The Aborigines and the Law: An Overview

The law* has played an important, though hardly creditable, part in the interaction between Aborigines and white society. From the outset, the law conferred on the Aboriginal the privilege of being a British subject. Yet at the same time it sanctioned the deprivation of his land and remained aloof while his society and his person were destroyed. Later, it confined him to areas of land with which he had no traditional relationship, deprived him of his civil rights, and justified his inferiority.

The purpose of this paper is to provide an introduction to the role of law in white-Aboriginal relations since 1788. The first part of the paper focuses on the common law and the courts, and the second on statutory enactments. Then an attempt is made to draw these themes together before some concluding observations on the present position of the law and of lawyers in Aboriginal affairs.

I. Aborigines and the Courts

From the outset of white settlement in 1788, Australia was destined to be regarded, in the nomenclature, as a settled, rather than as a conquered or ceded colony.1 The Aborigines, as nomadic food gatherers and hunters, lacked developed institutions, an easily recognizable relationship with the land, and persons with material wealth or obvious control with whom treaties of cession might be concluded.2 Moreover, since the Aborigines were unable to offer more than sporadic resistance to the settlers, there was never any need for them to be "conquered."

The fact that Australia was a settled colony had two direct legal consequences for the Aborigines. First, they were legally deprived of any rights in relation to the land, because colonisation by settlement meant that all land was regarded as ultimately belonging to the Crown. Hence, when a citizen, John Batman, sought to purchase land by treaty direct from Aboriginal tribes, the New South Wales government issued a proclamation to the effect that his action amounted to a trespass against the Crown.3 Soon afterwards, in a case involving title to land, the Supreme Court of New South Wales confirmed that the doctrine of the ultimate lordship of the Crown applied to Australia and that all land not granted in possession to a subject was in the legal possession of, and was owned by, the Crown.4

But if the Aborigines were deprived of ownership of their land, it was not inevitable that they should be without all land rights. In North America, some


Other abbreviations in this paper are: Historical Records of Australia — H.R.A.; Historical Records of New South Wales — H.R.N.S.W.; formerly — "f."; repealed — "r."
recognition was given to the principle that the indigenous people had a right to retain possession of, or be compensated for, the loss of their land. The Supreme Court of the United States held that the Indians had a right of occupancy to land, although title had passed to the state, on the basis that they had held the land from time immemorial. When the matter was considered in Australia, however, it was held that Australian law did not recognize native communal title (whereby the Aborigines might have subordinate rights under native law and custom to land owned by the Crown) since throughout the history of the settlement, neither executive, legislative nor judicial recognition had been given to the doctrine.

The second consequence of colonisation by settlement concerned the legal status of Aborigines. For some time, this point was uncertain. Instructions from the British government directed the early governors to educate and Christianize the Aborigines, to protect their persons and the enjoyment of their possessions, to prevent and restrain violence and injustices toward them, and to punish "any of our subjects" who harmed them. Governor Hunter took this to mean that the Aborigines were under the protection of the British government but later, Governor Macquarie proposed that Aborigines should only be regarded as under the mantle of British protection if they applied for certificates, and conducted themselves in a peaceful, inoffensive and honest manner. By the 1830's, the situation had clarified. The proclamation of Western Australia conferred the protection of the law on Aborigines as equals of "other of His Majesty's subjects." Then, following a report of the Select Committee of the House of Commons, which said that the Aborigines of Australia "must be considered as within the allegiance of the Queen and as entitled to her protection," the Aborigines were granted the protection and rights of British subjects on the foundation of South Australia. It is now accepted that Aborigines were British subjects from the outset of white settlement. In 1948, when an Australian citizenship was created, Aborigines became Australian citizens along with other persons born in Australia.

For the present discussion, the most important consequence of the Aborigines being British subjects was that theoretically they were equal before the law with white settlers. A proclamation of Governor King put the matter clearly as regards crimes against the Aborigines: white settlers were prohibited from any act of injustice or wanton cruelty towards the Aborigines "on pain of being dealt with in the same manner as if such act or injustice or wanton cruelty should be committed against the persons and estates of any of His Majesty's subjects."

As early as 1799, a group of whites was tried for the murder of two Aborigines.
and there are similar instances in the following years, including the infamous Myall Creek massacre, where seven whites were executed for their part in the slaughter of twenty-eight Aborigines, including children.16 By the same token, equality before the law meant that Aborigines accused of crimes had to be dealt with as British subjects. The documents contain reports of Aboriginals being tried and executed for murder. For example, when fifteen people of the shipwrecked “Maria” were killed in 1839, two Aborigines thought to be responsible were tried and executed.17

However, the legal implications of disputes solely among Aborigines remained uncertain for some time. In R. v. Murrell,18 a case involving the murder of one Aboriginal by another, two arguments were advanced to support the contention that British law was not binding on the Aborigines. First, counsel submitted that Australia was neither a settled colony (because the land had been populated) nor a conquered colony (since the government had never been at war with the inhabitants), but instead was a country having a population with its own manners and customs so that, strictly speaking, the British were bound by Aboriginal law. Although avoiding a direct determination of Australia’s position as a settled colony,19 the court held that the Aborigines were not strong enough to be regarded as free and independent tribes, and that therefore they were without sovereignty and an independent legal status.20

Counsel’s second argument was more subtle, and is such an eloquent exposition of the Aboriginal plight that it deserves to be quoted in full.

“The reason why subjects of Great Britain are bound by the laws of their own country is that they are protected by them; the natives are not protected by these laws; they are not admitted as witnesses in courts of justice, they cannot claim any civil rights, they cannot obtain recovery of, or compensation for, those lands which have been torn from them, and which they have probably held for centuries. They are not therefore bound by laws which afford them no protection.”

The court curtly dismissed the submission. Offences committed in the colony against a person, it said, were liable to punishment as a protection of his civil rights. If the offence had been clearly answerable, and there was “no distinction between that case and where the offence had been committed upon one of his own tribe.”

But doubts persisted. On at least two occasions after 1836 judicial attitude was inconsistent with the principle that Aborigines, or at least those not in contact with white society, were subject to the application of British law in disputes involving only Aborigines. Chief Justice Cooper of the South Australian Supreme Court expressed the view that murder of one tribal Aboriginal by another was not a crime against the law of that colony on the ground that, claiming no protection of the law, the Aborigines owed it no allegiance.21 The following year, Wills J., the resident judge of the Port Phillip Bay settlement, expressed doubt as to the competency of the court to try an Aboriginal for the murder of another. Wills J.’s remark provoked Governor Gipps to take the opinion of the judges of the Supreme Court of New South Wales, which was transmitted in a letter by the Chief Justice, Sir James Dowling. The Chief Justice’s letter strongly

17. F. Gale, supra note 12, at 85. See also Bridges, supra note 9, at 50, 52.
18. (1836) 1 Legge (N.S.W.) 72.
disapproved his brother's opinion, and in the event, Gibbs decided that declaratory legislation would be unnecessary to clarify the situation.\textsuperscript{22} Any lingering doubts were finally dispelled by two Victorian cases in 1860. In the first, an Aboriginal was charged with killing his wife. Although no evidence was adduced on whether he had become "civilized" or had changed his habits so as to be regarded as having voluntarily subjected himself to British law, the court held that its jurisdiction extended to all persons within the colony, including the accused.\textsuperscript{23} Three months later, the point was more extensively considered.\textsuperscript{24} In argument before the court, reference was made to American decisions for the proposition that, in some British colonies, the government had sanctioned continuation of the indigenous law. Although conceding the point, the court could find no evidence of an intention to continue Aboriginal law, and it therefore concluded that British legal authority was supreme throughout the colony and applied to all persons in it.

Thus, since 1860, it has been generally accepted that the courts must treat Aborigines equally with other citizens in the absence of statutory provision. Only three incursions have been made on this principle. First, some courts accept a lower standard of self-control from Aborigines where provocation is advanced as a defence.\textsuperscript{25} In addition, some courts make allowances for the Aboriginal background of an accused person when sentencing.\textsuperscript{26} Both exceptions are unobjectionable, since they recognize the disadvantages in terms of education and development experienced by many Aborigines.

But for a short time there was a threat that the industrial courts would adversely discriminate against Aborigines. In 1932, the Chief Justice of the Federal Court of Conciliation and Arbitration laconically stated that, since award conditions were inapplicable, Aborigines were excluded from the application of the pastoral industry award.\textsuperscript{27} No reasons were given, which was surprising since the Commonwealth Conciliation and Arbitration Act governing industrial awards did not exclude Aborigines from its operation. The judgment obviously reflected the prejudices of the time for, when the award was later reconsidered, its continued non-applicability to Aborigines was justified on the grounds that Aborigines were incapable of, or disinclined to, compete with Europeans or Asians in the economy; that they neither needed nor desired the ordinary standard of living prevailing throughout the country; that they were adequately provided for by the government; and that they were not being exploited or harshly treated by their station-owning employers.\textsuperscript{28} In 1962, a "slow workers'" clause was inserted in the Aluminum Industry Award so that Aborigines working on the bauxite mining projects in northern Australia could be paid rates of pay lower than those paid to white workers.\textsuperscript{29} Finally, in 1965, the Full Bench of the Commonwealth Conciliation and Arbitration Commission held that the exclusion of Aborigines from the normal operation of an industrial award was invalid.\textsuperscript{30} The Commission, though expressing the view that Aborigines did not


\textsuperscript{23} R. v. Peter, "Argus" (Newspaper) (Melbourne), 29 June 1860.

\textsuperscript{24} R. v. Jemmy, "Argus" 7 Sept. 1860.


\textsuperscript{27} Graziers' Association of New South Wales v. Australian Workers' Union (1932), 31 C.A.R. 710, 715. The award regulates employment in the pastoral industry in northern Australia.


\textsuperscript{29} Australian Workers' Union v. Alcoa of Australia Pty. Ltd. (1963), 104 C.A.R. 626.

\textsuperscript{30} In the matter of The Cattle Station Industry (Northern Territory) Award 1951
understand the meaning of work, concluded that the employers had

"... not discharged the heavy burden of persuading us that we should
depart from standards and principles which have been part of the Australian
arbitration scheme since its inception... There must be one industrial law,
similarly applied to all Australians, Aboriginal or not."\(^{31}\)

State industrial courts quickly adopted the decision and deleted clauses excluding
Aborigines from state industrial awards.\(^{32}\)

Almost paradoxically, the very fact that Aborigines were treated equally by
the law resulted in injustices. As late as 1958, Kriewaldt J. of the Supreme Court
of the Northern Territory excluded from evidence the dying declaration of an
Aboriginal by taking judicial notice of the fact that Aborigines did not have the
requisite religious belief in the hereafter to guarantee the truth of their final
statements.\(^{33}\) Much earlier, a problem had arisen in trials of Aborigines where
prospective female Aboriginal witnesses were the wives of the accused according
to customary law. Did the ordinary common law rule apply so that these women
were incompetent to give evidence against their husbands? Australian courts
refused to recognize Aboriginal marriages, and held that Aboriginal wives were
able to give evidence against their husbands.\(^{34}\) Legislative provision has been
made in Queensland to correct the effects of this anomaly, so that where a male
Aboriginal and a female Aboriginal are cohabiting in accordance with recognized
tradition, the female is not a compellable witness against the male.\(^{35}\)

In general, there were difficulties with Aboriginal evidence. In 1805, the
senior legal officer in the colony, Judge-Advocate Atkins, opined that Aborigines
were not bound by any moral or religious obligation to tell the truth, and that
therefore, their testimony could not be admitted by the courts.\(^{36}\) This
conclusion was universally accepted. In the result, whites were able to commit
crimes against Aborigines with impunity when the only eye-witnesses were other
Aborigines who could not be sworn to give evidence. The rule excluding
Aboriginal evidence was strictly applied. Thus, in \(R. \) \textit{v.} \textit{Paddy},\(^{37}\) the two
principal witnesses, who were Aborigines, gave some indication of a belief that
they would be punished for speaking falsely. Nevertheless, the Court held that
they did not have a sufficient belief in the future state of rewards and
punishments to imply a belief in a supreme being, nor had they performed any
ceremony considered binding on their consciences. Consequently, their evidence
was rejected. Early attempts in New South Wales to remedy this situation failed
when the Legislative Council rejected government-sponsored legislation. It was
not until witnesses were enabled to give evidence on a declaration that Aboriginal

\(^{(1966)}\), 113 C.A.R. 651. See generally Stanner, "Industrial Justice in the
Never-Never," \textit{Austn. Quarterly} March 1967, at 38; F. Stevens, \textit{Equal Wages for
Aborigines} (1968).

31. 669.
32. \textit{Australian Workers' Union \textit{v.} Graziers' Association of New South Wales} (1967), 121
   C.A.R. 454, 458; \textit{Station Hands' Award-State}, 68 Queensl. Ind. Gaz. 41 (June 23,
   1968).
33. \textit{R. v. Wadderwarri}, (1958) N.T. 53, 101 (The unreported decisions of Kriewaldt J.,
   cited N.T., are in the Darwin Supreme Court). See Brazil, "A Matter of Theology,"
   (1960) 34 \textit{A.L.J.} 195; O'Regan, "Aborigines, Melanesians and Dying Declarations,"
   (1972) 21 \textit{Int'l & Comp. L.Q.} 176.
34. \textit{R. v. Neddy Monkey} (1861), 1 Wyatt & Webb (Vict.) 40; \textit{R. v. Cobb} (1883), 4 L.R.
   (N.S.W.) 355. Similar unreported decisions exist in the Northern Territory; Kriewaldt;
   "Application of the Criminal Law to the Aborigines of the Northern Territory of
35. Q. 1971, s. 48; f.Q. 1963 to 1967, s. 41; f.Q. 1939 to 1946, s. 34 (1) (b).
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Evidence became admissible in the courts. Meanwhile, in other colonies, special laws to allow Aborigines to give evidence were introduced but later these were succeeded by general provisions, similar to the New South Wales enactment, for those unwilling or unable to give evidence on oath.

Inevitably, injustices arose when British law was applied to Aborigines who were ignorant of its tenets and who were motivated by traditional values. On one hand, as Mr. Justice Kriewaldt pointed out, the system did not punish persons regarded as culpable according to customary law, either because the act committed did not fall into existing categories of crimes, or because the law was set in motion by persons insufficiently appreciative of its ramifications. On the other hand, European law punished acts which were venial, even required, according to custom. For example, in 1966, an Aboriginal tribal elder was convicted by a Northern Territory court of spearing a fellow member of the tribe. Yet the elder was acting in conformity with tribal law, for the victim had insulted him to the extent that he would have lost face if retribution had not been taken. The dilemma of the courts in dealing with this type of situation was expressed by Blackburn J. in passing sentence:

“I am faced with the difficulty that on the one hand I have to enforce the law on an Aboriginal living in a relatively primitive life. On the other hand, I must recognize that such Aborigines have moral standards of their own to uphold which are not necessarily the same as ours. I think in the circumstances a relatively light sentence will mark disapproval of the law both for him and other Aboriginal members of the community.”

For a short period between 1939 and 1954, Western Australia legislated for the establishment of Courts of Native Affairs, which were to take into account tribal custom in mitigation of sentences. The courts were to be composed of a magistrate, acting with the assistance of an elder of the tribe of the accused. In 1939, the criminal law of the Northern Territory was amended so that regard could be had to tribal influence in sentences, but that provision was never proclaimed. In some states, if tribal influences can be proved to have motivated the offence, the court may take that into account in fixing penalties, despite the absence of specific statutory authority. However, the courts seem sceptical of the influence of custom on the criminal behaviour of Aborigines, except in the case of the few nomadic Aborigines in northern Australia.

The equal application of the common law to Aborigines also created practical problems in the administration of justice. In several early trials, accused Aborigines had to be discharged when competent interpreters could not be found. But in most cases, Aborigines were not so fortunate. Their ignorance of the law meant that they were disadvantaged from the outset. As Starke J. once put it, in a case involving the conviction of an Aboriginal for murder:

38. See Windeyer J’s illuminating judgement in Da Costa v. the Queen (1968), 118 C.L.R. 186, 198.
39. e.g. S.A.: An Ordinance to Facilitate the Admission of the Unsworn Testimony of the Aboriginal Inhabitants, no. 3 of 1848.
42. W.A. 1905–1954, s. 64 (r. 1954).
43. N.T.: Criminal Law Amendment Ordinance 1939, s. 8 (r. 1953).
45. e.g., Williams v. Porter, [1959] N.T. 311.
46. R. v. Willie (1885), 7 Q.L.J. (N.C.) 108; P. Corris, Aborigines and Europeans in Western Victoria 103 (Australian Institute of Aboriginal Studies, Occasional Papers No. 12, 1968) and the cases there incited.
47. Tuckiar v. The King (1934), 52 C.L.R. 335, 349.
It is manifest that the trial of the prisoner was attended with great difficulties, and indeed was almost impossible. He lived under the law in force in Australia, but had no conceptions of its standards. Yet by that law he had to be tried. He understood little or nothing of the proceedings of their consequences to him...

Thus, Aborigines, with their sense of communal responsibility, were often unaware that they had no responsibility for acts unless they were immediate actors or accessories.\textsuperscript{48} Racism pervaded the system. Although indifferent to crimes committed among Aborigines, white juries were too lenient if the accused was white and the victim Aboriginal, but manifestly harsh if the situation was reversed.\textsuperscript{49} The administration of justice on reserves was also highly irregular. Officials assumed power over offences outside their jurisdiction, treated all offences summarily, imposed uneven and excessive sentences, disregarded established procedures, and punished acts such as adultery and intercourse which were not offences outside the reserves.\textsuperscript{50} In remote areas of Australia, justices of the peace were often prejudiced so that sentences imposed on Aborigines were sometimes excessive and judgments biased.\textsuperscript{51}

A major difficulty arose with statements by Aborigines before or during their trials for criminal offences. The position of inferiority to which Aborigines were reduced by white domination meant that they were often bewildered and intimidated during police interrogation or in the course of a trial.\textsuperscript{52} The tendency of many Aboriginal accused was to tell the questioner what he wanted to know in the hope that this would ensure the maintenance of the status quo.\textsuperscript{53} Hence, Aboriginal accused appeared to be evasive or at worst, guilty. In addition, sometimes Aborigines could not understand what was happening. Translators were available, but this was not completely satisfactory, since Aboriginal languages cannot be used to express many western legal concepts.\textsuperscript{54}

“The Stuart Case” epitomized the injustices inherent in the trial of an unsophisticated Aboriginal whose statements are accepted at face value. Stuart was convicted of murder, the main evidence against him being oral and written admissions to police officers in English. Although expert evidence was given that Stuart was only fluent in an Aboriginal dialect (a fact which seemed to be confirmed by his dock statement, described by the High Court as “a few relatively inarticulate words which denied his guilt and alleged ill-treatment on the part of the police officers who had interrogated him”\textsuperscript{55}), appeals to the Full Court in South Australia and to the High Court of Australia failed.

In some jurisdictions, attempts were made to minimize the difficulties. Thus

\textsuperscript{49} P. Hasluck; \textit{Black Australians: A Survey of Native Policy in Western Australia 1829–1897} 125 (2nd. ed. 1970); e.g. R. v. Pompey (1924), 18 Q.J.P.R. 59.
\textsuperscript{50} Tatz; “Queensland’s Aborigines: Natural Justice and the Rule of Law,” \textit{Austn. Q.}, Sept. 1963 at 33.
\textsuperscript{51} In R. v. Justices of Rankine River; ex parte Sydney; ex parte Pluto (1962), 3 F.L.R. 215, one J.P. was manager of the station on which the defendants were employed, and the second J.P. made racist remarks in the vicinity of the court. See also Bolton v. Neilson (1951), 53 W.A.L.R. 48; Slaughter: “The Aboriginal Natives of North-West Western Australia and the Administration of Justice,” (1901) 116 Westminster Review 411, 413.
in the Northern Territory, an Aboriginal could not plead guilty to an offence unless an Aboriginal affairs department official had approved the plea and was present in court.\textsuperscript{56} In Queensland and Western Australia, the judge also had to be satisfied that the official had approved the guilty plea and that the Aboriginal understood the nature of the accusation against him, was aware of his right to trial and, without duress or pressure of any kind, desired to plead guilty.\textsuperscript{57} Some courts readily accepted the word of the official that the prerequisites had been complied with, while others were much stricter, holding that only in exceptional circumstances should a court approve a guilty plea, particularly if dubious police behaviour was involved.\textsuperscript{58}

In addition, limits were placed on the extent to which statements made by Aborigines before the trial could be accepted in evidence in the case of a serious offence. In the Northern Territory, such a statement had to be made in the presence of an officer of the Aboriginal affairs department, which meant that the officer could render the admission nugatory by withdrawal from the police interrogation.\textsuperscript{59} For a time, Queensland and Western Australia went further and excluded all statements. Not only could they not be sought from any Aboriginal charged or suspected of an offence but furthermore, if obtained, they were not receivable in evidence.\textsuperscript{60} The courts gave these sections broad effect: it was held that the exclusion applied to any statement which was incriminating in a material particular and that, although statements volunteered without previous inquiry were not barred, when these were made to police officers they were always suspect.\textsuperscript{61} After 1946, a statement was admitted in evidence in Queensland if the judge in chambers was satisfied that the Aboriginal understood its meaning and that it was obtained voluntarily and without pressure of any sort.\textsuperscript{62} The section was given a liberal construction. Any intimation of the accused's guilt fell within the exclusion, and pressure short of that which would ordinarily render a confession involuntary was held to invalidate a statement by an Aboriginal.\textsuperscript{63} As a result, judges became almost completely dependent on the assertion of an Aboriginal as to the voluntariness of his statements.

II. Aborigines and Statutory Laws

As has been seen, in the early period of white settlement, the Aborigines were regarded as being British subjects, with the same rights and duties as the white settlers. In the second period of white-Aboriginal relations, the law and administration were more concerned with subduing the wickedness of the Aborigines than with protecting their position as British subjects.\textsuperscript{64} Thus, some discriminatory legislation was introduced, such as that curbing Aboriginal consumption of alcohol. Associated with this period was the frontier violence which lasted from the 1840's to the 1880's (to the 1930's in some areas), during

\textsuperscript{56} N.T. 1953–1963, s. 82 (b), f. N.T. 1918–1953, s. 58.
\textsuperscript{57} Q. 1939 to 1946, s. 34 (2)–(3), (r. 1965) f. Q. 1934, s. 20; W.A. 1905–1954, s. 61 (2)–(4), (r. 1954).
\textsuperscript{59} N.T. 1953–1963, s. 82 (4) (c) (r. 1964); Wilson v. Porter, [1959] N.T. 311.
\textsuperscript{60} Q. 1939, s. 34 (1) (r. 1946); W.A. 1905–1960, s. 61 (1) (repealed for Aborigines except in the north of the state in 1963. See W.A. 1963, s. 31 (1) (r. 1972.).
\textsuperscript{61} Louis v. The King (1951), 53 W.A.L.R. 81. See also Thompson v. Brockman (1939), 42 W.A.L.R. 36.
\textsuperscript{62} Q. 1939 to 1946, s. 34 (1) (r. 1965).
which Aborigines were indiscriminately killed and their land expropriated. Then, in the closing decades of the nineteenth century and well into the twentieth century, protective-segregative legislation became the hallmark of Australian Aboriginal policy. Prompted by the urgent need to prevent the frontier violence and its consequences, this period was later associated with the policy of assimilation whereby Aborigines, or at least some of them, were to be tutored for entry into white society. Finally, the last decade has seen the modern period in which most discriminatory legislation has been repealed, and Aboriginal self-advancement assisted by a variety of special social and economic programmes. Symbolic of the change from the protective-segregative era was the success of the 1967 referendum, which deleted the constitutional limitation on the power of the federal government in Aboriginal affairs.  

In the main, the protective-segregative legislation originated in a humanitarian concern for the plight of the Aborigines. Initially, the emphasis was on providing Aborigines with rations, blankets and medicines and on preventing individual acts of cruelty toward them. But it soon became apparent that more drastic action was necessary if Aborigines were to be saved from extinction. Legislation was thus designed to isolate Aborigines from white exploitative influences and to protect them from their own innocence. Once this paternalistic policy was enacted, however, it became self-fulfilling and self-perpetuating. Controls were gradually increased so that, by the Second World War, most Aborigines were confined to reserves, deprived of their civil rights and strictly controlled. In the result, although Aborigines were British subjects, they were clearly deprived of the legal rights commensurate with that status. The outlook was pessimistic, static and repressive. Aborigines became passive recipients of institutional assistance, so that the racist assumptions justifying the policy were reinforced. The decline in the number of Aborigines of full descent gave rise to a widespread belief that eventually they would become extinct. Official policy in the meanwhile was directed to suppressing individual and social characteristics of Aboriginal origin and to destroying indigenous social organization. As an aspect of this, the authorities in Queensland and Western Australia were given power to prohibit native customs and practices. As to the part-Aborigines, although there were rigid laws against miscegenation, the ultimate hope was that they would somehow merge with the rest of the population. On occasions, this policy was quite blatant. For example, officials in charge of Aboriginal affairs in most states were made guardians of all Aboriginal children and were usually empowered to override the wishes of Aboriginal parents. Thus, Aboriginal children with light skins could be taken from their parents and placed in institutions or with white parents.

Essential to the implementation of the protective-segregative policy was the classification of persons as Aborigines. The method of definition adopted was, as Sir Owen Dixon once said, "artificial," but basically it depended on a person's Aboriginal ancestry or "blood." Hence, the opprobrious terms "full blood," "half caste" and "quadroon," were commonly used in statutes to describe persons of Aboriginal descent.

66. e.g., An Act to provide for the Protection and Management of the Aboriginal Natives of Victoria, 1869; Qld.: Fishery Act of 1881, s. 13.
67. Qld. 1965 to 1967, s. 60 (2) (r. 1971), f. Qld. 1939 to 1946, s. 23, f. Qld. 1897 to 1934 s. 31 (15); W.A. 1905–1960, s. 67 (r. 1964).
68. N.S.W. 1909–1936, s. 13A (r. 1940); Qld. 1939 to 1946, s. 18 (1) (r. 1965); S.A. 1934–1939, s. 10 (1) (r. 1962), f.S.A. 1911, s. 10; W.A. 1905–1960, s. 8 (r. 1963); N.T. 1953–1960, s. 24 (r. 1961), f. N.T. 1918–1953, s. 7.
The first jurisdiction that purported to define Aborigines in other than racial terms was the Northern Territory in 1953. It introduced the concept of "wardship": a ward was to be any person accepted by the authorities as in need of special assistance. But the definition remained basically racial. Wardship was linked to the franchise so that whites could not become wards and furthermore, the administration declared all Aborigines of full descent to be wards en masse. The arbitrary legislative classification of Aborigines automatically resulted in a lowering of their status. Even today, State legislation defines Aborigines as those descended from the original Australians, rather than in terms of self-identification. Because the status of an Aboriginal depended on his descent, it normally had an adhesive quality. Thus, in one case, it was held that a change in nationality could not affect it. The courts became adept in dealing with degrees of Aboriginal descent, but if official knowledge of a person's descent was absent, the courts were entitled to determine, and did determine status by sight.

Consistent with the policy of assimilation, provision was made to exempt from the effect of the protective-segregative legislation Aborigines considered sufficiently "advanced" to enter white society. But the exemption was always at the discretion of the Aboriginal Affairs Department and revocable at will. In Queensland, it could even be subject to the continued management of the Aboriginal's money and property by the administration. The demeaning nature of these provisions is reflected in Western Australia's Native (Citizenship Rights) Act 1944–1964. Under that Act, an Aboriginal seeking exemption had to satisfy a Native (Citizenship Rights) Board, whose members included at least one local dignitary, that, for the previous two years, he had "dissolved tribal and native associations" except with closer relatives; that he was industrious and of good behaviour and reputation. These assertions had to be attested by two "respectable" citizens; that he was capable of managing his own affairs; that he could speak and understand English; and that he was not suffering from leprosy, syphilis or similar diseases.

Early reserves (or settlements) were primarily designed as a place to provide subsistence to Aborigines deprived of their lands by the settlers. Later, the reserves became central to the protective-segregative policy. Despite legislative phaseology that the reserves were to be set aside for the benefit of the Aborigines, there was never the slightest suggestion that their boundaries were negotiated between the parties by way of adjustment of rights as in the case of the Indian reservations in North America. Instead, reserves were areas of Crown land, usually the most barren and inhospitable, designated by the government as areas where the "Aboriginal problem" would be solved. State Aboriginal affairs departments were empowered to remove Aborigines to reserves.

70. N.T. 1953–1963, s. 14 (1).
72. Dempsey v. Rigg, [1914] St. R. Qd. 245.
73. Branch V. Sceats (1903), 20 W.N. (N.S.W.) 41; Ex parte William (1910), 27 W.N. (N.S.W.) 147.
75. N.S.W. 1909–1963, s. 18c (r. 1969); Qld. 1939 to 1946, s. 5 (3) (r. 1965), f. Qld. 1897 to 1934, s. 33; S.A. 1934–1939, s. 11a; N.T. 1953–1963, s. 30–37 (r. 1964), f. N.T. 1918–1953, s. 3A.
77. e.g., S.A.: Waste lAnds Act 1842; Vict.: Land Act 1969, s. 6.
78. e.g., W.A. 1886, s. 6 (6).
to confine them there, and to transfer them from one reserve to another.\textsuperscript{80} In Queensland, for a time in Western Australia, and during the depression in New South Wales, Aborigines were systematically rounded up and confined to reserves.\textsuperscript{81} Once most Aborigines were within the reserves, the powers were used on a more selective basis. For example, the power of transferral became a means of discouraging Aborigines from seeking change in the existing system. In Queensland, Palm Island became notorious as the destination of potential “troublemakers.”

Despite the draconian nature of the powers of removal, confinement and transferral, the courts gave the Aboriginal Affairs Departments a virtual \textit{carte-blanche} in their use. For example, in 1951 Fred Waters, an Aboriginal and North Australian Workers’ Union activist, was taken into custody and confined to a reserve. An appeal to Fullagar J. of the High Court of Australia failed.\textsuperscript{82} The court concluded that it lacked jurisdiction to hear the appeal, but went on to hold that there was no abuse of power in the legal sense in that the power of removal could be based not only on the welfare of the individual Aboriginal, but also on the interests of other Aborigines and, if need be, on the general interests of the community. The unsympathetic tenor of the judgment and the unquestioning acceptance of the official line can be gleaned from the court’s conclusion on this point:

“I think that the immediate occasion of the plaintiff’s removal most probably did lie in the part taken by him in the events of the 12th February [a protest strike at Bagot Reserve near Darwin], but I think also that for some time before that date, there had been disturbances among the natives at and about Darwin, in the course of which they had been incited not to work and subjected to threats if they continued their work . . . I think it impossible for any court to say that there was any abuse of power here or even that the Director’s decision was unwise or unjust.” (My emphasis)

In effect, reserves were a microcosm of totalitarian states. The almost unlimited power of reserve authorities has been adequately described elsewhere.\textsuperscript{83} Nothing was too trivial to escape regulation. Penalties could be imposed by a court constituted by the reserve authority for insubordination, indecent behaviour, disorderly conduct, refusal to work, personal untidiness and uncleanness, and acts subversive to good order.\textsuperscript{84} A reserve Aboriginal could have his individuality and dignity stripped from him; for example, his mail could be examined and his home taken from him.\textsuperscript{85} The courts refused to interfere with the exercise of these powers, asserting that the nature of the “Aboriginal problem” required that the authorities be given wide rein to solve it.\textsuperscript{86}

Segregation of reserve Aborigines was guaranteed by “prohibitive, penal and discriminatory”\textsuperscript{87} provisions in all jurisdictions which made it unlawful for persons other than officials or Aborigines resident on the reserve to enter the reserve without authority.\textsuperscript{88} Authority was almost always refused to outsiders, 

\textsuperscript{80} Qld. 1965 to 1967, s. 34 (r. 1971), f. Qld. 1939 to 1946, s. 22, f. 1897 to 1934, s. 9–10; S.A. 1934–1939 s. 17 (r. 1962), f. S.A. 1911, s. 17; W.A. 1905–1954, s. 13–14 (r. 1954); N.T. 1953–1960, s. 17 (r. 1961), f. N.T. 1918–1953, s. 6 (1).
\textsuperscript{81} C. Rowley, \textit{Outcasts in a White Australia} (1972) 83, 85.
\textsuperscript{82} Waters \textit{v. Commonwealth} (1951), 82 C.L.R. 188.
\textsuperscript{83} Tobin: “Aborigines and the Political System” in \textit{2 Racism: The Australian Experience} 68 (1972); Tatz: “Aborigines-Equality or Inequality?” (1966) 38 Austn. Q. 73.
\textsuperscript{84} e.g., Qld.: \textit{Aboriginals Regulations} of 1945.
\textsuperscript{85} Id. s. 32; Aborigines Welfare Board \textit{v. Sounder}, [1961] N.S.W.R. 917.
\textsuperscript{87} Myers \textit{v. Simpson} (1965), 6 F.L.R. 440, 442, per Bridge J.
\textsuperscript{88} N.S.W. 1909–1963, s. 8 (1) (r. 1969); Qld. 1965 to 1967, s. 60 (23) (r. 1971), Qld.
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including scholars. In the result, Aborigines were unable to visit places where they may have spent most of their life, and reserve residents were denied contact with close relatives. *Ogilvie v. Lowe* 89 is illustrative. There the defendant was the non-Aboriginal of an Aboriginal woman (authorized to reside on the reserve) who had come to the reserve to gather wood for winter. In holding that the defendant was unlawfully on the reserve, the court found that there was no provision in the legislation or the regulations whereby a permit could be granted for the husband to reside on the reserve.

Other legislative provisions helped perpetuate the segregation of Aborigines from other Australians. From an early date, whites could be declared vagrants if they associated with Aborigines and were unable to give an adequate account of their means of support. 90 Whites were prohibited from being near a place where Aborigines were camped or congregated, 91 although the courts construed these provisions narrowly, so that all contact between the races was not prevented. 92 The authorities also had the power to remove Aborigines camped in the vicinity of towns, and to declare towns as areas where it was unlawful for Aborigines to be. 93 In Western Australia, it is still an offence for a non-Aboriginal to lodge with an Aboriginal. 94 Limitations were place on the association between white males and Aboriginal women. To some extent this was justified to prevent exploitation, but it was indefensible to make marriage between Aborigines and non-Aborigines dependent on the consent of the authorities. 95 Bureaucratically applied, such provisions caused great hardship. 96

The protective-segregative policy was accompanied by a vast array of other discriminatory provisions. Undoubtedly some measures benefited Aborigines. Thus, persons assaulting Aborigines were subject to summary trial; 97 authorities were able to take legal proceedings on behalf of Aborigines; 98 whites defrauding Aborigines by trick or misrepresentation were guilty of an offence; 99 Aborigines were assured of a fair return for their paintings and drawings; 100 Aboriginal children were regarded as legitimate even though their parents were married according to customary law; 101 and survivors of an Aboriginal dying intestate were not prejudiced in the disposition of the estate by the absence of a formal marriage. 102

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90. N.S.W.: *An Act for the Prevention of Vagrancy* ... 6 Wm. IV No. 6, s. 2. See also Qld.: *The Vagrants, Gaming and Other Offences Acts* 1931 to 1971, s. 4 (1) (ii) (r. 1971).
91. Qld.: 1965 to 1967, s. 60 (23) (r. 1971), Qld. 1939 to 1946, s. 30, f. Qld. 1901, s. 16; W.A. 1905–1954, s. 40 (r. 1954); N.T. 1953–1963, s. 51 (r. 1964), f. N.T. 1918–1953, s. 51.
93. N.S.W. 1909–1963, s. 14 (r. 1969); Qld. 1939 to 1946, s. 21 (r. 1965), f. Qld. 1901, s. 17; W.A. 1905–1954, s. 41–43 (r. 1954), f. W.A. 1886, s. 43.
94. W.A.: *Aboriginal Affairs Planning Authority Act* 1972, s. 65 (2).
95. Qld. 1939 to 1946, s. 29, 19 (r. 1965), f. Qld. 1934, s. 9; S.A. 1934–1939, s. 34a (r. 1962); W.A. 1905–1960, s. 43 (r. 1946); N.T. 1953–1960, ss. 64, 67 (r. 1961), f. N.T. 1918–1953, ss. 53, 45, 53, 45.
98. W.A. 1886, s. 17 (r. 1905).
100. N.T. 1953–1963, pt. VA.
101. Qld. 1971, s. 49 (1), f. 1965 to 1967, s. 43 (1), f. 1939 to 1946, s. 19 (2).
Two provisions of particular note concern alcohol and employment. There can be no denying that alcohol has had a catastrophic effect on many Aborigines, although it would be wrong to blame alcohol per se. Its abuse by Aborigines resulted from the intense pressure to which Aboriginal society was being subjected. In view of the obvious effects, restrictions on the consumption of alcohol predated the protective-segregative period by several decades. Initially, the supply of alcohol to Aborigines was penalized, but later it became an offence for Aborigines to possess alcohol or to be in places where alcohol was sold. Heavy penalties were imposed on those, mainly white publicans, who breached the prohibitions. But there seems to be no evidence that such action had any effect in alleviating the Aboriginal plight; this is not surprising, since the basic cause of the problem went untouched.

Exploitation of Aborigines by white employers was also an early legislative concern. The first legislation was passed to govern the employment of Aborigines in the pearl-shell fishing industry and on ships. These provisions were later incorporated into general legislation and extended to cover all Aboriginal employment. Under them, employment could be of only limited duration and subject to conditions approved by the authorities. Protection easily became oppression; once an Aboriginal entered regulated employment it became an offence for him to leave it. It was also unlawful to induce an Aboriginal to leave regulated employment: for many years, the authorities used this, and other powers, to stifle the spread of trade unionism among Aborigines.

But if some of the discriminatory measures were protective in nature, others were based on nothing more than a racist belief that Aborigines were inherently inferior in ability to other Australians. Queensland, Western Australia and the Northern Territory denied the franchise to Aborigines and the federal government, under the misapprehension that Section 41 of the Australian constitution required it, followed suit. Federal social welfare benefits were not payable to Aborigines covered by the protective-segregative statutes, although after 1959, only nomadic or primitive Aborigines were denied

103. e.g., N.S.W.: Supply of Liquor to Aborigines Prevention Act, 1867.
104. e.g., W.A. 1905–1960, s. 49 (2), 50 (r. 1963).
106. S.W. 1905–1960, s. 49 (2), 50 (r. 1963).
107. W.A.: Pearl Shell Fishery Regulation Act 1873, formerly Pearl Shell Act 1870; Qld.: Pearl-Shell and Beche-de-mer Fishery Act of 1881; Native Labourers' Protection Act of 1884.
108. W.A. 1905–1954, s. 27 (r. 1954).
110. Qld.: The Election Act 1915 to 1965, s. 11, 11A (r. 1965), f. The Election Acts 1885 to 1905, s. 6; W.A.: Electoral Act 1907–1957, s. 18 (e) (r. 1962), f. Constitution Act Amendment Act 1893, s. 12, 21. In the Northern Territory, Aborigines were excluded under the Electoral Regulations. See A. Elkin, Citizenship for the Aborigines (1944).
112. Social Services Act 1947–1958, s. 19 (2), 86 (3) (r. 1959), f. Invalid and Old-Age Pensions Act 1908–1946, s. 16 (1) (c), 21 (1) (b); Maternity Allowance Act 1912–1944, s. 6 (2).
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benefits. In Queensland from 1901, reserve authorities could direct the apportionment of an Aboriginal's wages among other Aboriginals. In 1939, it became mandatory for reserve authorities to undertake the management of an Aboriginal's property, whereupon he lost the power to dispose of it. An aspect of this was the notorious trust account scheme, whereby an Aboriginal's earnings went into a bank account to which he had access only with the consent of the authorities. Similar management could be undertaken in the Northern Territory, but in Western Australia and South Australia, the power existed only with the consent of the Aboriginal.

A host of other discriminatory measures existed at one time or the other. Aboriginals could not possess guns except with special permission; they, but not whites, could be publicly whipped; their movement outside Australia was restricted; they were subject to compulsory medical examination and hospitalization; and in Western Australia, special courts were constituted to deal summarily with Aboriginals charged with all but the most serious offences.

In recent years, most of these discriminatory provisions have been repealed. Only in Queensland do an objectionable number remain. In that State, Aboriginals on some reserves can be denied access to liquor, and Aboriginals may also be employed at lower rates of pay than would normally obtain. In addition, although the management of an Aboriginal's property in the future may only be assumed with his consent, once that consent has been given the control need be relinquished only if the authorities are satisfied that it will not be detrimental to the Aboriginal or his family.

Apart from these few vestiges of a discredited era, which the federal government is pledged to eliminate, the only major remaining restriction concerns reserves. Control over reserves by Aboriginal departments has been, or is being dismantled. For example, Aboriginal councils are assuming authority over Queensland reserves, although the administration retains overriding power.


114. Qld. 1901, s. 13.

115. Qld. 1939 to 1946, s. 16, After 1965, management was appealable, Qld. 1971, s. 27–29 (r. 1971).


117. W.A. 1905, s. 47–50; N.T. 1918, pt. V.


119. C.: *Migration Act* 1958–1971, s. 64 (r. 1973), f. *Emigration Act* 1910. There were also restrictions on intra- and interstate movement. e.g., W.A. 1905–1960, s. 10 (r. 1963).

120. N.S.W. 1909–1963, s. 14 A (r. 1969); Qld. 1939 to 1946, s. 20 (r. 1968), f. S.A. 1936–1939, s. 25–26, f. S.A. 1911, s. 25, 26; W.A. 1905–1954, s. 17 (r. 1954).


123. Qld. 1971, s. 37–47.


125. Qld. 1971, s. 31; *The Aborigines Regulations* of 1972, s. 18–41, see G. Nettheim, *supra* note 22 at 42–43.

jurisdictions and permission must be obtained from the local Aboriginal council or, in the absence of such a council, from the department.\textsuperscript{127} This restriction denies many Aborigines the security of a place to return to when they have nowhere else to go. On the other hand, difficulties are inherent in the suggestion that reserves should become open towns, without restriction on entry. Much Aboriginal social and ceremonial life is carried on in the open. The standard of reserve housing is not comparable with that of other Australians. Moreover, it would be a tragedy if Aborigines were to become a tourist curiosity.\textsuperscript{128} Hence, there is a real need to secure the privacy of the reserve inhabitants, and it would be best to allow them determine entry into the reserves.

In general, it can be said that Aborigines are now in the same position as white Australians with the same rights and responsibilities at law. Special legislation for Aborigines remains, but apart from that just mentioned, it has two main purposes. First, it implements the various schemes for Aboriginal advancement. Second, it makes special allowances for less advanced Aborigines: thus, nomadic Aborigines are exempted from conservation laws restricting the killing of birds and animals, and are entitled to enter land held under lease from the Crown and to kill thereon birds and animals \textit{ferae natural}.\textsuperscript{129}

III. Conclusion

The successful operation of the common law depends on individuals knowing their rights. In ordinary circumstances, this is difficult enough because of the complexity of legal materials and the paucity of inexpensive legal assistance. To expect Aborigines to exercise their legal rights under such a system was preposterous. Not surprisingly, the number of civil cases brought by Aboriginals was infinitesimal.\textsuperscript{130} On the other hand, in criminal cases, where only the state, and not the accused needed to have the knowledge and initiative, Aborigines featured prominently.\textsuperscript{131}

Even when Aboriginal issues were before the courts, there was no guarantee of a sympathetic hearing. In one case, Aborigines were told that their customs were uncivilized and their laws nugatory.\textsuperscript{132} “The assertion of vague rites and ceremonies” could not interfere with the application of British law, said another court.\textsuperscript{133} To a large extent, the courts were reflecting the prejudices of white Australia. Thus Aborigines were too readily assumed to be persons of lesser intelligence\textsuperscript{134} although part-Aborigines, because of their “white blood,” were more highly regarded.\textsuperscript{135}

As late as 1930, a frontier judge asserted that “retributive justice was all that the savage mind could understand.”\textsuperscript{136} In a well-known case involving the trial of an Aboriginal for the murder of a white police officer, the same judge was

\textsuperscript{127} e.g., Qld. 1971, s. 17; S.A.: \textit{Community Welfare Act} 1972, s. 88.


\textsuperscript{131} R. v. Cobby (1883), 4 L.R. (N.S.W.) 355, 356.

\textsuperscript{132} R. v. Neddy Monkey (1861), 1 Wyatt & Webb (Vic.) 40, 41.

\textsuperscript{133} e.g. R. v. Smith (1906), 6 S.R. (N.S.W.) 85.

\textsuperscript{134} Ex parte Willan (1910), 27 W.N. (N.S.W.) 147, 148. See also the remarks of Williams J. in sentencing an Aboriginal. \textit{Telegraph} (Newspaper) (Brisbane), February 7, 1973, at 2, col. 7.

severely reprimanded by the High Court of Australia for denying the accused a fair trial by distorting his defence, by failing to warn the jury of the difficulties in translated Aboriginal evidence, and by transforming the trial into a vindication of the victim’s character. Of course, there were sympathetic judges, but even their pronouncements were tinged with paternalism. Sometimes, judicial values still seem distorted. In 1970, an appellate court considered the obscenity of the phrase “fucking' boong,” which had been used in the public performances of a play. The court focused on the obscenity of the adjective and did not even make passing reference to the grossly derogatory character of the word “boong” when used to describe Aborigines.

The failure of the courts when considering Aboriginal questions stemmed, in part, from their judicial philosophy. The Anglo-Australian common law is based on the notion of formal equality even where this does not preclude substantive equality. Thus, concessions to Aboriginal culture and background were virtually unthinkable. As has been seen, Aboriginal evidence was excluded, and Aboriginal marriages went unrecognized. Sentencing was the only important instance where Aboriginal background was considered, but this was hardly an exception for sentencing has never been regarded as part of the substantive law. Furthermore, the Anglo-Australian common law disapproves judicial activism. Deference was therefore accorded to legislative solution of the “Aboriginal problem.” The Gove Land Rights Case, which denied Aboriginals any land rights, demonstrates the reluctance of the courts to take a bold approach without legislative support. The full bench of the Commonwealth Conciliation and Arbitration Commission expressed the attitude concisely in the decision mandating payment of equal wages for Aboriginal pastoral workers.

"Although what we do in the exercise of our powers may result in social changes, and may result in the Aborigines moving from one life to another, we are not social engineers nor can we deal with the whole spectrum of aboriginal life. We can do no more than to attempt to achieve a just result in an industrial situation. We will not ignore the consequences of our acts, including what may happen to aborigines employed on stations, but we cannot attempt to mould a policy of social welfare for those people in a way a government can.”

However, a century of legislative effort was without beneficial result. On the contrary, it shattered Aboriginal self-confidence and caused Aborigines to become passive recipients of institutional assistance. This, in turn, confirmed the need for the existence of the system and greater repression became justified. Aboriginal affairs bureaucracies acquired a momentum of their own, which made it more difficult for new initiatives to be taken.

Again, deficiencies in legal philosophy contributed. Legislators accepted the simplistic Austinian theory of law as a command, so that change was believed to come by direction from above. In this framework, Aboriginal participation was immaterial.

137. Tuckiar v. The King (1934), 52 C.L.R. 335.
140. e.g. Hodge v. Needle (1947), 49 W.A.L.R. 1, 9.
It is now generally accepted that social change will only result from spontaneous Aboriginal action. Statutory controls have been progressively repealed. Aboriginal initiative is being fostered. For example, government grants are available to assist Aboriginal business enterprises. To be sure, the Aboriginal affairs bureaucracies still adopt a paternalistic attitude in some jurisdictions, but this is not likely to continue when the federal government assumes full responsibility over Aboriginal affairs.

What will be the future role of the law in Aboriginal affairs? The courts must recognize that, since Aborigines are a deprived segment of the population, some divergence from the principle of formal equality may be necessary. Two recent cases are illustrative of the unfortunate consequences that can result when justice is tempered with neither compassion nor understanding. In the first, a cause célèbre, an Aboriginal woman living on a settlement situated on the outskirts of a country town was convicted, but later pardoned, of the death of her child. The child died from malnutrition, and it was said that she had negligently deprived it of adequate food and medical care. Yet in reaching this conclusion, the courts did not adequately consider the abysmal standard of medical and other assistance available to Aborigines living on the fringes of white society.

In the second case, a court ordered the adoption of an Aboriginal child by a white couple over the objections of the mother. The mother left the child with the couple to go on a holiday shortly after the suicide of her husband. When she desired the return of the child, she seems to have been reluctant to press the couple, since she was intimidated by the domineering personality of the wife and fearful of the distress it would cause her. In reaching its conclusion, however, the court had no regard to the general diffidence of Aborigines resulting from their years of oppression and judged the mother's behaviour according to the standards of white middle-class Australia.

Although legislation relating to Aboriginal affairs failed in the past, this does not mean that statutory law can be ignored as a positive source of social change. Statutes, as unequivocal declarations of public policy, can influence public opinion and can have a modernizing and innovative impact. The prejudiced views which Australians had of Aborigines were undoubtedly reinforced by the protective-segregative legislation. In the same manner, legislation could have a positive effect on the outlook and behaviour of the white Australians. Statutes protecting Aboriginal cave-drawings and artifacts, as well as having the immediate result of deterring vandals, can also lead to an appreciation of Aboriginal culture. So too with statutes prohibiting discrimination. Generally, public opinion can be moulded by legislation which gives support to those who do not wish to discriminate but who feel compelled to do so by social pressure.

Only South Australia has an anti-discrimination statute. In other jurisdictions, there are only limited remedies for discriminatory action. For example, a duty to supply meals and accommodation is imposed on inkeepers by the common law, and on licensees by legislation. Under the South Australian legislation, it is an

offence to discriminate on the basis of a person's race, country or origin or color in housing, land, employment, admission to public places, and the supply of goods and services. The present South Australian government has indicated its determination to enforce the legislation, and already the courts have rejected a technical attack on it. However the legislation seems deficient, for the individual victims of discrimination lack a private right of action. Moreover, it may be that prejudice is better discouraged by measures which emphasize conciliation rather than the criminal law. The criminal standard beyond reasonable doubt is difficult to enforce; criminal proceedings might be prosecuted by persons not especially skilled in race relations; and cases could be tried by persons either unfamiliar or unsympathetic to the victim.

Formal measures removing the remnants of the protective-segregative period and asserting Aboriginal equality are, in themselves, inadequate. The more difficult task is to promote substantive equality by social and economic reforms. The federal government now makes annual grants to the states for promoting Aboriginal health, education and housing. Special scholarships are awarded so that Aboriginal children may remain longer at school. The present Labor government established a special federal Ministry to assume, ultimately, full responsibility for policy and finance in Aboriginal affairs. There may be a special Aboriginal electorate in the federal Parliament if Aborigines support the idea. A commission has also been constituted under Mr. Justice Woodward to investigate methods of transferring the title of reserves to Aborigines, of granting land rights to Aborigines outside reserves, and of compensating Aborigines generally for the deprivation of their land. Only in South Australia and Victoria has the title to reserve lands been vested in the Aborigines. Otherwise, the Aborigines have no special rights in relation to land. In the Northern Territory, the Government facilitates the grant of leases to Aborigines: for example, the Gurindji tribe was given a special purpose lease at Wattie Creek. Royalties from exploitation of minerals and timber on Northern Territory reserves goes into a trust fund for Aboriginal welfare. It appears that the Queensland government has adopted a policy of disallowing mining on reserves until arrangements are made with the local Aborigines for the payment of special royalties.

Claims have been made that measures such as these are just as much a denial of equality as the protective-segregative legislation, since they treat Aborigines differently from other citizens. To this, there are at least two answers. First, it is not uncommon for society to have special programs for those in need, whether they be the aged, returned servicemen, or farmers, and yet it has never been claimed that these programs produce inequality as a result of past discrimination, there seems a good argument in favor of compensatory measures. Furthermore, substantive equality is by no means inconsistent with general principles of law. For example, special treatment for the purpose of advancing racial and ethnic minorities is well recognized in international law.

What of lawyers? In all facets of the criminal process — bail, representation in

151. Port Augusta Hotel Ltd. v. Samuels [1971], S.A.S.R. 139.
156. e.g. J. Rawls: A Theory of Justice 65, 83, 84–85 (1971). see also G. Nettheim, supra note 122, at 14.
court, and sentencing — Aborigines are in a worse position than whites. The need for a legal assistance program for Aborigines involved in criminal proceedings is thus incontrovertible. Some enactments now provide that if an Aboriginal is tried for a criminal offence, the Aboriginal affairs department is entitled to have one of its officers make representations to the court.\textsuperscript{158} But second best has been good enough for too long: Aborigines on criminal charges should be represented by qualified lawyers.

Aborigines have the lowest socio-economic position in Australian society and consequently tenancy, housing, family and commercial matters bear heavily in the absence of legal assistance. The same need for legal aid thus exists in the civil law. However, one difficulty may be that Aborigines will only slowly accept law as an instrument of social justice because hitherto, law must have appeared as a negative force of denial, sanctioning white domination and the loss of rights.\textsuperscript{160} Civil legal aid will assist Aborigines to appreciate that many of their problems involve legal issues. In several states, the federal government is funding legal services bureau for Aborigines, but areas other than Sydney, their development is as yet rudimentary.

The law can assist the individual Aboriginal to assert his rights, whether this be in matters of employment or housing or in the field of civil liberties. The law has a function in fostering the self-assertiveness of Aborigines as a group. The law can facilitate the growth of Aboriginal organizations and pressure groups e.g. by incorporation. In this manner, Aborigines would have control over their own affairs and would be able to negotiate more effectively with governments to advance their special interests.

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\textsuperscript{158} Vict. 1967–70, s. 37. Qld. 1971, s. 50; S.A.: Community Welfare Act 1972, s. 90; W.A.: Aboriginal Affairs Planning Authority Act 1972, s. 48; N.T. 1963–1972, s. 21.

\textsuperscript{159} See Swan: "Indian Legal Services Programs: The Key to Red Power?" (1970) 12 \textit{Ariz. L. R.} 594, 597.

\textsuperscript{160} Senate Standing Committee on Constitutional and Legal Affairs, The Elimination of Discrimination against Aborigines (including Torres Strait Islanders) by or under Commonwealth on State Laws, Minutes of Evidence, 12–18 (1972).

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