BEYOND TRINKETS AND BEADS : SOUTH AUSTRALIA'S ABORIGINAL LEGAL RIGHTS MOVEMENT, 1971-1978*

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Other than expressing sentiments of equality and humane treatment, the Proclamation read aloud by Governor John Hindmarsh at Glenelg on 28 December 1836 gave no indication of how the Aborigines in South Australia were to be treated. Relations between the races in South Australia almost immediately followed the general pattern which characterised settler-native relations in the other colonies. Colonists soon ignored the fact that Aborigines held the rights of British subjects. Rather than all being equal under British law, the Europeans relied on their legal system to protect them from, and to suppress, the Aborigines.

Few Europeans took exception to this denial of justice and equality. Although Judge Sir John Jeffcott stated in 1837 that Aborigines ought to receive less severe punishments than Europeans who were convicted of similar offences, his suggested discrimination in favour of the Aborigines was not adopted.¹ The application of British justice to indigenous society was rarely questioned by the majority of colonists. The only alteration to the imposed legal system was incorporated in the colony's *Evidence Act* of 1846, which enabled Aborigines to give their evidence without taking oaths.

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¹ Gale 1972:41-42.

In 1860 a Select Committee of the Legislative Council upon the Aborigines acknowledged the complex relationship which existed between the two races but simply reasserted the earlier principles rather than suggesting improvements. Thus no new regulations were promulgated and there were few administrative changes. The protectionist /missionary approach of providing food, clothing and blankets was reaffirmed. The general pattern of the Aborigines' existence on government and mission stations had been determined by the 1860s.² Conditions deteriorated further in the latter part of the 19th century and prompted another Parliamentary enquiry. However, the Select Committee of the Legislative Council on the Aborigines Bill in 1899 did not introduce fresh initiatives.

In 1911 the South Australian Parliament passed legislation extending restrictions on the legal rights of Aborigines. The humanitarian overtones indicated by the sub-title — *An Act to Make provision for the better Protection and Control of the Aboriginal and Half-Caste Inhabitants* — were belied by later events. The Act granted further powers to the protector of Aborigines, who became the legal guardian of all Aboriginal and 'half-caste' children until they reached the age of twenty-one years. This Act dictated the nature of the relationship between Aborigines and Europeans, and defined who was an Aboriginal for the purposes of protection and control. The Aborigines remained legally underprivileged in that certain civil rights were subject to the discretion of the authorities.

The report of a 1913 Royal Commission urged adoption of even more stringent measures — for example the segregation of 'full-bloods' and 'half-castes'. Shortly afterwards the government assumed control of the large reserves at Point Pearce and Point McLeay. More authoritarian measures were introduced by means of regulations so that, as Rowley notes, 'control meant further restriction of rights . . . the continuation of a process of lowering legal status which had been cumulative from the time of first contact'.³ The exclusion of Aborigines from the larger society had been reinforced by statutory and common law.

Within the broad constitutional problems of the status of Aborigines there were persistent difficulties for people caught in the legal processes. But the predicament of Australian Aborigines became more publicly politicised after the Second World War. For example, the creation of the United Nations Organisation and concurrent international pressures on racial issues resulted in some official modification of Australia's racist stance. Debates over attitudes

² For a detailed discussion of this period see Rowley 1974, Gale 1964, Jenkin 1979, Hassell 1966.

³ Rowley 1964:221.

and policies were conducted on a national and State level. On the local level the development of an Aboriginal civil rights movement and social action groups, as well as the publicity given to specific issues (such as the 'Stuart case' of 1959 and the resulting Royal Commission) raised community awareness of the many problems faced by Aborigines.⁴ This politicisation of the Aborigines' plight presumably encouraged the successful passage of the 1967 referendum proposals giving the Commonwealth power to legislate for Aborigines.⁵ Subsequently most States transferred their administrative responsibilities to the Commonwealth.

It is noteworthy that this constitutional amendment was 'widely interpreted as giving a mandate to successive Australian governments to improve the legal, social and economic position of Aborigines'.⁶ There has been a consensus among the major political parties since 1967 on these matters yet no Commonwealth government has fully implemented and effectively carried out its accepted mandate. In 1971 Prime Minister John Gorton recognized his government's failure to reduce the legal discrimination practised against Aborigines.⁷ While politicians played with words a small group of concerned Aborigines and Europeans had already struggled to achieve some significant changes. The Aboriginal Legal Service (ALS) formed in Redfern, New South Wales, was the first legal aid group specifically designed to cater for Aborigines. Although it originated in 1969 it was not firmly established nor fully operational until July 1971.⁸ A participant has reported that this first Aboriginal Legal Service was founded by a few Aborigines who were fighting back against 'an alien apparatus of law enforcement which bore oppressively on [them] and did not operate to protect their rights'.⁹ They took the initiative because they desired improvements in the treatment they received from police and courts. It was obvious that they were discriminated against by a system which was slow to respond to their needs.¹⁰

In April 1971 Gorton's successor, Prime Minister William McMahon, spoke of his government's strengthened resolution to assist Aborigines as individuals and, if they wish, as groups to hold effective and

⁴ The trial of Rupert Max Stuart is described by Inglis 1961 and Chamberlain 1973.

⁵ Similar proposals had been made by H.V. Evatt in the 'package deal' referendum of 1944 in which fourteen wide-ranging issues were covered by the one 'yes or no' vote. It was defeated.

⁶ Sackville 1975:263.

⁷ Lippmann 1973:50, 54, citing Gorton's speech at the Australian Alumni Dinner, Singapore, on 18 January 1971.

⁸ Fristacky 1976:16; Sackville 1975:284-285.

⁹ J.H. Wootten, cited in *The National Times*, 17-22 January 1972:6.

¹⁰ See Fristacky 1976, Sackville 1975, Lippmann 1973, Eggleston 1976, 1977, Gale 1972.

respected places within one Australian society with equal access to the rights and opportunities it provides and accepting responsibilities towards it.¹¹

The Liberal government followed these words with some action in the face of an impending election. The 1972/73 Budget provided \$57,300 for extension of the three existing legal services for Aborigines.¹²

One of the services to receive financial support was the recently-established Aboriginal Legal Rights Movement (ALRM) in South Australia. As had been the case in New South Wales, ALRM 'was set up because Aboriginal people were complaining about the way they were being treated in society and also by the police'.¹³ Both the Aboriginal Cultural Centre and the Aboriginal Women's Council based in Adelaide had received frequent complaints about mistreatment of Aborigines during the 1960s and they had organised a committee to investigate some of the problems, especially complaints in regard to police matters. Gale indicates the influence of these organizations in her comment that 'in matters affecting Aborigines, few political or administrative decisions [were] made without at least some consultation with these Aborigines' groups'.¹⁴ Once again it was the well-founded discontent of Aborigines that led to the formation of a legal service.¹⁵

There was a general reluctance to turn to any European-managed institution which operated for the whole community: 'it had long been felt by the Aboriginal people involved in the initial stages in the Movement that a special service was needed'.¹⁶ During a visit to Adelaide late in 1971 Professor J.H. Wootten described the operation of the New South Wales service to a group of Aboriginal and European people who were concerned about the treatment of Aborigines under the South Australian legal system. The Aboriginal Legal Rights Movement (as it was known from the outset) was formed in November 1971 and commenced active operations the next month.¹⁷ Although the impetus for a special legal service developed within South Australia, the organization was based on the Redfern model:

we refer to the experience in New South Wales where the Commonwealth recognised the value of the Aboriginal Legal Service . . . Only after this was proved successful did we in South Australia undertake a similar scheme.¹⁸

¹¹ Lippmann 1973:49.

¹² *Sydney Morning Herald*, 29 August 1972.

¹³ Record of interview, 4 September 1978.

¹⁴ Gale 1972:260.

¹⁵ Record of interview, 4 September 1978.

¹⁶ Anonymous 1972:4.

¹⁷ Anonymous 1972:2 and 4; Sackville 1975:284-285; Eggleston 1977:354-355; Record of interview, 4 September 1978.

¹⁸ Anonymous 1972:2.

It was recognised from the outset that Aboriginal control of the Movement was essential for its success: the Constitution required that two-thirds of the seventeen members of the controlling council be Aborigines. Although the Movement was to be run for and by Aborigines, some committed Europeans were necessarily involved. It is not easy, however, to distinguish the roles played by specific people. For example, one correspondent claimed that 'the ALRM was the brainchild of the Civil Rights Movement . . . [Mel Davies] was the brains behind the structuring of the whole idea'.¹⁹ One of the people interviewed commented that

there were a number of people [Europeans] involved, of course, but the person who has given most support, on-going support, and probably the brains behind the whole thing is Mr. Elliot Johnston, Q.C. . . . it was his expertise which made it possible to structure the Movement.²⁰

Another interviewee pointed out that there were actually 'quite a few lawyers involved'.²¹ Irrespective of the relative importance of individuals it is clear that Europeans played an essential part as supporters and advisers during the establishment of the Movement. Initially they held several important administrative positions such as President, Chairman, Secretary, Treasurer and lawyer. Except for the lawyer's role, these positions were later held by Aborigines.

The ALRM quickly expanded its operations despite the continual problems caused by lack of funds. At first it could only operate at a very basic level as the original allocation of \$22,000 from the Liberal government in 1972 was barely sufficient to cover the wages of a secretary and field officer, the purchase of a car and administrative expenses. Following the election of a Labor government in December 1972 there was a substantial increase in funds for the Movement. In fact most of the Aboriginal legal services now operating throughout Australia were established with financial assistance from the Commonwealth government after December 1972.²² Various Aboriginal legal services received additional grants totalling \$850,000 for the last five months of the 1972/73 financial year: the ALRM was granted \$100,000 to develop and extend its operations.²³

Many concerned Australians believed that although the injustices of the past could not be remedied, those of the present could be

¹⁹ Anonymous 1978.

²⁰ Johnston was the first President of the ALRM. Record of interview, 13 September 1978.

²¹ Record of interview, 4 September 1978. Eggleston (1977:354) reports that 'during the first year the field work was performed by Aboriginal volunteers and the legal work by a panel of lawyers working with the Law Society'.

²² Anonymous n.d.; Eggleston 1977.

²³ Measday and Pearce 1973:13.

corrected by providing legal advice and representation. Before he became Prime Minister, Gough Whitlam had stated in November 1972 that his objectives in this matter were 'to ensure that Aborigines are made equal before the law and that *the Commonwealth will pay all legal costs for Aborigines in all proceedings in all courts*'.²⁴ This led the Department of Aboriginal Affairs to believe that unlimited funds were available.²⁵ The assumption was incorrect.

The Aboriginal Legal Rights Movement was intended to supplement existing legal services and it was expected to brief lawyers from outside the Movement as they were needed. The inability of existing legal services to cater for Aborigines' needs meant, however, that the Movement was forced to conduct an ever-increasing number of cases itself rather than directing clients to outside lawyers. The rapid expansion of the ALRM, and the need for its services, effectively meant that the supplementary role became the dominant one. Increased funding offset the financial and geographical barriers which had limited the legal assistance available to Aborigines in the past. Distance and costs still hinder the Movement's efforts to extend legal aid to all Aborigines in the State, but 'no-cost' or 'low-cost' legal aid and the sensible provision of a bail fund have reduced the financial burden for many clients able to use the service.

Aborigines on trial no longer have to plead guilty automatically because they cannot afford to be represented. Lawful release of defendants can be obtained in order to prepare a proper case for the defence. The ALRM has even attempted to find employment for those awaiting trial or those recently released from detention. State-wide operation, involving long-distance travel, means that the frequency of visits from the Adelaide office to regional centres is restricted, but there have been improvements on the old days of 'bush justice' for rural and 'traditional' Aborigines.

The Aboriginal Legal Rights Movement has not always had a tension-free existence within the Aboriginal community. The incompatibility of tribal and European laws has been apparent from the 1830s and this has created a perplexing conflict for the Movement in its dealings with traditionally-oriented persons.²⁶ Indeed, the Movement found that many Aborigines from urban, rural and traditional groups were initially suspicious: 'a lot of people identified us with the police and a government body'.²⁷ The Movement recognised that a

²⁴ Hay 1976:155 (emphasis added).

²⁵ Hay 1976:27-28.

²⁶ 'It was [a problem] when we first started but now they know what the Movement's there for' (Record of interview, 4 September 1978). The ALRM now has a better understanding of tribal situations also: it only intervenes where necessary or if called in by the elders.

²⁷ Record of interview, 4 September 1978.

large part of this problem was psychological:

even though the idea behind the whole thing is that they are going to be assisted by being represented by the legal Counsellor, their whole life experience does not seem to justify that . . . they won't trust people enough.²⁸

Therefore it was necessary to encourage Aborigines to use and trust the Movement, and to reduce ignorance about the legal system. This was achieved through lawyers' and field officers' contributions, by personal experiences, and by word-of-mouth dissemination of knowledge about the European legal system and the role of ALRM. This educative aspect was enhanced by successful actions of the Movement, especially in the courts, 'because they have to work on the basis that justice has to be seen to be done'.²⁹ The spread of information was facilitated by the closeness of the Aboriginal community:

once they got to use the service or know of someone who has used it, they know what its all about . . . It's well-known now, it has taken all this time since '72. It's well-known through the community, throughout the Aboriginal community.

Q: Has an Aboriginal's knowledge of European laws changed much?

A: Yes! A lot more people, as far as we are concerned; the people we are dealing with are a lot more aware of their rights and responsibilities.³⁰

While many Aborigines learned of their rights and responsibilities, they still had to contend with the police and judicial and corrective services which retained the prejudices of society at large. It was not enough to tell Aborigines about the Movement: Europeans also had to be educated. The ALRM has attempted to increase government and public awareness of Aborigines' difficulties within the legal system and of the discrimination and prejudice sanctioned by society.

The relationship between the police force and Aborigines was particularly notable for mutual hostility. As Ligertwood notes, the ALRM hoped for and worked toward improvement. The creation of the Aboriginal/Police Steering Committee in 1972 was a significant achievement.³¹ The development in 1975 of the unique Aboriginal/Police Liaison Committee and the distribution by the Police Commissioner's Office of the circular 'PCO 354' of 24 March 1975 containing guidelines for the conduct of police officers were further steps forward.³² Such co-operation had never existed before. But the reforms

²⁸ Record of interview, 13 September 1978.

²⁹ Record of interview, 13 September 1978.

³⁰ Record of interview, 4 September 1978.

³¹ Ligertwood 1975:270.

³² South Australia, Police Commissioner's Office 1975 (hereafter PCO 354).

dealt more with the relationship between police and ALRM than with Aborigines in general. The police did not go out of their way to assist Aborigines. For example, the Movement had compiled a booklet of 'rights upon arrest' but PCO 354 noted that the 'distribution of such printed information was dependent upon its delivery to the Police Department by the ALRM'.³³ Even when it was delivered to police stations it was not always distributed to those arrested.³⁴ There were important implications in statements such as the PCO 354 statement that 'where and when supplies are made available . . . these instructions are to be complied with'.³⁵ But what happened when copies were not distributed — were the acknowledged guidelines followed? The PCO 354 directive was ambiguous in parts, while the work of the Steering Committee was often subject to personality and philosophical clashes.³⁶ These innovations were significant yet it is questionable whether they represented a real improvement in relations at the 'grass roots' level. PCO 354 informed all police that 'it is not Force policy to discriminate in favour of Aborigines any more than it is to discriminate against them . . . the rules have been devised to ensure equality of treatment'.³⁷ This equality is yet to be attained. It would seem that in 1978 police probably felt that the Aboriginal Legal Rights Movement was a nuisance and an obstruction to their duties.³⁸

Although a prime reason for establishing the Movement was the apparently excessive attention given to Aborigines by police, ALRM was not solely concerned with criminal matters. The Constitution's objective specified that the Movement would not only attempt to provide legal aid but would also make efforts to secure legal rights for the Aboriginal community which seemed proscribed within South Australia. The *Annual Report* for 1976/77 noted that 'Again and again the Council . . . discussed the need to develop the positive side of the work — the positive work of asserting the legal and social rights of Aboriginal people'.³⁹ But the urgency of criminal cases meant that these were given priority over non-criminal matters. Jim Stanley, President in 1976/77, recalled that 'when the Movement first started one hundred per cent of the work was in support of Aboriginal people in conflict with the police'.⁴⁰ During 1974/75 civil cases temporarily became more important but the 1975/76 figures indicated another rise in the

³³ PCO 354 1975:3, Item 10 — 'Aboriginal Prisoners'.

³⁴ Records of interview, 4 and 13 September 1978; also Anonymous 1977.

³⁵ PCO 354 1975:3, Item 10.

³⁶ Record of interview, 13 September 1978.

³⁷ PCO 354 1975:1, Item 2 — 'Police Policy'.

³⁸ Record of interview, 4 November 1978.

³⁹ Aboriginal Legal Rights Movement 1976/77:2.

⁴⁰ Aboriginal Legal Rights Movement 1976/77:2. Eggleston (1977:357-359) noted that the ALRM handled over 250 matters in its first year. Cases increased substantially (after a full-time field officer and solicitor were appointed) between December 1972 and March 1973 but criminal and civil cases were relatively balanced in 1973.

number of criminal cases in comparison to civil cases. The ALRM solicitors opened 639 new files in 1975/76: 63 per cent of the 483 cases handled by one solicitor and 72 per cent of the 156 cases taken by a second solicitor concerned criminal matters.⁴¹ Figures for the following year confirmed the importance of this work: the solicitors retained in 1976/77 handled 746 cases, including 543 of a criminal nature. Briefings outside the ALRM for that year consisted of 436 criminal cases and 128 non-criminal matters.⁴²

The Aboriginal Legal Rights Movement has been responsible for a decrease in the rate of convictions against Aborigines. Ligertwood found that 'in areas where Field Officers have worked well with the police the number of charges against Aborigines has significantly decreased'.⁴³ An example of the Movement's effectiveness occurred in May 1972 when thirteen Aboriginal people from Yalata reserve were charged at Nundroo, South Australia, with 121 offences ranging from assault to obscene language. When the ALRM represented the defendants most charges were dropped and convictions were recorded for only eighteen offences.⁴⁴ Since ALRM was founded, sentences for convicted Aborigines have been less severe (although this may be related to changing social values in the 1970s in that Europeans have also received less severe punishment).

The ALRM has always gone beyond the role accorded to it by its Constitution and official policy statements and ministerial directives. This has generally been caused by practical necessities. Many legal problems were of a multi-faceted and complex nature involving welfare and associated issues. Thus the Movement has inevitably become involved in welfare work as an integral part of its approach to legal matters and this can affect an appraisal of the organisation's value in the legal field *per se*. The fact that ALRM has been kept busy since its inception indicates the need for the service and the overwhelmingly favourable response to it. Most clients genuinely seek aid and there have been only a few cases of people abusing the system.⁴⁵ In 1976 the Commonwealth government commissioned D.O. Hay to report on the delivery of services financed by the Department of Aboriginal Affairs. He found little evidence of waste and concluded that in spite of administrative and financial difficulties experienced by the

⁴¹ Aboriginal Legal Rights Movement 1975/76:4, 20-21.

⁴² Aboriginal Legal Rights Movement 1976/77:14-18. The range of non-criminal matters included questions of civil rights, legal rights in a broad context, discriminatory legislation, 'de facto' discrimination, test cases on land, mineral rights and community development, matrimonial issues, workmen's compensation, road accidents and so on.

⁴³ Ligertwood 1975:271.

⁴⁴ Measday and Pearce 1973:14. They noted that 'once a stand has been taken on behalf of a particular Aborigine or in a particular type of case, the police are more reluctant to proceed in future and only do so with great care'. See White 1974 for an account of the Nundroo incident.

⁴⁵ Record of interview, 4 September 1978. Eggleston (1977) argued that welfare and legal issues are inextricably mixed in legal service work.

Legal Services and by the Department, the Aboriginal Legal Services have been effective in delivering aid to the Aboriginal community.⁴⁶

The ALRM has had a valuable community function to fulfil. The concept of special legal aid has been a potentially expensive but nevertheless worthwhile enterprise. The Movement has effectively represented its clients, protected their rights and appealed against unjust decisions. The objective that 'justice should be done and be seen to be done' is important in an immediate sense yet the ALRM should aim to go beyond this. It can act as a catalyst for reform in a broader context. It can seek to resolve the causes of the Aborigines' predicament and not just the symptoms. This should not, of course, be a process conducted solely by Aborigines: there must be an understanding between the races, or at least a recognition of each other. Actual equality must be granted and not just stated as a theory. But legal justice alone will be insufficient. Aborigines have been the most disadvantaged group in the community and they argue that social justice is needed as well: 'until we can get social justice, I can't understand how you're going to be able to improve the social status of Aboriginal people'.⁴⁷ If real equality can be accompanied by dissimilar, but not separate, development then Aborigines will be accorded a more satisfactory position in society. Rowley has pointed out the 'fallacy of assumptions that money and public service manpower can quickly solve racial and social problems',⁴⁸ but it is clear that additional finance is needed to fulfil the immediate needs of the ALRM and to enable it to look beyond these needs.

It remains to be seen whether the cycle of the last 146 years will continue in South Australia or whether a more equitable society will evolve. In the future the Aboriginal Legal Rights Movement can provide a valuable means of solving this dilemma. It may achieve even greater historical significance by being the force to break the cycle which has characterised race relations in South Australia.

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⁴⁶ Hay 1976:163.

⁴⁷ Record of interview, 13 September 1978.

⁴⁸ Rowley 1978:2.

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