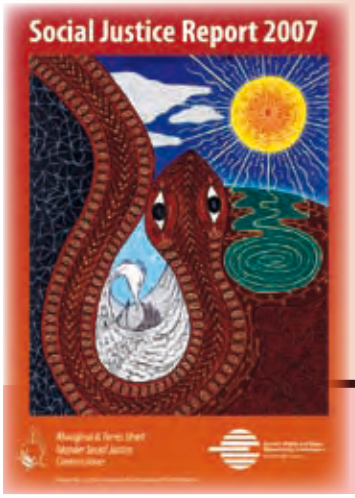


Social Justice and Native Title Reports 2007

A COMMUNITY GUIDE

A NOTE FROM THE COMMISSIONER

IN MY ROLE AS SOCIAL JUSTICE COMMISSIONER I AM REQUIRED TO PRODUCE TWO ANNUAL REPORTS ON Indigenous human rights issues – the Social Justice Report and the Native Title Report.

The reports, which are tabled in federal Parliament, analyse the major changes and challenges in Indigenous affairs over the past year. They also include recommendations to government that promote and protect the rights of Indigenous Australians.

This Community Guide gives a brief overview of some of the key issues in both reports.

An important part of my role is to work with governments, Indigenous organisations and communities, along with many other groups on practical human rights projects.

Over the coming 12 months I will:

- work with Indigenous health advocates and the government at a national summit to plan a coordinated strategy to 'close the gap' in health inequality for Indigenous Australians
- support Indigenous communities to develop and implement practical initiatives to deal with child abuse and family violence
- draw attention to the ongoing concerns and issues facing members of the Stolen Generations
- continue discussions with communities and governments on improving the operation of the native title system
- work with others to identify how the native title system and other Indigenous land rights can be used to contribute to Australia's commitment to tackle climate change
- begin discussions with the Australian Government to promote implementation of the Declaration on the Rights of Indigenous Peoples, adopted last year by the United Nations General Assembly.

I will also follow up on the issues and recommendations in the Social Justice and Native Title Reports.

Warning: This publication contains images of deceased Aboriginal and Torres Strait Islander persons.

TOM CALMA is the Aboriginal and Torres Strait Islander Social Justice Commissioner.

Tom, an Aboriginal elder from the Kungarakan tribal group and a member of the Iwaidja tribal group of the Northern Territory, commenced his five-year term in July 2004.

As Commissioner he advocates for the recognition of the rights of Indigenous Australians and seeks to promote respect and understanding of these rights among the broader Australian community.

Tom has been involved in Indigenous affairs at a local, community, state, national and international level and has worked in the public sector for over 30 years.

Aboriginal and Torres Strait Islander Social Justice Commissioner

Human Rights and Equal Opportunity Commission
www.humanrights.gov.au

Indigenous communities . . .
tackling family violence

> ***"THE SUCCESS OF THESE INITIATIVES WAS BUILT ON GOOD PROCESSES, PARTNERSHIP AND CONSULTATION – THE FOUNDATIONS FOR A HUMAN RIGHTS BASED APPROACH TO FAMILY VIOLENCE AND CHILD ABUSE."***
>
> ***Tom Calma***

FAMILY VIOLENCE AND ABUSE IS OCCURRING at an unacceptable level in our Indigenous communities. It is a scourge that damages our families and communities, traumatises our women and children, and tears at the fabric of our culture.

Over the last 18 months there has been sustained media coverage of these issues. What we have rarely seen, however, is how Indigenous people and communities across Australia are taking positive steps to respond to family violence, abuse and neglect. Many are trying to stop it from happening in the first place.

In my Social Justice Report I draw attention to 19 examples of successful programs which use a range of approaches to address this issue: community education; healing; alcohol management; men's groups; family support and child protection; safe houses; and programs for offenders.

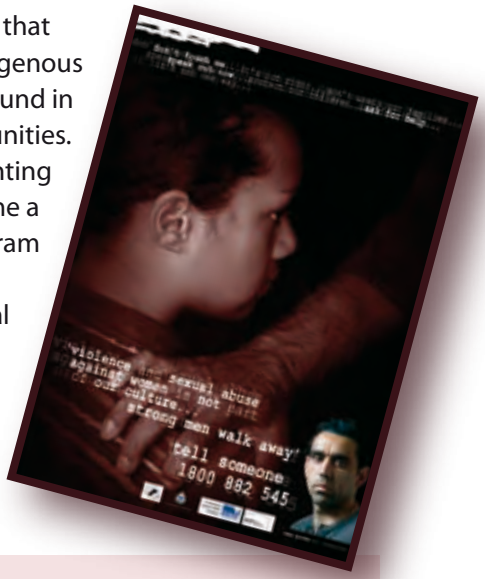
Some are well-established, some build on earlier programs and others are in their early stages. They all demonstrate the critical need to confront family violence, but to do so in a way that reinforces the inherent worth and dignity of Indigenous peoples.

The case studies in the Social Justice Report show that there is no 'one size fits all' approach to tacking family violence. Sometimes a program begins because of the commitment of a single person or small group. Sometimes it happens because communities feel a need to take action themselves. Other initiatives develop through local partnerships with government agencies, non-government organisations, the courts or police.

These case studies provide an opportunity to celebrate their successes and learn from their experiences.

They also offer some key lessons we can build on – the importance of **community consultation** and **community capacity building**, the value of taking a **holistic approach** to deal with complex issues and the critical need to **involve men** and **empower women**.

I am a firm believer that the answers to Indigenous problems can be found in Indigenous communities. Rather than reinventing the wheel every time a new policy or program is announced, tomorrow's national strategy should come out of today's 'promising practices'.



TO FIND OUT MORE . . .

A Community Guide showcasing seven case studies of 'promising practice' in dealing with family violence is available online at **www.humanrights.gov.au/social_justice/sjreport07/** or by phoning **1300 369 711**.

Cross cultural mediation: Yolngu elders and police officers at Mawul Rom training in Arnhem Land.

Towards sustainable development

RIGHT AROUND THE COUNTRY THERE ARE A number of positive initiatives where Indigenous people are using their land to pursue economic, social, cultural and environmental outcomes.

The 2007 Native Title Report profiles a couple of these innovative projects.

Winner of the 2007 Eureka Prize for innovative solutions to climate change, the **Western Arnhem Land Fire Abatement (WALFA) project**, utilises traditional fire burning practices to reduce carbon emissions and generate income for local communities.

The WALFA project is based on traditional Indigenous fire management practices, leaving the landscape in several different fire states and creating fire breaks to stop the spread of destructive and highly polluting late dry-season wildfires. It is carried out under the management of the Northern Land Council (NLC), in conjunction with rangers in five partner communities.

Under an agreement between Darwin Liquid Natural Gas and the Northern Territory Government, the company pays the government an annual fee of $1 million for carbon abatement. The government then pays the NLC, which distributes the funds to the local communities, to carry out the work.

With climate change a key discussion area at the upcoming United Nations Permanent Forum on Indigenous Issues, WALFA is an example of an Indigenous-led project delivering positive outcomes across a 'quadruple bottom line': it has environmental, economic, social and cultural benefits.

Late dry season fire. Photo: Russell-Smith, J (2007).

INDIGENOUS LAND USE AGREEMENTS (ILUAS) ARE an important tool of the native title system. They are voluntary agreements that, once finalised, are legally binding on all parties.

The **Central Queensland ILUA template** is the result of three years of negotiation. The Gurang Land Council Aboriginal Corporation worked with three native title claim groups from central Queensland, the Local Government Association of Queensland and 16 local governments to develop a 'template' for future ILUA negotiations.

While a number of ILUAs have been negotiated around Australia to address individual situations, templates for these agreements are a recent development. They include standard clauses, terms and conditions which can then be applied to individual agreements to suit different situations and achieve specific outcomes.

The Central Queensland ILUA template could serve as a model for other agreements involving local government, allowing groups to learn and build on the experiences of others.

***The Corporations (Aboriginal and Torres Strait Islander) Act** came into effect on 1 July 2007. It aims to strengthen governance and management of Indigenous corporations through the adoption of consistent governance practices and accountability standards.*

I am concerned that some organisations may struggle to meet their obligations under the Act. If you have questions about how the changes will affect your organisation, contact the Office of the Registrar of Aboriginal and Torres Strait Islander Corporations: www.oratsic.gov.au.

The Office of the Registrar of Aboriginal and Torres Strait Islander Corporations (ORATSIC) is responsible for ensuring Indigenous corporations understand their obligations and that the Act is well administered.

The Northern Territory intervention:

"SO LONG AS THE NT INTERVENTION LEGISLATION PERMITS THE CONDUCT OF RACIALLY DISCRIMINATORY ACTIONS, IT WILL LACK LEGITIMACY AMONG ABORIGINAL PEOPLE AND COMMUNITIES AS WELL AS THE BROADER AUSTRALIAN SOCIETY. IT WILL ALSO LEAVE AUSTRALIA IN BREACH OF ITS INTERNATIONAL HUMAN RIGHTS OBLIGATIONS."

Tom Calma

IN JUNE 2007 THE '*LITTLE CHILDREN ARE SACRED*' report was released, exposing the desperate plight of many Indigenous women and children in the Northern Territory who experienced family violence and sexual abuse. That same month the Australian Government announced a 'national emergency response' to address the problems identified in the report, which has come to be known as the 'NT intervention'.

Under legislation passed in August 2007, the government initiated a range of sweeping changes: health checks for all Aboriginal children; widespread alcohol restrictions; reforms to welfare payments; an end to the CDEP scheme; scrapping of the permit system; increased policing; and acquiring townships under five-year leases.

The NT intervention presents an historic opportunity to deal with a tragedy that has existed for too long which has destroyed too many families and young Aboriginal lives. And while I support the previous government's **intentions** to protect women and children, I have deep concerns about the actual **methods** used as part of the Northern Territory intervention.

The NT intervention legislation, and other associated measures, raises complex human rights challenges. As Social Justice Commissioner, my role is to assess whether it meets international human rights standards.

These standards are not merely technical matters that sit distant from the day-to-day realities of life for Indigenous children and their families. The ability of children, their families and their communities to enjoy their human rights has a profound impact on the environment in which they live, grow and develop.

My main concerns are that:

- **The NT legislation is inappropriately classified as a 'special measure'.** It is not possible to support the view that all of the initiatives contained in the legislation are beneficial and can be justified as 'special measures'. It is therefore not possible to say that the legislation is consistent with the Racial Discrimination Act 1975 (RDA).
- **The NT intervention legislation contains a number of provisions that are racially discriminatory.** There are also a number of provisions that deny Aboriginal people in the Northern Territory safeguards and human rights protections that exist for all other Territorians and Australians.
- **The NT intervention removes protection against discrimination that occurs in the implementation of the intervention** by explicitly preventing the application of the RDA and the Northern Territory Anti-Discrimination Act.

I also have a number of specific concerns about the consistency of the income management regime with the rights to social security, privacy and non-discrimination; the consistency of the alcohol management regime with the right of non-discrimination; and the absence of effective participation of Indigenous people in decision making that affects them.

a human rights perspective

MEETING HUMAN RIGHTS STANDARDS – TEN POINT ACTION PLAN

In the Social Justice Report I outline a **Ten Point Action Plan** for modifying the NT intervention so that it respects the human rights of Indigenous people and treats us with dignity.

ACTION 1:
Restore all rights to procedural fairness and external merits review under the NT intervention legislation.

ACTION 2:
Reinstate protections against racial discrimination in the operation of the NT intervention legislation.

ACTION 3:
Amend or remove the provisions that declare that the legislation constitutes a 'special measure'.

ACTION 4:
Reinstate protections against discrimination in the Northern Territory and Queensland.

ACTION 5:
Require consent to be obtained in the management of Indigenous property and amend the legislation to confirm the guarantee of just terms compensation.

ACTION 6:
Reinstate the CDEP program and review the operation of the income management scheme so that it is consistent with human rights.

ACTION 7:
Review the operation and effectiveness of the alcohol management schemes under the intervention legislation.

ACTION 8:
Ensure the effective participation of Indigenous peoples in all aspects of the intervention – Developing Community Partnership Agreements.

ACTION 9:
Set a timetable for the transition from an 'emergency' intervention to a community development plan.

ACTION 10:
Ensure stringent monitoring and review processes.

In putting this plan forward, I note that the new federal government has emphasised the importance of ensuring that the NT intervention proceeds in a manner that is consistent with Australia's human rights obligations.

COMPULSORY FIVE YEAR LEASES

A central element of the NT intervention legislation is the compulsory acquisition by the government of five year leases over Aboriginal-owned land. This approach raises a number of significant human rights issues.

Under the legislation, any existing Aboriginal land in the NT can be compulsorily acquired without consent of the owner; there is no unconditional guarantee for compensation on just terms; the government is not compelled to pay rent; and the Minister can make wide-ranging decisions, including who can live in the community, without being answerable to Parliament.

For more information about leases see Chapter 9 of the Native Title Report.

Aboriginal women have answers themselves: Women and children at the Balgo Women's Law Camp. Copyright Zohl de Ishtar, 2007.

Native title: 15 years on . . .

IN 2007 WE MARKED THE 40TH ANNIVERSARY OF the 1967 constitutional referendum, which promised Indigenous Australians equal rights and equal opportunities. We also marked the 15th anniversary of the High Court's decision in Mabo No 2, which led to the passage of the *Native Title Act 1993*.

The Act established a system where Indigenous people can gain recognition by Australian law of rights and interests they have in land and waters according to Indigenous traditional laws and customs.

Its intention was to promote and protect the rights of Indigenous Australians, deliver economic, social and cultural benefits for Indigenous communities and advance the process of reconciliation among all Australians.

Anniversaries are an appropriate time to ask the big questions. For instance, does the Native Title Act deliver on its principal objects? Does it offer real economic and social development opportunities for Indigenous Australians? And, looking deeper, is it just in its structure and just in its application?

Left to right: Greg McIntyre (solicitor); Ron Castan QC; Eddie Mabo; Bryan Keon-Cohen (junior counsel).
The photograph is courtesy and copyright of Bryan Keon-Cohen.

Since it was introduced, the native title system has been successfully used in many parts of the country. There are over 68 registered determinations of native title on the Native Title Register and an increasing number of Indigenous Land Use Agreements are entered into each year.

These successes, however, can hide serious problems. Fifteen years on, the system is in gridlock and many Indigenous people feel it has delivered little in the way of meaningful results. The process is seen by many to exacerbate old conflicts and create new ones between Indigenous and non-Indigenous Australians.

The native title system has become too complex, too legalistic and too bureaucratic. It hinders rather than helps Indigenous people towards the full realisation of their rights.

The previous federal government made a number of changes to the native title system, which came into effect in 2007. However, it would seem that it was the imperatives of government, rather than the needs and aspirations of Indigenous people, that drove these changes.

As the native title system has developed, its own operation – along with a desire to save time and reduce costs – has become the primary focus, rather than the outcome it was originally established to achieve.

As well as reviewing the changes to the native title system, I consider four Federal Court decisions in this year's Native Title Report. These highlight the hurdles faced by Indigenous people seeking recognition of their native title. These need to be removed.

There needs to be a comprehensive review of the whole native title system focusing on how the system may better deliver protection and recognition of native title. The review needs to seek significant simplification of the legislation and structures so they are in an easily discernable form. There should also be a national summit on the native title system to bring together wide ranging views and fresh thinking on how the Native Title Act, and system, may fulfill its primary objective.

Assessing changes to the Native Title Act

THERE HAVE BEEN A NUMBER OF SIGNIFICANT changes to the native title system over the last year. These changes will have a direct impact on Indigenous stakeholders and their representatives.

As the changes are implemented it will be interesting to see whether they improve the system. My initial concerns are that the changes have not focused on ensuring the system provides for greater recognition and protection of native title. And that they will not deliver this.

There are outstanding issues that also need to be addressed, including those around overlapping claims, connection reports, delay in conducting tenure research, lack of resources and gathering of evidence.

CLAIMS RESOLUTION PROCESS

Changes to the Native Title Act have placed a much greater emphasis on resolving claims through mediation, by giving stronger powers to the Native Title Tribunal and changing the role of the Federal Court. The tribunal is now the primary mediator of native title claims.

The tribunal has been given powers to direct attendance at mediations and the production of documents, and new powers to conduct reviews and inquiries. There is a new obligation on parties to mediate in good faith, and consent determinations may now be made over part of a claim, rather than the whole claim.

New powers have also been given to the Federal Court. The court may now dismiss claims that fail the registration test, and in certain circumstances, it must dismiss claims lodged in response to a future act notice.

CHANGES TO REPRESENTATIVE BODIES AND PRESCRIBED BODIES CORPORATE

Aboriginal and Torres Strait Islander representative bodies assist traditional owners to gain protection and recognition of their native title rights, while prescribed bodies corporate hold and manage native title on their behalf. Without these two groups, the whole native title system would grind to a halt.

Changes to the Act now allow non-Indigenous corporations to perform the functions of representative Indigenous bodies. Representative bodies are now only recognised for limited, fixed terms of between one and six years.

I am concerned that such short-term recognition periods may result in an erosion of the independence and security of representative bodies. In addition, if the bodies are not adequately funded, it compromises their ability to provide effective representation.

Changes to the Act limit the requirement on prescribed bodies corporate to consult with native title holders about decisions concerning their lands. It is essential that Traditional Owners and the community are able to participate in important decisions and give informed consent.

CHANGES TO RESPONDENT FUNDING

The Australian Government funds many elements of the native title system, including the 'respondent funding scheme', which can provide financial assistance to certain 'non-claimant' parties to participate in native title proceedings.

The Attorney-General's Department publishes guidelines for funding and administering the scheme. New guidelines have been released which are an improvement.

However, the restrictions on who may receive assistance under the guidelines may not go far enough. It is important that participants in native title proceedings have a real and significant interest in the proceedings. The involvement of parties in native title proceedings who have no such interest makes the proceedings unnecessarily complex, lengthy and expensive. The outcome may also be compromised.

Sorry: the first 'essential' for social justice

TO COMMEMORATE THE 10TH ANNIVERSARY of HREOC's *Bringing them home* report in 2007, I invited Indigenous peoples across Australia to share their experiences of removal and their hopes for the future.

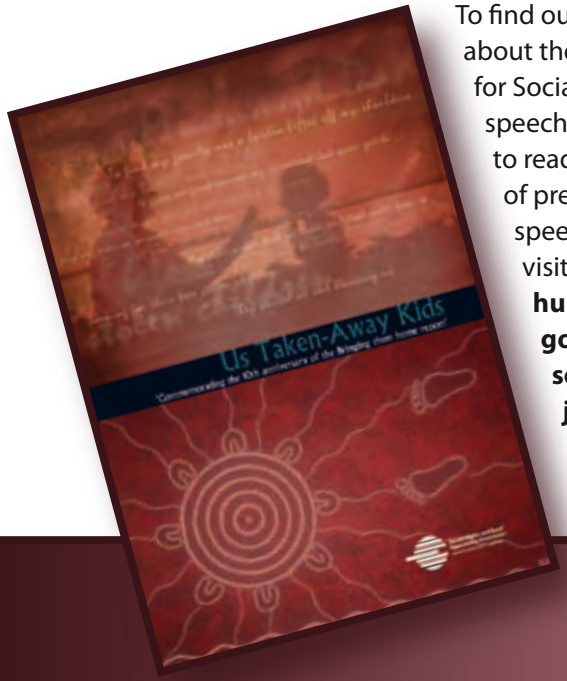
Us Taken-Away Kids is a moving collection of the contributions they generously provided. It is a testimony to their resilience and the ability of Indigenous people to overcome adversity and look to a brighter future.

The recent national apology made by the Australian Parliament to members of the Stolen Generations was an important step on that journey towards healing and reconciliation.

Sorry is an important word. In fact I believe it is the starting point for any real and lasting achievement of social justice for Indigenous Australians.

'Sorry' was the theme of the first of seven speeches that I am giving on the 'Essentials for Social Justice.' The second speech, given in February 2008, looked at 'Reform'.

Speeches to be delivered in the coming months will discuss: 'Native Title', 'Health', 'Land and Culture' and 'The Future'. This last speech will review the progress of the new federal government on Indigenous issues and outline an inter-generational approach to Indigenous affairs planning and service delivery.



To find out more about the 'Essentials for Social Justice' speech series, or to read transcripts of previous speeches, visit **www.humanrights.gov.au/social_justice/essentials/**.

Copies of *Us Taken Away Kids* can be ordered through HREOC (see below).

MORE ON SOCIAL JUSTICE AND NATIVE TITLE

Call 1300 369 711 to order hard copies and CD-ROMs of the Social Justice and Native Title Reports and for additional copies of this Community Guide.

The *Social Justice Report 2007* is available at **www.humanrights.gov.au/social_justice/sj_report/sjreport07/**

The *Native Title Report 2007* is available at **www.humanrights.gov.au/social_justice/nt_report/ntreport07/**

If you have comments or feedback please email us at **sjreport@humanrights.gov.au** or **ntreport@humanrights.gov.au**

DEALING WITH DISCRIMINATION

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For free advice on discrimination and your rights, or to make a complaint, call our Complaints Information Line on **02 9284 9888**, **1300 656 419** or TTY **1800 620 241**.

Information about making or responding to a complaint is available at **www.humanrights.gov.au/complaints_information/.** You can also email us at **complaintsinfo@humanrights.gov.au**.