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COMMISSION ON HUMAN RIGHTS
Sub-Commission on Prevention of
Discrimination and Protection
of Minorities

Working Group on Indigenous Populations
Third session
Geneva, 30 July-3 August 1984
Items 4 and 5 of the provisional agenda

REVIEW OF DEVELOPMENTS PERTAINING TO THE PROMOTION AND
PROTECTION OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS OF
INDIGENOUS POPULATIONS

CONSIDERATION OF THE EVOLUTION OF STANDARDS CONCERNING
THE RIGHTS OF INDIGENOUS POPULATIONS

Report of the Secretary-General

Addendum

The present document contains information received from the Government of
Australia.

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AUSTRALIA

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[24 July 1984]

1. General

The Australian Government wishes to reaffirm its support for the Working Group. Australia co-sponsored Commission on Human Rights resolution 1982/19 which led to the establishment of the Group and participated actively in the Group's meetings in 1982 and 1983.

The Australian Government's policy on the consideration of indigenous issues in international forums has been based on the promise that international attention to the situation of indigenous populations is warranted and indeed overdue. Indigenous populations are among the larger identifiable disadvantaged and vulnerable groups in the world. This disadvantage and vulnerability has been exacerbated by the difficulties encountered by some indigenous groups in making their voices heard. The Working Group provides a forum for indigenous populations to present their views.

The Group also allows Governments to present their views as observers. The Australian Government welcomes the opportunity to ensure that its policies are accurately reflected and properly understood internationally and to learn from the experience and comments of others. The Group therefore offers a valuable international forum for thoughtful and constructive dialogue between indigenous groups, Governments and experts in the field.

The Australian Government welcomes constructive proposals to encourage the participation of indigenous representatives in the Working Group's activities. The flexible procedures adopted by the Group have facilitated indigenous participation. In order that indigenous populations and the groups that represent them may become aware and informed of the Group's work, attention should be given to disseminating information on the Group (especially the Group's reports). Australia has expressed its support in principle for the proposed fund to facilitate indigenous representation at meetings of the Group. If acceptable arrangements can be made to administer the fund, Australia would consider the question of financial assistance. The Government is however concerned that debate on important questions should not be side-tracked by possible controversy over the fund.

The Group has made useful progress in preparing a programme of work designed to focus international attention on issues of priority concern to indigenous populations. The Australian Government sees the Group's task of developing a set of standards to protect the rights of indigenous populations as being of particular value. These standards should harmonize with and build upon fundamental human rights enunciated in relevant international instruments.

A further important objective will be to encourage the participation of other United Nations bodies and specialized agencies in seeking to protect and promote the rights of indigenous populations. A useful beginning has been made in this respect. Some constructive references to the problems of indigenous populations were, for example, included in the Programme of Action adopted by the Second World Conference to Combat Racism and Racial Discrimination, held in Geneva in August 1983.

Non-governmental organizations have traditionally played a leading role in United Nations human rights activities, including in the area of indigenous rights.

The Australian Government welcomes the interest of non-governmental organizations in the Group's activities and considers that these bodies can assist the Group in its standard setting role.

The Government would welcome early discussion by the Working Group of the question of land rights, an area to which Australia has accorded considerable importance. The fundamental principles underlying its approach to land rights are set out below.

The Australian Government is concerned that debate on definitional issues should not become overly technical and artificial. It is hoped that a flexible working definition will emerge at an early stage and that discussion can then move to other issues of major significance. Australia's views on this issue are set out below.

2. Definitional Questions

The Australian Government uses both a legal and an administrative definition of its indigenous population.

When referring to the indigenous population of Australia, reference is made not only to Aboriginal people but also to Torres Strait Islander people, who maintain a separate culture. Torres Strait Islander people inhabit the islands in the Torres Strait north of Australia which are part of the State of Queensland. Historically, the Torres Strait Islander people have maintained close contact with mainland Aboriginal people in North Queensland.

(a) Legal Definition

The legal definitions of an "Aboriginal" have evolved within the Federal Government's power under section 51 (xxvi) of the Constitution (as amended in 1967) "to make laws ... with respect to ... the people of any race for whom it is deemed necessary to make special laws". Both Aboriginals and the Torres Strait Islanders are accepted by the Federal Government to be "a race" for this purpose. The definitions embodied in Federal legislation focus on race to ensure that the legislation is constitutionally valid. That is, they are designed to ensure that the power of the Federal Government to enact that legislation cannot be challenged. They do not therefore attempt to deal with degree of Aboriginal descent, nor to define in any other way the categories of person to whom the legislation may apply.

The most recent legislation to define "Aboriginal", the Aboriginal and Torres Strait Islander Heritage (Interim Protection) Act 1984, states "Aboriginal means a member of the Aboriginal race of Australia and includes a descendant of the indigenous inhabitants of the Torres Strait Islands". In the recent Franklin Dam case, all seven members of the High Court of Australia made reference in varying detail, to the meaning of the word "race" in section 51 (xxvi) of the Constitution. The general thrust of the judgements handed down supported, in principle, the Australian Government's working definition of an Aboriginal.

(b) Administrative Definition

To identify persons eligible for the specific Aboriginal programmes and benefits which it has established, the Australian Government has developed the following administrative definition which, with slight variations, is generally used by Australian Government authorities:

"An Aboriginal or Torres Strait Islander is a person of Aboriginal or Torres Strait Islander descent who identifies as an Aboriginal or Torres Strait Islander and is accepted as such by the community with which the person associates."

The definition contains three key elements, or criteria, all of which must be satisfied, viz.

Aboriginal descent;

Self-identification as an Aboriginal;

Acceptance by the community as an Aboriginal.

An administrative approach to definitions brings a number of advantages. The definition takes into account concepts of self-identification and community acceptance which are central to the rationale for the Australian Government's Aboriginal advancement programmes. It removes the need to prove actual degrees of descent which could be regarded as insulting for many individuals. Apart from these difficulties, experience has shown that lineage is not a reliable indicator of the extent to which an Aboriginal or Islander person may suffer economic and/or social disadvantage. Nor is there any need for cumbersome and potentially offensive registration by Aboriginals and Torres Strait Islanders. Importantly, the working definition approach has proven generally acceptable to Aboriginal people and organizations.

Some difficulties are associated with this administrative definition. There is no readily applicable test for the concept of "Aboriginal descent", retention of which is essential to continue the link with the Federal Government's constitutional powers. Similarly the words "community" and "identifies" are used without being defined. Administratively assessments of these concepts can at times be difficult to establish.

Two other complicating factors should be noted. The working definition is not consistently used or accepted by all State and Federal Government agencies responsible for the administration of Aboriginal advancement programmes. Moreover, there is a history of dispute over whether Melanesian groups, other than Torres Strait Islanders, e.g. descendants of South Sea Islanders also known as Pacific Islanders, brought to Australia in the last century to work, qualify for assistance under the definition of "Aboriginal or Torres Strait Islander".

(c) General conclusion

The Australian Government's experience has been that flexible working definitions of indigenous populations based on the elements of descent, and most importantly self-identification and community acceptance, are more useful and less problematic than artificial and potentially offensive attempts to classify individuals rigidly according to lineage.

While it recognizes the different factors at play in relation to other indigenous groups in other parts of the world, the Australian Government would endorse a similarly flexible approach in addressing the question of definition for the purposes of drafting international standards to protect indigenous rights. The Government would be concerned if minimal differences of opinion about definitions became an obstacle to progress in the debate about the fundamental human rights of indigenous populations.

3. Land Rights

Introduction

Land rights legislation has been enacted in Australia in recent times as an act of justice to people who have been dispossessed of their land without prior consent or compensation. Land rights have also been recognized in a way in which Aborigines may re-establish spiritual links with their land, regain control over their land and their lives and be provided with a potential economic base for the future.

So far land has been returned to Aborigines in the Northern Territory, South Australia, Victoria and lately, New South Wales. Most of the land was formerly set aside as reserves for the use and benefit of Aborigines. Aborigines (160,000 in all, representing 1 per cent of the total population of Australia) now have various forms of legal title to about 900,000 km² of land (including land in the process of being granted), or about 11.5 per cent of the land mass of Australia. Of this, 614,000 km² or 8 per cent of total land is Aboriginal freehold title land or is in the process of being granted as such.

The Queensland Government has enacted legislation providing for the eventual grant of limited title to Aboriginal and Torres Strait Islander reserves in that State under a deed of grant in trust system. The Western Australian Government has appointed Mr. Paul Seaman, QC, to conduct an inquiry relating to land rights in that State. The Western Australian Government has stated that all land reserved for the use and benefit of Aborigines₂ will be vested in Aboriginal local communities. This covers some 190,000 km².

The Australian Government will submit to the Working Group a further paper setting out in more detail the position with regard to land rights at the Federal and state levels.

Federal land rights legislation

The Australian Government has announced its commitment to ensure a consistent national approach to land rights for Aborigines throughout Australia in terms of five fundamental principles:

Aboriginal land to be held under inalienable freehold title;

Protection of Aboriginal sites;

Aboriginal control in relation to mining on Aboriginal land;

Access to mining royalty equivalents; and

Compensation for lost land to be negotiated.

In developing proposals for the legislation, the Federal Minister for Aboriginal Affairs, the Hon. Clyde Holding, MP, has formed an Aboriginal Steering Committee comprising representatives of the National Aboriginal Conference, Aboriginal Land Councils and the Aboriginal Development Commission, to provide policy advice. The Steering Committee has been assisted by a panel of lawyers.

The Government recognizes that the situation varies from state to state, and that factors such as historical development, degree of dispersal and dispossession of Aboriginal people, present mode of living, existing tenure arrangements and numbers of people affected are obviously relevant. Also differing legislative and

administrative arrangements now apply in the various states and territories. However, uniformity of approach and unanimity of attitude in this area is a desirable objective, consistent with the spirit of the 1967 referendum in relation to matters affecting the Aboriginal people of Australia, and the Government will be negotiating with all states towards this end.

The Federal Minister for Aboriginal Affairs has discussed various aspects of the proposed legislative scheme in public forums and in a speech proposing a resolution moved in the Federal Parliament on 8 December 1983.

The main points made in the resolution of 8 December 1983 are that:

The people whose descendants are now known as the Aboriginal and Torres Strait Islander people of Australia were the prior occupiers and original owners of Australia and had occupied the territory of Australia for many thousands of years in accordance with an Aboriginal system of laws which determined the relationship of Aboriginal responsibility for and to the land to which they belonged;

Since the arrival of European settlers, Aboriginals and Torres Strait Islanders have been dispersed and dispossessed and as a result are the most disadvantaged group in Australian society;

The Parliament considers that special measures need to be taken to ensure real equality and advancement of Aboriginal people including effective consultation, land rights, programmes designed to ensure Aboriginal equality in fields including health, education, housing, employment and welfare, and promotion and protection of Aboriginal cultural identity;

Programmes should be developed to improve community relations; and

The bicentennial year 1988 provides an immediate focus to achieve these objectives.

In June 1984, the Australian Parliament enacted the Aboriginal and Torres Strait Islander Heritage (Interim Protection) Act 1984.

The Act has two main purposes:

- (i) Preserving and protecting areas in Australia and Australian waters which are of particular significance to Aboriginal or Islander people in accordance with their traditions; and
- (ii) Preserving and protecting objects, including Aboriginal and Islander remains, which are of particular significance to Aboriginals or Islanders in accordance with their traditions.

The Act is an interim measure which will be replaced in due course by more comprehensive legislation dealing with Aboriginal land rights and heritage protection. The Act is expressly stated to have effect for no more than two years from the date of its commencement due to the Government's intention to legislate more comprehensively in the future. The Act complements existing state and territory laws and will be used in cases where those laws do not provide effective protection of areas and objects from injury or desecration.