DISCRIMINATION AGAINST ABORIGINES AND THE ROLE OF THE COMMISSIONER FOR COMMUNITY RELATIONS

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Since the coming of the white invader in 1788, Aborigines have suffered dispossession and discrimination. Early struggles were over land, as the colonists drove Aborigines from the grasslands in the south, which had proved ideal for the growing of merino wool. Contrary to the evidence of a thousand school text-books, Aborigines did not 'fall back to the north'. They were slaughtered in large numbers in the south; those already in the north were permitted to remain, in country too barren and too distant to be of interest to the invaders. Until comparatively recently, the extent and duration of guerilla warfare over the whole continent was not realised. We now know that, though Aboriginal fatalities exceeded those of whites, often by ten to one, they continued their armed struggles to defend their homelands Australia-wide up to the 1920s.

But the battle was doomed to exact heavy cost : numbers greatly favoured the whites, as did their more complex technology. Aboriginal social organisation (unlike that of the Maori) made large-scale warfare almost impossible. Since the traditional society was semi-nomadic, there were no villages to which to retreat and regroup, no single leader for each group and no stockpiles of food or weapons so sustain fighters over any length of time.

The result has been an almost total dispossession from lands to which the various Aboriginal groups belonged and the propagation of the legal myth ('legal' according to white man's law) that Australia was an uninhabited country, 'discovered' by the British.

But these and subsequent attempts to crush Aborigines have failed. Their number, thought to be 300,000 at the time of the invasion, decreased to 40,000 in the 1930s, due to slaughter on and off the battlefield, disease and starvation.

It now stands at 175,000 and is increasing (though Aborigines are only 1.2 per cent of the population). They have never admitted defeat and have continued to fight for Land Rights and justice to the present day. Only their tactics have changed. From the 1930s onward, physical confrontation was replaced by political demonstrations of equal ingenuity and courage.

Nevertheless, at an early stage of post-invasion history, a domination over blacks was established which still continues as a form of internal colonialism. This has followed the classic pattern of invasion, conquest, exploitation, and political and cultural control, all accompanied by a self-justifying ideology. Black reserves and communities are still largely governed by external political and socio-economic forces, despite a government policy (white slogan?) of 'self-management'. Aborigines continue to be under-represented on every form of decision-making body, whether professional, economic, overtly political, voluntary or welfare.

A glance at the usual indices of socio-economic position indicates that Aborigines have landed on the bottom rung of Australian society.

Their mortality and morbidity rates are appallingly high and are proof in themselves of the inherent racism of Australian society. No white group would be left in this deplorable situation.

The Aboriginal infant mortality figure is three to four times that of Australia as a whole and life expectancy at birth is 50 years,[2] as contrasted with 70 and 77 years for white males and females respectively.

The annual personal ,income of Aborigines also forms a marked contrast with that of whites : at the time of the 1976 census, 62 per cent of the total Australian population. 3 In June 1978, morethan 33 per cent of Aborigines were unemployed, about six times the national average. A particularly disturbing aspect that that 60 per cent of those with matriculation could not get jobs, which the

Department of Employment and Industrial Relations attributed to discrimination by employers.

'Many Aborigines today are living under shocking conditions, conditions which would not be tolerated by any white Australian', declared an Aboriginal journal in commenting on the housing situation.[5] The Northern Territory Health Department also refers to a "Dickensian environmental pattern" in the Territory and has stated that 'overcrowding is the single most important factor in the pathogenesis and perpetuation of respiratory diseases' in Aboriginal communities.[6]

A further discrimination in housing has been the enforced cultural conformity which it implies. In urban areas houses are designed for nuclear but not for extended families; in tradition-oriented areas they are built according to white suburban criteria.

Education has been one of the severe areas of discrimination, where teacher attitudes of denigration or indifference have influenced Aboriginal children's achievement, where the whole school ambience has ignored the Aboriginal contribution and background. Children have very quickly received the message of the hidden curriculum, that Aboriginality is not highly prized by the general community, that white schools exist to benefit white students and to alienate blacks. The result has been that, in 1977, only 8 per cent of Aboriginal secondary students were in forms above the third, contrasted with 20 per cent for all Australian students.[7] Aboriginal people, especially those of the tradition-oriented communities, do not necessarily want the standard curriculum of the white school, but all of them have indicated a desire for basic literacy and numeracy in their own languages and for a knowledge of English, at least in oral form.

The law has been an inherent area of discrimination for Aborigines in all its many facets. Research has indicated[8] that an Aboriginal man or woman is more likely than a white to have his/her home searched without a warrant, to be charged with a minor offence, to be refused bail, to receive

a gaol sentence rather than a fine and .a .longer sentence if gaoled. Magistrates are more likely to accept police evidence or that of any white as against any number of blacks. Despite the efforts of the Aboriginal Legal Services, which have come into operation in all States and in the Northern Territory since 1971, :there are still instances of Aborigines going undefended before the courts (particularly those in remote areas which the Services cannot cover) or of not being supplied with an interpreter when their English is not adequate to follow proceedings. The then Minister for Aboriginal Affairs, Ian Viner, admitted in 1978 that:

> Aboriginals as a group have the... lowest legal status of any identifiable section of our population.[9]

Incarceration rates for Aborigines remain outstandingly high, whether in prisons or juvenile detention centres.[10] Complaints by Aborigines against police are an almost weekly occurrence. These are mostly investigated by police themselves, a procedure which does not inspire confidence as to impartiality. Sometimes a policeman is transferred as a result, but the overall situation continues to recur.

The Office for Community Relations has handled a number of complaints against individual police and has been able to take effective action to resolve them in the interests of the Aborigines concerned. More adequate staffing would enable more such work to be carried out.

In Queensland the Aborigines Act and the Torres Strait Islanders Act are still in force, largely for those living on reserves, and are discriminatory in the powers they give to the Queensland Government over the daily lives of black people in that State, as distinct from other Australians.

Anti-Discrimination Laws and Agencies

As can be seen, there is an all-pervasive prejudice against Aborigines in every area of Australian life which translates into unending acts of discrimination. Given their post-contact history of poverty, enforced dependency and cultural distinctiveness, one could foresee that such would be the case. Just as Aborigines are the poorest, least educated (in white man's terms) and worst housed segment of the population, so are they the greatest sufferers from discrimination.

Perceived need for the protection of the weaker sections of the community received official recognition in 1966, with the passing of the first anti-discrimination legislation in Australia, the Prohibition of Discrimination Act of South Australia (a year after the Race Relations Act came into operation in the United Kingdom and five years before the New Zealand Race Relation's Act of 1971). The South Australian Act made a limited number of actions illegal, though it did not contain a general definition of racial discrimination. All actions had to be taken in the criminal courts, but only after the Attorney-General had issued a certificate. Such were its complexities that this had only happened four times (and only two of the ensuing cases had been successful) before the Act was repealed and replaced by the Racial Discrimination Act 1976 (SA).

On 15 June 1973 the Federal Government of Australia ratified the International Labour Organisation Convention Number 111 : Discrimination (Employment and Occupation), which in Article 1 defines discrimination as:

> Any distinction, exclusion or preference made on the base of race, colour, sex, political opinion, national extraction or social origin, which has the effect of nullifying or impairing equality of opportunity or treatment in employment and occupation.

In order to demonstrate its commitment to the principles of the Convention, one National and six State Committees on Discrimination in Employment and Occupation were set up in June 1973 to investigate complaints of discrimination in the workforce. Their only power is the threat of naming a discriminating employer in the Annual Report, but this has not yet occurred.

The first six Annual Reports disclose a total of 229 complaints received on grounds of race or colour up until June 1979. Though a few of these may have come from Asians, a very large proportion would have been brought by Aborigines. Thirty were resolved. In view of the countless instances of employment discrimination against Aborigines observable daily in all parts of Australia, the ineffectiveness of this form of protection becomes apparent.

On 21 December 1965 the General Assembly of the United Nations unanimously adopted the International Convention on the Elimination of All Forms of Racial Discrimination, which was a practical expression of the United Nations Charter and the Universal Declaration of Human Rights. The preamble to the Convention opens with the affirmation that

> the Charter of the United Nations is based on the principles of the dignity and equality inherent in all human beings;

one of its purposes being

> to promote and encourage universal respect for and observance of human rights and fundamental freedoms for all, without distinction as to race, sex, language or religion.

The obligations of signatory States are set out in Articles 2 to 7 of the Convention and include an undertaking to eliminate all racial discrimination by governments, public authorities,

organisations and individuals; to amend laws which are discriminatory, to provide effective protection against discrimination and to undertake programs of social, cultural and educational development.

As a necessary concomitant to signing the Convention by Australia, the Racial Discrimination Act was passed by the Federal Parliament in 1975, after substantial amendment. The amendments included the removal of the power of the Commissioner to institute civil proceedings arising out of an alleged infringement of the Act and of his power to apply to the Court for an order for the taking of evidence in the matter under investigation. A clause which sought to prohibit dissemination of ideas based on racial superiority or hatred was also deleted.

Under the Act as it was passed, discrimination is made unlawful on grounds of race, colour, descent or national or ethnic origin, particularly in employment, access to places and facilities and the provision of goods and services. A statutory office of the Commissioner for Community Relations was established to administer the legislation.

The Anti-Discrimination Act of New South Wales became operative on 1 June 1977, rendering unlawful racial, sex and other types of discrimination in certain circumstances and promoting equality of opportunity between all persons. The Act makes it unlawful to discriminate on the grounds of race, sex or marital status in the areas of employment, the provision of goods and services and accommodation and on the ground of race in education. It establishes a Counsellor for Equal Opportunity and an Anti-Discrimination Board. Victoria has no legislation which renders discrimination on racial or ethnic grounds illegal; Tasmania has drafted such a Bill, though it appears doubtful whether it will be passed. The Queensland and Western Australian Governments are opposed to such Acts.

Commissioner for Community Relations

The Annual Reports which the Commissioner for Community Relations is required to make to the Parliament are important social documents, particularly as to their information concerning Aborigines. (He has also duties towards all other racial and ethnic groups, but these will not be considered here).

In the first five years of operation, of a total of 4,212 complaints received, 1,570 or 37 per cent have come from Aboriginal people. It is obvious that, for a variety of reasons, these are only a small fraction of the total which might have been reported.

The procedures under the Racial Discrimination Act provide simply that a complaint is made in writing. It is for the Commissioner then to inquire into that complaint.

The procedures followed in the inquiry vary according to the gravity and the urgency of the complaints. In many cases informal conferences are held as a means of conciliation between the parties and a significant number of complaints have been resolved by these means. It is also a fact that many situations have called for compulsory conferences which are provided for in the Act. Failure to attend can attract a penalty of $500.

The compulsory conference involves the Commissioner or a staff member designated by him, the complainants and the alleged discriminator. If conciliation proves impossible and the complainant requires satisfaction then the Commissioner can issue a certificate which enables the courts to seek either a restraining order, injunction, apology or damages.

Conciliation has involved obtaining the reversal of racially discriminatory decisions, undertakings not to offend again, the tendering of apologies and sometimes the payment of damages in recognition of the offence given.

Those most discriminated against are always likely to be from the weakest section of the community (Aborigines and newly-arrived non-English speaking immigrants, for example) who are not in a position to complain for lack of facility or fear of reprisal.

The question can therefore be asked, Why should the oppressed and aggrieved be left to have the carriage to court of their own case without the further assistance of the Commissioner? This weakness of the Act to which reference was made in the Fourth Annual Report (page 12, "Amendments Proposed") could be a factor which deters complainants from pursuing remedies through court processes following the issue of the Commissioner's certificate.

On the other hand it must be recognised that conference procedures under the Racial Discrimination Act are not so culturally alien to Aboriginal people as are court procedures and there is the added security in the fact that the evidence produced at such conferences cannot be tendered in subsequent court actions.

The legislation lays stress on conciliation of complaints and, to date, of the more than 4,000 cases, the Commissioner has issued only nine certificates to indicate that conciliation has failed. Four cases were settled after the certificates were issued. The remaining five have not yet been taken before the court.

The Annual Reports so far published have drawn attention to weaknesses in the legislation which call for parliamentary amendment. There is need for a government authority to have power of prosecution on behalf of the complainant; the definition of 'racial discrimination' should be broadened to include the dissemination of ideas based on racial hatred; the Commissioner should be able to give legislative protection to those who assist him in his work; and he should be empowered to direct the production of documents related to his enquiries.

Though Section 23 of the Racial Discrimination Act provides for Regulations to establish conciliation committees, such Regulations have not been promulgated. A number of Consultative Committees have been established, but no finance is available for their administrative and travel expenses and they are not legally recognised. The Reports also comment on inadequacy of facilities to deal with complaints : staff shortage and lack of offices in areas where the majority of Aborigines live : Western Australia, the Northern Territory, Queensland and South Australia.

Community Relations Operations

The Commissioner for Community Relations has two main areas of activity, the one associated with complaints and the other with community education. According to Section 20 of the Act, his functions are:

(a) to inquire into alleged infringements (of the Provisions of the Act) and endeavour to effect a settlement of the matters alleged to constitute those infringements;

(b) to promote an understanding and acceptance of, and compliance with, this Act; and

(c) to develop, conduct and foster research and educational programs and other programs for the purpose of -

(i) combating racial discrimination and prejudices that lead to racial discrimination;

(ii) promoting understanding, tolerance and friendship among racial and ethnic groups; and

(iii) propagating the purposes and principles of the Convention.

Refusal of service in public places occurs all over the continent and is often excused on the grounds of inadequacy or inappropriateness of dress of behaviour. Research[12] and empirical evidence suggest otherwise. Country towns particularly tend to be controlled by a white social matrix which views Aborigines as inferior and separate and does not hesitate to exclude them in every possible way. Aborigines on their part are turning more and more to the Community Relations Office to try and eradicate such deep-seated forms of discrimination.

But it is not just in refusal of service that Aborigines suffer, nor is it only in country towns. They are frequently denied accommodation by property owners or agents or by a State Government housing agency. They are refused essential services by local authorities; racial epithets and denigratory statements are often applied both orally and in printed form. They are denied jobs or advancement in employment and frequently complain of harassment by certain police. School administrations and teachers treat their children unjustly. It would be hard to think of any area of daily life in which equality prevails. All these and many more complaints reach the Community Relations Office daily.[13]

Queensland and Western Australia

It is generally conceded in Australia that Federal law has precedence over State law and applies to all Australians. Additionally, Section 6 of the Racial Discrimination Act specifically binds Australia and each State. However, two States, Queensland and Western Australia, have informally (though not through legal channels) challenged the Act's validity.

In 1977 the Queensland Minister for Lands, Forestry, National Parks and Wildlife Service refused to permit the transfer of land owned by the Archer River Pastoral Holding Company to the Aboriginal Land Fund Commission, for subsequent use by the Winchinam group of Aboriginal people. A complaint was filed under the Racial Discrimination Act. Several letters on the matter from the Commissioner for Community Relations to the

Minister remained unanswered over a lengthy period. Directions were then issued under Section 22 of the Act to the present and previous Ministers for Lands, the Director of the Queensland Department of Aboriginal and Islander Advancement and the Chairman of the Land Administration Commission to attend a compulsory conference in Brisbane on 17 July 1979. None of the alleged discriminators appeared. In a letter dated 16 July 1979, Commonwealth Attorney-General Durack advised the Commissioner that the Premier of Queensland had complained to the Prime Minister over this action. The Attorney-General gave the opinion that the Commissioner was not empowered to direct a State Minister or statutory officer to attend a compulsory conference. At about the same time, a letter from the Queensland Crown Solicitor directly challenged the legislation by stating that 'the constitutional validity of the Act is disputed'.[14]

A similar situation arose the following year concerning Western Australia in the form of a letter from the Western Australian Chief Secretary and Minister for Police and Traffic and Community Welfare to the Commissioner, dated 23 May 1980, stating that 'the government of the State of Western Australia is not a matter over which you have, or ought to have, the slightest jurisdiction'.[15]

The discrimination complaint which gave rise to this comment concerned the transfer of a community development officer employed by the Department for Community Welfare at Fitzroy Crossing, a small town in the north of Western Australia. Leaders of the five remote Aboriginal communities concerned complained that his transfer discriminated against them as they would no longer benefit from the work which he and his wife had been doing successfully. They (and he) also maintained that the transfer arose in order to placate a small number of whites in the area, regardless of the needs of Aboriginal communities. Actions taken by the Office for Community Relations in this matter brought forth the letter cited above.

No challenge has been issued before the courts to establish the validity or otherwise of the Racial Discrimination Act, but the practice of non-co-operation on the part of Queensland and Western Australian politicians and public servants persists.

Strengths of the Racial Discrimination Act

The passing of the Racial Discrimination Act and the setting up of an Office of the Commissioner for Community Relations indicated that the Australian community as a whole disapproved discrimination on racial or ethnic grounds and was prepared to provide machinery to deal with it. The Commissioner has pointed out a number of weaknesses in the Act, but it nevertheless has the effect by its very presence of support for an ideal of social justice. It can also have the effect of eliminating actions which, though iniquitous, have become entrenched through long usage. An example of this - one of many which might be cited - occurred at the time of the Western Australian Government elections early in 1980. There was a deliberate attempt by a white to make the members of a small Aboriginal community at Turkey Creek (in the north-west) drunk for the express purpose of preventing them from voting. The police and State Government authorities stated they were unable to take action under existing State law and a complaint was laid under the Racial Discrimination Act. As a result of conciliation proceedings by a Community Relations officer, the offender tendered a written apology to the community and $1,000 in cash. The Aboriginal people of Turkey Creek were elated. Such events had occurred before in the area, but this was the first time a government agency had intervened on their behalf. They wisely remarked that this would probably be the last time anyone would attempt such an action and risk incurring the-resultant notoriety.

A further advantage in having a Community Relations Office lies in the publicity which it can give at official level to the Aboriginal situation in general and the many specific acts of discrimination which they suffer. The raising of awareness of injustice goes a certain way towards its alleviation.

A second and most important function of the Commissioner for Community Relations is that of community education which takes a variety of forms. The Commissioner is involved in a continuous public education campaign. His staff, though small, is specialised in the education area and acts as catalyst to educational groups to inject new ideas into effective race relations training. Seminars and courses are mounted and educational bodies encouraged to incorporate them in regular training programs of nurses, police, social workers, medical practitioners and the like. Particular attention is paid to in-service and pre-service training of teachers : there are now few teacher training institutions in Australia which do not include in their curriculum a component dealing with race and ethnic relations.

The Office has conducted a particular campaign against racism in textbooks[16] and has instigated innumerable workshops for teachers, librarians and education students all over the continent, to enable them to judge the often subtle racism with which school materials are imbued. Certain publishers now consult the Office regularly before issuing children's materials pertaining to race. But, regrettably, the battle is by no means won, and biased and inaccurate literature, especially that concerning Aborigines, continues to appear.

Weaknesses of Anti-Discrimination Legislation

The Racial Discrimination Act and its administration by the Commissioner for Community Relations cannot, however, provide a complete solution for Aboriginal problems of discrimination. These are too insidious and too deeply embedded in the society to be capable of cure only by legal and bureaucratic means within the forms of the existing power structure. As we have seen, that structure in all its manifestations is the problem. Aborigines have been excluded from the decision-making process, adding to the gross inequality of their position.

Unlike similar legislation in the United States the Act does not include Affirmative Action (or positive discrimination) which enforces a quota of jobs for the disadvantaged minorities from major employers. But it does provide a means whereby Aborigines have a grass roots forum for their complaints. But it has been consistently recognised by the Commissioner that individual case work alone is not enough to change the institutions and provide opportunities for the exercise of power by Aborigines.

For this reason five years of effort have gone into trying to effect change in Australia's institutions to remove the root causes of continuing racial discrimination. First priority has been given to institutional and formal education as provided for both in the Act and the International Convention on the Elimination of All Forms of Racial Discrimination. In the Commissioner's view a basic change in attitudes is the only permanent solution to discrimination.

Though ideally the law is neutral, in practice, like other societal institutions, it must be culturally based and biased and does not in any case, favour those on the bottom socio-economic rung. The present system treats discriminatory acts as aberrant, whereas in fact they are part of the normative order of the society. Aborigines cannot obtain their fair share of power unless it is voluntarily relinquished at least in part by whites by a process of negotiation between conflicting interests. Legal procedures must have some bearing on Aboriginal traditions, beliefs and values in order to assist Aboriginal communities to assert their own ethic.[17]

In the long term the answer to inherent injustice and racism is the strengthening of Aboriginal communities to a status of independence and equality by the granting of Land Rights and of adequate compensation for land already alienated. But at least until that day arrives, the Office of the Commissioner for Community Relations preserves a useful function as watchdog for society's ideals and as a deterrent to those who seek to denigrate their fellow citizens.

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