

AIATSIS Native Title Conference
Keynote address
Our relationships in native title: starting the conversation

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Introduction

I would like to begin by acknowledging the Traditional Owners of the land we are meeting on today – the Turrbal, Jagera, Yuggera and Ugarapul Peoples. I pay my respects to their Elders past and present.

I am a Gangulu person from the Dawson Valley in Central Queensland and when I speak to my Elders, they ask me to pass on my salutations to the Traditional Owners of the land I visit for their continued fight for their country and their culture.

I would also like to acknowledge that we are sitting here today inside ‘the boundary’. A couple of streets behind the Brisbane Convention and Exhibition Centre is Boundary Street West End. From the mid-1800s, the area from Boundary Street West End to Boundary Street Spring Hill to Boundary Street in Camp Hill formed an exclusion zone that was established to stop Aboriginal people coming into Brisbane city after 4pm and on Sundays.

Uncle Bobby Anderson told me yesterday that he can remember his mother always telling him to be home from school before dark every day.

So it is not that long ago that this was happening but I think we have come some way from that time.

It is an honour to be asked to present this keynote address and I’d like to thank the conference co-conveners, AIATSIS and QSNTS, for the invitation to speak. I’d especially like to acknowledge my fellow speaker, Andrew Leach, and Andrew, welcome to Australia.

I would also like to thank the Chair, Mick Dodson, for his introduction. Mick was the first Social Justice Commissioner, appointed in 1993, and I’d like to

acknowledge his continuing advocacy for the rights and interests of Aboriginal and Torres Strait Islander peoples here in Australia, and Indigenous peoples internationally.

Social Justice Commissioner Priorities

I will start by giving you some background to my role as the Social Justice Commissioner at the Australian Human Rights Commission.

The office of the Social Justice Commissioner is responsible for two annual reports: the *Native Title Report*, which reviews the impact of the *Native Title Act 1993* (Cth) 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).

Although both of these reports are tabled annually in Parliament, it is my view that they are only useful if we can do something with them. So the question I thought about when I started in this position about 18 months ago is: how can we use these reports to achieve our aims?

In the *Native Title Report 2010*, I outlined my key priorities relating to native title. These are:

To advance the full implementation of the *United Nations Declaration on the Rights of Indigenous Peoples* (the Declaration) in Australia.

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 during my five-year term. These are:

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

These priorities and themes have been informed in part by the many conversations that I have had on my travels; and in part by my own involvement in the Indigenous policy environment.

Importantly, these key areas of relationships are embedded in and derived from the human rights agenda and the Declaration.

So what do these priorities mean for us as Aboriginal and Torres Strait Islander peoples?

The Declaration

First, I want to see the full implementation of the Declaration in all laws, policies, practices and programs that affect us. Through this, the spirit and intent of the Declaration can be realised.

The Declaration reaffirms that Indigenous people are entitled to all human rights recognised in international law without discrimination. But it also acknowledges that, without recognising the collective rights of Indigenous peoples and ensuring protection of our cultures, Indigenous people 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.

The Declaration is not an instrument of division as some would have us believe.

Nor is the Declaration something to be dismissed with the argument that it is not legally binding. I note that Article 38 says:

States in consultation and cooperation with indigenous peoples, shall take the appropriate measures, including legislative measures, to achieve the ends of the Declaration.

And Article 42 says:

...States shall promote respect for and full application of the provisions of this Declaration and follow up the effectiveness of this Declaration.

I also refer to the United Nations Permanent Forum on Indigenous Issues, which states that the purpose of the Declaration is to 'constitute the legal basis for all activities in the area of indigenous issues'.

It is important to realise that the Declaration does not contain any new rights. Rather, in one document, it contains existing human rights standards that are enshrined in international law and interprets them as they apply to Indigenous peoples.

Clearly, there are strong legal arguments for the implementation of the Declaration. But legal debates aside, what a monumental show of bad faith and breach of trust it would be for the Australian Government, having endorsed the Declaration – a document that no country in the world opposes – to not implement it.

I believe that now is the time to move beyond the rhetoric of support and calls for implementation, to the development of a detailed plan of action and raise awareness and understanding of the Declaration.

I urge all of you here today to familiarise yourselves with the Declaration – there are copies of the book, poster and community guide available at the Conference – and to use the Declaration in your work, whether it is talking about community issues or writing submissions to government.

The Constitution

In moving towards full implementation of the Declaration in laws, policies and programs, we must also ensure Indigenous rights and interests are placed at front and centre of Australian nationhood and embedded in the institutional fabric of the country – by recognising Aboriginal and Torres Strait Islander peoples in our Constitution.

And why is it so important to recognise Australia's first peoples in the Constitution?

The Attorney-General recently 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.

But I believe the nation is beginning to come to terms with its true, complete history.

The Queensland, Victorian and NSW Constitutions have all been changed to recognise Aboriginal and Torres Strait Islander Peoples.

At the federal level, bipartisan support for amending the Constitution in this regard has been maintained since 2007 and was reaffirmed by both major parties as election commitments in the federal election held in August 2010.# The Greens and Independents have also expressed their support for moving towards a referendum.

This year, the first formal steps towards a referendum began with the establishment of the Expert Panel on Constitutional Recognition of Indigenous Australians.

The 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 this year on options for Constitutional recognition of Indigenous peoples. I am pleased to be an ex officio member of the Expert Panel.

The Discussion Paper by the Expert Panel was launched two weeks ago – along with their website. The Paper outlines a number of ideas for changing the Constitution, including:

- the inclusion of a statement of recognition in a preamble to the Constitution, or in the body of the Constitution, acknowledging Indigenous Australians' distinct culture, identity and heritage, their prior custodianship 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.
- new powers for the Australian Government to legislate to protect Indigenous culture and heritage, and to redress historical disadvantage.

There also may be other ideas that emerge from the consultation and engagement process. I encourage you all to engage in this process, inform yourselves of the issues and have your say – because this provides an opportunity for us to be involved in this national dialogue to get our views across about how we want to be recognised in the Constitution.

While the Expert Panel process is a crucial first step, we have much to do to achieve a successful referendum. And the task of achieving a successful referendum cannot and should not be left to the Expert Panel alone.

To be successful, a referendum requires a double majority. That is, the majority of people in the majority of States must vote 'yes'. In real terms, this means we need between 12-13 million voters on our side.

Tomorrow afternoon, there is a Dialogue Forum to talk about Constitutional reform in relation to land justice. I look forward to an interesting discussion. It is essential that we engage effectively in this process, especially when we consider that popular education and popular ownership are two critical factors for success.

I would also like to say to those who doubt the importance of what amounts to a form of words that this process to achieve Constitutional reform will give this generation of Australians the opportunity to say 'yes' – and an opportunity to demonstrate goodwill and innate decency, just like 90% of Australians did in 1967.

Yes, there will be debates, speeches, opinion pieces in the press, people prowling the parliamentary corridors, Constitutional lawyers at 10 paces, yea and nay sayers, documentaries, panel discussions, arguments at dinner parties, barbecues and in front bars – all of these things.

And it's precisely all of these things that will build awareness, focus minds and hearts, and help move us all forward as a nation.

This will be a long hard journey. But it's the journey that will mark our maturity as a nation, not just the destination – as important as it might be.

This referendum about a change to our Constitution is not just about Aboriginal and Torres Strait Islander peoples. It's not about looking back. It's about looking forward and moving forward as one, united nation.

Lateral violence and our relationships in native title – starting the conversation

I also want to start another conversation today. It's a conversation about improving our relationships within our communities, our organisations and our families. This is a key priority for me and I will be looking at this through the

concept of 'lateral violence'.

Lateral violence is described by Richard Frankland as 'internalised colonialism' and includes:

the organised, harmful behaviours that we do to each other collectively as part of an oppressed group; within our families, within our organisations and within our communities. Lateral violence is the expression of rage and anger, fear and terror that can only be safely vented upon those closest to us when we are being oppressed.

The notion of lateral violence says that this behaviour is often the result of disadvantage, discrimination and oppression, and that it arises from working within a society that is not designed for our way of doing things.

But whether the lateral violence theory is sustainable or not, this is abuse and there's no excuse for it. We must have a zero tolerance policy for any type of abuse anywhere at any time.

Stakeholders and commentators talk about native title creating formal disputes within communities. I believe that native title processes also provides a platform where previously latent conflicts that may have pre-existed can be played out, native title situations can exacerbate the potential for lateral violence within our communities.

All of us who are involved in native title claims or agreement-making know that at every step of the process, the requirement to legitimise our claims and our birth rights creates conflict and tension within our communities, and effectively results in lateral violence.

Yesterday, Ian Delaney spoke to us about the situation on Stradbroke Island, where he is the sole named claimant, where in all likelihood there will a consent determination in the very near future.

I think that when this occurs there will be a fairly unique perspective because with the determination will come the closure of mining instead of the usual proposed development. And along with this will come the loss of jobs rather than their creation.

Now mining has been going on the Island for about 70 years and in that time the community and families have been divided about it. There are some who have take-up job opportunities and have done ok.

There are others who have fought the mining tooth and nail and have always agitated for it's ending. Then along comes native title which, like I said before, provides another platform for these old fights to take on a renewed energy.

Ian spoke of the challenges of moving to tourism as the base for the job market and the fear of some being left behind.

Add to this some non-Aboriginal people who are similarly divided between the pro and anti mining camps and are now wanting to become new best friends of the mob.

And just to provide some more complexity, some of those new jobs created will be in the joint management of national parks. People like Valerie Cooms, Darren Burns, Bain Stewart and Aunty Joan Hendricks have been advocating that those who will be working with the Traditional Owners need to be culturally competent and are in a seeming endless round of negotiation with the State Government about something as basic as this.

So you can see there are many platforms available to the Quandamookas to play out all sorts of grievances, disputes and quarrels, be they related to native title or not.

Initially, I was concerned that a frank airing of this issue might well cause me some grief. I was prepared that some would accuse me of airing our dirty laundry in public – saying that this is just the way things are done in the Indigenous world and that I'm just making another rod for our backs with which non-indigenous people can beat us up.

However, I've been encouraged by the responses I have received when I have raised this issue with Aboriginal and Torres Strait Islander people.

People recognise this is a real issue. And one we need to address.

Even in our communities there seems to be a considerable appetite to confront it and deal with it. I am immensely heartened by this.

Lateral violence is something we need to address ourselves, but we also need to be aware of how governments can create the environment for lateral violence through a lack of recognition and engagement and pitting groups against each other. As we go through the next few days of talking and listening, it would be useful to think about the native title system and the ways that native title processes create the space for lateral violence to occur in Aboriginal and Torres Strait Islander communities.

So how do we stop policies that are supposed to empower us from destroying us?

I would like to suggest that we use the Declaration to guide the development of

our relationships, be they within the community, organisations or within families. For example, the Declaration states in:

- Article 18, that we have the right to participate in decisions that affect us.
- Article 19, that Governments should work with our peoples through a representative body to obtain our free, prior and informed consent before making laws or policies that affect us.
- Article 32, that we have the right to determine how our country is to be developed and to set the priorities for any development, including the use of resources.
- Article 34, that we have the right to develop and practice our own laws, legal systems, customs and traditions in accordance with international human rights standards.
- Article 35, that as a group, our communities can determine the responsibilities of individuals within that community and what those responsibilities are to their communities.
- Article 40, that we have the right to a fair process to resolve disputes and to provide effective remedies for violations of our rights. This process should consider our customs and legal systems and international human rights law.

These Articles of the Declaration, when read together, guide how we engage with government and the broader community but, even more importantly, provide us with direction for how we engage with each other.

Ian told us yesterday about the structure that has been developed on Straddie that bring families together to work their way through these issues that underpins and supports him as the sole named claimant.

Others spoke about deciding how decisions will be made between the mob before entering into the native title process. You know developing, if you like, rules of engagement.

I think the Declaration can provide us guidance on all these things.

Lateral violence is an area of work that I will be discussing in this year's Social Justice and Native Title Reports. I am aware that there were opportunities to talk about this yesterday and there will be opportunities to talk about this later in this conference.

I'm interested in hearing your experiences around lateral violence and invite you to come and talk to me and my staff over the new few days.

I want to finish today by quoting some of Oodgeroo's poem the 'Song of Hope' which I think is appropriate for today:

Look up, my people,

The dawn is breaking

The world is waking

To a bright new day

When none defame us

No restriction tame us

Nor colour shame us

Nor sneer dismay.

Now brood no more

On the years behind you

The hope assigned you

Shall the past replace

When a juster justice

Grown wise and stronger

Points the bone no longer

At a darker race.

New rights will greet us

New mateship meet us

And joy complete us

In our new Dreamtime¹

To our father's fathers

The pain, the sorrow;

To our children's children

The glad tomorrow

Thank you.

¹ O Noonuccal, *Song of Hope* (1966).