2009 Mabo Oration: Tom Calma

I begin by paying my respects to the Turrbal and Jagera peoples, the traditional owners of the land where we are meeting today. I pay my respects to your elders, to those who have come before and to those who are still to come.

Thank you to Aunty Valda Coolwell for your warm welcome to country.

My thanks also to Commissioner Susan Booth and the Anti-Discrimination Commission of Queensland for the invitation to deliver the 2009 Mabo oration.

I acknowledge:

- Mrs Bonita Mabo who could not join us tonight because of ill health and I wish Auntie Bonita a quick recovery.
- The Honourable Justice Wilcox;
- Her Excellency Ms Penelope Wensley Governor of Queensland;
- Members of the Judiciary and Tribunals;
- Members of Parliament;
- Business and community leaders;
- Heads of government departments;
- My Aboriginal and Torres Strait Islander brothers and sisters.
- Distinguished guests, friends and supporters.

It is an honour to speak to you this evening in commemoration of a great warrior - Eddie Koiki Mabo.

From self-respect comes dignity, and from dignity comes hope : meeting the challenge of social justice for Aboriginal and Torres Strait Islander peoples

I first met Eddie at education conferences in the early 1980s. I remember well his passion and the way he persuasively set out many issues, including access to education and recognition of his traditional rights to land.

In 1992 Eddie Mabo was posthumously awarded the Human Rights Medal, the highest honour at the national Human Rights Awards. These are awarded each year by the Human Rights and Equal Opportunity Commission - or the Australian Human Rights Commission - as we are now known.

This award was also presented to Eddie Mabo's co-claimants in the case: the Reverend Dave Passi, Barbara Hocking, and the now deceased Sam Passi, James Rice and Celuia Mapo Salee.

It was awarded in recognition of their long and determined battle to gain justice for their people and the work over many years to gain legal recognition for indigenous people's rights .

I would also like to pay my respects to each of these people, extraordinary individuals who stood strong alongside Eddie Mabo and fought for recognition of our cultures.

Eddie Mabo was a man of courage and principle who fought for the inherent rights of the Meriam people, and ultimately for the rights of all Torres Strait Islanders and Aboriginal peoples. He was a man who spoke and acted on what he felt was a simple and certain truth.

To Mrs Mabo, and the members of your family who are here tonight. And to all of the families of the claimants, thank you for your commitment and resilience through this endeavour. You changed the path of our nation.

As Larissa Behrendt stated in the previous Mabo oration:

Like many of the great Aboriginal and Torres Strait Islanders leaders, (Eddie Mabo) had a mix of street smarts and self education, an unwavering sense of justice and a profound understanding of his own history. The genesis of the fight that he would take all the way to the High Court came after he had worked at James Cook University as a gardener and where he would also sit in on lectures and read books in the library, particularly those written by anthropologists about his own people.

The folklore now says that, after speaking about his land back on Mer, or Murray Island, with Professors Noel Loos and Henry Reynolds, Mabo was surprised to learn that the land that he understood was his was actually Crown land. He reportedly said, No way, it's not theirs, it's ours. And so he began his long fight for land justice that would culminate in the 1992 decision that now bears his name.

Eddie Mabo stands tall in a long line of Aboriginal and Torres Strait Islander peoples who have advocated for the recognition of our peoples' rights.

People such as William Cooper, Kath Walker, Joe (Pumeri) McGinness (a fellow Kungarakan), 'Mum' Shirl Smith, Margaret Tucker, Pastor (and later Sir) Douglas Nicolls, Faith Bandler, Bill Onus, Charles Perkins, Jack Patten and Vincent Lingiari. And we cannot forget the Yolngu people of Arnhem Land who lost their land claim in the late 1960s on the basis that Australian law did not recognise Indigenous rights to land but who, in doing so, were pioneers for land rights.

And there are many others. All of them, I honour here today.

Eddie Mabo's fight was not a popular one.

It was not about working within the confines of the system as it existed.

It was about challenging a fundamental premise on which our society operated.

Ultimately, what Eddie Mabo's fight shares in common with the advocacy of so many of our warriors that preceded him, is that he spoke about a fundamental truth.

He spoke about a fact that was so obvious, and that should have been self-evident to us all.

That fact was, that the land we now call Australia, was occupied when the British came here and that the land (and the seas) continued to be cared for, occupied, utilised and identified as the land of different tribal groups, operating in accordance with their customary laws and traditions.

This is a reality so striking and so obvious that it is hard not to comprehend.

But it took ten long years before the courts finally recognised this fact in 1992.

During that time, Eddie Mabo sadly lost his life.

When I was considering what to say in this Oration, I asked myself "what does Eddie Mabo's fight mean to me?"

The immediate response that came to mind is that the 'promise' of the Mabo case has not been met.

This week marks the seventeenth anniversary of the High Court's Mabo decision which recognised the continued existence of native title in Australia.

Seventeen years may seem a long time to some - but it is not a long time in the history of this country, or in the history of the practice of culture by Aboriginal and Torres Strait Islander peoples on these lands.

However, seventeen years should have been more than enough time to have built on Eddie Mabo's legacy.

But that has not happened. The native title system has been a disappointment to many Indigenous people. It is often a long, exhausting and painful road for the claimants. The majority of claims remain unresolved, with the system grinding along endlessly. Some have been afoot for over 15 years now, and the National Native Title Tribunal reports that at the current rate, it will take upwards of 30 years to determine native title across the country.

Native title bodies and claimants are tangled up in processes for notifications, registration and connection tests and with other technical matters. They are tangled up in processes that prioritise the needs of non-Indigenous people, such as under the right to negotiate or rights to be consulted, without any underlying recognition of title flowing to Indigenous peoples. And they are tangled up in negotiating agreements that generally provide only begrudging recognition Aboriginal and Torres Strait Islander peoples' rights to land, and treat other issues as 'non-native title outcomes' - an absurd distinction if ever there was one.

This is a long way from what Eddie Mabo fought for, and it is a long way from the self-evident truth that he sought to have recognised.

I will talk more about this shortly.

On further reflection I thought this is not really what Eddie Mabo's actions mean to me. They don't reflect on Eddie Mabo. They reflect on the actions of Australian governments that followed, and on the narrow legal interpretations of the courts after Eddie Mabo died.

Eddie Mabo's actions speak to me about the power of determination and the importance of acting on the truth.

Eddie Mabo believed that a fundamental problem existed in Australian society. He was undeterred by the attempts of the Queensland Government who tried to pre-emptively extinguish any native title rights we had. Eddie Mabo and his co-claimants persisted and persisted. He struggled and firmly held onto a vision of his people and his vision for the future.

And what he fought for was an inconvenient and uncomfortable truth to many.

But this truth would not go away and would ultimately have to be addressed.

And so, the overarching theme of this Oration is about self-evident truths in Aboriginal and Torres Strait Islander affairs. In particular, the need to build stronger relationships between Indigenous and non-Indigenous Australians that are based on honesty, acknowledgment and understanding.

Self-evident truths are authentic and we know them when were hear them.

These truths are not necessarily abstract, but instead they relate directly to human experience. Sometimes, in fact too often, these truths fall from our sight and give way to complex and technical policy jargon, parliamentary discussions and pieces of legislation that sit some distance from the living, breathing, proud, and sometimes fragile people it will affect.

In spite of this, truths are stubborn and are not easily deferred. The truth is persistent.

I have spent a great deal of my life advocating for the rights of Aboriginal and Torres Strait Islander peoples. As I speak to you tonight I am coming to the end of my five year term as the Aboriginal and Torres Strait Islander Social Justice Commissioner and Race Discrimination Commissioner.

In these roles one of my core functions has been to take the voices and the truth of peoples' lived experiences to government. It has been to ensure that the discussion and debate about Indigenous peoples and social justice is based on reality.

Tonight, I will talk about a few priority areas where we must return to the simple truths in order to move things forward.

Coming to the end of my term, I have been reflecting on what has happened over the last five years; where we have moved forward, and why, and where we have not advanced, and why?

I think we have made some great progress over this period, particularly in the past eighteen months. Even though it hasn't all been heading in the right direction, and at times there have been inconsistencies and contradictions in the approaches adopted, we are nevertheless moving forward.

What made the Apology such a momentous event? Ultimately, it was for its recognition of the truth and the generosity of spirit in which it was offered.

And it was for the way that our Parliament finally embraced our history as a way of unifying people, rather than denying history in order to divide us.

I do think there is a lesson for all Australians in the Apology beyond its specific recognition and condemnation of forcible removal practices.

It showed, for just one day, what a united Australia looks like when we squarely acknowledge our history and share our pain. It showed that ultimately, whether you are an Aboriginal or Torres Strait Islander person, or not, our futures are inextricably bound together by the common threads of dignity, respect and hope.

In his lead judgement in the Mabo case, Justice Brennan makes this point most eloquently. He noted that recognising native title involved overruling cases from the past, he states: 63... To maintain the authority of those cases **would destroy the equality of all Australian citizens before the law** .

Not just for Indigenous peoples, but for everyone. He continued: The common law of this country would perpetuate injustice if it were to continue to embrace the enlarged notion of terra nullius and to persist in characterizing the indigenous inhabitants of the Australian colonies as people too low in the scale of social organization to be acknowledged as possessing rights and interests in land.

Ultimately, a system built on discrimination or dispossession is a house of cards. It is not a stable basis for a society and it will not guarantee sustainability and cohesion into the future.

In the Indigenous policy sphere, we - and when I say we I am referring to the power brokers and policy makers - tend to become so focused on the way we do things, that we seem to have a perpetual desire to change and refine things. Too often we mistakenly believe that 'change' or 'reform' equates to improvement.

But we rarely look at the big picture and see whether we have the fundamentals right to achieve the outcomes that we desire. We don't ask ourselves, what is wrong with this picture? And by not asking this question, we can end up with policy approaches that border on the absurd, and that are simply not capable of ever achieving the type of objectives that they are set out to achieve.

There is lack of reality and grounding in Indigenous policy making that too often goes unnoticed. And most often Indigenous people are blamed when new initiatives fail. And always, it is Indigenous people and Indigenous communities who suffer when these policies fail, and fail, and then fail again.

This approach is what Lieutenant General John Sanderson, Chairman of the Indigenous Implementation Board in Western Australia calls, riding a dead horse . Doing the same thing again and again even though it plainly isn't working. In a recent speech at the

University of Western Australia, the Lieutenant General urged that if you find yourself riding a dead horse, the best policy is to dismount .[1] I agree entirely.

My point is that this should not be the way governments work. Government officials and public servants at every level in Australia must develop a live notion of the real issues affecting Aboriginal and Torres Strait Islander peoples.

We need to stop allowing governments to develop policies for our Aboriginal and Torres Strait Islander communities, in an insular and myopic fashion. And instead, governments need to develop a genuine and respectful partnership with Aboriginal and Torres Strait Islander peoples. This doesn't just mean engaging the 'usual suspects', that is, the Indigenous leaders who are easily to access. I'm referring to relationships across the communities themselves and government's hearing what matters to people.

One of the things that matter to Indigenous people every day, is their health and access to health services. In my annual Social Justice Report to Parliament in 2005 I proposed a new approach to achieve health equality within a generation. This set an overall target of life expectancy rates being equal between Indigenous and non-Indigenous peoples within 25 years, and that there be equal access to primary health care and health infrastructure within a decade.

I proposed that there be targets set to measure progress and to hold governments, and other service providers, accountable for their obligations to Indigenous peoples and to ensure that health (and other) policy was realistic, and capable of meeting the level of need among our communities. And I did this by articulating a human rights based approach to health.

This is not rocket science. But I must say how surprised I have been at how it has been regarded as an innovative, best practice model on a global level - praised by the World Health Organisation, the World Commission on Social Determinants, and the UN Special Rapporteur on Health among others.

This eventually grew into the Close the Gap campaign, a non-government and community led initiative that began in 2006. The previous government refused to engage with this campaign. Today it is a standard government policy agreed through the Council of Australian Governments and backed by significant commitments of new funding and with reporting mechanisms. The Prime Minister himself delivers a Close the Gap progress report on the first day of Parliament each year.

And this is another truth. The relationships between Indigenous Australians and the Australian Government must be based on respect for culture and human rights, on the principles of justice, equality and non-discrimination. Responsible governance requires clear benchmarks and targets. Governments' must be accountable for these benchmarks and targets. They must meet the commitments they make to Aboriginal and Torres Strait Islander peoples with all of the necessary funding, staffing and infrastructure support to ensure a possible success. And they must ensure that they work in real partnership with Aboriginal and Torres Strait Islander peoples.

I am pleased that there have now been preliminary discussions about how the 'close the gap' approach can be applied to Indigenous education. Already, the Australian Education Union, the National Centre for Indigenous Studies at the ANU, the National Indigenous Higher Education Council and senior Indigenous education professionals have started this conversation together. I hope we will see further developments in this regard in the coming year.

Sometimes we reach a point where opportunities open up for us to seriously reflect on why we do the things we do, and why we do them in that way. We are at one of those moments at present.

We still have a relatively new federal government, which has continually stated its desire to 'reset the relationship' with Indigenous peoples based on mutual respect and good faith. It has joined with all Australian governments to make extremely significant commitments to close the gap, including by working in new ways and with accountability processes that have never meaningfully existed in the past. And it has committed to supporting Indigenous representative structures to ensure a seat at the table for Indigenous peoples in decisions that affect us.

So I want to reflect on what some of the fundamentals are that we still need to address, like actually having a plan of action. These fundamentals are broadly as follows:

- Ensuring our participation in decision making that affects us
- Adequately protecting our human rights
- Ensuring education is available to all of our children
- Being proactive about crime prevention by investing in our communities and
- Seeing native title as a core part of the social justice agenda.

To me, each of these should be self-evident.

They should appear obvious to everyone.

And you may think they are trite and wish that I was talking about something a bit more exciting.

Regrettably, the reality is that we cannot put our hands on our hearts and say with any conviction that current Indigenous policy adequately addresses the fundamentals I have listed.

The question then is why not?

Let us move to the first one: ensuring our participation in decision making that affects us.

The importance of this issue cannot be understated.

As I have stated on many occasions in recent years, it doesn't matter how magnificent a policy proposal is, how well crafted or clever it is, or how much money is attached to it. It will all amount to a hill of beans if it does not meet the 'reality test' of the livelihoods of Aboriginal and Torres Strait Islander peoples. Nor will it be legitimate in their eyes.

We need to be the central players in our own development. Sustained prosperity and well being among our communities can only be achieved from building and supporting our capacity.

More than this, we have the right to determine the priorities for our communities and for our families.

Sure, we, like any community, will make bad decisions from time to time. We may even make the type of disastrous decisions that governments have continually made for us over

the past two centuries. In fact we only need to look at the drivers of the Global Financial Crisis to recognise that no one is infallible.

Mistakes should be expected from time to time, so long as they are not the modus operandi and we actually learn from them, we can grow from them.

The current Australian Government has acknowledged that there are problems that have flowed from the lack of engagement and lack of participation of Indigenous peoples in policy processes. You may have heard the phrase that the government is committed to 'resetting the relationship' with Indigenous peoples.

The Government has also indicated its support for the establishment of a new national representative body for Aboriginal and Torres Strait Islander peoples.

This is clearly a critical mechanism for achieving the type of routine participation in decision making that we so desperately need.

At present, I am leading the process to develop a preferred model for a national representative body. There are detailed processes underway at present ahead of a final report being submitted to government at the end of July this year on the way forward.

I won't talk about this process tonight other than to urge all Indigenous peoples to get involved and have your say.

Instead, I wanted to reflect on some of the challenges that will be raised when a national representative body is in place.

If it is to succeed, the national body has to have influence with government **and** credibility with Indigenous peoples.

It should not simply be a body that operates like a seal of approval and ticks off government initiatives. It needs to be able to engage robustly with government to set the agenda, based on the evidence provided from Indigenous communities.

This is a two way relationship.

It may require redefining the priorities of government so that they are aligned with the priorities, hopes and ambitions of Indigenous peoples.

And it will require new partnerships and shared accountability.

This may ultimately need to be backed up by agreements, covenants or some other form of compact.

For Indigenous peoples, we also need to decide whether we want a national body that is representative of all of us, or simply a body that represents a national view of Indigenous issues and advocates for us collectively. There is a substantial difference between these two things.

A national view can be reflected through the processes of how a representative body operates - for example through e-forums, state-wide or regional planning forums, advisory councils or other consultation and research based activity. A representative view may require more extensive processes.

Resetting the relationship is, however, about more than having a national representative body. It is about Indigenous and non-Indigenous people learning to come together and hearing each other in a new way.

In resetting this relationship, we need to ensure that Indigenous perspectives are front and centre of all relevant policy development processes. All government workers should have in the front of their mind the questions: does the policy I am working on impact on Indigenous peoples? Have I engaged with Indigenous peoples to reflect their perspectives on this issue and to identify the pathway forward?

For example, my latest Native Title Report discusses in detail the challenges that climate change and water resources create for Indigenous peoples. Our voices in these processes to date have been marginal at best. This is despite significant potential for strategies to mitigate the effects of climate change creating or supporting economies for our peoples or alternatively, for our traditional practices to be severely impacted upon by mitigation strategies.

The critical importance of ensuring our engagement in the climate change debate is but one example of what needs to occur if we are to reset the relationship in good faith.

There are many other examples I could also use.

Here in Queensland, for example, we have seen the declaration of Wild Rivers in the Cape York region without sufficient consultation with the affected Indigenous communities and traditional owners. The same goes for proposals to declare sections of Cape York on the World Heritage list.

Gone should be the days when Indigenous or non Indigenous politically or ideologically driven pressure groups, governments or individuals can dictate what is best for Aboriginal or Torres Strait Islander peoples. Thorough community consultation and involvement of Indigenous peoples in designing the strategies for their communities should be at the centre of any such processes.

In April this year the Government formally signalled its support for the United Nations Declaration on the Rights of Indigenous Peoples so the Declaration must now be the pre-eminent reference on all issues relating to Aboriginal and Torres Strait Islander peoples.

The impact of decisions on the cultural economy and exercise of native title rights of traditional owners should be negotiated with affected communities and should be done so in accordance with the free, prior and informed consent of those communities.

The same goes for the implementation of other reforms in the Cape York region.

This leads to my next self-evident truth: that our human rights should be adequately protected so that we are treated equally to all other Australians.

Over the past decade we have seen a convenient but very destructive approach utilised by the Australian Government. This is to treat protections against racial discrimination as expendable and not a necessary precondition for government action.

The Wik ten point plan native title amendments were introduced despite being racially discriminatory. Heritage protection laws were exempted from a major development in South Australia to remove requirements to protect Aboriginal heritage. And in the Northern Territory

and Queensland, the Racial Discrimination Act has been suspended in communities covered by the Northern Territory intervention and those where the Queensland Family Responsibilities Commission Act applies.

This is unacceptable.

It is also wholly unnecessary.

This is a self-evident truth: there is an urgent need in Australia to promote and protect the rights of Indigenous peoples, importantly the right to live free from discrimination. The suspension of our racial discrimination protections can never be justified. Measures can be designed to protect women and children that are not racially discriminatory provided there are adequate protections in place for merits review and comprehensive consultation with communities. If proper processes are in place, initiatives such as the Family Responsibilities Commission do not depend on the suspension of racial discrimination or anti-discrimination laws to ensure their validity.

I am pleased that the Australian Government intends to remove the existing suspensions in legislation to be introduced to federal Parliament in October this year.

What this example also demonstrates is the vulnerability of our protection of human rights for all Australians.

The Australian Human Rights Commission is advocating very strongly for a national human rights act to codify our human rights responsibilities and to embed dialogue about human rights in to our system of government.

We are also advocating for this to be accompanied by constitutional reform at two levels. First, recognition in the preamble of Aboriginal and Torres Strait Islander peoples and our First Nations' status. And second, the removal of the racially discriminatory section 25 of the Constitution and its replacement with a clause guaranteeing equality before the law and non-discrimination.

Surely this is also part of resetting the relationship with Indigenous peoples. By acknowledging that we have been racially discriminated against during our history as a nation and setting a path where this cannot happen into the future.

So let me move to my next self-evident truth.

Without education, we can't properly invest in the next generation of our peoples. Aboriginal and Torres Strait Islander children deserve to have the same opportunities to be educated as non-Indigenous children. They deserve to be educated in schools that are properly resourced, culturally appropriate and accessible.

Again, it is remarkable to think that this is not the case in twenty-first century Australia.

In a country as wealthy as ours, we should at very least, be able to give Aboriginal and Torres Strait Islander children equal life chances through education.

Yet in remote locations in Australia there are limited school options for children living on country. In places with populations above 100 people you may find a primary school with part-time or a full-time teacher, though you will only find secondary schools in the bigger

remote towns with populations in the thousands. In many cases these secondary schools are very new additions.

It might surprise you to know that secondary education has only begun to be rolled out in remote areas of the Northern Territory since 2005.

In fact remote school education has been spectacularly neglected in our country, and as a consequence the national test results of remote students do not keep pace with their city counterparts.

In many small homeland communities in this country, students are taught in tin sheds with no power and very few teaching resources. In all likelihood the teaching service is very part-time, sometimes only three days a fortnight.

Now some of you might be thinking, we can't put a school in every area where there are a dozen school children. Yes there is some truth in this, though let's consider the following.

Firstly, in cases where there are small populations of non-Indigenous remote students, you are more likely to find school services and infrastructure - and I challenge anyone to disprove this.

Secondly, distance education is tailored to the needs of non-Indigenous students. Non-Indigenous kids across this country are able to access a reasonable level of education through the distance education technology which delivers curricula that is tailored to English speakers.

The third point is an important one - governments have no idea of the number of Aboriginal and Torres Strait Islander students with limited or no access to schools within their region. There is no reliable data in this country that matches school-aged populations of young people against school infrastructure and facilities.

This is not just a problem facing the Northern Territory either.

So while some might think it is unreasonable to oblige governments to build schools in every tiny community - of which there are many in this country - my point is that governments don't even know the extent of the problem.

We hear different estimates about the number of kids who miss out on school education - they shift and change - but they are only estimates. What I can tell you is this - it is the Aboriginal and Torres Strait Islander kids who are missing out.

I answer a lot of correspondence from parents who are advocating for schools in their region. It is time for governments to have a serious look at this issue - especially in light of the fact that there are increasing welfare obligations on parents to send their children to school. This is a mutual obligation - between governments and citizens.

It begs the question, what are the consequences for governments who abrogate their responsibility to provide school education?

The final point about education relates to control of our education systems and curricula. There are moves afoot right now to phase out Bilingual education in Australia.

Of the 9,581 schools that exist in Australia today, only nine of them are Bilingual schools. The nine Bilingual schools instruct students in the mother tongue during the early years of schooling. They assist students to establish their first literacies in their Indigenous languages while progressively transferring the learning skills and literacies to English.

As of this year there is a policy in the Northern Territory that mandates four hours of English at the beginning of the school day. This policy destroys the Bilingual education model and puts at risk the fragile continuation of our rich languages. I am extremely concerned about this situation and I plan to do some work on this issue this year.

I think the Northern Territory Government needs sharp reminding that Bilingual schools support and enhance all that we Indigenous people have fought for over time to preserve our independent cultures and identities.

Furthermore, our cultures and our languages are our human rights, protected under international treaties. Our struggles to be heard and to be recognised have resulted in international treaties which respect our right to be self determining and have a say in decisions that affect us.

This is another truth and a terrible reality. The rapid loss of Aboriginal and Islander languages in Australia is a cultural catastrophe. With the loss of these languages we lose whole cultural concepts and meanings that can never be explained in any other language. With the loss of languages, we lose knowledge systems about caring for country. Of the estimated 250 original Indigenous languages in Australia, less than 20 languages are considered not in danger. Dismantling Bilingual education endangers many of these remaining 20 languages.

Let me move to my next self-evident truth.

The criminal justice system is failing Indigenous people and making our communities weaker. We need to proactively invest in the front end of the system on crime prevention rather than focus the overwhelming majority of funding on criminalisation.

It is a sad fact that Indigenous imprisonment rates are unacceptably high. Nationally, Indigenous adults are 13 times more likely to be imprisoned than non-Indigenous adults. Indigenous young people are 23 times more likely to be placed in juvenile detention than their non-Indigenous peers.

Indigenous over representation in the criminal justice system is not a new issue. It has been the subject of countless reports, research projects and roundtables since the Royal Commission into Aboriginal Deaths in Custody in 1991.

Since then some good initiatives have begun. Circle sentencing and diversion projects have had some success, but the bottom line remains - Indigenous imprisonment and over-representation in the criminal justice system has not decreased.

In fact, the situation is getting worse. We have seen a 48% increase in Indigenous imprisonment since 1996, and the gap between Indigenous and non-Indigenous imprisonment rates continue to grow.

This is particularly pronounced for Indigenous women. Indigenous women are 23 times more likely to be imprisoned than non-Indigenous women. We have also seen an explosion in the

number of Indigenous women in custody. Between 2002 and 2006, the Indigenous female prison population jumped 34%.

In 2006, almost 75% of Indigenous prisoners, compared with 52% of non Indigenous prisoners had a history of prior adult imprisonment. This gap varies across Australia with the highest discrepancy in the Northern Territory where 76% of all Indigenous prisoners have prior adult imprisonment compared to 27% of non-Indigenous prisoners. All in all, it seems that Indigenous prisoners are twice as likely to be re-admitted to custody, than non-Indigenous prisoners.

Recidivism rates and progression into the adult criminal justice system are also appalling. In a NSW cohort study of juveniles before the Children's Court for the first time, 92% went on to appear before the adult criminal court in the follow up period, compared to 52% of the non-Indigenous juveniles in the group.

Something is very wrong when we see the steady progression of Indigenous kids from the juvenile justice system graduating to the adult criminal justice system. When people look at the over representation figures, and wonder how we have gotten in such a mess, this is how it starts.

Many of these kids come from backgrounds of family violence and abuse and are part of a child protection system that is failing them. A Queensland study has found that over 90% of Indigenous juveniles on juvenile justice supervision orders had a history of child protection involvement and 67% had been in juvenile detention.

The criminal justice system is one area where accurate and detailed data is actually available. And you cannot escape how well the statistics highlight the seemingly intractable issues we face, and how seriously the current system is failing Indigenous people.

When something isn't working we need to be bold and creative in thinking outside of our safe policy parameters for alternative solutions.

One alternative solution is a recent development from the United States called justice reinvestment.

Justice reinvestment is a criminal justice policy approach that costs the expenditure on imprisonment to taxpayers and diverts a proportion of this to local communities where there is a high concentration of offenders. The money that would have been spent on imprisonment is reinvested in programs and services that address the underlying causes of crime in these communities. The end result, unsurprisingly, is significant savings to taxpayers through the prevention of crime.

In some places, million dollar blocks have been identified. For instance in just one neighbourhood in Connecticut, $20 million was spent in one year to imprison 387 people.

Justice reinvestment still retains prison as a measure for dangerous and serious offenders, but actively shifts the culture away from imprisonment and starts providing services that prevent offending.

Justice reinvestment is a deceptively simple idea but it is underpinned by a rigorous research methodology based on demographic analysis and evidence based policy options.

But what is really interesting about this idea is how it has found sway in some of the most conservative, 'lock 'em up' states in the US like Texas. And this is with bipartisan support across the political spectrum.

This is because justice reinvestment has as much in common with economics as social policy. It asks the question - is imprisonment good value for money?

The simple answer is that it is not.

We are spending increasing amounts on imprisonment while at the same time prisoners are not being rehabilitated, recidivism rates are high and the return to prison rates have created overcrowded prisons.

In the midst of the global financial crisis when spending is threatened we need to be sure we are investing in what works. As we have seen from the US, when politicians are faced with the choice between spending on schools or prisons, some are willing to look at alternatives to the tough-on-crime rhetoric in favour of solutions that reduce imprisonment costs.

I think justice reinvestment is an idea worth seriously considering for Indigenous communities. $2.6 billion was spent on adult imprisonment last year, around a quarter of that for Indigenous prisoners. Imagine if some of this money was invested, in consultation with communities, in crime prevention and community development projects. The research is still in its infancy, but we would have our own million dollar blocks where there is a high concentration of Indigenous offenders that would really benefit from intensive community development.

Just as importantly, justice reinvestment is about stopping people going to prison in the first place. Not only for economic reasons but because there is now credible research that sending people to prison weakens the entire community, making it less safe.

This is something Indigenous communities have known for a long time.

Every time an Indigenous person goes to prison and leaves their community, there are children that are losing parents, sisters, brothers and uncles and aunties. We need to act to disrupt this cycle of crime to prevent the harm for victims and offenders alike.

Finally, let me return to where I began: the under-achievement of the native title system.

The self-evident truth is that the promises that were made when the Native Title Act was passed must be fulfilled if we are ever going to achieve social justice and realise the rights of Aboriginal and Torres Strait Islander peoples. Native title and connection to our land and waters is at the core of our spirituality and our physical and emotional well-being.

Justice Brennan's judgement in the Mabo case has been much praised as a landmark legal judgement. But it was also prophetic about what would happen over the following two decades. He stated: 63. ...The dispossession of the indigenous inhabitants of Australia was not worked by a transfer of beneficial ownership when sovereignty was acquired by the Crown, but by the recurrent exercise of a paramount power to exclude the indigenous inhabitants from their traditional lands as colonial settlement expanded and land was granted to the colonists. Dispossession is attributable not to a failure of native title to survive the acquisition of sovereignty, but to its subsequent extinction by a paramount power.

The opportunity that native title provided has not been realised. The preamble to the Native Title Act says that the system would rectify the consequences of past injustices and ensure that Aboriginal and Torres Strait Islander people were recognised as the First Nations of this country. But this has not happened.

Native title law has become one of the most complex and slowest parts of the justice system in Australia. Between 1 January 1994, when the Native Title Act came into effect, and 31 December 2008, 117 determinations of native title had been made. But there are still over 500 claims waiting to be determined and as I mentioned earlier, the National Native Title Tribunal estimates it will take another 30 years to go through the claims.

In any case, native title law today is hardly justice. Just last month Mr Rob Oakeshott MP, an Independent member in the House of Representatives recognised that: [w]hilst the native title system that has been built up certainly provides access to the law, it is questionable, as of today, whether it is a process that is just in delivering the reconciliation outcomes that I would hope everyone in this chamber is looking for. [2]

There are many reasons for these criticisms.

Not only does the law grind along excruciatingly slowly, but it operates in such a way that the more a community was hurt by government's policies, the less likely they can gain recognition of their rights.

For many groups, the reason the law won't recognise their native title is because at some point since colonisation, white settlement and policy meant that they lost their connection with their land, even if it was just for a moment.

Commonly, it was because they were removed, separated from their families, or prevented from practicing their culture or speaking their language.

The compensation provisions have also failed abysmally. There has not been one successful compensation claim under the Act.

In 2006, applicants who primarily represented the Yankunytjatjara and Pitjantjatjara people, claimed compensation for the extinguishment of their native title rights and interests in Yulara. Yulara, in the Northern Territory, is a town which sits in the shadows of Uluru. Their claim for compensation was denied. [3] If the Traditional Owners of the red centre of this country, an area which most Australians see as the heart of Indigenous Australia cannot gain native title let alone compensation, then where will Indigenous people be able to succeed?

And for those groups who do have their native title recognised, there is constant fear that the governments may simply brush those rights aside and come over the top of them with other laws, regulations and interests. Threats of compulsory acquisition often loom large.

The reasons for these failures are many.

The original Act was drafted as a compromise between many powerful interests, including mining companies and pastoralists who were scared of the uncertainty that acknowledging the truth of our past would have.

The Act was also supposed to be supported by a land fund and a social justice package which would provide for those groups that couldn't claim native title - neither of which have eventuated in the form intended.

Then the *Native Title Act* was amended in 1998. The then government ensured that the amendments provided bucket loads of extinguishment and wiped out many groups' claims for native title.

The end result is a native title system which some say has simply formalised dispossession.

However, native title has done what no other law did. It recognised the truth of our history and started the path forward. So we now must work to ensure that native title lives up to what it is held out to be - a just system which goes some way to rectifying past injustices and recognising Indigenous peoples' status as the First Nations of this country.

Fortunately, through the involvement and commitment of many people over the years, not least Eddie Mabo and his co-claimants in the case, we are gaining traction to have some real improvements made.

Just last month in Parliament, some minor amendments to the Act were being debated. During that debate Members of Parliament from all sides of politics and from all corners of the country acknowledged that the native title system was not working and must be changed.

Rob Oakeshott MP from the North Coast of NSW, even introduced amendments that would shift the burden of proof to the state governments.

He said: It should be up to the State, with its 220 year history of advantage, power and resources, to disprove a connection to the land rather than the current model that asks Indigenous groups, with a 220 year history of disadvantage, removal and dislocation. It is a small but significant shift in the burden of proof as it acknowledges a difficult and fractured 220 year history and replaces it with a legal framework that is a step closer to walking together and working together in the future. [4]

Unfortunately, his amendment didn't get through, but I am encouraged by the comments of other Members of Parliament, including those of the Attorney-General who has committed to considering further change. With the support of Chief Justice French, and many other legal practitioners and advocates including Justice Wilcox who is here tonight, I think this significant and symbolic change may one day eventuate.

It was also encouraging and refreshing to hear another Member recognise that the debate which took place in Parliament that week showed that in this area we are maturing, hopefully, which will be to the benefit of not just Indigenous people but our nation. For too long, a lot of this debate has been as a result of ignorance and prejudice, which has sidelined proper policy.[5]

The federal Attorney-General has staked his reputation on achieving a fair native title system, it is one of the markers by which he seeks to be judged. I will continue to work with him in proposing the reforms necessary to turn the system around. We need to return to the fundamental purpose of the system and to ensure that it addresses the fundamental truth identified by Eddie Mabo all those years ago.

Conclusion

On the flyer for this Oration, you may have noticed that the title is "From self-respect comes dignity, and from dignity comes hope."

Some of you may be aware that in the majority of speeches I have given over the past five years I traditionally finish with this phrase. Eddie Mabo was a man of great dignity who caused all Murray Islanders to have hope.

Bryan Keon-Cohen was one of Eddie Mabo's barristers, and he gave a speech at Mabo's funeral in Townsville in Feb 1992 - he said:

> *I confine myself here to the Land Rights case, the most significant point to make is that without Eddie the case would probably never have begun. The case began when Eddie gave a speech at a conference here in Townsville in 1981. He spoke of Murray Island customs and traditions concerning land and urged that something should be done to have those customs recognised in Australian law. That speech triggered a very long legal saga that changed the lives of many people. Certainly it changed my life and that of my family and may yet bring even greater reforms and hopefully improvements for the lives of all Murray Islanders. Throughout this last decade Eddie demonstrated to me many fine qualities, which will be well known to you all. But for me and the lawyers we particularly remember his friendliness and hospitality, his initiative and originality, his courage and quiet determination, his intelligence and astonishing knowledge and memory of his people, his island, its history, customs and traditions. Above all I remember his deep commitment to correcting historical wrongs, some very personal, and to achieving recognition of traditional land rights of his family and his people. He was in the best sense a fighter for equal rights, a rebel, a free thinker, a restless spirit, a reformer who saw into the future and far into the past.*

We must return to the self-evident truths that exist - in our relationships, and from our history.

Only by doing this will we achieve social justice for Aboriginal and Torres Strait Islander peoples and in doing so, equality for all Australians.

Remember, from self-respect comes dignity, and from dignity comes hope.

Thank you.

Endnotes

1. Lieutenant General John Sanderson, AC. 29 April 2009. Speech at the Local Government and Indigenous Communities Conference, University of Western Australia.
2. Commonwealth, Parliamentary Debates, House of Representatives, 12 May 2009, p 17 (Oakeshott MP).
3. Jango v Northern Territory (2006) 152 CLR 150; Jango v Northern Territory (2007) 159 FCR 531.

4. JR Oakeshott MP, 'Oakeshott moves amendment to native title act' (media release, 12 May 2009).
5. Commonwealth, Parliamentary Debates, House of Representatives, 14 May 2009 (Melham MP).