land.

This book explores the history of the relationship. It outlines the sobering earlier assertion of power and sovereignty over the Aboriginal people and their land. It records the modest recent achievements that have been made in the field of constitutional reform, substantive and procedural reform and land rights. Despite these achievements, and the changes in public attitudes which have accompanied and sustained them, the overall effect of these essays will be to leave the reader - especially the Australian reader - profoundly depressed.

In the field of criminal law and punishments, the inescapable statistics demonstrate, as is now well accepted, that the rates of Aboriginal imprisonment far exceed those of non-Aboriginal Australians. Indeed, the figures display a gigantic disproportion which seems to call out for attention and remedies. We can take comfort from the establishment of Aboriginal Legal Aid Services and the due process they now assure most Aboriginal defendants in the courts. We can glean satisfaction from the belated recognition by the judges of the special disadvantages which Aboriginal defendants face when under interrogation by police. We may comfort ourselves with John Walker's conclusion that the courts may actually be particularly lenient with Aboriginal accused. But the haunting statistical disproportion continues to confronts us. How can we possibly justify a society and a criminal justice system which seems to condemn a high proportion of the descendants of the original inhabitants of this continent to a life of recurring imprisonment, with all the anti-social consequences which that entails?

THE LAW REFORM AGENDA

In almost a decade in the Australian Law Reform Commission I was confronted, virtually daily, with the issues raised in adjusting the Australian legal system to the reality of Aboriginal Australia. In the first project, which dealt with criminal investigation, the Commission made special recommendations relating to interrogation of Aboriginal suspects by Federal Police.[1] In a later project on sentencing reform, the Commission identified and quantified the special disadvantages suffered by Aboriginals in the application of

Federal criminal laws.[2] That report also called attention to a particular, and disturbing, problem relating to the terms under which Aboriginals were kept in lock ups in Western Australia on a per diem fee basis.[3]

In a further report on reform of the laws of evidence in Federal and Territory courts, the Law Reform Commission gave particular attention to the way such laws, in effect, may sometimes discriminate against Aboriginal witnesses.[4] Most recently, the Commission has delivered a major report on the recognition of Aboriginal customary laws.[5] That report, its themes, issues, recommendations and basic principles, is the subject of a succinct summary in this book, offered by James Crawford, Peter Hennessy and Mary Fisher.

If the Federal Government and Parliament were to implement, to the letter, the various suggestions and recommendations of the Law Reform Commission the result, sadly, would simply scratch the surface in removing the major sources of injustice presented by the Australian legal system to the Aboriginal people of Australia. That is not, of course, a reason for wringing our hands, despairing about our puny endeavours and doing nothing. The lesson of reform in a society such as ours, are that patience is sometimes rewarded, that revolutionary change is rare and that interstitial steps, on the path to improvement, are more likely to achieve results than waiting for sudden, dramatic departures from what has gone before. The very history of Australia, with its absence of revolution, the continuity of its constitutional law, and the want of a civil war of any magnitude all teach the lessons of gradualism.

These lessons are intensely frustrating to those who see the continuing destruction of a unique and precious culture happening before their eyes. They are profoundly depressing to those who see the denegration of thousands of young people caught up in the practical, and sometimes unintended, discrimination inherent in the operation of the law. They are irritating in the extreme to those who view what they see as the inherent perfidy of a system which can punish people for theft of a motor car ("a man's second most precious possession") whilst usually providing no compensation whatsoever for the initial usurpation of Aboriginal land and erosion of the traditional rights that once went with it. The realisation of these things provokes denunciation for the failure to honour political promises of effective land rights legislation, sacred site protection, mining royalties for Aboriginals and the regulation of a Treaty between representatives of Aboriginal Australia and representatives of those who came later.

For all this, boringly enough, the way ahead may lie in the step by step removal of injustice and the provision of institutions and laws which tackle, one after another, the causes of injustice.

Professor Nettheim, in his opening essay, talks of the remarkable shifts of attitude in the Australian community towards the reconciliation of the majority community with the Aboriginal minority. As this book goes to press, we are going through a rather discouraging period. Professor Nettheim's essay plainly demonstrates this. In part, this reality may be yet another unfortunate consequence of the economic ills which

beset Australia just now. In part, it may be a passing phase. Impatient with the apparently slow progress in the economic advancement of Aboriginal Australians and jealously sensitive in comparing their perceived preferential treatment against the burdens borne by other disadvantaged groups, the Australian today might prefer to put the "Aboriginal problem" out of sight, out of mind.

ADAPTING GENERAL RULES AND PRESERVING EQUAL JUSTICE

But any fair reader of these pages will put this book down with a sense of disquiet, and even shame at the way the Australian legal system has operated in relation to Aboriginal Australia. The fine qualities of neutrality and independence, of equality before the law, and adherence to the Rule of Law, have resulted, all too often, in the universal application of legal rules, appropriate for general operation, in a way that prove unjust when they are applied to the descendants of the indigenous culture of Australia. Their social organisation, though truly a government of laws and not of men[6], was, nonetheless, so profoundly different from that of the European settlers that the merger of the two has not been very successful. The notion of timely and appropriate modifications of general rules, in order to effect true justice can be traced back to the profound thinkers of ancient Greece, including Aristotle. Even in our own legal system, the system of Equity was developed, in part based upon the notion of conscience inherited from the Ecclesiastical courts, to ensure that the legal system did not, in its quest for even handed neutrality, work specific injustice in particular cases. Modern administrative law is another example of this adaptation. Yet

because of its infatuation with neutrality and even-handedness, it may sometimes overlook the occasional needs for special treatment of minorities. These needs are presented most vividly by the interaction of the general law with Aboriginal Australia.

In so far as there were occasional modifications in the past they were often inappropriate. Indeed they were often prejudicial to Aboriginals, as many of the essays in this book demonstrate. But it was not universally so. And especially of late, civilised and humane judges and magistrates have attempted to modify rules of evidence, sentencing practices and other laws. They have done so with little more to guide them than their common sense, experience of Aboriginals and quest to do justice. The result has been something of a hybrid system. It has been uncoordinated attack on what ought to have been recognised as a major national responsibility and obligation.

What now lies ahead? For some contributors to this book, such as Dorothy Parker, there must be an end to the collections of statistics and the repeated descriptions of inequity. These should be replaced by studies of the multinational companies and other examinations of the economic inequality of Aboriginal Australia. For others, such as Professor Nettheim, there is a need to rekindle a sense of urgency in the national Parliament - preferably on a bipartisan basis. The Holding resolution, never put to the vote, should be revived. The five pronged attack on land rights, sacred sights, mining rights, royalty entitlements and compensation for lost land should be renewed. The faded idea of a national Treaty, such as has occurred in Canada, New Zealand and other Dominions of the Crown, should be revived and life should be breathed into it. Still other

contributors warn that unless national initiatives are taken, there may be the danger that Australia could follow South Africa as a pariah of the international community. The brave hopes of enlivening the national conscience in time for action to co-incide with the Bicentenary seemed to be fading. But is it too late to use that national celebration as an occasion for national reconciliation upon terms which are practical and just and remove the blight of two centuries of injustice and neglect?

These words "injustice and neglect", when spoken, seem a severe verdict on nearly two hundred years of officials, most of whom would have conceived themselves as working diligently and fairly, with integrity and impartiality towards all races. But it is the lesson of these pages that the result of two hundred years of high minded officials, and the society they governed, has been the destruction of the cohesiveness of Aboriginal society, its replacement with widespread economic and social dislocation - with drunkeness (a common problem of the old) and petrol sniffing (a common problem of the young). These symptoms of despair display their outward manifestations in the intolerable levels of criminal convictions and imprisonment and in the rates of child care orders which are so high in the case of Aboriginal children as is demonstrated by several of the authors in this book.

THE LONG HAUL BACK

The long haul back to a law respecting Aboriginal community in Australia, lies upon a road in which many of the unequal laws have been reformed, to ensure that they apply appropriately and justly to the Aboriginal people. Moreoever, it is a road which points to self respect and economic equity

for the Aboriginal people, along lines foreshadowed in Mr. Holding's resolution, sadly not yet acted upon.

Despite all the pessimistic indications to the contrary, and the many reasons for profound dissolutionment and even despair that are succinctly collected in this book, there are also reasons for hope. Notwithstanding the current mood, the Bicentenary may yet stimulate the national conscience simply because it focuses attention upon our origins (which, from the first, amounted to a typical denial of Aboriginal Australia) and our history since (which has repeatedly reinforced that denial).

Furthermore, the collection of statistics on imprisonment and child welfare inequality cry out for reforming action which goes beyond the palliative of dropping drunkenness as an offence whilst retaining effective loss of liberty, just the same. The Law Reform Commission's report on the recognition of Aboriginal Customary Laws gives a charter which commands attention. More fundamentaly, the economic deprivations must be cured. Old economic wrongs might be righted, if the next generation of Aboriginal Australians is to escape the snares of our criminal justice system.

Ahead of us lies an agenda for change in attitudes, laws and policies. This book collects some of the reasons for change. It presents some of the ideas for reform. As such, it deserves the attention of a nation, claiming adherence to legality, boasting of a commitment to an economic fair go and pretending to spiritual values and a civilised order.

M.D. KIRBY

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FOOTNOTES

* President of the Court of Appeal, Supreme Court, Sydney.

1. Australia, the Law Reform Commission, Criminal Investigation, interim report (ALRC 2), 1975, 118 ff.

2. Australia, the Law Reform Commission, Sentencing of Federal Offenders, interim report (ALRC 15), 1980, 118 ff.

3. ibid, 120.

4. Australia, the Law Reform Commission, Evidence, interim report (ALRC 26), 1985, vol 1, 135, 291.

5. Australia, the Law Reform Commission, The Recognition of Aboriginal Customary Laws (ALRC 31), 1986.

6. Milirrpum v Nalbalco Pty Limited (1971) 17 FLR 141, 267.