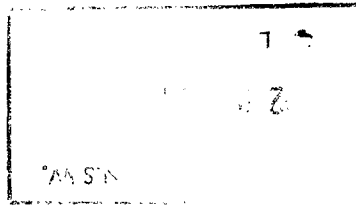


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ABORIGINAL LAW NOTES

89/5
AUGUST 1989

ISSN 0811 - 9597

ABORIGINAL LAW CENTRE

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Chair and Acting Director : Garth Nettheim
Editors : Aileen Kennedy
Teresa Libesman

The Aboriginal Law Notes are distributed to members of the Centre's network.
Subscription \$5.00 per annum.
The Centre also publishes the Aboriginal Law Bulletin

RESEARCH GRANT TO THE ABORIGINAL LAW CENTRE

The Aboriginal Law Centre has received a research grant of \$10,451 from the Criminology Research Council in Canberra. The proposed research will investigate issues relating to Aboriginal youth and the juvenile justice system in NSW.

Preliminary research has indicated that Aboriginal youth are massively over-represented in the State's juvenile corrective institutions, where they comprise some 25% of the incarcerated population. There is little information available however on the comparative treatment of Aboriginal and non-Aboriginal youth before they are given custodial sentences.

The proposed research will investigate juvenile court appearances in NSW in 1988 for differences in the treatment of Aboriginal and non-Aboriginal youth. It will also determine which NSW communities are most over-represented in the number of juvenile court appearances with the view to analysing wider factors which may account for over-representation, including policing levels and strategies, and the local relationships between the Aboriginal and non-Aboriginal communities.

The co-researchers for the project are Chris Cunneen from the ALC and Garth Luke from the NSW Judicial Commission.

PUBLICATIONS, ETC, RECEIVED

BOOKS

Coral Edwards and Peter Read(eds), *The Lost Children*, Double day, 1989 softcover \$19.95 198 pages.

Kent McNeil, *Common Law Aboriginal Title*, Oxford University Press, 1989 cloth \$90.00 304 pages.

Ed. I. H. Kawharu, *Maori and Pakeha Perspectives of the Treaty of Waitangi*, Oxford University Press, 1989 paperback &44.00 329 pages.

Native North Americans: Crime, Conflict and Criminal Justice - A research Bibliography with over 2,300 citations of American Indian and Northern justice related materials. The Northern Justice Centre, 1989 \$45.00 Cdn. \$38.00 U.S.

JOURNALS

Land Rights News Jan, March, May, July 1989, Published by the Northern Territory Land Councils.

Assembly of First Nations Bulletin vol. 6, no. 3, May/June 1989, Published by The Assembly of First Nations.

Human Rights Internet Reporter vol. 13, no. 1, Spring 1989. Published by Human Rights Internet, Harvard Law School. Includes "Aborigines : The Continuing Crisis" - article on deaths in custody by Keith Suter.

Human Rights Internet Reporter - Master List 1989 - 1990 . Contains names and addresses of organisations whose material is reviewed in the reporter. Published by Human Rights Internet.

Human Rights Education: the Fourth R vol.1, no. 2 Winter 1989, Published by Amnesty International USA's Steering Committee on Human Rights Education and Human Rights Internet Reporter.

Survival International no.24, 1989.

Pacific News Buletin vol.4 no.8 August 1989, Pacific Concerns resource Centre (PCPR) and Pacific News Bulletin Office.

Care Newsletter no.90 July/August 1989.

Aboriginal Medical Service Newsletter June 1989.

Human Rights Monitor nos 4&5 May and July 1989 International Service for Human Rights.

Aboriginal Deaths in Custody Watch Committee Newsletter August/September 1989

REPORTS

Christian Anderson and Suzette Crates Research Study no. 1 : The Underlying Causes for the Deaths of Australian Aboriginal People in Government Detention. An Investigation of factors affecting the lifestyle of Wujalwujal community North Queensland 1989 National Aboriginal and Islander Legal Services Secretariat (NAILSS)

Aboriginal Development Commission Annual Report 1987 -1988 Australian Government Publishing Service.

SUBMISSIONS / RESEARCH PAPERS

Aboriginal Living Areas (Excissions): a Submission to the Chief Minister of the Northern Territory The Honourable Steve Hatton MLA June 1988 From the Northern Territory Lands Councils.

Donna Craig *The Development of Social Impact Assessments in Australia and Overseas and the Role of Indigenous Peoples*, East Kimberley Working Paper no.31, May 1989.

Boer *The Legal Framework Affecting Aboriginal People in the East Kimberly*, East Kimberly Working Paper no.26, May 1989.

CONFERENCE

International Conference on Human Rights in Cross-Cultural Perspectives

October 12 - 14, 1989

Venue : Hotel Bessborough

The Theme of the conference is to promote greater legitimacy for human rights standards through re - interpretation of certain cultural and ideological traditions, and to discuss issues of intergrating and informing national and international human rights policies from a variety of cultural perspectives.

For further information contact Ms. Deanna Hunter :

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T.V AND RADIO PROGRAMS

SBS - every Tues 7.30 pm - *First in Line*, Aboriginal lifestyle magazine presented by Rhoda Roberts & Michael Johnson

ABC Radio National presents *Between Two Laws* a new series on the Patrol Officers of the Northern Territory 3 - 24 September, 1989. *Between Two Laws* will be broadcast on Radio National on Sundays at 1.30pm, and also on ABC regional radio on Thursdays at 7.39pm.

Program one - *The Aboriginal Roads* - Radio National 3 Sept, Regional Radio 7 Sept.

Program two - *Watching The Cattle Barons* - Radio National 10 Sept, Regional Radio 14 Sept.

Program three - *Establishing the Settlements* - Radio National 17 Sept, Regional Radio 21 Sept.

Program four - *The Assimilation Factories* - Radio National 24 Sept, Regional Radio 28 Sept.

RESEARCH PROJECTS
ABORIGINES AND THE LAW Session 1, 1989

BECKETT, Simeon	Evidentiary Problems in the Proof of Aboriginal Customary Title: The Mabo Case
BURR, Michael	Public drunkenness and Aboriginal people
CAPELIN, Tim	The Healesville land claim issue
CIPOLLA, John	Popular perceptions of Aboriginal people and the exercise of police discretions in regard to street offences
CONNOR, Adele	The legal rights of the Maralinga peoples
CRONIN, Margie	Proposals to outlaw incitement to racial hatred and racial vilification
DAWSON, Freya	Queensland heritage legislation and international law
DOOSEY, Cathy	Aboriginal law and the Australian Criminal Law: The case for a customary law defence
FUNNELL, Elise	A Critical Evaluation of the N S W Government Green Paper "New Directions in Aboriginal Affairs"
HANNA, Michael	Local government responsibility for Aboriginal communities in NSW
KATRIB, Forial	The Status of Aborigines: Sovereignty, the Treaty, Self-Determination
KOHLHAGEN, Brian	The probably adverse impact of the Summary Offences Act 1988 on Aboriginal persons in New South Wales and commentary on policing Aborigines in the "public order offences" context
MURRAY, Don	The relative merits of pursuing Aboriginal land rights under common law or under statute in Australia
O-Tarpey, Margie & HUNT, Lisa	The Open Wound: Policing of Aborigines under Summary Offences Legislation 1970-1989
ROCHE, Bernadette	Indigenous Self-Government and Immunity from Jurisdiction
ROYLANCE, Fran	Aboriginal Missions and Communities in NSW
SAROOSHI, Daneesh	Development as Destruction
SHAW, Madeline	The Australian Law Reform Commission and the Recognition of Aboriginal Laws
SIVYERS, Joanne	Reasons for Lack of Enforceability of the James Bay and Northern Quebec Agreement
SMYTH, Maggie	Evidential Issues in Proof of Title: The Mabo Case
TAKAC, Ryan	Commonwealth power to protect Aboriginal title from extinguishment by the States
TCHARLASSIAN, Betty	Self-Determination for Australian Aborigines: Is it possible? How can they achieve it?
TOWNSDEN, Anthony	The Board for the Protection of Aborigines 1909-1969: An examination of the Board's operation with respect to children.
WHITTAKER, Brian and KEIL, Helen	Do governments stand in a trust/fiduciary relationship to indigenous peoples? The potential use of the doctrines of fiduciary relationship and trust for Aboriginal claims to land rights

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SUPPLEMENT TO ABORIGINAL LAW NOTES 89/5 AUGUST 1989

ALC BRIEFING PAPER

UNITED
NATIONSEconomic and Social
CouncilDist.
GENERALE/CN.4/Sub.2/1989/33
15 June 1989

Original: ENGLISH

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INTRODUCTION

COMMISSION ON HUMAN RIGHTS

Sub-Commission on Prevention of
Discrimination and Protection of
MinoritiesForty-first session
Item 13 of the provisional agenda

: DISCRIMINATION AGAINST INDIGENOUS PEOPLES

First revised text of the Draft Universal Declaration on Rights of
Indigenous Peoples prepared by the Chairman-Rapporteur of the
Working Group on Indigenous Populations, Mrs. Erica-Irene Daes,
pursuant to Sub-Commission resolution 1988/18

INTRODUCTION

- I. APPROACH TO THE TASK
- II. FIRST REVISED TEXT OF THE DRAFT UNIVERSAL DECLARATION ON RIGHTS OF
INDIGENOUS PEOPLES

1. At its fortieth session, the Sub-Commission expressed its appreciation to Mrs. Erica-Irene Daes for the working paper (E/CN.4/Sub.2/1988/25) prepared at the request of the Economic and Social Council in its resolution 1988/36. This document contains a full set of principles and preambular paragraphs for insertion in a draft declaration, for consideration by the Working Group and which may be adopted by the General Assembly.

2. In this connection, the Sub-Commission adopted resolution 1988/18 entitled "Draft universal declaration on indigenous rights", by which, *inter alia*, it expressed its appreciation to the Working Group on Indigenous Populations and to its Chairman-Rapporteur, Mrs. Erica-Irene Daes, for the progress made at its sixth session in carrying out its mandate, with particular reference to her thorough and useful working paper and recommended that the Chairman-Rapporteur be entrusted with the task of preparing a first revised text of the draft declaration based on comments made at the sixth session of the Working Group and on written observations and suggestions received from Governments, indigenous peoples, intergovernmental and non-governmental organizations.

3. For this purpose, the Sub-Commission, in the same resolution, requested the Secretary-General to transmit the Working Group's report to Governments, indigenous peoples, intergovernmental and non-governmental organizations for specific comments and proposals for the further elaboration of the text now contained in annex II to the aforesaid report (E/CN.4/Sub.2/1988/24).

4. The Commission on Human Rights, in its resolution 1989/34, expressed its determination to do everything possible to promote the enjoyment of the rights of indigenous populations, and endorsed the aforementioned recommendations. It also welcomed the decision of the Sub-Commission to continue to entrust to the Chairman-Rapporteur of the Working Group the further development of the draft declaration on indigenous rights within the framework contained in her working paper, taking into consideration, *inter alia*, the comments on the draft declaration which would be provided by Governments, indigenous organizations and communities and other interested parties in accordance with the relevant resolution of the Sub-Commission.

5. Pursuant to the said request of the Sub-Commission, the Secretary-General transmitted the report of the Working Group by a note verbale dated 13 December 1988 to Governments, and by a letter of the same date, to indigenous peoples, intergovernmental and non-governmental organizations, inviting their comments and proposals on the text contained in annex II to the above-mentioned report.

6. By 1 June 1989, substantive comments and proposals had been received from the Governments of Australia, Byelorussian Soviet Socialist Republic, Burma, Canada, Czechoslovakia, Finland, Panama, Romania, Sweden and Venezuela.

7. Observations and proposals had also been received from the United Nations Centre on Transnational Corporations, the Economic Commission for Latin America and the Caribbean, the International Labour Office, the United Nations Educational, Scientific and Cultural Organization, and the Food and Agriculture Organization of the United Nations.

8. The following non-governmental organizations submitted comments and suggestions regarding the text: Assembly of First Nations, Four Directions Council, Indian Law Resource Center, Inuit Circumpolar Conference, National Indian Youth Council, Regional Council on Human Rights in Asia, Stichting Plurale Samenlevingen, Survival International, World Council of Indigenous Peoples.

9. Replies received from Governments, United Nations organs, specialized agencies, other intergovernmental and non-governmental organizations, will be collected in an analytical compilation to be issued as an addendum to this document.

I. APPROACH TO THE TASK

10. Sub-Commission resolution 1988/18 mandated the Chairman-Rapporteur to prepare a first revised text of the draft declaration. She was entrusted to base her work on comments made at the sixth session of the Working Group (E/CN.4/Sub.2/1988/24, paras. 66-95), and on written observations and suggestions received.

11. In preparing the present revised text, an attempt has been made to examine and interpret all comments, information and proposals available to the Chairman-Rapporteur. She also kept in mind that the text submitted by her to the sixth session of the Working Group was generally considered to be a thorough and useful working paper, which constituted a concrete and concise basis for further work and a sound guidance in the right direction.

12. All information received contains valuable, constructive and reliable comments and proposals which ought to be taken into account in future standard-setting work. Despite the quality of these remarks and comments, the Chairman-Rapporteur does not consider her mandate to reflect on all legal, social, economic, political and cultural aspects raised by the information. However, in view of the small number of replies received from all parties concerned, these cannot be considered as reflecting the views and proposals of a sufficient number of Governments and indigenous peoples of the international community. Therefore, the Chairman-Rapporteur thought that a complete and substantive revision of the existing working paper would be premature. Furthermore, in view of the diversity of opinions, which have become evident in the observations made by the Governments, on the one hand, and by indigenous organizations, on the other, in particular on provisions as to land and resources rights, self-government and self-autonomy, the Chairman-Rapporteur felt that these and other provisions, in their substance, should better stand as they are. This would facilitate later discussion. In doing so, she has taken into account that the text as it stands now, constitutes a fair balance between the aspirations of indigenous peoples and the legitimate concern of States and, for that reason, seems to be a realistic approach to the issues. It has also to be mentioned that substantial changes have to be acceptable to all parties concerned.

13. Thus, the Chairman-Rapporteur decided to restrict herself as much as possible to technical alterations of preambular and operative principles where she considered them appropriate and feasible rather than inserting more extensive and substantive revision. This would be done later in co-operation with the other members of the Working Group, governmental and indigenous representatives.

14. All comments and proposals received have been included in the annex to this document so that they can fully be considered when the improved text will be re-examined as a whole. For the sake of clarity and better understanding, the Chairman-Rapporteur has underlined all the phrases and words which have been altered in the text.

15. The Chairman-Rapporteur would like to stress that the drafting of such a document is a never-ending exercise and one could constantly clarify or improve the wording. Therefore, it is her firm conviction that the text submitted below should be considered as preliminary. It goes without saying that it stands to be corrected, improved or amended wherever necessary.

16. The Chairman-Rapporteur would like to take the liberty of suggesting to the Working Group and to the Sub-Commission the following procedure for further work on the draft declaration:

(a) General discussion on the present text may be made at the seventh session of the Working Group;

(b) The Working Group may wish to recommend to the Sub-Commission that it ask the Commission and the Council to authorize the Working Group to meet in private one week prior to the eighth session of the Working Group to elaborate a draft declaration, using the present revised working paper as a basis. The draft, after the relevant presentation by the Chairman-Rapporteur, Mrs. Erica-Irene A. Daes can then be subject to an article-by-article study by the Working Group, at its eighth and later sessions. In this connection, the Chairman-Rapporteur would like to underline that she considers the future declaration an international instrument, which will be important for the survival of the indigenous peoples around the world, for all parties concerned and the international community.

17. Finally, the Chairman-Rapporteur wishes to express sincere thanks and appreciation to all those Governments, indigenous peoples, specialized agencies, intergovernmental and non-governmental organizations whose contribution to an international instrument of historic importance has been essential, and has much facilitated her assignment.

II. FIRST REVISED PART OF THE DRAFT UNIVERSAL DECLARATION ON RIGHTS OF INDIGENOUS PEOPLES

The General Assembly,

Considering indigenous peoples born free and equal in dignity and rights in accordance with existing international standards while recognizing the right of all individuals and groups to be different, to consider themselves different and to be regarded as such,

Considering that all peoples and human groups have contributed to the progress of civilizations and cultures which constitute the common heritage of humankind,

Recognizing the specific need to promote and protect those rights and characteristics which stem from indigenous history, philosophy of life, traditions, culture and legal, social and economic structures, especially as these are tied to the lands which the groups have traditionally occupied,

PART II

Concerned that many indigenous peoples have been unable to enjoy and assert their inalienable human rights and fundamental freedoms, frequently resulting in insufficient land and resources, poverty and deprivation, which in turn may lead them to voice their grievances and to organize themselves in order to bring an end to all forms of discrimination and oppression which they face,

Convinced that all doctrines and practices of racial, ethnic or cultural superiority are legally wrong, morally condemnable and socially unjust,

Reaffirming that indigenous peoples in the exercise of their rights should be free from adverse distinction or discrimination of any kind,

Endorsing calls for the consolidation and strengthening of indigenous societies and their cultures and traditions through development based on their own needs and value systems and comprehensive participation in and consultation about all other relevant development efforts,

Emphasizing the need for special attention to the rights and skills of indigenous women and children,

Believing that indigenous peoples should be free to manage their own affairs to the greatest possible extent, while enjoying equal rights with other citizens in the political, economic and social life of States,

Bearing in mind that nothing in this declaration may be used as a justification for denying to any people, which otherwise satisfies the criteria generally established by human rights instruments and international law, its right to self-determination,

Calling on States to comply with and effectively implement all international human rights instruments as they apply to indigenous peoples,

Acknowledging the need for minimum standards taking account of the diverse realities of indigenous peoples in all parts of the world,

Solemnly proclaims the following declaration on rights of indigenous peoples and calls upon all States to take prompt and effective measures to implement the declaration in conjunction with the indigenous peoples.

PART I

1. The right to the full and effective enjoyment of all fundamental rights and freedoms, as well as the observance of the corresponding responsibilities, which are universally recognized in the Charter of the United Nations and in existing international human rights instruments.

2. The right to be free and equal to all the other human beings in dignity and rights and to be free from adverse distinction or discrimination of any kind.

3. The [collective] right to exist as distinct peoples and to be protected against genocide, as well as the [individual] rights to life, physical integrity, liberty and security of person.

4. The [collective] right to maintain and develop their ethnic and cultural characteristics and distinct identity, including the right of peoples and individuals to call themselves by their proper names.

5. The individual and collective right to protection against ethnocide. This protection shall include, in particular, prevention of any act which has the aim or effect of depriving them of their ethnic characteristics or cultural identity, of any form of forced assimilation or integration, of imposition of foreign life-styles and of any propaganda derogating their dignity and diversity.

6. The right to preserve their cultural identity and traditions and to pursue their own cultural development. The rights to the manifestations of their cultures, including archaeological sites, artefacts, designs, technology and works of art, lie with the indigenous peoples or their members.

7. The right to require that States grant - within the resources available - the necessary assistance for the maintenance of their identity and their development.

8. The right to manifest, teach, practise and observe their own religious traditions and ceremonies, and to maintain, protect and have access to sacred sites and burial-grounds for these purposes.

9. The right to develop and promote their own languages, including an own literary language, and to use them for administrative, juridical, cultural and other purposes.

10. The right to all forms of education, including in particular the right of children to have access to education in their own languages, and to establish, structure, conduct and control their own educational systems and institutions.

11. The right to promote intercultural information and education, recognizing the dignity and diversity of their cultures, and the duty of States to take the necessary measures, among other sections of the national community, with the object of eliminating prejudices and of fostering understanding and good relations.

PART III

12. The right of collective and individual ownership, possession and use of the lands or resources which they have traditionally occupied or used. The lands may only be taken away from them with their free and informed consent as witnessed by a treaty or agreement.

13. The right to recognition of their own land-tenure systems for the protection and promotion of the use, enjoyment and occupancy of the land.

14. The right to special measures to ensure their ownership and control over surface and substance of resources pertaining to the territories they have traditionally occupied or otherwise used including flora and fauna, waters and ice sea.

15. The right to reclaim land and surface resources or where this is not possible, to seek just and fair compensation for the same, when the property has been taken away from them without consent, in particular, if such deprivation has been based on theories such as those related to discovery, terra nullius, waste lands or idle lands. Compensation, if the parties agree, may take the form of land or resources of quality and legal status at least equal to that of the property previously owned by them.

16. The right to protection of their environment and in particular against any action or course of conduct which may result in the destruction, deterioration or pollution of their traditional habitat, land, air, water, sea ice, wildlife or other resources without free and informed consent of the indigenous peoples affected. The right to just and fair compensation for any such action or course of conduct.

17. The right to require that States consult with indigenous peoples and with both domestic and transnational corporations prior to the commencement of any large-scale projects, particularly natural resource projects or exploitation of mineral and other subsoil resources in order to enhance the projects' benefits and to mitigate any adverse economic, social, environmental and cultural effect. Just and fair compensation shall be provided for any such activity or adverse consequence undertaken.

PART IV

18. The right to maintain and develop within their areas of lands or territories their traditional economic structures and ways of life, to be secure in the traditional economic structures and ways of life, to be secure in the enjoyment of their own traditional means of subsistence, and to engage freely in their traditional and other economic activities, including hunting, fresh- and salt-water fishing, herding, gathering, lumbering and cultivation, without adverse discrimination. In no case may an indigenous people be deprived of its means of subsistence. The right to just and fair compensation if they have been so deprived.

19. The right to special State measures for the immediate, effective and continuing improvement of their social and economic conditions, with their consent, that reflect their own priorities.

20. The right to determine, plan and implement all health, housing and other social and economic programmes affecting them, and as far as possible to develop, plan and implement such programmes through their own institutions.

PART V

21. The right to participate on an equal footing with all the other citizens and without adverse discrimination in the political, economic and social life of the State and to have their specific character duly reflected in the legal system and in political and socio-economic institutions, including in particular proper regard to and recognition of indigenous laws and customs.

22. The right to participate fully at the State level, through representatives chosen by themselves, in decision-making about and implementation of all national and international matters which may affect their life and destiny.

23. The [collective] right to autonomy in matters relating to their own internal and local affairs, including education, information, culture, religion, health, housing, social welfare, traditional and other economic activities, land and resources administration and the environment, as well as internal taxation for financing these autonomous functions.

24. The right to decide upon the structures of their autonomous institutions, to select the membership of such institutions, and to determine the membership of the indigenous people concerned for these purposes.

25. The right to determine the responsibilities of individuals to their own community, consistent with universally recognized human rights and fundamental freedoms.

26. The right to maintain and develop traditional contacts and co-operation, including cultural and social exchanges and trade, with their own kith and kin across State boundaries and the obligation of the State to adopt measures to facilitate such contacts.

27. The right to claim that States honour treaties and other agreements concluded with indigenous peoples.

PART VI

28. The individual and collective right to access to and prompt decision by mutually acceptable and fair procedures for resolving conflicts or disputes and any infringement, public or private, between States and indigenous peoples, groups or individuals. These procedures should include, as appropriate, negotiations, mediation, arbitration, national courts and international and regional human rights review and complaints mechanisms.

PART VII

29. These rights constitute the minimum standards for the survival and the well-being of the indigenous peoples of the world.

30. Nothing in this Declaration may be interpreted as implying for any State, group or individual any right to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms set forth herein.