HUMAN RIGHTS COMMISSION

REPORT NO. 9

COMMUNITY SERVICES (ABORIGINES) ACT 1984

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Report No. 1 *The Australian Citizenship Act 1948* (August 1982)
Report No. 2 *Proposed A.0 .T. Mental Health Ordinance 1981* (October 1982)
Report No. 3 *Testamentary Guardianship in the Australian Capital Territory* (April 1983)
Report No. 4 *Human Rights and the Deportation of Convicted Aliens and Immigrants* (June 1983)
Report No. *5 Review of Crimes Act 1914 and Other Crimes Legislation of the Commonwealth* (August 1983)
Report No. 6 *The Observance of Human Rights at the Villawood Immigration Detention Centre* (August 1983)
Report No. *7 Proposal for Amendments to the Racial Discrimination Act to Cover Incitement to Racial Hatred and Racial Defamation* (November 1983)
Report No. 8 *Deportation and the Family: Report on the Complaints of Mrs M. Roth and Mr C.J. Booker* (September 1984)

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Human Rights Commission
G.P.O. Box 629
Canberra, A.C.T. 2601

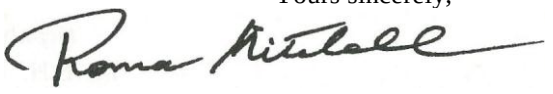
9 January 1985

The Honourable Lionel Bowen, M.P.
Deputy Prime Minister and Attorney-General
Parliament House
Canberra, A.C.T. 2600

Dear Attorney-General,

Pursuant to section 9(1)(c) of the *Human Rights Commission Act 1981*, we present this report to you following the Human Rights Commission's examination of the Queensland *Community Services (Aborigines) Act 1984.*

Yours sincerely,



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CONTENTS

FUNCTIONS OF THE COMMISSION

Section 9 of the *Human Rights Commission Act 1981* reads:

9. (1) The functions of the Commission are—

(a) to examine enactments, and (when requested to do so by the Minister) proposed enactments, for the purpose of ascertaining whether the enactments or proposed enactments are, or would be, inconsistent with or contrary to any human rights, and to report to the Minister the results of any such examination;

(b) to inquire into any act or practice that may be inconsistent with or contrary to any human right, and-

(i) where the Commission considers it appropriate to do so—endeavour to effect a settlement of the matters that gave rise to the inquiry; and

(ii) where the Commission is of the opinion that the act or practice is inconsistent with or contrary to any human right, and the Commission has not considered it appropriate to endeavour to effect a settlement of the matters that gave rise to the inquiry or has endeavoured without success to effect a settlement of those matters — to report to the Minister the results of its inquiry and of any endeavours it has made to effect such a settlement;

(c) on its own initiative or when requested by the Minister, to report to the Minister as to the laws that should be made by the Parliament, or action that should be taken by the Commonwealth, on matters relating to human rights;

(d) when requested by the Minister, to report to the Minister as to the action (if any) that, in the opinion of the Commission, needs to be taken by Australia in order to comply with the provisions of the Covenant, of the Declarations or of any relevant international instrument;

(e) on its own initiative or when requested by the Minister, to examine any relevant international instrument for the purpose of ascertaining whether there are any inconsistencies between that instrument and the Covenant, the Declarations or any other relevant international instrument, and to report to the Minister the results of any such examination;

(f) to promote an understanding and acceptance, and the public discussion, of human rights in Australia and the external Territories;

(g) to undertake research and educational programs, and other programs, on behalf of the Commonwealth for the purpose of promoting human rights and to co-ordinate any such programs undertaken by any other persons or authorities on behalf of the Commonwealth;

(h) to perform-

(i) any functions conferred on the Commission by any other enactment;

(ii) any functions conferred on the Commission pursuant to any arrangement in force under section 11; and

(iii) any functions conferred on the Commission by any State Act or Northern Territory enactment, being functions that are declared by the Minister, by notice published in the Gazette, to be complementary to other functions of the Commission; and

(j) to do anything incidental or conducive to the performance of any of the preceding functions.

(2) The Commission shall not—

(a) regard an enactment or proposed enactment as being inconsistent with or contrary to any human right for the purposes of paragraph (1) (a) or (b) by reason of a provision of the enactment or proposed enactment that is included solely for the purpose of securing adequate advancement of particular persons or groups of persons in order to enable them to enjoy or exercise human rights equally with other persons; or

(b) regard an act or practice as being inconsistent with or contrary to any human right for the purposes of paragraph (1) (a) or (b) where the act or practice is done or engaged in solely for the purpose referred to in paragraph (a).

(3) For the purpose of the performance of its functions, the Commission may work with and consult appropriate non-governmental organizations.

I. INTRODUCTION

1. This report has been prepared because of the concern expressed to the Commission by many Aborigines, Aboriginal communities, and members of the community generally about some of the provisions of the *Community Services (Aborigines) Act 1984* of the Queensland Parliament ('the Act'). The Act replaces the *Aborigines Act 1971-1979* which provided for the management of Aboriginal reserves by elected councils and by government officials, who retained control of expenditure and made most of the important decisions. The Act is a special legislative measure for Aboriginal Queenslanders, and principally for those living on what are now called trust areas and were previously called reserves in the *Aborigines Act 1971-1979.* Its main purpose is to establish for those Aboriginal communities in trust areas a form of local government analogous to, but in some important respects different from, that established under the *Local Government Act 1936-1984* for most other Queenslanders. Two Aboriginal communities—Aurukun and Mornington Island—have since 1978 had another special system of local government, more closely related to the Local Government Act system and administered by the Minister and Department of Local Government.

2. The Act replaces references to reserves with the concept of the 'trust area'. An unsophisticated reader of the legislation might conclude that this somehow required deeds of grant in trust to be made, or even presume that they had already been made. However, the definition of 'trust area' in section 6 of the Act includes not only land granted in trust, but also land reserved for the use and benefit of Aborigines.

3. So, as Queensland Crown lands law now stands, the system of Aboriginal reserves remains, but they are called trust areas in the Act. Provision exists in the laws relating to Crown lands for deeds of grant in trust to be made, but, at the date of writing of this report, no grants have been made. When they are, there is nothing in the law to require their boundaries to be the same as the boundaries of the former reserves, or to prevent key sites within them being excised and left as unalienated Crown land. The result is that great uncertainty still surrounds the tenure of Aboriginal Queenslanders over their reserve lands. But the provisions of the Act relating to the management of trust areas apply, even though the trust areas have not been granted.

4. The Commission considers that the Act, which came into operation on 31 May 1984, contains the potential for discrimination against members of Queensland Aboriginal communities which are subject to it. It is also concerned that in some respects the new Act does not provide Aborigines subject to its operation the rights recognised in the International Covenant on Civil and Political Rights ('the ICCPR') and the International Convention on the Elimination of All Forms of Racial Discrimination (' the Racial Discrimination Convention'). It recommends action which it considers the Commonwealth should take to remove or reduce this discrimination.

5. The Commission has received detailed comments on the Act from the National Aboriginal Conference (NAC). These comments are the result of a Workshop held on Palm Island on 8-11 May 1984 attended by representatives of Aboriginal reserves and communities. Wherever relevant, the NAC' s comments on provisions of the Act have been taken into account in the preparation of this report. So also have comments made by Ms Barbara Miller in a research paper prepared for the Commission at the time the legislation was being enacted. It reports the views of the Yarrabah community and will be circulated as a Discussion Paper of the Commission.

6. In 1983, the Commission prepared an Occasional Paper on Aboriginal Reserves By-Laws and Human Rights', which dealt with the position not only in Queensland, but also elsewhere in Australia.

7. The Act was passed at the same time as a very similar piece of legislation, the *Community Services (Torres Strait) Act 1984.* Many of the comments about the former Act which are made in this report are equally applicable to comparable sections of the latter Act. Because this report has been developed in consultation with Aboriginal Queenslanders and organisations representing them and is to a great extent a response to concerns they have expressed about the implications of the Act, the Commission has decided to leave a detailed consideration of the Torres Strait legislation until such time as the Islander communities have indicated to the Commission their attitudes to it.

1. Human Rights Commission, *Occasional Paper No. 5,* AGPS, Canberra, 1983.

II. SELF-MANAGEMENT AND DISCRIMINATION

8. **It** has been put to the Commission that the crux of the dissatisfaction with the Act is that it does not give self-management to Aboriginal communities. The remaining sections of this report are in large part a commentary on that central proposition. They show, for example, that in matters of administration, voting rights, supervision and control of alcoholic drinks the Aboriginal communities have not been given an appropriate measure of self-management.

9. There is, however, a dilemma in providing for self-management. It is that if the wishes of Aboriginal communities are fully met, then they may well have arrangments for self-management which differ from those for the community generally. Some provisions of the Act already give to Aboriginal communities more powers than are usually enjoyed by an ordinary white community under local government law, as in the case of control over those who can reside in a trust area. On the other hand, there are measures where the central government has retained greater controls over Aboriginal Councils through the powers of executive officers than is the case with ordinary local government.

10. Not every difference in the exercise of rights and freedoms is unlawful discrimination.' Nor may legislation which adopts race as the basis of its operation be invariably objectionable. It may be that the legislation recognises a group defined by reference to race and seeks to assist them in sharing the same opportunities as other members of the State while, at the same time, allowing them the opportunity to maintain their identity. Article 1.4 of the Racial Discrimination Convention recognises that special measures may be taken for the advancement of a racial group, and section 8 of the *Racial Discrimination Act 1975* makes it clear that such special measures do not constitute unlawful acts of racial discrimination.

11. There have been suggestions that the Act was to some extent conceived as a special measure for the benefit of the residents of trust areas. When introducing it into Parliament the Minister stated that the aim of the Act was . . to unfetter Aboriginal and Islander people in formulating decisions which affect the development of their communities . . Later, he stated that 'Local government decision-making powers will, with this legislation, shift to the local democratically elected community council'.

12. Although the Commission recognised that in many respects the Act does give a greater measure of self-management to Aboriginal communities, it notes in this report a number of areas where, in its view, the measures do not go far enough. Further, it notes that there are aspects of the Act which, rather than being special measures assisting the advancement of Aboriginal Queenslanders, actually have the potential for discrimination against them.

13. Section 10 of the *Racial Discrimination Act 1975* provides that all persons are, without regard to their race, colour or national or ethnic origin, to enjoy rights equally with others. Any law which reduces the enjoyment of any right on racial grounds is to be read down to the extent that the discriminating factors are rendered inoperative. Commonwealth law, including section 10, prevails over inconsistent State laws by virtue of section 109 of the Constitution. It is not always easy to determine whether a provision of State law is inconsistent with a Commonwealth law. The fact that State legislation is not explicitly discriminatory is not determinative of the issue. The question always is whether there is a distinction, exclusion, restriction or preference based on race, colour, descent, or national

1. *Belgian Linguistics* case (1968), ECHR Ser.A No.6 p.34.

or ethnic origin, which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise on an equal footing of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life. This is the definition of racial discrimination contained in Article 1(1) of the Racial Discrimination Convention and is the yardstick of racial discrimination contained in the *Racial Discrimination Act 1975.*

III. BY-LAWS

14. In Occasional Paper No. 5 published by the Commission in 1983 entitled Aboriginal Reserves By-Laws and Human Rights', the Commission commented that the existing system of by-laws applying on Aboriginal reserves was wholly inappropriate to the needs of Aboriginal communities and should be replaced by some system of social control that reflected their needs. The paper detailed numerous instances where provisions in the by-laws are in conflict with Articles of the ICCPR and the Racial Discrimination Convention.

15. At page 43 of that Occasional Paper, the hope was expressed

> . . . that the present paternalistic system of by-laws applying to all Aboriginal reserves in Queensland will be replaced by systems of social control, whether enshrined in by-laws or some other form, which represent the genuinely felt needs of the communities concerned and not what outsiders think they should have imposed upon them. In particular, the temptation to adopt in one way or another the existing by-laws, even as an interim measure to avoid a legal vacuum, as reserves are replaced by other forms of tenure, should be avoided. The by-laws are peculiarly inappropriate to the needs of Aboriginal communities in Queensland and should disappear with the reserves to which they now apply.'

When the *Aborigines Act 1971-1979* was repealed by the *Community Services (Aborigines) Act 1984*, the old by-laws applying on every Aboriginal reserve in Queensland were continued in force by section 5(3) of the new Act. It is true that extensive by-law making powers are given to Aboriginal Councils, subject to close supervision, but until Councils replace the old by-laws with new, and more appropriate by-laws, the day-to-day lives of Aboriginal Queenslanders residing in trust areas are controlled under this singularly inappropriate collection of paternalistic rules, many of which are inconsistent with human rights.

The Commission notes the Minister's comment that these by-laws are to be temporary only, and that the new Councils are undertaking the task of drafting, advertising and publishing new provisions. It expresses the hope that every encouragement will be given to Aboriginal communities to undertake and complete this important task.

16. A further point should be made about the by-laws continued in force by section 5(3). A number of the by-laws refer to the position of reserve managers. For example, by-law 1 of Chapter 10, discussed at pages 32[3] and following of Occasional Paper No 5, provides that

> A persons swimming and bathing shall be dressed in a manner approved by the Manager.

By law 3 of Chapter 17 provides that,

> A persons shall not, without the permission of the Manager, engage in any trade or business in a park or anywhere in the Community/Reserve area.

17. Very wide discretionary powers were entrusted to managers under the by-laws, yet the Act no longer provides for the position of manager. Managers are replaced by executive officers who, in law if not in practice, have fewer powers. The result is that many of the by-laws continued in force will it seems be unenforceable to the extent that they require the manager to make a decision or form an opinion, because that functionary is no longer in existence. If this amounts to the de factor repeal of by-laws such as those quoted above, then

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I. Human Rights Commission, *Occasional Paper No.* 5, AGPS, Canberra, 1983.
2. ibid. p.43.
3. ibid. p.32.

the result is welcome. This would include some by-laws that infringe human rights. However, there are some, e.g. those by-laws found in Chapter 17, where the lacuna could in itself be inconsistent with human rights. The by-laws in Chapter 17 contain an absolute prohibition on certain activities without the permission of the manager. Thus, by-law 4 of Chapter 17 provides that

> A person shall not, without the permission of the Manager, organise a game or play in a park or anywhere in the Community/Reserve area where places have not been set aside for the playing of games.

It may be that the result of the elimination of the position of manager, together with the continued operation of this by-law, is that no games can be played anywhere in a trust area except in places specially set aside for that purpose. It is perhaps unlikely that the continuation of such by-laws will have any practical effect, but their continued existence highlights the need to replace the old by-laws with appropriate new ones.

IV. OFFICIAL SUPERVISION

18. The effect of the Act is to provide that members of Aboriginal communities will be subject potentially to a far greater degree of official scrutiny than are the residents of other local government areas.

19. Under section 11 of the Act the Governor in Council may appoint a visiting justice to visit trust areas in order, amongst other things, to investigate complaints of Aboriginal residents concerning their administration and to inspect the records of punishments imposed by Aboriginal courts. The Act provides that the visiting justice may be requested to report to the Under Secretary on any matter that in his opinion affects the welfare of the residents of a trust area, and also on 'such other matters as the Under Secretary requests'.

20. This provision is a relic from the *Aborigines Act 1971-1979.* No comparable provision is included in the *Local Government Act 1936-1984* and it appears to be objectionable on several grounds. Firstly, the whole concept of a visiting justice has overtones of the gaol or other institution in which people are incarcerated against their will, which is to be subject to regular inspections by that functionary. The concept fits uneasily with that of a community of Aboriginal Queenslanders living freely together under their own institutions.

21. Secondly, in this context, there is potential for a conflict of roles between the visiting justice as inspector and the visiting justice as magistrate. Our constitutional system is based on the principal of the separation of powers in which distinct and independent branches of government exercise judicial powers, on the one hand, and executive powers, on the other. This distinction is blurred in the case of the visiting justice, who functions as an extension of the executive arm of government in conducting investigations and carrying out requests made by the Under Secretary under section 11(2)(d)(iii) to report on any matter at all of interest to him and, on the other hand, who functions as a magistrate dispensing justice. The NAC has expressed concern as to the possibility of a perception of bias or lack of confidence in the legal system by the Aboriginal community. The potential conflict of roles of the visiting justice is unlikely to create confidence in the legal system or remove the perception of bias.

22. Thirdly, the wide scope of the virtually unlimited discretion of the Under Secretary to make requests to visiting justices to report on matters of interest to the Under Secretary has the potential not only for paternalistic intervention in matters of detailed administration, but also for interference with the personal affairs and privacy of Aboriginal Queenslanders in such a way as to raise issues under the Racial Discrimination Convention and the ICCPR .

23. Under section 12(1) of the Act the Governor in Council may authorise any person to hold inspections, investigations and inquiries for the purposes of the Act as he considers desirable. Persons so authorised have the powers and protection of a Commission appointed under the *Commissions of Inquiry Acts 1950-1954.* However, witnesses at an official inquiry under section 12 of the Acts do not receive the protection given to witnesses under section 14 of the *Commissions of Inquiry Acts 1950-1954* which provides, amongst other things, that witnesses may refuse to produce documents if they have a reasonable excuse for doing so and that statements made by witnesses are inadmissible in subsequent civil or criminal proceedings. The Commission sees no substantive reason by this special form of inquiry should be included in the Act. If it is necessary, then proper protection for witnesses should also be included.

24. The Commission believes that these provisions relating to visiting justices and inquiries should be used sparingly, and that some public notification should be given of occasions on which reports and inquiries are made, and of the subjects covered, even if in some circumstances it may not be possible, e.g. for legal reasons, to release the full report.

V. LOCAL GOVERNMENT ACT IMPLICATIONS

25. The Act makes provision for voting arrangements for Aboriginal Councils, with the voters' rolls being compiled using the procedures adopted in the *Local Government Act 1936-1984*. The special measures found in division 1 of Part III of the Act, coupled with the regulations which were in draft form when this report was being written, will have the effect of making only Aboriginal persons resident in each trust area eligible to be elected members of a Council, but will enfranchise all adult residents of trust areas, though some of these residents will not be Aborigines. For example, section 14(2) envisages communities of Tones Strait Islanders living within trust areas. It would seem that in these circumstances the Torres Strait Islanders could vote for members of the Aboriginal Council concerned but could not stand for election. If at first sight this seems anomalous, it should be added that section 14(2) of the Act provides that Aboriginal Councils have no jurisdiction over that part of their trust area allocated to the use of a Torres Strait Islander community.

26. Also, as far as white officials and their families are concerned, it may well be that their places of residence are technically outside trust areas, with the result that they can neither vote nor stand for Councils which, in turn, have no power over the places in which they reside. Section 82(12), for example, envisages that there will be enclaves of Crown land which are not included in deeds of grant in trust and which are surrounded by trust area lands. The overall result is that relatively small numbers of people who are not Aborigines are likely to reside on land within the jurisdiction of each Aboriginal Council. While these people can vote, they cannot stand for election.

27. Though at first sight this seems to represent an unlawful discrimination against them, it may well be that their exclusion from office can be justified under Article 1.4 of the Racial Discrimination Convention as a special measure taken for the sole purpose of securing adequate advancement of a racial group requiring such protection as may be necessary to ensure its enjoyment of human rights on an equal footing with other racial groups. It will be recalled that section 8(1) of the *Racial Discrimination Act 1975* exempts such special measures from its prohibitions. However, as against this, Article 1.4 has two important requirements which may not be met by the Act. The first is a proviso that affirmative action programs do not . . lead to the maintenance of separate rights for different racial groups . . .' It is noted that the effect of the Act is to separate Aboriginal local government from the ordinary system of local government in such a way as to suggest separate rights are maintained for different racial groups. The second requirement is that affirmative action programs 'shall not be continued after the objectives for which they were taken have been achieved'. The absence of some type of sunset provision in the Act appears, in the circumstances, inconsistent with the proviso that the special measures being discussed shall not be continued after their objectives have been achieved.

28. It might also be added that the existence of enclaves of white residents on Crown land inside trust areas but exempt from the jurisdiction of Aboriginal Councils is itself anomalous for, in reality, the interaction of these separate communities, as well as their interdependence, makes it logical they share the same local government system. If they do not, in effect there are separate local government systems for different racial groupings. The Minister has, however, indicated that it is his intention that all persons within the outer perimeter of the Trust areas, whether Aboriginal or not, and whatever their occupations, will be eligible to vote for the Aboriginal Councils and be subject to their by-laws.

29. Section 19 of the Act provides that a person whose name appears on a voters' roll for the purpose of electing an Aboriginal Council is not to vote at an election for the local government area of which the Aboriginal Council forms a part and that such a person is not qualified to be enrolled on the voters' roll for the purpose of such an election. The effect of this provision is to disenfranchise members of Aboriginal communities in trust areas from voting in ordinary local government elections. Further, the effect of section 7(1) of the *Local Government Act 1936-1984* is that residents of trust areas will no longer be eligible to hold office in ordinary Local Authorities because only persons qualified to be on a voters' roll are so eligible.

30. At the same time, the powers of local government authorities continue to extend onto trust areas which fall within their boundaries. For example, section 19(a) of the Act, exempting land in trust areas from rating under the Local Government Act, is drafted on the premise that trust areas are within the boundaries of local authorities. Similarly, section 19(b) of the Act, disenfranchising residents of trust areas from voting in local authority elections, is based on the premise that otherwise these residents could vote in local authority elections. Local authorities will be responsible for certain services benefitting trust areas, such as the upkeep of access roads to trust areas.

31. The first question to be answered is whether the provisions of the Act relating to the local government franchise are inconsistent with the *Racial Discrimination Act 1975,* or are desirable special measures designed to assist the development of Aboriginal communities, as envisaged in section 8 of that Act. Before answering this question on a theoretical level, the Commission records its awareness that at the time of the preparation of this report there is no single Aboriginal view as to the desirability or otherwise of the provisions of the Act relating to the local government franchise. Some Aboriginal residents of trust areas are anxious to cut themselves off from the ordinary processes of local government as much as possible and welcome the provisions of the Act that further that goal. They do not wish to participate in the ordinary local government system and, at the same time, do not wish to have white Queenslanders participating in their own Councils. On the other hand, there is another body of Aboriginal opinion resentful of the provisions of the Act which take away existing rights to vote in the ordinary local government system. In addition, Aboriginal people opposed to their disenfranchisement also tend to resent limitations on the powers of Aboriginal Councils, particularly in respect of their lack of jurisdiction over other racial groups living in or adjacent to trust areas.

•32. For the provisions of the Act relating to voting in local government elections to be special measures within section 8(1) of the *Racial Discrimination Act 1975,* it is necessary for them to satisfy the requirements of Article 1.4 of the Racial Discrimination Convention, which provides that

> Special measures taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals requiring such protection as may be necessary in order to ensure such groups or individuals equal enjoyment or exercise of human rights and fundamental freedoms shall not be deemed racial discrimination, provided, however, that such measures do not, as a consequence, lead to the maintenance of separate rights for different racial groups and that they shall not be continued after the objectives for which they were taken have been achieved.

It is difficult to see how the taking away of a right to vote in the ordinary local government elections can be seen to be a measure taken for the sole purpose of securing adequate advancement of Aborigines. It is a measure depriving them of rights, rather than one giving them special rights. Furthermore, even if excluding them from the ordinary local government franchise were to be regarded as a special measure for the purposes of

Article 1.4, the arrangement should only continue until a position of equality had been reached. The absence of a sunset provision in the Act terminating these special measures once their objectives have been achieved is inconsistent with Article 1.4. One solution might be to phase out the offending provisions as Aboriginal communities assume their place as full participants in local government in Queensland. Another approach might be to apply the system of local government found in the Act to all isolated Queensland communities lacking substantial revenue from rates so as to remove the criticism that the legislation is racially discriminatory by virtue of applying only to Aboriginal communities in trust areas.

33. But as the matter now stands, the principal effect of sections 18 and 19 is to take away the existing rights of Aboriginal residents of trust areas to vote in ordinary local government elections, and, in this sense, the Act is racially discriminatory. It is true that sections 18 and 19 of the Act, which, when read together, remove the rights of residents of trust areas to vote in ordinary local government elections, are not cast in overtly racial terms. They do not say that Aboriginal persons living in trust areas may not vote in ordinary local government elections. But that is the practical result of their application. Section 18 requires a voters' roll to be made for the purposes of every election for an Aboriginal Council, and once a person's name appears on that roll, section 19 takes away the right to vote for local authority elections. It is indisputable that the vast majority of people whose names are on voters' rolls for Aboriginal Councils will be Aborigines. It is true that, as noted above, there will be some people of other racial groupings entitled to vote, if not to stand, for Aboriginal Councils. However, the fact remains that, in depriving Aboriginal residents of trust areas of their existing rights to vote in the ordinary local government system it is difficult to escape the conclusion that racial discrimination is necessarily involved in the application of the Act.

34. Sections 18 and 19 of the Act fall within the description of racially discriminatory laws found in section 10(1) of the *Racial Discrimination Act 1975,* since the rights they restrict include those found in Article 5(c) of the Racial Discrimination Convention, in particular, the right to participate along with other citizens in elections and to take part in the conduct of public affairs at any level. Furthermore, it is likely that the administrative acts of officials under section 19 in eliminating the names of residents of trust areas from local authority electoral rolls and in refusing to permit Aboriginal residents of trust areas to vote in appropriate local authority elections would be racially discriminatory acts made unlawful by section 9(1) of the *Racial Discrimination Act 1975.*

35. The application of section 10 of the *Racial Discrimination Act 1975* to section 19 of the Act would be to nullify its effect. Persons whose rights were purportedly affected by section 19 might obtain redress in the courts by declaration or otherwise. One choice available to the Commonwealth Government would be to add a further section to the *Aboriginal and Torres Strait Islanders (Queensland Discriminatory Laws) Act 1975* declaring that section 19 of the Act and any other provision cast in similar terms was unlawful and ineffective to take away the rights of Aboriginal people to vote in Queensland local authority elections.

36. Although the Commission is of the opinion that racial discrimination is involved in the deprivation of the rights of residents of trust areas to vote in local authority elections, it refrains from making a formal recommendation on this subject in the light of the divergence in Aboriginal opinion on this topic, and expresses the view that there should be further consultation by the Queensland Government with Aboriginal communities in Queensland on the issues involved.

VI. EXECUTIVE OFFICERS

37. Section 23 of the Act provides that an Executive Officer for each Aboriginal Council may be appointed for a period of three years (or by arrangement for a shorter or longer period) after the commencement of the Act. Thus the services of the Executive Officers of an Aboriginal Community Council are terminated after a stated period.

38. This is an example of one of the special provisions that distinguishes the management of Aboriginal Councils from that of ordinary local government councils. In the view of the Commission the provision represents a constructive compromise between the right of a Council, possibly arbitrarily, to terminate the appointment of its executive officer, and the right of the officer to have some security of tenure. The Commission will watch with interest the development of this new form of office. Its role, powers and tenure are clearly different from those of the former managers of reserves, yet they are not identical with town and shire clerks appointed under the *Local Government Act 1936-1984*.

VII. ABORIGINAL COUNCILS

39. Section 25 of the Act indicates that in discharging local government functions Aboriginal Councils shall do so 'in accordance with the custom and practices of the Aborigines concerned . . .' and that by-laws may be made for that purpose. The meaning that should be given to these words is uncertain. The response of the Minister to enquiries indicates that the provision is intended to allow for the special requirements of Aboriginal communities. The Commission supports this extension of the range of by-laws that can be made under the Act, and will watch to ensure that innovative regulations are not unreasonably disallowed.

40. Section 29 provides that the budgets of Aboriginal Councils are of no force and effect until approved by the Minister. In this the Act goes further than section 25 of the *Local Government Act 1936-1984* which only requires local authorities to prepare a budget for the current year in the form and manner prescribed by the Act. The Minister advised the Commission that the power to disapprove would be used sparingly, and in a case involving clear irresponsibility, rather than questionable wisdom, on the part of an Aboriginal Council. He said that the provision had been included only to deal with this situation, and having in mind the large sums of money which the Queensland Government will be transferring to Aboriginal Councils. Since Aboriginal Councils will be primarily dependent upon Government funding rather than on rates, it was considered appropriate to impose more Government control over them than over other local government authorities. The Commission will watch the operation of this provision to ensure that it is not used to nullify the concept of self-management.

41. Section 32 of the Act provides that Aboriginal Councils shall keep records of receipts and disbursements, including such records as may be directed by the Minister. The comparable provisions in the *Local Government Act 1936-1984* indicate that accounts should be kept in the manner prescribed by the regulations. Secondly, section 32 provides that the Under Secretary or a person authorised is entitled to enter into and be in the area and premises of an Aboriginal Council to inspect Council's books and records. There is no general power of entry given to an auditor in respect of other local authorities. Furthermore, subsection (2) indicates that the accounts of an Aboriginal Council shall be audited by the Auditor-General as if the Council were a department of the Government of Queensland.

42. Aboriginal Councils are required to give monthly financial returns to the Minister for three years and after that at quarterly intervals under section 33 of the Community Services (Aborigines) Act. This requirement differs materially from the provisions of the *Local Government Act 1936-1984*, where the Town Clerks give monthly reports to their Councils. Section 33(2) of the Act requires annual statements to be given to the Minister whereas the *Local Government Act 1936-1984* requires the Town Clerk to give annual statements to the Council. These differing provisions emphasise the relative lack of independence of Aboriginal Councils as compared with other local authorities.

43. This unequal treatment of Aboriginal Councils as against other local authorities raises questions of discrimination under Article 5 of the Racial Discrimination Convention, and, in particular, issues under Article 5(c) which provides that everyone, without distinction as to race, is entitled to take part, on the basis of equality, in the conduct of public affairs at the local government level. In the view of the Commission, these provisions need to be reviewed, with the object of bringing them into line with the comparable provisions in the *Local Government Act 1936-1984*, which it understands have worked satisfactorily.

VIII. LAW AND ORDER

44. Section 42 provides that an Aboriginal court which has jurisdiction over a trust area shall be constituted by two justices of the peace, each of whom is an Aboriginal resident of the area for which the court is constituted or, if this cannot be complied with, by the member of the Aboriginal Council established for the area concerned, or a majority of them. Section 43 provides that an Aboriginal court has jurisdiction conferred on it by the Act and the by-laws of the Aboriginal Council concerned and that it may hear and determine complaints about breaches of the by-laws, disputes concerning matters within its area that are not breaches of the by-laws, and matters committed to its jurisdiction by the regulations. Section 25(6) provides that a by-law of an Aboriginal Council may impose a penalty not exceeding $500, or if it is expressed as a daily penalty, not exceeding $50 per day.

45. The Act does not provide any procedure for the appointment of member of Aboriginal courts, nor does it require them to possess any particular qualifications or training, other than appointments as justice of the peace. This raises the questions whether the members of Aboriginal communities are subject to the application of a different standard in the administration of justice, since unqualified justices of the peace rarely sit as magistrates in the ordinary courts. It is recognised that it is desirable for Aboriginal courts to be staffed by Aboriginal magistrates, and that to insist, at this stage, on strict formal legal qualifications for appointment to Aboriginal courts might result in staffing them with people who were not Aborigines. Clearly what is needed is a program to enable Aboriginal magistrates to acquire necessary and desirable legal qualifications and, in the meantime, for the powers of unqualified magistrates to be limited.

46. Section 44 of the Act indicates that the jurisdiction of each Aboriginal court extends only to and in respect of persons, whether Aborigines or not, who are part of the community that resides in the area for which it is constituted. A person who is resident on a trust area by virtue of an appointment that requires residence on the trust area is not taken to be part of the community and is not subject to the jurisdiction of an Aboriginal court. Such a person may be dealt with by a Magistrate's Court for a break of a by-law which, in that case, is deemed to be part of the law of Queensland. By way of contrast the jurisdiction of the Aboriginal courts is exercised under section 43 . . having regard to the usages and customs of the community within its area. . . ' . Where charges of breach of by-laws are heard in Magistrate's Courts, section 43 does not apply.

47. The effect of section 44 is that offenders against the by-laws are treated differently according to whether they are Aborigines or not. From the point of view of Aboriginal residents of trust areas, they do not receive equal treatment with white officials in respect of breaches of the by-laws, and, as a result, their right to equal treatment before the courts guaranteed by Article 5 of the Racial Discrimination Convention is infringed on racial grounds. One possible solution to this problem might be for persons charged with offences against the by-laws to have a choice of tribunal, or a right of appeal, irrespective of their race. Accordingly, offenders might elect to have charges for breaches of the by-laws heard either by Aboriginal courts or by the ordinary Magistrates' Courts. It might well be that in such circumstances most Aboriginal residents would prefer to be dealt with by Aboriginal courts, but at least they would have a choice of venue. A further anomaly appears to be that while a persons resident on a trust area by virtue of appointment is not subject to the jurisdiction of Aboriginal courts, the Act does not indicate that the person's spouse or family are also exempt from their jurisdiction. This situation appears to be

anomalous. Moreover, some ambiguity is associated with the definition of 'community' which forms the basis of the jurisdiction of Aboriginal courts. The Commission takes the view that institutions in trust areas should relate equally to *all* residents, irrespective of race. This observation applies to the administration of justice on trust areas as it does to other matters, and, accordingly, the courts sitting on trust areas should have jurisdiction over all who may have committed breaches of the law there.

48. The Act appears to give to the Aboriginal courts an unlimited civil jurisdiction. There is no upper dollar limit on the matters which they can hear. Moreover, it is not clear from the Act how an Aboriginal court's orders and judgments are to be enforced. The Act does not lay down any procedure. It would appear that community members subject to the jurisdiction of Aboriginal courts are not given any effective remedy. For Aboriginal courts to fulfil their proper role in Aboriginal self-management in trust areas their powers need to be defined with more precision and uncertainties in relation to the enforcement of judgments need to be removed.

IX. DECEASED ESTATES

49. Section 75 of the Act gives to the Under Secretary power to administer the estates of Aboriginal Queenslanders who have died without appointing an executor, and the estates of such Aborigines where there is no executor resident in Queensland willing and capable of acting, or where the Aborigine is missing. The section is not confined to the administration of the estates of the residents of trust areas; it applies to all Queensland Aborigines. It gives to the Under Secretary wide powers to administer Aboriginal estates, but also empowers him to renounce these rights in favour of the Public Trustee. No criteria are set out to guide the Under Secretary in his task. Surprisingly, no reference is made to those who might be entitled to share in the estate by virtue of Aboriginal law and custom. Moreover, subsection 3 goes on to say that when the Under Secretary has made his decision, the persons whom he has selected as beneficiaries are the only ones

> . . entitled in law to succeed to the estate . . .

50. In apportioning an estate as between beneficiaries, the Under Secretary may divide it in whatever proportions he chooses; he is not required to make an equal distribution as amongst the beneficiaries he selects or, for example, to consult the Council or community. If he selects none, then the proceeds of the estate are applied to a fund used to make grants, under subsection 71 of the Act, to Aboriginal Queenslanders who make application for aid to the Under Secretary.

51. The overall effect of section 75 is to provide a different system of administration of intestate estates of Aborigines and of the estates of missing Aborigines from that applicable under the general law to Queenslanders of other racial origins. This different regime is not an attempt to recognise systems of distribution and descent based on Aboriginal law and custom; rather, it is an example of an unfettered discretion entrusted to officials, with the potential to be used in an arbitrary and paternalistic way. It is in clear contravention of Article 5(d)(vi) of the Racial Discrimination Convention which entitles all persons to the enjoyment of the right of inheritance without distinction as to race and colour. It also appears to fall within the prescriptions of section 10(1) of the *Racial Discrimination Act 1975* which provides that, if a State law has the effect of denying persons of a particular race rights enjoyed by persons of other races, then despite the State law, the people discriminated against are put on the same footing as other racial groups. Putting it in another way, section 75 of the Act may be open to challenge under section 10(1) of the *Racial Discrimination Act 1975.* To clarify this point, it would be desirable to add a section to the *Aboriginal and Torres Strait Islanders (Queensland Discriminatory Laws) Act 1975* nullifying the operation of section 75 of the Act to estates over $500 in value.

52. The Commission notes that it is possible for a person other than the Under Secretary to administer the estate. It was advised by the Minister that the purpose of section 75 is to prevent small estates being whittled away by the expense incurred in an administration by the Public Trustee or a private solicitor. The Commission considers that a limitation should be placed upon the value of estates which the Under Secretary may administer, e.g. less than $500, and that in other cases the Aboriginal Council, in the absence of identifiable and willing close relatives, should have a discretion as to the way in which the estate should be administered.

X. CONTROL OF ALCOHOL

53. Section 76 of the Act gives to Aboriginal Councils power to establish within their areas premises for the sale and supply of beer and to conduct the business of selling and supplying beer. These powers can be exercised only with the approval of the Under Secretary. The provisions of the *Liquor Act 1912-1984* do not apply to the activities of Aborigines Councils in selling and supplying beer. Moreover, Councils may make by-laws governing the sale, supply and consumption of beer and the conduct of premises on which beer is sold, and imposing limits on the amount of beer which may be taken away from Council premises for consumption elsewhere.

54. In addition, section 82(12) provides for regulations to be made with respect to trading hours for beer selling premises. The draft regulations circulated in August set *maximum* trading hour limits of 10 a.m. to 10 p.m. but allow Councils to open premises at such other times as the Under Secretary fixes 'having regard to the needs of the area'.

55. The Act gives no power to Councils in relation to alcoholic beverages other than beer, but section 82(12) confers a regulation-making power on the Governor in Council in respect of

> the bringing of liquor into and the presence and consumption of liquor within areas or parts within the outer limits of an areas that are reserved from the grant of that areas or that are not reserved and set apart for the Aboriginal inhabitants of the State.

This somewhat obscure regulation-making provision appears to envisage different rules about liquor for white officials from those governing Aboriginal residents of trust areas. The regulation-making power is not explicitly racial in its terms, but it is capable of being used in a racially discriminatory manner and of having the effect of providing different rules about the consumption of alcohol for Aborigines and non-Aborigines. On several occasions the Commission was advised by Aborigines that the rules concerning alcohol were regarded as racially discriminatory. The discrimination occurs because different regulations apply in those enclaves of Crown land which are likely to be left within trust areas and occupied by white officials. The enclave areas will not be within the control of Aboriginal Councils, whose jurisdiction will be limited to the geographical boundaries of the trust areas, although the inhabitants of these enclaves will live side by side with the Aboriginal residents. By virtue of the different rules about the supply and consumption of liquor, the enclave residents are likely to enjoy benefits which will raise issues of racial discrimination as against those denied them.

56. In reality, illegal buying and selling of liquor will be inevitable, given the restrictions on the jurisdiction of Councils over liquor, and the comparative ease with which it will be able to be brought into trust areas along public roads ostensibly for use in the enclaves. Aboriginal self-management on Aboriginal land necessarily involves Council control over all liquor, not just beer. The limitations on their powers under the Act are inconsistent with self-management in this important area. There can be little or no justification for giving the Councils powers over the supply of beer but not of other liquor, particularly when it will be impracticable to prevent other liquor being brought into trust areas.

57. For the time being, the effect of section 21(2) of the *Queensland Acts Interpretation Acts 1954*, as amended, will be to preserve the regulations made under the repealed *Aborigines Act 1971-1979.* The old Aborigines Regulations will be displaced by fresh regulations made under the *Community Services (Aborigines) Act 1984* dealing with the same topic. Regulation 13 of the Aborigines Regulations of 1972 prohibited the

bringing of liquor onto reserves, and the supply of liquor on reserves to Aboriginal people. It is probable that this regulation will stay in force until fresh regulations relating to liquor are made under the *Community Services (Aborigines) Act 1984*. There is, however, some doubt on this question, as what is prohibited is the supply and possession of liquor on 'reserves', terminology which has been changed under the *Community Services (Aborigines) Act 1984,* which refers to 'trust areas'. Pending the actual granting of deeds of grant in trust, however, it is accurate to describe trust areas as reserves so that, on balance, it is likely that Regulation 13 remains in force for the time being.

58. As far as the Commission can ascertain, in draft Regulations circulated in August 1984 which were then proposed to be made under the *Community Services (Aborigines) Act 1984* there was no equivalent of Regulation 13 of the Aborigines Regulations of 1972. It remains to be seen whether the old Regulation 13 will survive the introduction of fresh regulations under the new legislation. Councils and individual residents and groups on trust areas may, and do, apply for special licences under the *Liquor Act 1912-1984* to sell liquor on sporting and social occasions. Nevertheless, it seems likely that Aboriginal Councils will want some controls imposed on the importation of alcohol or, alternatively, a power to make by-laws on this subject. The present position is anomalous, leaving Councils with wide powers to control the sale and drinking of beer and none to restrict the introduction, sale and supply of other forms of alcoholic drinks in trust areas.

XI. ENTRY AND RESIDENCE

59. Central to the concept of Aboriginal self-management is the question who may enter and live in trust areas. Section 66 provides, amongst other things, that

> . . . an Aborigine or other person who, in either case, is a member of the community resident in an area [may] . . . enter upon, be in and reside in that area.

In other words, community members have a statutory right of entry and residence. A 'community member' is not defined with precision, although section 66 envisages that a person who is not an Aborigine can, in certain circumstances, be a community member. Section 66 is worded in a way that suggests, at first sight, that membership of the community is dependent upon residence in the trust area concerned. This would cause some difficulty for those persons intimately associated with a community, who regard themselves as part of it, but who do not, at the present time, reside in the trust area concerned, though they may wish to do so in the future. However, though the question is not entirely free from difficulty, it is probable that the section does not equate present residence with community membership in every case. Were residence at the time the Act came into force required, then section 66 should have been more explicit on this point. It uses the word 'resident' to describe the community in each case rather than to define its members. The result is that though it is likely that in each case the majority of the members of each community would be resident in its trust area, there may be some who would be regarded as members of the community, and would regard themselves as members, yet who did not reside in its trust area at the time the Act came into force. Such people may have lived in the trust area concerned in the past and have some expectation of living in it in the future.

60. Section 65 provides a right for persons to enter roads, parks, and public areas generally within trust areas for lawful visits and business purposes. It is also made lawful for persons to enter other places for lawful purposes as a guest or at the request of a community member.

61. Section 68, amongst other things, permits each Aboriginal Council to make by-laws defining what classes of persons may enter, be in and reside in each trust area. Section 68 must be read in conjunction with section 66, and no Council can make valid by-laws excluding members of a community from their trust area. A Council can, however, make by-laws adding classes of persons other than existing residents who may enter and reside in its trust area. Each Council may also make by-laws prohibiting and restricting the classes of persons who may enter, be in and reside in a trust area.

62. A power is also conferred on Aboriginal Councils by section 70 to eject persons from trust areas who are there in defiance of the by-laws.

63. Section 69 provides that any person who is refused entry to a trust area is entitled to be given reasons by the Aboriginal Council concerned for the exclusion. There is, however, no right of appeal against a decision by a Council to exclude a person from a trust area. In some circumstances this could be seen as having the potential for allegations of the denial of natural justice by persons excluded. For example, it might be alleged that person wishing to enter a reserve had a case to put which had not been heard, or that allegations had been made which could have been answered had the opportunity been given. Experience will eventually show whether there is reasonable ground for disquiet on this point. Another, and more positive view of section 69 would be that by leaving the decision to exclude entirely in the hands of each Aboriginal Council rather than leaving

the ultimate power of decision in the hands of an outside appellate body, there is an appropriate recognition of the significance of Councils in the process of self-management.

64. These provisions of the Act relating to entry and residence in trust areas, taken as a whole, represent a reasonable attempt at balancing the rights of the residents of trust areas to manage their own affairs and to exclude from trust areas those people who have no reasonable claim to be there, while at the same time making it clear that the members of each community are entitled as of right to live in its trust area. There is no provision in the Act permitting the arbitrary exclusion of community members from trust areas, and members are freely able to invite members of their family and other people to visit them.

65. Putting it another way, the Act seeks to preserve a balance between the individual rights of community members to security of tenure on lands to which, in many cases, they may be entitled by custom and tradition, and the necessity for each community to protect its integrity by limiting the number a persons who can live in its trust area. The old permit system has not resurfaced, and there is no suggestion of any infringement of section 6 of the *Aboriginal and Torres Strait Islanders (Queensland Discriminatory Laws) Act 1975* which, amongst other things, recognises the rights of Councils to control entry onto Aboriginal reserve lands.

XII. RECOMMENDATIONS

66. The Commission recommends that—

(1) a copy of its report should be made available to the Queensland Government with an invitation to comment on the various human rights and racial discrimination issues identified, namely—

(a) the continuation in force of the paternalistic by-laws made under the repealed *Aborigines Act 1971-1979:* International Convention on the Elimination of All Forms of Racial Discrimination, Article 5 (paragraph 15)

(b) the continuation in force of by-laws relating to the powers of the Reserve Manager when this post has been abolished: Convention, Article 5 (paragraph 17)

(c) the potential for excessive interference in Aboriginal self-management in trust areas by visiting justices: Convention, Article 5(c) (paragraphs 18-23)

(d) the desirability of consultation with Aboriginal communities and their representatives on the question of local government with the object of reaching arrangements satisfactory to the Aboriginal people generally: Convention Article 5(c) (paragraph 36)

(e) the importance of ensuring that innovative by-laws made by Aboriginal Councils are not unreasonably disallowed: Convention, Article 5(c), (d)(vii), (viii) and (ix) (paragraph 39)

(0 the importance of ensuring that Government supervision of the finances of Aboriginal Councils is not used to nullify the concept of self-management: Convention, Article 5(c) (paragraph 40)

(g) the necessity of reviewing those provisions of the *Community Services (Aborigines) Act 1984* in which Aboriginal Councils are given unequal treatment as against other local authorities: Convention, Article 5(c) (paragraph 43)

(h) the desirability of limiting the powers of unqualified magistrates sitting in Aboriginal courts pending the establishment of a program for Aboriginal magistrates to obtain appropriate legal qualifications: Convention, Article 5(a) (paragraph 45)

(i) the different treatment of white officials offending against the by-laws as compared to Aboriginal offenders: Convention, Article 5(a) (paragraph 47)

(j) the need to define with more precision the powers of Aboriginal courts, particularly as to the enforcement of civil judgments: Convention, Article 5(a) (paragraph 48)

(k) the racially discriminatory system of the administration of intestate estates of Aborigines and of the estates of missing Aborigines provided by section 75 of the *Community Services (Aborigines) Act 1984:* Convention, Article 5(d)(vi) (paragraph 51)

(I) the potential for racial discrimination in the regulation-making power relating to the use of liquor in enclaves within the trust areas: Convention, Article 5(c) (paragraph 55)

(m) the need for Councils to control all liquor, not just beer, in order to achieve Aboriginal self-management on Aboriginal land: Convention, Article 5(c) (paragraph 56).

(2) to the extent that the Queensland Government does not itself decide to remove racially discriminatory provisions of the Act, action should be taken by Aboriginal

communities and the Commonwealth Government to have the Queensland legislation declared inoperative;

(3) to the extent that provisions inconsistent with human rights and racially discriminatory provisions exist in the *Community Services (Aborigiines) Act 1984*, as identified in (1) above, the Commonwealth Government and Parliament should consider supplementing the *Aboriginal and Torres Strait Islanders (Queensland Discriminatory Laws) Act 1975* to nullify their effect.