

The Eddie Koiki Mabo Lecture 2011

Strengthening our relationships over lands, territories and resources: the United Nations Declaration on the Rights of Indigenous Peoples

Mr Mick Gooda

Let me begin by acknowledging and paying my respects to the Traditional Owners of the place upon which we sit and talk tonight. I honour your Elders that have come before us, those that are here tonight and I await in optimistic anticipation for those Elders who are yet to emerge.

My people are the Gangulu from the Dawson Valley in Central Queensland. I stand here proud to bring a message from my Elders. First, they ask me to pass on their greetings and thanks for allowing me on your lands. They then say that they are aware of your continued fight for your culture and your country and salute you for your ongoing struggle.

It is an honour for both my people and myself to be presenting this year's Edward Koiki Mabo Lecture. I'd like to thank James Cook University and Professor Nola Alloway for the invitation to speak tonight.

Can I particularly acknowledge Edward's daughter, Gail Mabo, who is here tonight representing the Mabo family. Gail, can I say that I am acutely aware of the strains and stresses that the families of our heroes, such as your Dad, endure when fighting the good fight for our people's rights.

Aboriginal and Torres Strait Islander peoples also owe a debt of gratitude for the sacrifices that your Mum and your brothers and sisters have also made.

Edward Koiki Mabo, David Passi and James Rice, on behalf of the Meriam People from the Murray Islands in the Torres Strait, showed tremendous leadership to challenge the Queensland Government in the High Court. As we all know, the outcome of this challenge was the High Court's rejection of the common law doctrine of, or as I am sure Edward would have put it, the lie of terra nullius.

Without the legacy of this High Court decision on native title there would be no opportunity for us to access this unique form of land tenure that recognises our native title rights and interests to our traditional lands and waters.

I remember working in the Torres Straits in the late eighties when a buzz would go around Thursday Island that Koiki was back in town. On one occasion a couple of us decided to go down to the Court House to see what all of the fuss was about. After sitting there for a couple of hours trying to understand what was going on as these lawyers argued points of law backward and forward we decided it was all a bit boring and went back to more exciting things like acquitting grants or checking CDEP participant schedules.

I was in Thursday Island when a famous boat in Queensland, the Melbidir, took those involved in the final hearings around the Straits and finally to Murray Island. When it returned to TI, I remember my friend Lloyd Maza, a Murray Island man, entertaining lawyers, court reporters and boat crew, regaling them about the part they were playing in what would be one of the most important decisions made in the history of this country. I am not sure whether everyone shared his optimism, but in 1992 when I heard the decision, my thoughts went to the joy and elation Lloyd would be feeling but then I thought of Edward who, sadly never got to see the results of his, David and James efforts. It is those efforts that we honour here tonight.

Social Justice Commissioner Priorities

Before I get into the presentation proper I think I need to give you some background to my role as the Aboriginal and Torres Strait Islander Social Justice Commissioner at the Australian Human Rights Commission. The role of the Social Justice Commissioner is defined in the Australian Human Rights and the Native Title Acts and my duties include the preparation of two annual reports:

- the Native Title Report, which reviews the impact of the Native Title Act on the exercise and enjoyment of the human rights of Aboriginal and Torres Strait Islander peoples; and
- the Social Justice Report, which reports on issues affecting the human rights of Aboriginal and Torres Strait Islander peoples in accordance with the Australian Human Rights Commission Act 1986 (Cth).

In the Native Title Report 2010, I outlined the key priorities for my five year term. These are:

- To advance the full implementation of the United Nations Declaration on the Rights of Indigenous Peoples (the Declaration) in Australia; and
- To promote the development of stronger and deeper relationships:
 - between Aboriginal and Torres Strait Islander peoples and the broader community;
 - between Aboriginal and Torres Strait Islander peoples and government within Aboriginal and Torres Strait Islander communities.

I also set out the themes in native title that I want to focus on in this time. These include:

- Building an understanding of, and respect for, our rights to our lands, territories and resources throughout Australia;
- Creating a just and fair native title system through law and policy reform;
- Promoting effective engagement between governments and Aboriginal and Torres Strait Islander peoples; and
- Enhancing our capacity to realise our social, cultural and economic development aspirations.

I believe these key areas of relationships are embedded in and derived from the human rights agenda and the United Nations Declaration on the Rights of Indigenous Peoples.

The Native Title Report 2011

This year's Native Title Report will be tabled in parliament and launched late next month. So I thought that I would take this opportunity to share with you the theme and some of the issues I discuss this year.

I use both the Native Title and Social Justice Reports 2011 to start a conversation about lateral violence and the ways that Aboriginal and Torres Strait Islander peoples can create the foundations to strengthen and rebuild relationships within our families, our communities and our organisations.

What is lateral violence?

For those of you wondering what I mean by lateral violence, let me explain. Lateral violence comes from behaviours that might include bullying, gossiping, jealousy, shaming, social exclusion, family feuding and organisational conflict, which often escalate into physical violence. Now, lateral violence occurs in all levels of society but for oppressed peoples it is particularly acute and has a particularly sharp edge. The theory behind why lateral violence impacts us differently is because it is often the result of disadvantage, discrimination and oppression, and it arises from working within a society that is not designed for our way of doing things.

For us lateral violence can be described as 'internalised colonialism' and according to Richard Frankland includes *"...the organised, harmful behaviours that we do to each other collectively as part of an oppressed group: When we are consistently oppressed we live with great fear and great anger and we often turn on those who are closest to us."*

The concept of lateral violence for oppressed groups of peoples has its origins in the writings on colonialism from Africa and Latin America, as well as the literature around the oppression of African Americans, Jewish people and women. According to this literature, lateral violence is created by situations of power imbalance which in turn affects the identity of the people who are colonised.

This occurs because colonised groups internalise the values and behaviours of their oppressors, which leads to a negative view of themselves and their culture. Anger and frustration about the injustice of feeling powerless manifests itself in violence – not 'vertically' towards the colonisers responsible for the oppression but 'laterally' towards their own community. Acts of lateral violence establish new hierarchies of power within colonised groups that mimic those of the colonisers. So not only are we dealing with the harm that lateral violence causes individuals, we are also dealing with the destruction that it causes to the traditional structure and roles in our societies.

Our history of colonisation

Our history of colonisation here in Australia describes a similar story. Aboriginal and Torres Strait Islander peoples have been living together on our lands and with the environment for up to 70 000 years. We have strong social structures, sophisticated systems of law, a rich culture and complex ways of living, surviving and thriving in our sometimes harsh landscape. We had mechanisms to govern, not only our interpersonal relationships, but trade and territorial agreements and conflicts between different nations, clans and groups. Men's and women's business, Elders councils and ceremonies regulated all aspects of life and were used to resolve conflict.

When the British arrived on our lands, rather than respect these laws and customs, the story of terra nullius was fabricated: Aboriginal and Torres Strait Islander peoples simply did not exist as fellow humans in the eyes of our colonisers. Similar to other colonised countries, Aboriginal and Torres Strait Islander peoples found there was no effective way for them to challenge the power and resources of the colonisers, and this created the foundation for lateral violence.

And it is important to understand that this history of colonisation and the resulting dispossession of our lands and waters is an on-going experience for many of us right up to the present day. In reaching this understanding we are able to recognise that non-Indigenous peoples continue to control the structures, processes and policies that provide access to wealth and power. This creates an environment where Aboriginal and Torres Strait Islander peoples are relatively powerless and lateral violence is able to thrive.

Why is lateral violence associated with native title?

So why is lateral violence associated with native title? As I have said earlier, Edward Koiki Mabo, David Passi and James Rice fought for and secured the High Court decision on native title which recognised our connection to our lands and waters by creating a unique form of land tenure that attempts to intersect our traditional laws and customs with Australian common law and legislation.

The Native Title Act was then developed which codifies a process that can lead to the recognition of these relationships. Acknowledging our rights to and interests in our country has the potential to generate positive outcomes for our communities. But too often this potential is not realised and lateral violence fragments our communities as we navigate through the native title system. I know of communities where there are wounds that, in my view, will never heal because of what they had to go through to secure their native title.

However, I want to emphasise that native title in and of itself does not necessarily cause lateral violence. Nor is native title the only forum within which lateral violence occurs for Aboriginal and Torres Strait Islander peoples. Rather, lateral violence is created by experiences of power and oppression, and can manifest in many different community and family situations.

For instance, native title processes require individuals and families to meet to describe and prove their connection to country, identify their ancestors and decide the applicant. These meetings provide a forum which can add 'fuel to the fire' in communities where feuds between individuals and families are already a source of conflict. Each of these issues can create and contribute to positions of power within our communities and in this way, provide a catalyst for lateral violence. In this way native title processes provide a platform for latent conflict to develop into lateral violence because families, communities and organisations have to meet to decide fundamental questions about their identity and where they fit within the native title claim group. These issues of power and questions about identity feed into the cycle of latent conflict and lateral violence.

These questions of identity are fed by the inherent contradiction between past governments policies that removed our peoples from our country and the current requirement under the Native Title Act for us to prove continuing connection to our lands and waters since the arrival of the British.

In this year's Native Title Report, I set out the native title process and explain how – at each stage of the native title process – lateral violence can be generated. This is because the long and resource intensive native title process provokes issues of powerlessness and questions about identity. I again want to emphasise that it is necessary to distinguish between native title outcomes that recognise our rights and interests in our lands, and the native title processes that are outlined in the Native Title Act.

Native title itself provides immense benefits to Aboriginal and Torres Strait Islander peoples; but it is the processes that we are required to follow to prove our native title that provides opportunities for lateral violence within our families and our communities.

Giving effect to the UN Declaration on the Rights of Indigenous Peoples: ways to reduce lateral violence

I have committed to using the United Nations Declaration on the Rights of Indigenous Peoples to guide the work during my time in this position because it reaffirms that Indigenous peoples are entitled to all human rights recognised in international law without discrimination. But it also acknowledges that, unless the collective rights of Indigenous peoples are recognised and our cultures are protected, we can never be truly free and equal. The declaration is about creating new relationships between Indigenous peoples and government based on partnership, mutual respect and honesty. I believe that it can also guide relationships within our Aboriginal and Torres Strait Islander communities. This is because the rights set out in the declaration can support us to create and maintain environments that are 'culturally safe' for us to address lateral violence.

In my view, the declaration is not only a guide; it is also an assessment tool against which communities and governments can measure the successful application of human rights standards as they apply to the rights of Aboriginal and Torres Strait Islander peoples.

In addition to clearly outlining our human rights, the declaration contains a number of key principles that underpin the rights contained within it. These principles are:

- self-determination;
- free, prior and informed consent;
- non-discrimination; and
- the maintenance and protection of culture.

Self-determination as it applies to Indigenous peoples *'is the right of a group of peoples to meet the human needs of that group, including the means to preserve that group's identity and culture'*. Exercising our right of self-determination means we have the *'freedom to live well and live according to our values and beliefs'*.

Similar to the principle of self-determination, free, prior and informed consent reinforces all of the rights contained within the declaration. Indeed, free, prior and informed consent has been identified as a *'requirement, prerequisite and manifestation of the exercise of our right to self-determination'*.

Discrimination arises where the powerful assert their authority against the powerless. While Aboriginal and Torres Strait Islander peoples can face all categories of discrimination, including sex, age and disability, it is the race based discrimination that exacerbates the effects of all others.

Culture is a source of strength, resilience, happiness, identity and confidence for our communities. So access to our lands, territories and resources is essential to the maintenance and protection of our cultural identity, cultural integrity and cultural self-determination. As I said earlier, these rights of self-determination, free, prior and informed consent, non-discrimination and protection of culture are contained within the declaration. It is my view that lateral violence occurs when these fundamental human rights and principles are not met. I strongly believe that if we draw on these principles in the declaration to guide our efforts to secure the rights of Aboriginal and Torres Strait Islander peoples, the potential for lateral violence will be significantly reduced.

Options for addressing lateral violence in native title

What are our options for addressing lateral violence in native title? I want to enlarge on three opportunities to progress legislative and policy reform that would respond to this recommendation and significantly improve the operation of the native title system. These are to:

- ensure that the unique and inherent rights of Aboriginal and Torres Strait Islander peoples are protected under the National Human Rights Framework;
- reform the Australian Constitution to recognise Aboriginal and Torres Strait Islander peoples and prohibit discrimination on the basis of race; and
- maintain efforts aimed to create a just and equitable native title system.

The National Human Rights Framework

The establishment of the National Human Rights Framework provides all of us, the Aboriginal and Torres Strait Islander community and government, the opportunity to embed a regime that recognises and respects our inherent rights. Its development also provides the Australian Government with the perfect opportunity to work with Aboriginal and Torres Strait Islander peoples to review and where necessary, reform all relevant legislation and policies to ensure their compliance with human rights standards and the declaration.

This Framework has three parts: human rights and the public sector; public awareness of human rights; and the establishment of a Parliamentary Committee to scrutinise proposed legislation for compatibility with Australia's international human rights obligations. My aim is to have the UN Declaration on the Rights of Indigenous Peoples entrenched in all three parts of this Framework.

Constitutional Reform

Aboriginal and Torres Strait Islander peoples are not recognised in the Australian Constitution as our nation's first peoples. As such the Constitution offers no recognition or protection of our rights to our lands, territories or resources.

The Attorney-General has referred to the Constitution as '*our nation's birth certificate ... which sets out the legal and political framework on which our nation is built*'. The current Chief Justice of the High Court of Australia has referred to it as '*defining our legal universe*'.

While this is the case for modern Australia, the Constitution fails to recognise that Australia is home to the oldest living cultures in the world and this is something that each and every Australian should be proud of. And be proud to assert as part of the Australian national identity. If indeed it is our birth certificate, it should reflect our place in the nation as the first Australians. It should reflect the nation's complete genealogy – not just one part of the family tree. I believe that these reforms to the Australian Constitution will go some way to stem the ongoing impacts of colonisation and lateral violence by:

- affirming our place as the first peoples of Australia and recognising the untruth of terra nullius in our founding document;
- addressing a history of exclusion of Aboriginal and Torres Strait Islander peoples;
- improving the sense of self-worth and social and emotional well-being of Aboriginal and Torres Strait Islander peoples as individuals, as communities and as part of the national identity;
- changing the context in which debates about the challenges faced by Aboriginal and Torres Strait Islander communities take place; and
- improving relationships between Aboriginal and Torres Strait Islander peoples and non-Indigenous Australians.

This process also provides us with an opportunity to address the provisions of the Constitution that permit discrimination on the basis of race. The right to live free from discrimination is a fundamental human right that most Australians take for granted.

This year, the first formal steps towards a referendum began with the establishment of the Expert Panel on Constitutional Recognition of Indigenous Australians. This Panel is charged with leading a broad national consultation and community engagement program to seek the views of Aboriginal and Torres Strait Islander peoples and non-indigenous people. It will report to the Australian Government in December on options for Constitutional recognition of Indigenous peoples.

The Expert Panel is currently considering a number of ideas including:

- the inclusion of a statement of recognition in a preamble to the Constitution, or in the body, acknowledging Indigenous Australians' distinct culture, identity and heritage, their prior ownership of our land, and their ongoing contribution to Australian society;
- the inclusion of a statement of values in a preamble or in the Constitution itself, which would include both recognition of our Indigenous peoples and also set out the fundamental values of our society such as our personal freedoms, the rule of law, racial and gender equality, and our commitment to democratic government;
- the repeal or amendment of provisions in the Constitution currently based on racial discrimination – sections 25 and 51;
- the creation in the Constitution of a new guarantee of non-discrimination and racial equality; and
- new powers for the Australian Government to legislate to protect Indigenous culture and heritage, and to redress historical disadvantage.

It is my view that we will be voting in a referendum sometime before the next election is due in 2013. But to those who doubt the importance of what amounts to a form of words, I say this: this process will give this generation of Australians the opportunity to say 'yes' – an opportunity to demonstrate goodwill and innate decency, just like 90% of Australians did in 1967.

Native Title Reform

Establishing our claims to native title involves extensive requirements for proving our identity and connection to country. In the shadow of our dispossession it is often these questions of 'who we are' that can exacerbate lateral violence in our communities. The native title reforms that I and previous Social Justice Commissioners have advocated go some way to addressing these issues. These include:

- improving the recognition of traditional ownership;
- minimising the current burden of proving native title;
- addressing the operation of the law regarding extinguishment; and
- developing options for advancing negotiated settlements (including the potential for alternative, comprehensive settlements)

I am of the view that these native title reforms would have a positive effect on addressing lateral violence in our communities. The reforms that may be of particular benefit include reversing the onus of proof, providing more flexible approaches to connection evidence and exploring options for negotiating alternative settlements.

In this year's Native Title Report, I call for a review of the Native Title Act to bring it in line with international human rights standards. This should incorporate our collective goal to achieve a 'fair, independent, impartial, open and transparent process' that acknowledges our traditional laws and customs to our lands, territories and resources, and eases the burden that comes with the requirements to prove our identity and connection to country.

What do we do about lateral violence?

However, while we can talk extensively about the system and things like colonisation and how they impact on us, the main responsibility for addressing lateral violence lies with us.

But what can we do?

Naming lateral violence

The first step towards exerting control over an issue is giving it a name. It is a way of exercising agency and responsibility for our communities. Naming lateral violence in itself becomes an action of prevention.

We know that the conversation around lateral violence is not an easy one. It means confronting those in our communities who perpetrate lateral violence and holding them accountable for their actions. But facing up to tough issues is not new for Aboriginal and Torres Strait Islander communities. There are many instances of communities confronting problems like family violence or alcohol abuse with great courage.

Naming lateral violence is essentially a process of awareness-raising and education. It is about giving communities:

- the language to name laterally violent behaviour;
- the space to discuss its impact; and
- the tools to start developing solutions

Confronting bullying

Bullying has a pervasive impact in many areas of life. In our world, bullying has become one of the weapons of choice when it comes to lateral violence. Just as the wider Australian society is now

confronting the insidious effects of bullying, so must we. One of the growth areas of bullying is in the cyber world, where perpetrators can remain anonymous and there is no need to ever do anything face to face if they so wish. But as anyone knows who has been confronted by this form of lateral violence, the effects can be devastating to the victim.

Like I say above about naming lateral violence, so it is with bullying. Calling it when it is perpetrated is the first step in making it stop. We need to have environments in our communities, families and organisations where everyone can feel safe and secure. However, it is necessary to forge strong partnerships with community and other organisations involved. In the case of the cyber bullying project in Yuendumu we have seen collaboration between the community groups, Police and the Department of Justice.

Dispute resolution

I discussed earlier how the process of colonisation undermined our traditional ways of resolving conflicts based on our complex customary laws. When thinking about lateral violence, it is important to never lose sight of the fact that our people managed to coexist for over 70 000 years before the Europeans arrived. This fact makes me confident that we can once again enjoy a life where conflict is properly managed and lateral violence does not rule our communities.

Healing and social and emotional wellbeing

Some of the most serious impacts of lateral violence can be found in how it affects our social and emotional well being. At its most tragic extreme is the high level of suicide and suicide attempts in our communities, compared to the non-Indigenous population.

Addressing lateral violence requires healing approaches. Many of these sorts of programs can help in healing the harm caused by lateral violence and can also challenge negative stereotypes, making our culture strong and safe enough to prevent lateral violence.

The Family Empowerment Program in Yarrabah is a great example of a community-generated program that focuses on the healing needs of participants. Although it was not set up to explicitly address lateral violence, by empowering themselves, building conflict resolution skills, dealing with trauma, grief and loss and promoting strong culture, it attacks lateral violence on a number of fronts.

In raising the issue of lateral violence I say in this year's Social Justice Report, that I have had to think long and hard about being open and honest about the damage that lateral violence does in our communities; am I contributing to the further demonisation of our people? While this is a view that some people may possibly take, the damage and impact caused by not doing anything about lateral violence is, in my view, far greater than the risk of speaking out.

But I have been buoyed by the positive reaction of people and their willingness to address this scourge confronting our communities, families and organisation.

I have also been encouraged to keep on this path by the work being done around Australia by people such as David Baird of Gurriny Yealamucka who was instrumental in initiating the Family Empowerment Program in Yarrabah, Eileen Deemal-Hall from the Northern Territory Department of Justice and Sergeant Tanya Mace in confronting cyber bullying in Yuendumu and the work of Associate Professor Juli Coffin in Yamatji communities, families and schools developing innovative ways to prevent bullying amongst young people in the Solid Kids, Solid Schools project.

As I have said, confronting lateral violence will take courage, foresight and leadership. But, let me be clear tonight, we have been confronted by greater challenges and the man who we gather to honour tonight, Edward Mabo stands in the pantheon of our champions such as William Cooper, Oodgeroo Nunukul and Vincent Lingiari who were confronted by far greater challenges and prevailed.

In conclusion, I highlight the need to ensure that legislative and policy frameworks advance Aboriginal and Torres Strait Islander peoples and empower us to reach our full potential in accordance with the Declaration on the Rights of Indigenous Peoples. The recognition of our native title provides a unique opportunity for many Aboriginal and Torres Strait Islander peoples to overcome disadvantage.

But the native title system must operate in a way that empowers us to achieve this outcome. It must be supported by strong foundations that ensure our self-determination and enable our effective participation in decision-making.

Thank you.