

UNITED NATIONS REFORM AND INDIGENOUS PEOPLES

by Megan Davis

INTRODUCTION

The United Nations ('UN') has become a focal point as an effective supranational, multilateral institution for indigenous peoples around the world. Indigenous Australia is no exception. Indeed, in the absence of adequate rights protections domestically and the lack of respect for or recognition of cultural difference in Australia, it has been the UN human rights system that has provided Indigenous Australians with powerful advocacy tools. The *Racial Discrimination Act 1975* (Cth), the *Land Rights (Northern Territory) Act 1976* (Cth) and decisions such as *Koowarta v Bjelke-Peterson*¹ and *Mabo v State of Queensland (No 2)*² have all had their genesis in fundamental principles of international law, in particular international human rights law.

With the abolition of the Aboriginal and Torres Strait Islander Commission ('ATSIC'), a nascent proposal by the next President of the Australian Labor Party ('ALP') to privatise Aboriginal land and diminish the collective nature of Indigenous culture, and the UN Committee on the Rights of the Child questioning whether the new arrangements replacing ATSIC are 'in the best interests of the child', Indigenous peoples' use of supranational human rights institutions will continue unabated.³ This paper provides an explanation about the significance of the UN Summit held in September 2005 and the issues significant to Indigenous Australians in the reform process of the UN. Of particular interest is the establishment of a Human Rights Council.

UN REFORM: AN OVERVIEW

The challenge of reforming the UN has preoccupied scholars and commentators since its establishment 60 years ago in San Francisco.⁴ Kofi Annan, the Secretary-General of the UN, has in particular made reform of the UN one of the key goals of his term in office. In recent years the call for reform has increased with marked intensity following crises such as the failure to prevent genocide in Rwanda and the Oil-for-Food controversy. Such debate has also been fuelled in recent times by an orchestrated campaign to undermine the UN because it resisted pressure to give its imprimatur to the United States' intervention in Iraq. There have been suggestions that press owned by

Rupert Murdoch, for example, who supported the war in Iraq, ran consistent editorial positions opposing the UN and undermining the Secretary-General.⁵ Changing geopolitical patterns also means that many nations such as Japan, Germany and India are clamouring for membership of the Security Council; a Council whose permanent members have omnipotent power over decisions, such as the use of armed force, manifest in their veto power.

The call for UN reform reached particular hysterical heights this year because of the UN High-level Plenary Meeting of the 60th Session of the General Assembly held 14-16 September 2005.⁶ The meeting was originally planned to be an opportunity to consider the progress of the UN Millennium Declaration⁷ and the implementation of the Millennium Development Goals.⁸ Journalists in Australia competed to label the Summit an immediate failure, relaying random insights into diplomacy and cumbersome UN decision making. Australian coverage suffered because of the lack of a serious and in-depth reportage culture on issues of international relations and the over-reliance on clichés and banal racial stereotypes of nations. In the current conservative milieu, with bilateralism having ascendancy over multilateralism, it is easy to be dismissive of the UN; especially for a nation that, while glorifying the tragedy of war, fails to make a connection between the horror of war and the need for peace and security. However, while many commentators in Australia, and internationally, labelled the summit and the UN a failure,⁹ many others made astute and powerful arguments for its importance for the world.¹⁰ Indeed many highlighted the importance of leadership in the success of the UN.¹¹

Ever since the UN was established 60 years ago in San Francisco, there has been discussion about its reform; just as there has been about many public institutions. The Security Council in particular has attracted much criticism.¹² The Security Council has five permanent members - the five victors of World War II: United States, Russian Federation, United Kingdom, France and China. There are also 10 other positions that are elected for two-year periods by the General Assembly. The permanent members of the Security Council have a power of veto

over any Security Council resolution, regardless of whether that Resolution has a majority vote.

Kofi Annan has always signalled UN reform as being a significant issue over his term as Secretary-General. Continued UN reform was a key outcome arising from the Millennium Summit in 2000.¹³ In 2003, Kofi Annan gave a speech signalling the beginning of the process of reform of the UN.¹⁴ Annan established a High-level Panel on Threats, Challenges and Change to identify what the key threats were to international peace and security. Gareth Evans, former Federal Foreign Minister, was one of the Panel members appointed by Annan.

The Panel report, 'A More Secure World: Our Shared Responsibility', was issued in December 2004 and focused importantly on reform of the Security Council, the non-proliferation of nuclear weapons, and the issue of the use of force. The report had a number of recommendations including recommendations as to the reform of the Security Council.¹⁵ The Panel suggested ways to improve the Security Council, including a two-tier structure with six additional permanent seats and three elected seats. A second option proposed no new permanent members but the addition of eight semi-permanent seats of four years' duration and one additional elected member.

In response to this and the follow up to the Millennium Summit, the Secretary-General issued a report, 'In Larger Freedom: Towards Development, Security and Human Rights For All'.¹⁶

IN LARGER FREEDOM: A HUMAN RIGHTS COUNCIL

This report contained a number of issues relevant to indigenous peoples; too many to recall in this article, but they included issues surrounding use of force for indigenous peoples who live in states of civil conflict or in failing states. Moreover, the progress of the Millennium Development Goals is significant for indigenous peoples and this was reflected in the 2005 Permanent Forum on Indigenous Issues held in New York. Two specific concerns in the report have been noted as being significant for indigenous peoples. The first concern is the role of civil society:

Civil society organizations have a critical role to play in driving this implementation process forward to "make poverty history". Not only is civil society an indispensable partner in delivering services to the poor at the scope required by the Millennium Development Goals but it can also catalyse action within countries on pressing development concerns, mobilizing broad-based movements and creating grass-roots pressure to hold

leaders accountable for their commitments. Internationally, some civil society organizations can help create or galvanize global partnerships on specific issues or draw attention to the plight of indigenous peoples and other marginalized groups, while others can work to share best practices across countries through community exchanges and providing technical support and advice to Governments.¹⁷

The second important concern in the report relates to environmental issues:

The degradation of more than a billion hectares of land has had a devastating impact on development in many parts of the world. Millions of people have been forced to abandon their lands as farming and nomadic lifestyles have become unsustainable. Hundreds of millions more are at risk of becoming environmental refugees. To combat desertification, the international community must support and implement the UN Convention to Combat Desertification in Those Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa.¹⁸

The other significant issue for Indigenous peoples is the reform of the Commission on Human Rights ('CHR'). The Secretary General made proposals for the establishment of a Human Rights Council to replace the CHR.¹⁹ The Council would be a standing body and would meet whenever a crisis emerges.

Equal attention will have to be given to civil, political, economic, social and cultural rights, as well as the right to development... Under such a system, every Member State could come up for review on a periodic basis. Any such rotation should not, however, impede the Council from dealing with any massive and gross violations that might occur. Indeed, the Council will have to be able to bring urgent crises to the attention of the world community.²⁰

The report argues that it would move the discussion of human rights beyond the six-week session of the CHR. The members would be elected by the entire membership of the General Assembly, making members 'more accountable and the body more representative'.²¹ This would also mean that the membership has greater authority because it has been elected by the General Assembly rather than being a subsidiary body of the Economic and Social Council. The Human Rights Council would continue to be based in Geneva.

There would also be a peer review mechanism that would 'complement but would not replace reporting procedures under human rights treaties'.²² The peer review involves States voluntarily entering discussions about human rights in their country. The peer review mechanism

would, according to the Secretary-General, 'avoid ... the politicization and selectivity that are hallmarks of the Commission's existing system'.²³ Indeed the report states that Member States can choose how to elect Human Rights Council members. Some have alluded to the fact that this should involve members who meet the highest standard of human rights, however such criteria would be impossible to meet for every Member State of the UN. International human rights instruments involve minimum standards, and while it palls States like Australia or the United States - who regard themselves as great human rights champions - to have to share a Council with States like Libya, Iran or China with their appalling human rights violations, it would defeat the whole purpose of a Human Rights Council to exclude those who are not Western liberal democracies. It would fail miserably the citizens of those countries that fall outside what Western relativists comfort themselves as being 'human rights defenders'. Of course Indigenous Australians or African Americans in New Orleans, for example, see their countries in a different light. This relativism is why it is important that no nations are excluded from sitting on the Human Rights Council.

THE IMPORTANCE OF THE UN TO INDIGENOUS PEOPLES

One of the most significant developments for Indigenous peoples at the UN was the 1971 Economic and Social Council decision that enabled the UN Sub-Commission on the Prevention of Discrimination and Protection of Minorities to engage Cuban diplomat and expert Jose R Martinez Cobo and a member of the Sub-Commission to conduct a comprehensive 'Study of the Problem of Discrimination against Indigenous Populations'²⁴ ('Cobo Report'). The Cobo report was completed over the course of 12 years with the final volume being published in 1983. The report has been integral to the expansion of indigenous peoples' issues throughout the UN system and in particular to the greater understanding of the issues that affect indigenous peoples; one of the most significant being racial discrimination.

An important outcome of the Cobo Report is the frequently cited UN definition of 'indigenous peoples' that has become a guide for the UN system:

[Indigenous peoples] are those which, having a historical continuity with pre-invasion and pre-colonial societies that developed on their territories, consider themselves distinct from other sectors of the societies now prevailing in those territories or parts of them. They form at present non-dominant sectors of society and are determined to preserve, develop and transmit to future generations their ancestral territories, and their ethnic identity, as the basis of their continued existence

as peoples, in accordance with their own cultural patterns, social institutions and legal systems.²⁵

The next most significant decision was when, on 21 December 1993, the General Assembly resolved to proclaim 1995-2004 as The International Decade of the World's Indigenous People²⁶ ('International Decade'). With a main goal being to strengthen international cooperation in solving issues faced by indigenous peoples, the International Decade was themed 'Indigenous people: partnership in action'.

Also within General Assembly Resolution 48/163, a request was made to the Secretary-General to appoint a Coordinator for the International Decade. The Assistant Secretary-General for Human Rights took this role and also established a special Voluntary Fund for projects and programs aimed at promoting the objectives of the International Decade. General Assembly Resolutions 49/214 and 50/157 adopted short-term and comprehensive programs of activities respectively. In 1998, General Assembly Resolution 52/108 appointed the High Commissioner for Human Rights as the Coordinator for the International Decade.

At the end of 2004, the General Assembly proclaimed a Second International Decade of the World's Indigenous People.²⁷

There are four UN mechanisms specifically dedicated to indigenous issues: the Working Group on Indigenous Populations²⁸ ('WGIP') (a subsidiary organ of the Sub-Commission on the Promotion and Protection of Human Rights); a Commission on Human Rights opened, inter-sessional Working Group ('CHR working group') elaborating a Draft Declaration on the Rights of Indigenous Peoples²⁹ ('Draft Declaration'); the Permanent Forum on Indigenous Issues³⁰ ('Permanent Forum'); and a Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous peoples.³¹

The WGIP has been instrumental in the development of indigenous peoples' rights. This is because of the mandate established by the Sub-Commission on the Promotion and Protection of Human Rights in 1982, which authorises the WGIP to 'review developments pertaining to the promotion and protection of the human rights and fundamental freedoms of indigenous'³² populations and secondly to give special 'attention to the evolution of international standards'³³ concerning the rights of such populations. The review of developments enables indigenous peoples to report to the WGIP human rights violations and other

developments within the state that may assist the WGIP in its work. The standard setting mandate has been a very powerful tool for indigenous peoples and integral to the purpose of the WGIP. It was in the WGIP that the UN Draft Declaration was conceived and elaborated upon, establishing for the first time in UN history a Draft Declaration on the Rights of Indigenous Peoples.

The CHR working group on the UN Draft Declaration on the Rights of Indigenous Peoples has been negotiating a text for a Declaration since 1995. The fundamental principle of the Declaration is the right of self-determination for indigenous peoples. For indigenous peoples, self-determination is the bottom line from which all negotiations are based. The Draft Declaration begins by providing for indigenous peoples a right to self-determination with provisions elaborating on what self-determination means. A significant aspect of the Draft Declaration is the importance of indigenous customs and traditional practices and the right of indigenous peoples to continue their distinctive juridical customs, traditions, procedures and practices, in accordance with internationally recognised human rights standards. The working group has been hampered by state objections to the right to self-determination, collective rights, and rights to land and resources. In 2004 there was a significant and welcome change in the Australian Government's contribution to the CHR working group. The Australian Government decided to support the right to self-determination for indigenous peoples in the Draft Declaration, reflecting its commitment to the establishment of human rights standards pertaining to indigenous peoples in international law.

The Permanent Forum on Indigenous Issues is the most recently established body dedicated solely to indigenous peoples' issues.³⁴ The Permanent Forum is an advisory body to the Economic and Social Council ('ECOSOC'). The membership of the Permanent Forum includes 16 independent experts, eight of whom are nominated by governments and eight of whom are appointed by the President of the ECOSOC. Members serve the Permanent Forum for a three-year period and there is an option for renewal of membership for an additional year.³⁵

The primary mandate of the Permanent Forum is to discuss indigenous peoples' issues in the areas of economic and social development, culture, environment, education, health and human rights. Permanent Forum members are expected to 'provide expert advice and recommendations on indigenous issues to ECOSOC as well as to programmes, funds and agencies of the United

Nations through the Council.'³⁶ Its role is also to 'raise awareness and promote the integration and coordination of activities on indigenous issues within the UN system.'³⁷ The Permanent Forum is mandated to meet once a year for 10 working days and submit an annual report to the Council on its activities, including any recommendations for approval. The report, once approved, is distributed to relevant UN organs, funds, programs and agencies.

The Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people was a position established by the CHR.³⁸ This Special Rapporteur, Rudolfo Stavenhagen, is mandated by the CHR to collate and exchange information with relevant sources such as Governments, indigenous communities and non-governmental organisations on the human rights situation of indigenous peoples. The Special Rapporteur formulates proposals and recommendations to the CHR for appropriate measures to be taken by the UN in remedying and improving the status of indigenous peoples, their freedoms and human rights.

CONCLUSION

Indigenous Australians have been perhaps the most successful group of Australians in working with, lobbying and attending UN meetings. This advocacy work has become severely limited with the abolition of ATSIC, though there are discretionary opportunities provided by the Office of Indigenous Policy Coordination which has been able to occasionally assist in the continuation of some very important human rights activities for some Indigenous representatives. For a Federal regime that has historically been ostensibly hostile to human rights, this should be applauded, particularly given that dissent and accountability are fundamental to Western liberal democracies.

Though it is not always evident, the benefits of the UN advocacy to Indigenous Australians have been many and varied. Professor Mick Dodson once commented that, 'the *Racial Discrimination Act 1975* (Cth), the *Land Rights (Northern Territory) Act 1976* (Cth), the High Court's 1992 decision on native title – all of them were firmly grounded in, if not derived from, international law'.³⁹ Larissa Behrendt has similarly observed that

[i]n the absence of rights protection in the constitution, it is the reporting and monitoring mechanisms under international law that have created the most effective method of monitoring human rights in Australia.⁴⁰

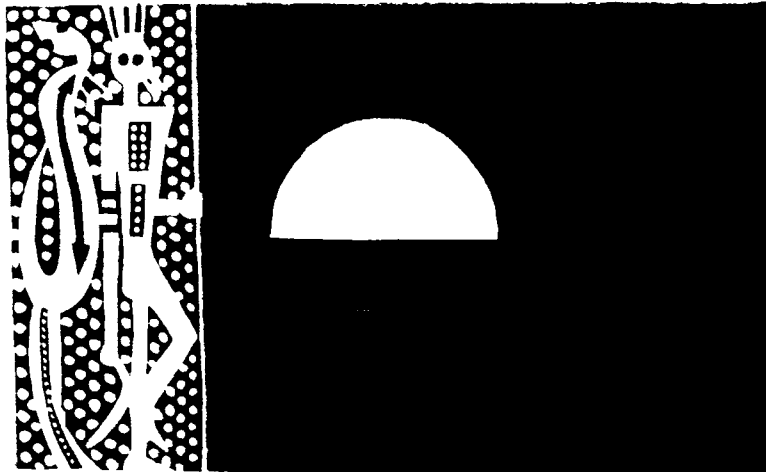
The reform of the UN is relevant to Indigenous Australians because, in the absence of rights protection in Australia;

in the potential absence of a human rights watchdog; and with the Federal government having absolute, unfettered control of both houses of Parliament, Indigenous rights, if relevant, will always be bargained away without a whimper from the Australian media or the Australian public. If it happened when the ALP had *some* control in the Senate, then it is sure to repeat with no control, only this time the challenges to Indigenous human rights won't come from a conservative government, but from the ALP itself. The UN will continue to provide Indigenous peoples with standards of how they should be treated within the State. It may not change the law or policy but it does continue to be imbued with great moral persuasive power.

Megan Davis BA, LLB (UQ); GDL, LLM, Candidate PhD (ANU) is a Senior Research Fellow at the Research Unit of Jumbunna Indigenous House of Learning, University of Technology Sydney; a Visiting Fellow at the Faculty of Law, University of New South Wales; and was a UN Indigenous Fellow with the Office of the High Commissioner for Human Rights in 1999.

- 1 (1982) 153 CLR 168.
- 2 (1992) 175 CLR 1.
- 3 Concluding Observations, UN Committee on the Rights of the Child *Consideration of Reports Submitted by States Parties Under Article 44 of the Convention*, [76], CRC/C/15/Add.268.
- 4 Maurice Bertrand, 'The UN as an Organization: A Critique of its Functioning' (1995) 6 *European Journal of International Law* 349; Michael J Kelly, 'UN Security Council Permanent Membership: A New Proposal for a Twenty-First Century Council' (2000) 31 *Seton Hall Law Review* 319; Craig Hammer, 'Reforming the UN Security Council: Open Letter to UN Secretary General Kofi Annan' (2002) 15 *Florida Journal of International Law* 261; Ernst-Ulrich Petersmann, (1997-98) 'How to Reform the UN: Lessons from the International Economic Law Revolution' 2 *Journal of International Law and Foreign Affairs* 185.
- 5 Roy Greenslade, 'Their Master's Voice' *The Guardian* (United Kingdom) 17 February 2003 <<http://www.guardian.co.uk/Iraq/Story/0,2763,897015,00.html>> at 31 October 2005.
- 6 <<http://www.un.org/summit2005>> at 31 October 2005.
- 7 UN General Assembly Resolution A/Res/55/2 <<http://www.un.org/millennium>> at 31 October 2005.

- 8 <<http://www.un.org/millenniumgoals>> at 31 October 2005.
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- 10 George J Mitchell, 'Don't Write Off UN Reform Just Yet' *International Herald Tribune* (Neuilly Cedex, France), 11 October 2005. <<http://www.iht.com/articles/2005/10/11/opinion/edmittchell.php>> at 31 October 2005.
- 11 See for example, Rita Hauser, 'The United Nations - Overstretched and Out of Date?' (2002) 14(2) *The Sydney Papers* 35.
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- 14 UN General Assembly, Fifty-eighth session: 7th Plenary Meeting, 23 September 2003, New York, UN Official Records A/58/PV.7, 2003.
- 15 For commentary, Marco Odello, 'Commentary on the United Nations' High-level Panel on Threats, Challenges and Change' (2005) 10 *Journal of Conflict & Security Law* 231; John Langmore, 'Global politics at the UN' (2005) *Dissent* 58.
- 16 *In Larger Freedom: Towards Development, Security and Human Rights For All: Report of the Secretary-General, A/58/2005*.
- 17 *Ibid* [38].
- 18 *Ibid* [58].
- 19 *In Larger Freedom: Towards Development, Security and Human Rights For All, Report of the Secretary-General, Addendum, Human Rights Council A/59/2005/Add.1*.
- 20 *Ibid* [6].
- 21 *Ibid* [4].
- 22 *Ibid* [7].
- 23 *Ibid* [8].
- 24 E/CN.4/Sub.2/1986/7 and Add.1-4.
- 25 E/CN.4/Sub.2/a986/7/Add.4 [379].
- 26 UN General Assembly Resolution 48/163.
- 27 UN General Assembly Resolution 59/174.
- 28 UN Economic and Social Council Resolution 1982/34.
- 29 UN Economic and Social Council Resolution 1995/32.
- 30 UN Economic and Social Council Resolution 2000/22.
- 31 UN Commission on Human Rights Resolution 2001/57.
- 32 UN Economic and Social Council Resolution 1982/34.
- 33 *Ibid*.
- 34 UN Economic and Social Council Resolution 2000/22.
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- 40 Larissa Behrendt, *Achieving Social Justice: Indigenous Rights and Australia's Future* (2003), 5.

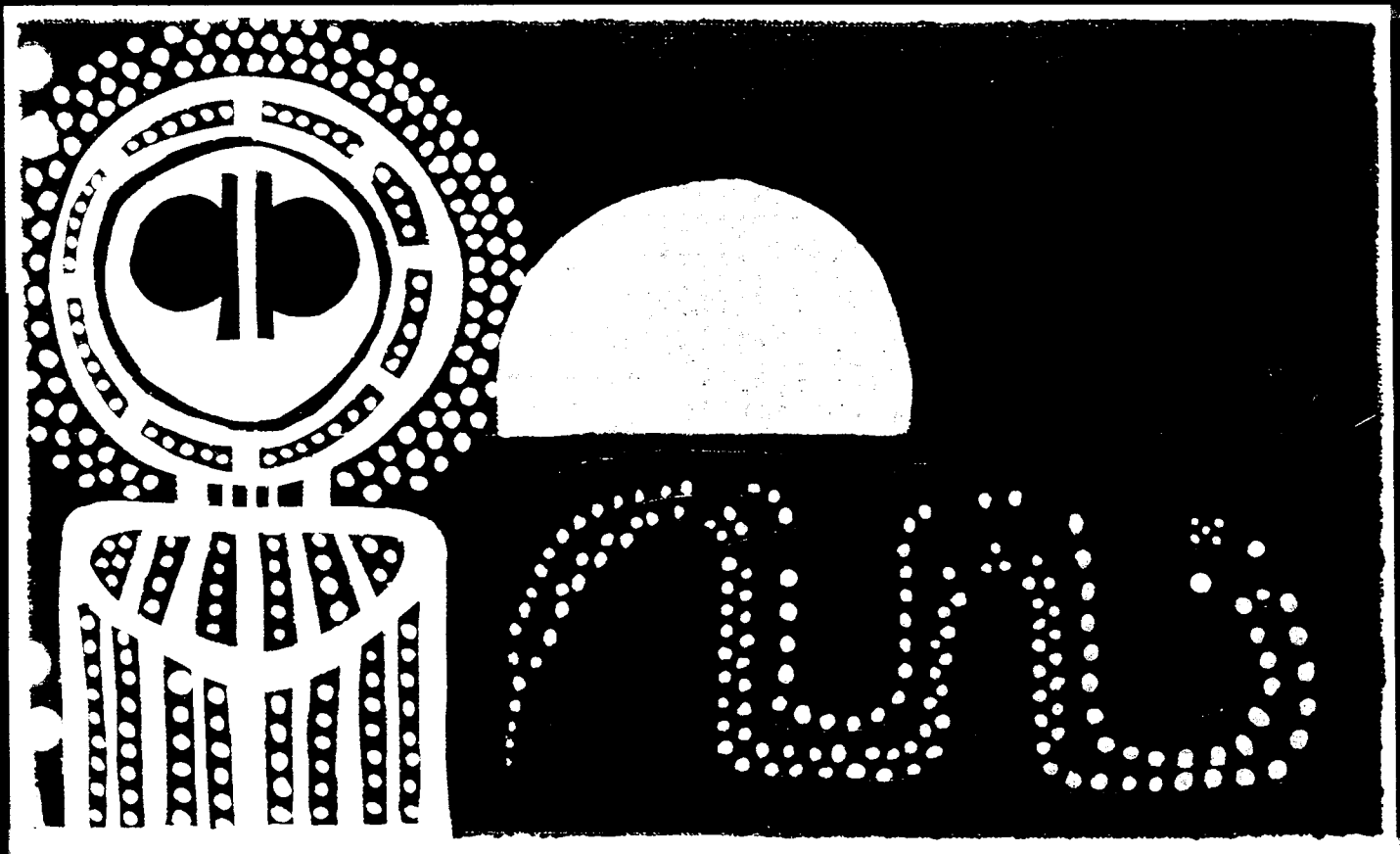


Mundungala Dreaming
Derek 'Dingo' Glaskin

Acrylic & ochre on canvas 508 x 406mm

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Indigenous Law Bulletin

Faculty of Law, University of New South Wales, Sydney 2052 Australia

Phone 61 2 9385 2256

Fax 61 2 9385 1266

Email editors ilb@unsw.edu.au

Subscriptions ilbsubscriptions@unsw.edu.au

Website www.ilb.unsw.edu.au

Editorial Board David Brown, Toni Bauman, Neva Collings, Mick Dodson, Garth Nettheim, Sarah Pritchard, Robynne Quiggin, Prue Vines, Kevin Williams

Editors Jacqui Houston, Catherine Hunter

Subscriptions Melodie-Jane Gibson

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Phone 61 2 9385 2252

Fax 61 2 9385 1266

Email ilc@unsw.edu.au

Website www.ilc.unsw.edu.au



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Articles

Language: To ensure accessibility to a broad readership, technical and jargonistic language must be simplified into plain English. Aboriginal English is an exception to this rule but where necessary, translations will be provided in addition to the original expression.

Style: Australian Guide to Legal Citation,
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Articles may be subject to anonymous peer review.

Art

Images of visual artworks in any medium that are suitable for reproduction in colour or black and white may be submitted for publication. Images may be submitted as slides, photographic prints, transparencies or 300 dpi electronic scans of the work. Graphics inserted in Word documents or obtained from the web are not suitable.

EDITORIAL

Once more we have chosen to begin the edition with an article written in narrative style by Carwyn Jones. Carwyn is a New Zealand Maōri and his stories maintain a respect and an accessibility for all readers; qualities which are often sadly lacking in decision making on environmental and heritage issues. Another of Carwyn's stories runs in this edition alongside an article by Joseph Kennedy, a University of NSW Law student who analyses the issue of permits to destroy sites of Indigenous cultural heritage in NSW. Joseph examines current legislation and case law and questions whether a uniform piece of cultural heritage legislation, founded in the principle of self-determination, would be a more equitable and just approach.

On criminal justice issues, this edition covers an array of issues ranging from offender rehabilitation to the duty of care owed by corrections departments to prisoners and related persons. Joanna Salomone from the Western Australia Department of Justice discusses the establishment of the Boronia Pre Release Centre for Women, aimed at addressing the personal, cultural and criminogenic needs of women currently serving a sentence. Victoria Police talk about the way in which the Koori Court has aided in the strengthening of relations between Indigenous Victorians and the State's police. Supplementing this article, University of NSW Law student Seranie Gamble explains the various approaches states and territories have taken as culturally appropriate ways of addressing offending behaviour.

Charmaine Smith, the Indigenous Justice Project Solicitor at the Public Interest Advocacy Centre ('PIAC'), provides us with a casenote on *Veronica Appleton v State of NSW* (Unreported, District Court of New South Wales, Judge Quirk, 28 July 2005). In this case, run by PIAC, the District Court found that the Department had breached its duty of care in not taking adequate precautions to prevent a prisoner from self-harm which led to his death. The decision showed an interesting distinction in recognising breaches by the Department of its duty of care to the deceased's mother, however the implications of the decision as it relates to recommendations of the Royal Commission into Aboriginal Deaths in Custody remain most significant. A need for greater understanding of the needs of all prisoners, but particularly those with mental health issues, is of paramount importance.

Our feature article in this edition comes from Megan Davis. Megan's article discusses reform of the United Nations ('UN'); a challenge many have contributed

to over the UN's 60-year history. Maintaining and enhancing the supranational strength of the UN as protector of human rights remains the ultimate goal for indigenous peoples worldwide.

In conclusion we draw your attention to the Viscopy (Visual Arts Copyright Collecting Agency) campaign to encourage the Federal Government to amend the *Copyright Act 1968* (Cth) to establish a Resale Royalty Scheme for visual artists. For further information on this issue, see Volume 6 Issue 5 (August-September 2004) and Issue 6 (October 2004) for Robynne Quiggin's analysis. In short, a resale royalty gives the artist a right to receive a percentage of the price when their work is on-sold. To have your say on this important issue, contact the Attorney-General, the Hon Philip Ruddock to let him know that you believe a resale royalty scheme should exist in Australia for the resale of all artworks, so that visual artists directly benefit from the resale of their works. Send letters to:

The Hon Philip Maxwell Ruddock
 Attorney-General
 PO Box 1866
 HORNSBY WESTFIELD NSW 1635

The Editors

ARTIST'S NOTE

**Cover Art *Serpent Dreaming*
 Derek 'Dingo' Glaskin**

Derek 'Dingo' Glaskin, born in 1957 in Western Australia, is of Wardandi and Binjurub Nyungar descent. He is also of Dutch Hawaiian heritage.

Dingo's mother, Lyla Hume, became a Wongi elder after a long stint operating the general store on the Warburton Mission and adopting some twenty or more Aboriginal children. Lyla's father was known as Nyungar tracker Jacki Hume from Greenbushes, Western Australia.

Dingo's paintings reflect a contemporary Nyungar attitude combining yesterday's old with modern dreaming in order to explore his clan's origin, found in the Serpent and Salt Water Dreaming. Glaskin moved to Hawaii in 1988 in order to further his understanding of Kanaloa¹ Wardandi.

Dingo recently had six political artworks featured on exhibition "Seeing the Other" at the Kluge Ruhe

Aboriginal Art Collection of the University of Virginia, USA. These dreamings are based on a conversation with Kluge-Ruhe Aboriginal Art Collection Curator Margo Smith in regard to the origin of the colours of the Aboriginal flag.

For further information see <www.derekgaskin.com>.

¹ 'In the mythology of old Hawaii, Kanaloa was the god of the ocean, a healer god, and the close companion of Kane, the god of creation.' <<http://www.huna.org/html/ekanaloa.html>> at 15 November 2005.

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