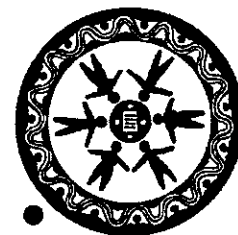


INQUIRY INTO OVERCOMING INDIGENOUS DISADVANTAGE

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jumbunna
Indigenous House of Learning

Submission for the Inquiry into Overcoming Indigenous Disadvantage

Prepared for the **Standing Committee on Social Issues**

Prepared by Larissa Behrendt, Ruth McCausland and Alison Vivian
Research Unit
Jumbunna Indigenous House of Learning
September 2008

1 September 2008

Ms Victoria Pymm
Principal Council Officer
Standing Committee on Social Issues
Legislative Council
Parliament House
Macquarie St.,
Sydney NSW 2000

Dear Ms Pymm,

Re: Overcoming Indigenous Disadvantage

1. Thank you for the opportunity to further comment on the work of the Standing Committee on Social Issues into this inquiry.
2. We would particular like to address the following issues:
 - I. Measuring Outcomes;
 - II. Building Partnerships in Service Delivery;
 - III. Capacity Building in Aboriginal Communities; and,
 - IV. Concerns about the Northern Territory Intervention being extended into New South Wales.

I. Measuring Outcomes

- **Realistic and Appropriate Benchmarks**

3. In order to effectively address Aboriginal and Torres Strait Islander disadvantage, realistic and appropriate benchmarks need to be set. We argue that they need to be set in collaboration with Aboriginal communities through a **regional planning process**.
4. Although this will be a resource intensive process, it will have the following advantages:
 - a. It will pick up differences in profile and need in regions across New South Wales. This will ensure that there is flexibility in approaches to policy and service delivery rather than a "one-size-fits all" approach that can be problematic.
 - b. It provides a mechanism by which the government can build a relationship with Aboriginal communities around the state, assisting with the creation of an interface between the two which is particularly helpful when the government needs to consult with Aboriginal communities or is seeking to roll out programs and services into those communities.
 - c. It is an approach that is consistent with the research that says that the most effective way to improve socio-economic data is to involve Aboriginal people in the creation of policy and the design of programs and service delivery models that are to be implemented into their communities.
5. This regional planning approach could utilise the NSW Aboriginal Land Council's regional forums or other established regional networks making them easier to establish or identify and providing an opportunity for building relationships and partnerships between the state government and Aboriginal communities.

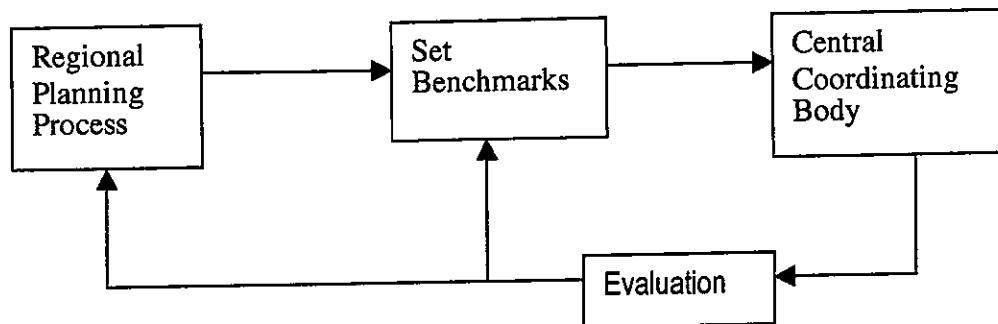
- **Better quality data**

6. There is a need for a significant improvement in the planning, collection and analysis of data relating to Aboriginal and Torres Strait Islander people in relation to all socio-economic indicators to assist with benchmarking and evaluation. It is difficult to assess change or progress in policy and programs when the quality of data varies so greatly between regions and over time.
7. This is complicated by the way in which Aboriginal and Torres Strait Islander individuals identify or are identified in different datasets in different jurisdictions.
8. It is imperative that there is good quality data available about the socio-economic profile of the Aboriginal and Torres Strait Islander community beyond national and state levels and beyond broad remote/non-remote distinctions. This data needs to be able to be disaggregated adequately at a regional or community level to enable policy and programs to be targeted effectively.
9. These comprehensive statistics do not just inform debates about what kinds of policies and programs are more effective in addressing Indigenous disadvantage. For example, they assist in evaluating whether mainstream or Indigenous specific-program delivery is more effective.
10. While these observations seem self-evident, they are not consistent with cuts to key information collecting sites such as the Australian Bureau of Statistics by the Federal Government.

- **A State-wide approach**

11. While planning should be done at a regional level, there needs to be a place where regional priorities, benchmarking and activities can be co-ordinated. This central location

should also arrange evaluations and feed them back into the planning and benchmarking process.



12. We recommend the establishment of a Parliamentary Committee on Indigenous Issues charged with monitoring the benchmarks and reporting to Parliament on progress every two years.

II. Building Partnerships in Service Delivery

- **Challenges to Service Delivery in New South Wales due to cost-shifting**

13. We appreciate the challenges facing the New South Wales government in relation to overcoming Indigenous disadvantage with the failure of the federal government to give adequate resources to New South Wales.
14. Despite the fact that the Federal Government has stated a commitment to "closing the gap" between Indigenous people and all other Australians, their funding commitments and policy priorities suggest otherwise. The 2008-2009 budget provides additional funding of \$718.7million for Indigenous issues over five years, some of which had already been announced in the 2007-2008 February Additional Estimates.

15. The majority of the funding allocated in the Federal Budget (\$426.6 million over five years) is provided for activities in the Northern Territory, including \$320.9 million in 2008-09 for activities that are part of the Northern Territory Emergency Response (NTER). In total, new and re-directed funding for Indigenous measures following the 2007 election and the 2008-09 Budget is \$1.2 billion over five years. Just over half of this (\$637.4 million) is specifically for the NTER.

16. Significantly more resources are required if governments are serious about "closing the gap" on Aboriginal and Torres Strait Islander disadvantage. Only 11 percent of the Indigenous population live in the Northern Territory,

- **Building an Interface with Communities for Service Delivery**

17. In order to improve the effectiveness and efficiency of service delivery into Aboriginal communities, there needs to be an investment in building the interface between Aboriginal communities and government. Aboriginal community organisations often find themselves as the place where governments consult or work in partnership with to deliver programs and service delivery. It is therefore crucial that effort be put into building capacity of Aboriginal community organisations.

18. Research conducted by the Australian Institute of Aboriginal and Torres Strait Islander Studies¹ at the invitation of the Australian Collaboration, a consortium of community organisations,² investigated initiatives devised by Indigenous organisations that have promoted community wellbeing or overcome disadvantage.³

¹ <http://www.aiatsis.gov.au/>

² <http://www.australiancollaboration.com.au/>

³ The findings of the study are reported in three volumes at <http://www.australiancollaboration.com.au/research/index.html>. The first two volumes examine and analyse strategies in sixteen Indigenous organisations that have been successful in promoting community wellbeing and overcoming disadvantage. The third volume is concerned with joint management of Indigenous lands of high conservation value.

19. The study observed that while Indigenous disadvantage was well documented, "inadequate attention had been given to examples of Indigenous creativity and leadership in tackling problems and that a report focusing on such successes would be of considerable value to Indigenous people and Indigenous policy makers".⁴
20. Themes that emerge of successful organisations include:
- sound governance with training adapted to specific circumstances;
 - efficient and responsive service delivery;
 - strategic planning;
 - internal and external accountability;
 - engagement with the community;
 - clear and transparent vision and objectives, and
 - flexibility and responsiveness to change.⁵
21. The study also found that relationships and partnerships are vital, where Indigenous organisations have a strong intercultural nature.⁶
22. These findings give a research-based framework upon which to assist Aboriginal community organisations to meet the expectations put on them by their various stakeholders, including the role they can play in building a bridge between governments and communities by providing services or by advising about the provision of services.

⁴ The Australian Collaboration & AIATSIS, *Volume 1: Organising for Success. Policy Report. Successful strategies in Indigenous organisations*, (AIATSIS and Australian Collaboration, 2007), 9 downloaded from <http://www.australiancollaboration.com.au/research/index.html> (accessed 12 August 2008)

⁵ The Australian Collaboration & AIATSIS, *Volume 1: Organising for Success. Policy Report. Successful strategies in Indigenous organisations*, (AIATSIS and Australian Collaboration, 2007), 17-26 downloaded from <http://www.australiancollaboration.com.au/research/index.html> (accessed 12 August 2008)

⁶ The Australian Collaboration & AIATSIS, *Volume 1: Organising for Success. Policy Report. Successful strategies in Indigenous organisations*, (AIATSIS and Australian Collaboration, 2007), 17-26 downloaded from <http://www.australiancollaboration.com.au/research/index.html> (accessed 12 August 2008)

III. Capacity Building in Aboriginal Communities

23. Research findings in Australia⁷ and North America⁸ are remarkably consistent in identifying the fundamental principles inherent in Indigenous communities that accomplish their own economic, political, social and cultural goals.
24. The research identifies that economic, social and cultural prosperity is achieved where communities exercise genuine decision making control over their internal affairs and utilisation of resources; where they have capable institutions of self-governance that have cultural legitimacy with the community that they serve and where their actions are based on long term systemic strategies with leadership focussed on creating stable political institutions.
25. The evidence indicates that federal government support would be best focussed on facilitating institutional capacity building, assisting communities to engage in long term strategic planning, supporting visionary leadership, allowing communities to develop their

⁷ M Dodson & D E Smith, "Governance for sustainable development: Strategic issues and principles for Indigenous Australian communities" *Discussion paper No 250/2003*, (CAEPR, Australian National University, 2003) at <http://www.anu.edu.au/caepr/discussion.php> (accessed 12 August 2008). See the findings of the Indigenous Community Governance Project, a collaborative action research project by the Centre for Aboriginal Economic Policy Research (CAEPR) and Reconciliation Australia (RA) http://www.anu.edu.au/caepr/ICGP_home.php (accessed 25 July 2008). See also the findings of the Successful Strategies in Aboriginal Organisations Project at <http://www.australiancollaboration.com.au/research/index.html> (accessed 12 August 2008)

⁸ For an overview of the research of the Harvard Project on American Indian Economic Development and the Native Nations Institute for Leadership, Management and Policy see Miriam Jorgenson (ed), *Rebuilding Native Nations: Strategies for Governance and Development* (Tucson, University of Arizona Press: 2007). For publications of the Harvard Project see <http://www.hks.harvard.edu/hpaied/> (accessed 25 July 2008) and NNI see <http://nni.arizona.edu/> (accessed 25 July 2008). There is dispute as to whether aspects of the Harvard Project's findings are replicable or indeed, desirable in Australia, which arguably relates to the ambiguity between 'community' and 'community organisation' identified by Hunt & Smith. See for example, Patrick Sullivan, "Indigenous Governance: The Harvard Project, Australian Aboriginal Organisations and Cultural Subsidiarity" *Working Paper No 4* (Desert Knowledge CRC, March 2007); Martin Mowbray "Localising Responsibility: The Application of the Harvard Project on American Indian Economic Development to Australia" (2006) 41(1) *Australian Journal of Social Issues* 87-103 and The Australian Collaboration & AIATSIS, *Volume 1: Organising for Success. Policy Report. Successful strategies in Indigenous organisations*, (AIATSIS and Australian Collaboration, 2007), 14-16 downloaded from <http://www.australiancollaboration.com.au/research/index.html> (accessed 12 August 2008). The significance of these critiques is open to question and there may be implications for potential implementation of the research. Nonetheless, an analysis of the findings demonstrates significant correlation of the fundamental foundations of 'successful' communities and organisations.

own priorities and assisting them to develop appropriate benchmarks that reflect Indigenous aspirations.

26. In summary, the North American and Australian research has identified that Indigenous skills, abilities, knowledge and leadership are most effectively mobilised and exercised when initiatives are Indigenous-driven.⁹
27. Where communities exercise genuine decision making control, greater risk and accountability results in community leaders bearing the consequences of their actions and dealing with the consequent approval or disapproval from stakeholders, which in turn fosters better decision making as decision makers learn through experience.¹⁰
28. Indigenous governance arrangements that have legitimacy with the community have two features.¹¹ They embody structures and decision making processes that reflect contemporary Indigenous conceptions of what are 'proper' relationships and forms of authority.¹² Second, they have the capacity to effectively get things done predictably and reliably, demonstrating accountability to internal and external stakeholders.¹³

⁹ M Dodson & D E Smith, "Governance for sustainable development: Strategic issues and principles for Indigenous Australian communities" Discussion paper No 250/2003, 8 at <http://www.anu.edu.au/caepr/discussion.php> (accessed 12 August 2008).

¹⁰ Stephen Cornell and Joseph P Kalt, "Two Approaches to the Development of Native Nations: One Works, the Other Doesn't" in Miriam Jorgenson (ed), *Rebuilding Native Nations: Strategies for Governance and Development* (Tucson, University of Arizona Press: 2007), 21; Stephen Cornell & Joseph P Kalt, "Reloading the Dice: Improving the Chances for Economic Development on American Indian Resources", in Stephen Cornell & Joseph P Kalt (eds) *What Can Tribes Do? Strategies and Institutions in American Indian Economic Development* (Los Angeles, American Indian Studies Centre UCLA: 1992), 14

¹¹ Janet Hunt & Diane Smith, "Indigenous Community Governance Project: Year Two Research Findings" *CAEPR Working Paper No 36/2007* (CAEPR, Australian National University: April 2007), <http://www.anu.edu.au/caepr/Publications/WP/CAEPRWP36.pdf> (accessed 25 July 2008); Stephen Cornell,

"Remaking the Tools of Governance. Colonial legacies, Indigenous solutions" in Miriam Jorgenson (ed), *Rebuilding Native Nations: Strategies for Governance and Development* (Tucson, University of Arizona Press: 2007), 71

¹² Janet Hunt & Diane Smith, "Indigenous Community Governance Project: Year Two Research Findings" *CAEPR Working Paper No 36/2007* (CAEPR, Australian National University: April 2007), 27 <http://www.anu.edu.au/caepr/Publications/WP/CAEPRWP36.pdf> (accessed 25 July 2008)

¹³ Stephen Cornell, "Enhancing Rural Leadership and Institutions: What Can We Learn from American Indian Nations?" (2001) 24(1) *International Regional Science Review* 84, 92-94

29. Vitality, while formal governing institutions must resonate with contemporary Indigenous notions of appropriate form and organisation, this does not mean a return to precolonial systems and traditions.¹⁴ Cultural legitimacy is increasingly complicated due to the legacies of colonialism and diverse aims and ambitions within Indigenous constituencies.¹⁵ Smith provides the concept of the "process of Indigenous choice" where an Indigenous controlled process of fashioning new governance tools can itself be a source of legitimacy.¹⁶

- **The Need for Government Responsibility**

30. The ambitious objectives underpinning capacity building will, in no small way, rely on the support of government – whether at the federal, state or local level. Devolving responsibility to Indigenous communities does not end government responsibility. Instead, its role is transformed from decision maker to facilitator. This underlines the need for the provision of governance capacity development and training that is targeted, high quality and place-based.¹⁷

IV. Concerns about the Northern Territory intervention being expanded into the New South Wales

31. We have concerns that the Northern Territory National Emergency Response being extended into New South Wales.

¹⁴ Stephen Cornell and Joseph P Kalt, "Two Approaches to the Development of Native Nations: One Works, the Other Doesn't" in Miriam Jorgenson (ed), *Rebuilding Native Nations: Strategies for Governance and Development* (Tucson, University of Arizona Press: 2007), 25

¹⁵ Stephen Cornell, "Remaking the Tools of Governance. Colonial legacies, Indigenous solutions" in Miriam Jorgenson (ed), *Rebuilding Native Nations: Strategies for Governance and Development* (Tucson, University of Arizona Press: 2007), 73

¹⁶ D E Smith, "From Gove to Governance: Reshaping Indigenous Governance in the Northern Territory", *Discussion Paper No 265/2004*, (CAEPR, Australian National University: December 2004) <http://www.anu.edu.au/caepr/discussion.php> (accessed 13 August 2008); Stephen Cornell, "Remaking the Tools of Governance. Colonial legacies, Indigenous solutions" in Miriam Jorgenson (ed), *Rebuilding Native Nations: Strategies for Governance and Development* (Tucson, University of Arizona Press: 2007), 73

¹⁷ Janet Hunt & Diane Smith, "Indigenous Community Governance Project: Year Two Research Findings" *CAEPR Working Paper No 36/2007* (CAEPR, Australian National University: April 2007), 6, 7, 13, 23, 28, 34, 42 <http://www.anu.edu.au/caepr/Publications/WP/CAEPRWP36.pdf> (accessed 25 July 2008)

32. These concerns are contained in our submission to the Northern Territory National Emergency Response Review attached at Appendix 1. In particular, we would draw to your attention:

- a. The lack of evidence to support the linking of welfare payments to school attendance;
- b. The failure to address the underlying causes of disadvantage including the failure to provide adequate levels of basic health services, education and housing; and,
- c. The suspension of basic rights to due process such as the suspension of the *Racial Discrimination Act 1975 (Cth)* and suspension of appeals to the Social Security Appeals Tribunal.

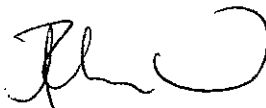
33. There has been no adequate review of the mechanisms employed in the Northern Territory intervention, particularly around the notion that school attendance can be linked to welfare payments.

34. In light of this, we would caution an embrace of this experimental approach at the expense of resources for approaches and programs that have been proven to work.

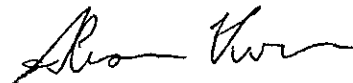
Thank you for the opportunity to make this further contribution to the Inquiry into Overcoming Indigenous Disadvantage.



Prof. Larissa Behrendt
Director of Research



Ruth McCausland
Senior Researcher



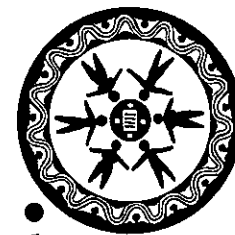
Alison Vivian
Senior Researcher

APPENDIX 1

Submission to the Review of the Northern Territory National Emergency Response
by Larissa Behrendt, Nicole Watson, Ruth McCausland and Alison Vivian,
Research Unit, Jumbunna Indigenous House of Learning
University of Technology, Sydney



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Indigenous House of Learning

Submission to the Review of the Northern Territory National Emergency Response

Prepared by Larissa Behrendt, Nicole Watson, Ruth McCausland and Alison Vivian
Research Unit
Jumbunna Indigenous House of Learning
August 2008

18 August 2008

Northern Territory Emergency Response Review Board
Secretariat
GPO Box 7576
Canberra Mail Centre
ACT 2610

To Whom It May Concern:

Re: Northern Territory National Emergency Response

1. Thank you for the opportunity to comment on the Northern Territory National Emergency Response ('NTNER').
2. The NTNER was described by the then Howard Government as a response to the report, *Little Children are Sacred*, the report from the Inquiry into the Protection of Aboriginal Children from Sexual Abuse into child sexual abuse in Aboriginal communities in the Northern Territory.
3. Key findings of the report included:
 - Most Aboriginal people are willing and committed to solving problems and helping their children. They are also eager to better educate themselves;
 - Aboriginal people are not the only victims and not the only perpetrators of sexual abuse.
 - Much of the violence and sexual abuse occurring in Territory communities is a reflection of past, current and continuing social problems that have developed over many decades.
 - The combined effects of poor health, alcohol and drug abuse, unemployment, gambling, pornography, poor education and housing, and a general loss of identity and control have contributed to violence and to sexual abuse in many forms.
 - Existing government programs to help Aboriginal people break the cycle of poverty and violence need to work better. There is not enough coordination and communication between government departments

and agencies, and this is causing a breakdown in services and poor crisis intervention. Improvements in health and social services are desperately needed.

- Programs need to have enough funds and resources and be a long-term commitment.
4. We would like to firstly canvass several specific aspects of the Intervention that have caused us concern. Secondly, we would like to highlight underlying problems with the approach taken by the Intervention and then, thirdly, make recommendations.

A. Concerns about the NTNER

5. The Northern Territory National Emergency Response involved a complex and wide-ranging set of mechanisms.
6. We would begin by acknowledging that aspects of the Intervention that are aimed at providing additional policing and health resources to Aboriginal communities in the Northern Territory have been a much overdue injection of basic funding for essential services.
7. We would like to canvass several aspects of the Intervention that have caused us concern, namely:
 - a. The lack of consultation about the intervention when it was put in place;
 - b. The suspension of basic procedural rights;
 - c. The quarantining of welfare payments;
 - d. The Abolition of CDEP;
 - e. The Serious Infringement of Property Rights; and
 - f. The Minister's Powers to Intervene in the Operations of Community Organisations.

a. The Lack of Consultation with Aboriginal Communities

8. The implementation of the Northern Territory National Emergency Response was done without any consultation with the communities that were going to be affected by it. Our basic concerns about this are detailed in the article attached as Appendix 1.
9. Our underlying concerns about the lack of consultation are twofold. Firstly, it ignored all of the evidence available at the time about programs actually in place across the Northern Territory, developed through the initiative of Aboriginal people, that dealt effectively specifically with the issues that the NTNER claimed it was addressing. Indicative of this are the programs identified in the document prepared by the Coalition of Aboriginal Organisations and attached as Appendix 2.
10. Secondly, the top-down approach taken by the Intervention that avoids consultation and involvement of Aboriginal communities is contrary to the approach that the research identifies as being crucial to improving the socio-economic status of Aboriginal people. That research, from Australia, the United States and Canada, points to the need to have Aboriginal people centrally involved in the developing of policies that are to be directed towards their community and in designing the programs that are to be rolled out in their community. We deal with this research in more detail later in this submission.
11. We would further note that the first recommendation of *Little Children are Sacred*, the report upon which the NTNER purportedly relied, emphasised the need to properly consult with Aboriginal communities. Recommendation 1 of the report stated:

That Aboriginal child sexual abuse in the Northern Territory be designated as an issue of urgent national significance by both the Australian and Northern Territory Governments, and both governments immediately establish a collaborative partnership with a Memorandum of Understanding to specifically address the protection of Aboriginal children from sexual abuse. *It is critical that both governments commit to genuine consultation with Aboriginal people in designing initiatives for Aboriginal communities.* (emphasis added).

b. Lack of Procedural Fairness and Due Process

12. Basic rights to review of administrative decisions, protection against the arbitrary confiscation of property and protection against unlawful discrimination are well recognised within the Australian legal system through a variety of legislation. In fact, most Australians assume that such rights are inherent to democracy. Another sign of a healthy democracy is respect for the contributions made by independent advocacy bodies to public policy.
13. We believe that certain aspects of the Northern Territory National Emergency Response legislation deny legal equality to Aboriginal people in the Northern Territory. In particular it:
- Suspends the protection of the *Racial Discrimination Act 1975 (Cth)*;
 - Denies protection from the Northern Territory anti-discrimination legislation;
 - Prevents appeals to the Social Security Appeals Tribunal;
 - Compromises the integrity of Indigenous property rights; and
 - Threatens the independence of Indigenous community organisations.
14. In particular:
- (a) Sections 132-133 *Northern Territory National Emergency Response Act 2007 (Cth)* deny certain Indigenous people protection against unlawful discrimination;
 - (b) Section 144(ka) *Social Security (Administration) Act 1999 (Cth)* precludes certain individuals from obtaining review from the Social Security Appeals Tribunal;
 - (c) Part four of the *Northern Territory National Emergency Response Act 2007 (2007)* deprived certain Indigenous people of the enjoyment of their property rights; and,
 - (d) Part five of the *Northern Territory National Emergency Response Act 2007 (Cth)* vested extraordinary powers in the Commonwealth Minister for Indigenous Affairs to intervene in the operations of Indigenous community organisations.
15. The above provisions have either no link to, or only a tenuous relationship with, the protection of children from abuse. Furthermore, they vested extraordinary power in the Commonwealth to intervene in the lives of Indigenous people with relative impunity. In the absence of the usual checks and balances, there is a risk that such powers could be

exercised capriciously. Therefore, this submission calls for the above provisions to be repealed.

- **The Loss of Protection against Unlawful Discrimination**

16. Section 5 *Northern Territory National Emergency Response Act 2007* (Cth) provides that the object of the Act is to 'improve the well-being of certain communities in the Northern Territory'. It is not self-evident that the attainment of this worthy, though somewhat imprecise, goal requires the loss of protection against unlawful discrimination for people who are among the most marginalised in Australian society.

17. Subsection 132(1) *Northern Territory National Emergency Response Act 2007* (Cth) provides that the legislation and acts done under the legislation are 'special measures' for the purposes of the *Racial Discrimination Act 1975* (Cth). In essence, a special measure is a form of permissible discrimination because it has the aim of securing the advancement of a disadvantaged group.

18. Section 8 of the *Racial Discrimination Act* allows for 'special measures' as prescribed by Article 1(4) of the *International Convention on the Elimination of All Forms of Racial Discrimination* ('ICERD'), which states:

Special measures taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals requiring such protection as may be necessary in order to ensure such groups or individuals equal enjoyment or exercise of human rights and fundamental freedoms shall not be deemed racial discrimination, provided, however, that such measures do not, as a consequence, lead to the maintenance of separate rights for different racial groups and that they shall not be continued after the objectives for which they were taken have been achieved.

19. The Aboriginal and Torres Strait Islander Social Justice Commissioner in the *2007 Social Justice Report* addressed the specific requirements of Article 1(4), namely that the measures provide a benefit, have a sole purpose, are necessary and cease once their

purpose has been reached.¹ The Commissioner concluded that it was not possible to support the contention that all the provisions of the NTNER could be justified as special measures.² We support the Commissioner's conclusion.

20. Similarly, many of the submissions to the Senate Legal and Constitutional Affairs Committee's Inquiry into the NTNER rejected the notion that its provisions were 'special measures'. For example, the Human Rights and Equal Opportunity Commission argued that:

Special measures are generally measures by way of 'affirmative action' or 'positive discrimination'. The exemption in discrimination law made for special measures therefore aims to protect things done to benefit a disadvantaged group from challenge by non-members of the group... Measures that may impact negatively on rights, such as limitations upon the availability of alcohol, may be considered 'special measures' where they are done after consultation with, and generally the consent of, the 'subject' group...³

21. We believe that those criticisms remain valid and that the NTNER cannot be properly categorised as a special measure while it lacks the support of Indigenous communities in the Northern Territory. Further, we consider that the NTNER breaches Australia's obligations under ICERD.
22. The Committee on the Elimination of Racial Discrimination recently on 4 & 5 August 2008 conducted a thematic debate on the obligation of State parties to undertake special measures or positive measures, also known as affirmative action.⁴ The Committee observed that the concept of special measures was a subject that Committee Experts held "particularly dear". Among issues discussed by the Committee were the need for periodic

¹ Aboriginal & Torres Islander Social Justice Commissioner, "Chapter 3: The Northern Territory 'Emergency Response' Intervention – A human rights analysis", *Social Justice Report 2007*, 261-265 at http://www.hreoc.gov.au/social_justice/sj_report/sjreport07/index.html (accessed 12 August 2008)

² *Ibid*, 265

³ Human Rights and Equal Opportunity Commission, Submission to the Senate Legal and Constitutional Committee on the Northern Territory National Emergency Response Legislation (10 August 2007) [20] – [21]; references omitted.

⁴ Committee on the Elimination of Racial Discrimination, "Committee on Elimination of Racial Discrimination Discusses States' Obligation to Undertake Special Measures (5 August 2008) at [http://www.unog.ch/unog/website/news_media.nsf/\(httpNewsByYear_en\)/696149E128473FAFC125749C004A5160?OpenDocument](http://www.unog.ch/unog/website/news_media.nsf/(httpNewsByYear_en)/696149E128473FAFC125749C004A5160?OpenDocument) (accessed 12 August 2008)

assessment and management of special measures; a distinction between permanent and temporary measures; and the harmonisation of terminology with other human rights treaty bodies, with a focus on theories of social justice. These elements are lacking in the blanket assertion that the provisions of the NTNER are special measures.

23. Subsection 132(2) provides that the legislation and acts done under the legislation are excluded from the operation of Part II *Racial Discrimination Act 1975* (Cth). Likewise, s 133(2) states that acts done under the legislation, 'have effect despite any law of the Northern Territory that deals with discrimination.' Once again, the broad dispensation of statutory protection against unlawful discrimination has no apparent connection to the object of the Act.
24. Furthermore, there is a danger that these provisions may be interpreted as a licence for derogatory behaviour by unscrupulous individuals who play a role in the administration of the NTNER. Conversely, there is the potential for Indigenous people in prescribed areas to fall under the misconception that they no longer have any protection whatsoever against such conduct.

- **The Denial of Access to the Social Security Appeals Tribunal**

25. Those subject to the income management regime do not have recourse to the Social Security Appeals Tribunal.⁵ This is concerning in light of the reality that just over thirty percent of appeals to the Social Security Appeals Tribunal in 2006 were decided in favour of the applicant.⁶ Furthermore, access to independent review of administrative decisions has become one of the hallmarks of Australian democracy. It is unacceptable that Indigenous people are denied the ability to exercise something that for most Australians is an entitlement.

⁵ *Social Security (Administration) Act 1999* (Cth) s 144(ka)

⁶ Australian Government, *Centrelink Annual Report 2005-2006*, 86, quoted by the Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice Report* (2007) 254.

c. The Quarantining of Welfare Payments

26. As part of the NTNER, the introduction of 'income management regimes' were announced that included a measure described as "linking school attendance to welfare payments". This measure was described by the legislation as a "special measure". Our concerns about this measure are threefold.
27. Firstly, there is no evidence that making welfare payments conditional on school attendance is effective in increasing parental responsibility or reducing child abuse or neglect.
28. Secondly, we have concerns about the manner in which whole communities were subject to income management regimes. Instead of being applied on a case-by-case basis targeting parents who were not meeting their parental obligations, the legislation took a blanket, non-discretionary approach whereby every individual receiving some kind of welfare payment in a prescribed community had their payments quarantined whether their children were attending school, or whether they had direct responsibility for a child or not.
29. Thirdly, the manner in which the policy was rolled out required the suspension of the *Racial Discrimination Act 1975 (Cth)* and also denied a right of appeal to the Social Security Appeals Tribunal.
30. Our concerns about this policy of linking welfare payments to school attendance are explored in much more detail in the paper by Ruth McCausland attached at Appendix 3.

d. The Abolition of CDEP

31. The Community Development Employment Program (CDEP) was established in part because of the understanding that in some parts of Australia there will never be a labour market large enough to provide employment for all members of the community interested

in finding a job. CDEP programs were a mechanism that provided communities with a way to obtain a service or create a business that would not be viable otherwise. For example, CDEP programs engaged in activities as varied as fence painting, building community infrastructure, running an orchard and fishing.

32. Our concerns about the abolition of CDEP are threefold. Firstly, while there was provision of additional jobs in some communities where CDEP was abolished, these have not been created at the same rate of CDEP jobs that have been lost.⁷

33. Secondly, people who lost the CDEP jobs were put onto welfare and this meant that in some communities, people had moved from being in a CDEP funded job where they had some independence and were employed in an activity that contributed to their community to being in a position where they are on welfare benefits that are quarantined. We have concerns about the psychological impact that has on an Aboriginal person.⁸

34. Thirdly, CDEP has not been replaced by any program that recognises that there are a limited number of employment opportunities. There has been no consideration given to other programs that can provide training and skills for community members and provide a mechanism for making a positive contribution to communities who do not have adequate services or infrastructure.

e. The Serious Infringement of Property Rights

35. Several aspects of the Northern Territory National Emergency Response compromise the integrity of Indigenous property rights. Our concerns about the underlying rationale and ideologies for the inclusion of these changes as part of the Northern Territory National Emergency Response package are contained in the article at Appendix 4.

⁷ 'Govt needs to consider human rights in Territory intervention', *7.30 Report*, 31/3/08, <http://www.abc.net.au/7.30/content/2007/s2203948.htm>

⁸ Jon Altman, *Neo-Paternalism and the Destruction of CDEP*, August 2007, 2007/14. <http://www.anu.edu.au/caepr/topical.php#0753>

- **The Arbitrary Confiscation of Property Rights**

36. The Commonwealth's powers to acquire Indigenous lands are contained in Division one and Division two of Part four of the *Northern Territory National Emergency Response Act 2007* (Cth).
37. Subsection 31(1) in Division one provides that leases over certain lands are granted to the Commonwealth. The commencement dates of the leases vary, but all are to end five years after the commencement of s 31.⁹
38. Although the relationship between the Commonwealth and Indigenous land holders is that of lessor and lessee, Indigenous land holders have few of the rights ordinarily enjoyed by lessors at common law and in particular, they lack the power to terminate a lease.¹⁰

- **Leases under the *Special Purposes Leases Act* (NT)**

39. Division two provides for the acquisition of lands that include what have become known as town camps. Titles to the lands that make up the camps are held by Indigenous associations under the *Special Purposes Leases Act* (NT).
40. Section 44 amends provisions of the *Special Purposes Leases Act* (NT), so that references to the Northern Territory Minister or Administrator include references to the Commonwealth Minister.
41. When the Commonwealth intends to resume such land it will have to give only 60 days notice, as opposed to the six months required by s 29 of the *Special Purposes Lease Act* (NT).

⁹ *Northern Territory National Emergency Response Act 2007* (Cth) s 31(2)(b). Section 2 provides that s 31 commenced on 18 August 2007.

¹⁰ *Ibid* s 35(4).

42. The danger inherent in s 44 is the potential for the Commonwealth to exploit its powerful position in order to overwhelm a community that it perceived to be recalcitrant. An example of this scenario was the protracted dispute between the former Minister, Mal Brough, and the Tangentyere Council. In March 2007 Minister Brough offered funds in order to address the lack of housing in the Alice Springs town camps. However, the Commonwealth package was conditional upon the relinquishment of leases over the camps to the Northern Territory.¹¹ The associations were unwilling to accede and subsequent attempts to achieve compromise were unsuccessful.¹² Further consultation between the Commonwealth and the Tangentyere Council was rendered superfluous as a result of s 44. A 30-year lease was recently negotiated between the Commonwealth and the Tangentyere Council.

43. However, the potential for the Commonwealth to impose its will upon Indigenous people remains. At the very least, we see no justification for the short notice period of 60 days to be retained.

- **The Suspension of Procedural Rights under the *Native Title Act 1993* (Cth)**

44. Just as the Commonwealth dispensed with the need for negotiation with Indigenous lessees, it also suspended the procedural rights of native title holders. Native title is dealt with in s 51, which precludes the application of the future act regime in the NTA to s 31 leases and interests vested under s 47. Although many of the procedural rights within the future act regime are meagre, the right to negotiate in subdivision P is potentially valuable to native title holders. Once again, there is no justification for the suspension of the procedural rights of native title holders.

- **Compensation for land yet to be resolved**

45. It is unclear as to whether or not Indigenous people will be entitled to compensation for the loss of their property rights. Subsection 60(1) precludes the application of s 50(2) *Northern*

¹¹ Ibid 232.

¹² Ibid 233.

Territory Self-Government Act 1978 (Cth) from the acquisition of property, with the consequence that compensation on just terms is not required. However, s 60(2) also provides that if an acquisition does attract the operation of s 51(xxxi) of the Constitution, the Commonwealth is liable to pay a 'reasonable amount of compensation'. This double edged approach takes advantage of confusion over whether the Territories power in s 122 of the Constitution is fettered by s 50(xxxi).

46. Many observers, including the Law Council, have argued that the issue is not settled. In its submission to the Senate Inquiry in 2007, the Law Council suggested that:

The application of s 51(xxxi) of the Constitution to provide compensation for an acquisition of property in the Northern Territory is not a foregone conclusion. Under current High Court Authority there is no requirement to pay compensation for an acquisition of property referable only to the s 122 Territories power under the Constitution. The Bill makes it apparent (through reference to the non-application of s 50(2) of the Northern Territory (Self-Government) Act 1978) that the power relied upon for the acquisitions is pursuant to the Commonwealth's S 122 Territories power.

The Law Council notes that the legislation appears to shield the Commonwealth from its obligation to compensate the relevant Land Trust or pay rent, in circumstances where a lease is issued under section 31.¹³

47. In the event that the Commonwealth was required to pay compensation, it is not clear what form the compensation would take. Subsection 61(c) provides that in determining a 'reasonable amount of compensation' a Court must take account of improvements made by the Commonwealth, including the construction of or improvements to buildings and infrastructure.

f. The Minister's Powers to Intervene in the Operations of Community Organisations

48. Part five vests broad powers in the Minister to intervene in the affairs of 'community services entities' in 'business management areas'. Both terms are defined so broadly that

¹³ Law Council of Australia, *Submission to the Senate Standing Committee on Legal and Constitutional Affairs, Northern Territory National Emergency Response Legislation*, 9 August 2007, [68] – [69].

it is likely that part 5 will apply to the majority of Indigenous community organisations responsible for delivering services in the Northern Territory. Part 5 Division 2 empowers the Minister to direct a community services entity to provide a service in a specified way, use its assets in a particular way, or even transfer ownership of its assets to a person or entity determined by the Minister.

49. Part 5 Division 3 also empowers the Minister to appoint an 'observer' to attend a meeting of a community services entity. There are no preconditions for the appointment of an observer and hypothetically, one could be appointed for the ulterior motive of intimidating an organisation that publicly criticised the Government. An observer appointed under Part 5 Division 3 will be entitled to copies of any papers or documents to be considered at the meeting and the minutes of the previous meeting (s. 73(2)). A failure to comply with such requirements may result in a civil penalty (s 74).

B. Underlying Concerns of the Approach Taken by the NTNER

50. We are concerned that the underlying approaches taken by the intervention have been driven by ideological responses to the issues it claims to address and has not been informed by looking at the evidence of what works and what doesn't.

- **The Need for a Research Based Policy Approach**

51. The absence of an evidence-based approach in the NTNER is evident by the failure to develop mechanisms for collecting baseline data by which to objectively assess whether the NTNER is working or not. It is also evident by the failure to recognise and support the programs that have been proven to work and by the failure to properly consult with the Aboriginal communities who are the subject of the intervention.

- **The Need to Focus on Capacity Building**

52. The mechanisms employed in the review do not focus on building skills within the Aboriginal community and they are not conducive to building capacity within Aboriginal communities. The abolition of CDEP has not been replaced by any programs focused on training and skilling Aboriginal people to the same extent and the quarantining of welfare payments is not as effective at building financial literacy as more targeted case managed programs such as the Family Income Management Scheme (FIMS) or by using the existing Centrepay system used by Centrelink, a voluntary automatic bill-payment program.
53. Research findings in Australia¹⁴ and North America¹⁵ are remarkably consistent in identifying the fundamental principles inherent in Indigenous communities that accomplish their own economic, political, social and cultural goals.
54. The research identifies that economic, social and cultural prosperity is achieved where communities exercise genuine decision making control over their internal affairs and utilisation of resources; where they have capable institutions of self-governance that have

¹⁴ M Dodson & D E Smith, "Governance for sustainable development: Strategic issues and principles for Indigenous Australian communities" *Discussion paper No 250/2003*, (CAEPR, Australian National University, 2003) at <http://www.anu.edu.au/caepr/discussion.php> (accessed 12 August 2008). See the findings of the Indigenous Community Governance Project, a collaborative action research project by the Centre for Aboriginal Economic Policy Research (CAEPR) and Reconciliation Australia (RA) http://www.anu.edu.au/caepr/ICGP_home.php (accessed 25 July 2008). See also the findings of the Successful Strategies in Aboriginal Organisations Project at <http://www.australiancollaboration.com.au/research/index.html> (accessed 12 August 2008)

¹⁵ For an overview of the research of the Harvard Project on American Indian Economic Development and the Native Nations Institute for Leadership, Management and Policy see Miriam Jorgenson (ed), *Rebuilding Native Nations: Strategies for Governance and Development* (Tucson, University of Arizona Press: 2007). For publications of the Harvard Project see <http://www.hks.harvard.edu/hpaied/> (accessed 25 July 2008) and NNI see <http://nni.arizona.edu/> (accessed 25 July 2008). There is dispute as to whether aspects of the Harvard Project's findings are replicable or indeed, desirable in Australia, which arguably relates to the ambiguity between 'community' and 'community organisation' identified by Hunt & Smith. See for example, Patrick Sullivan, "Indigenous Governance: The Harvard Project, Australian Aboriginal Organisations and Cultural Subsidiarity" *Working Paper No 4* (Desert Knowledge CRC, March 2007); Martin Mowbray "Localising Responsibility: The Application of the Harvard Project on American Indian Economic Development to Australia" (2006) 41(1) *Australian Journal of Social Issues* 87-103 and The Australian Collaboration & AIATSIS, *Volume 1: Organising for Success. Policy Report. Successful strategies in Indigenous organisations*, (AIATSIS and Australian Collaboration, 2007), 14-16 downloaded from <http://www.australiancollaboration.com.au/research/index.html> (accessed 12 August 2008). The significance of these critiques is open to question and there may be implications for potential implementation of the research. Nonetheless, an analysis of the findings demonstrates significant correlation of the fundamental foundations of 'successful' communities and organisations.

cultural legitimacy with the community that they serve and where their actions are based on long term systemic strategies with leadership focussed on creating stable political institutions.

55. Thus, the evidence indicates that federal government support would be best focussed on facilitating institutional capacity building, assisting communities to engage in long term strategic planning, supporting visionary leadership, allowing communities to develop their own priorities and assisting them to develop appropriate benchmarks that reflect Indigenous aspirations.
56. The Indigenous Community Governance Project ('ICGP') is a partnership between the Centre for Aboriginal Economic Policy Research ('CAEPR') and Reconciliation Australia, to undertake research on Indigenous community governance with participating Indigenous communities, regional Indigenous organisations, and leaders across Australia.¹⁶ The project seeks to understand the effectiveness of different forms of governance and their consequences for Indigenous policy, service delivery, self-determination and socioeconomic development.¹⁷
57. ICGP's preliminary findings appear to support the principles arising from the research findings of the Harvard Project on American Indian Economic Development over a twenty year period, that governance capacity is a fundamental factor in generating sustained economic development and social outcomes.¹⁸ "Important factors in the link between governance and socioeconomic development outcomes include strong visionary leadership; strong culturally based institutions of governance, sound stable management,

¹⁶ See the findings of the Indigenous Community Governance Project, a collaborative action research project by the Centre for Aboriginal Economic Policy Research (CAEPR) and Reconciliation Australia (RA) http://www.anu.edu.au/caepr/ICGP_home.php (accessed 25 July 2008)

¹⁷ Janet Hunt & Diane Smith, "Building Indigenous community governance in Australia: Preliminary research findings" *Working Paper No 31/2006* (CAEPR, Australian National University: May 2006), Foreword:

<http://www.anu.edu.au/caepr/Publications/WP/CAEPRWP31.pdf> (accessed 25 July 2008)

¹⁸ *Ibid*, ix

strategic networking into the wider regional and national economy; having prerequisite social infrastructure in place; and relevant training and mentoring opportunities.”¹⁹

58. In summary, the North American and Australian research has identified that Indigenous skills, abilities, knowledge and leadership are most effectively mobilised and exercised when initiatives are Indigenous-driven, towards Indigenous goals²⁰ that Dodson and Smith describe as exercising ‘jurisdiction’.²¹ Where communities exercise genuine decision making control, greater risk and accountability results in community leaders bearing the consequences of their actions and dealing with the consequent approval or disapproval from stakeholders, which in turn fosters better decision making as decision makers learn through experience.²² However, Indigenous jurisdiction and Indigenous driven initiatives are a necessary but not sufficient precondition for success. Effective institutions are also required.

59. Indigenous governance arrangements that have legitimacy with the community have two features.²³ They embody structures and decision making processes that reflect contemporary Indigenous conceptions of what are ‘proper’ relationships and forms of authority.²⁴ Second, they have the capacity to effectively get things done predictably and reliably, demonstrating accountability to internal and external stakeholders.²⁵

¹⁹ Ibid,

²⁰ Janet Hunt & Diane Smith, “Indigenous Community Governance Project: Year Two Research Findings” *CAEPR Working Paper No 36/2007* (CAEPR, Australian National University: April 2007), 34
<http://www.anu.edu.au/caepr/Publications/WP/CAEPRWP36.pdf> (accessed 25 July 2008)

²¹ M Dodson & D E Smith, “Governance for sustainable development: Strategic issues and principles for Indigenous Australian communities” Discussion paper No 250/2003, 8 at <http://www.anu.edu.au/caepr/discussion.php> (accessed 12 August 2008).

²² Stephen Cornell and Joseph P Kalt, “Two Approaches to the Development of Native Nations: One Works, the Other Doesn’t” in Miriam Jorgenson (ed), *Rebuilding Native Nations: Strategies for Governance and Development* (Tucson, University of Arizona Press: 2007), 21 (Two Approaches); Stephen Cornell & Joseph P Kalt, “Reloading the Dice: Improving the Chances for Economic Development on American Indian Resources”, in Stephen Cornell & Joseph P Kalt (eds) *What Can Tribes Do? Strategies and Institutions in American Indian Economic Development* (Los Angeles, American Indian Studies Centre UCLA: 1992), 14

²³ Hunt & Smith, above, note 20; Stephen Cornell, “Remaking the Tools of Governance. Colonial legacies, Indigenous solutions” in Miriam Jorgenson (ed), *Rebuilding Native Nations: Strategies for Governance and Development* (Tucson, University of Arizona Press: 2007), 71 (Remaking Tools)

²⁴ Hunt & Smith, above note 20, 27

²⁵ Stephen Cornell, “Enhancing Rural Leadership and Institutions: What Can We Learn from American Indian Nations?” (2001) 24(1) *International Regional Science Review* 84, 92-94

60. The research indicates that for Indigenous institutions to operate effectively, they need to be regarded as legitimate in the eyes of the people they purport to serve.²⁶ Importantly, there is significant difference between Indigenous and non-Indigenous notions of 'legitimacy'. While non-Indigenous assessments of legitimacy, especially in respect to organisational governance, focus on "corporate governance, financial and legal compliance, technical and administrative capacity, program accountability, inclusive community representation, the use of individual electoral and decision-making processes and concepts of individual equity", legitimacy for Indigenous people concentrates on "processes, relationships and cultural institutions".²⁷ As Hunt & Smith observe, process is fundamental to legitimacy, such that the means may be more important than the end.²⁸

61. Vitally, while formal governing institutions must resonate with contemporary Indigenous notions of appropriate form and organisation, this does not mean a return to precolonial systems and traditions.²⁹ Cultural legitimacy is increasingly complicated due to the legacies of colonialism and diverse aims and ambitions within Indigenous constituencies.³⁰ Smith provides the concept of the "process of Indigenous choice" where an Indigenously controlled process of fashioning new governance tools can itself be a source of legitimacy.³¹

62. Other factors include long term strategic thinking that converts reactive to proactive thinking, fosters a systemic approach and engenders a broader societal focus.³²

²⁶ Hunt & Smith, above, note 17, 14

²⁷ *ibid*, 15; Manley A Begay Jr, Stephen Cornell, Miriam Jorgenson & Joseph P Kalt, "Development, Governance, Culture. What are they and what do they have to do with rebuilding Native nations?" in Miriam Jorgenson (ed), *Rebuilding Native Nations: Strategies for Governance and Development* (Tucson, University of Arizona Press: 2007), 53 (Development, Governance, Culture)

²⁸ Hunt & Smith, above, note 17, 16

²⁹ Cornell & Kalt, Two Approaches, above note 22, 25

³⁰ Cornell, Remaking Tools, above, note 23, 73

³¹ D E Smith, "From Gove to Governance: Reshaping Indigenous Governance in the Northern Territory", *Discussion Paper No 265/2004*, (CAEPR, Australian National University: December 2004) <http://www.anu.edu.au/caepr/discussion.php> (accessed 13 August 2008); Cornell, RemakingTools, above, note 23., 73

³² Cornell & Kalt, Two Approaches, above, note 22, 25-26

Leadership that is focussed on empowering the nation and advancing national objectives is also fundamentally important to promoting development.³³

63. Complementary research conducted by the Australian Institute of Aboriginal and Torres Strait Islander Studies³⁴ at the invitation of the Australian Collaboration, a consortium of community organisations,³⁵ similarly found common themes. The two-year research project: "Successful Strategies in Aboriginal Organisations" investigated initiatives devised by Indigenous organisations that have promoted community wellbeing or overcome disadvantage.³⁶ The study observed that while Indigenous disadvantage was well documented, "inadequate attention had been given to examples of Indigenous creativity and leadership in tackling problems and that a report focusing on such successes would be of considerable value to Indigenous people and Indigenous policy makers".³⁷

64. Themes that emerge of successful organisations include sound governance with training adapted to specific circumstances; efficient and responsive service delivery; strategic planning; internal and external accountability; engagement with the community; clear and transparent vision and objectives and flexibility and responsiveness to change.³⁸ Relationships and partnerships are vital, where Indigenous organisations have a strong intercultural nature.³⁹

- **The Need for Government Responsibility**

³³ Cornell & Kalt, Two Approaches, above, note 22), 26-27; Manley A Begay Jr, Stephen Cornell, Miriam Jorgenson and Nathan Pryor "Rebuilding Native Nations: What do Leaders do?" in Miriam Jorgenson (ed), *Rebuilding Native Nations: Strategies for Governance and Development* (Tucson, University of Arizona Press: 2007), 275ff

³⁴ <http://www.aiatsis.gov.au/>

³⁵ <http://www.australiancollaboration.com.au/>

³⁶ The findings of the study are reported in three volumes at <http://www.australiancollaboration.com.au/research/index.html>. The first two volumes examine and analyse strategies in sixteen Indigenous organisations that have been successful in promoting community wellbeing and overcoming disadvantage. The third volume is concerned with joint management of Indigenous lands of high conservation value.

³⁷ The Australian Collaboration & AIATSIS, *Volume 1: Organising for Success. Policy Report. Successful strategies in Indigenous organisations*, (AIATSIS and Australian Collaboration, 2007), 9 downloaded from <http://www.australiancollaboration.com.au/research/index.html> (accessed 12 August 2008)

³⁸ *ibid*, 17-26

³⁹ *ibid*, 17-26

65. The ambitious objectives underpinning nation building will, in no small way, rely on the support of government – whether at the federal, state or local level. Devolving jurisdiction to Indigenous communities does not end government responsibility. Instead, its role is transformed from decision maker to facilitator. Supporting the foundational concepts of community building requires vision and fortitude.
66. Once the foundational conditions necessary for community growth and prosperity are understood, the challenge is in how those principles may be implemented in communities where they are not the norm.⁴⁰ The inevitable result from the research is that Indigenous communities will demonstrate diversity in structures, strategies and outcomes, which will be testing for to governments used to devising and implementing generic policy.⁴¹
67. Again, resonant themes emerge from the Australian and North American research as to the appropriate role for government. It is not uncommon for authority given to Indigenous leaders to be restricted to administrative implementation of government set priorities and protocols *within program guidelines*, while the big decisions about priorities and program design will be set elsewhere.⁴² Instead, the research reinforces the role of government as assisting communities to identify and achieve priorities.
68. Based on ICGP research, Hunt and Smith have made a variety of recommendations to foster environments conducive to the achievement of economic and social aspirations of Indigenous communities. These include fully costed service delivery in Indigenous communities; policy frameworks and program guidelines that actively promote Indigenous capacity and authority; greater support, advice, and mentoring for both governing bodies

⁴⁰ Developing strategies for implementation of nation building principles is the mission of such organisations as the Native Nations Institute for Leadership, Management and Policy (NNI) at the University of Arizona.⁴⁰ NNI's central focus, building on the research of the Harvard Project on American Indian Economic Development, is to assist in the building of "capable Native nations that can effectively pursue and ultimately realise their own political, economic, and community development objectives." It provides Native nations with comprehensive, professional training and development programs, including executive education and youth entrepreneur training programs, designed specifically to meet the needs of Indigenous leadership and management, concentrating on strategic and organisational development. See <http://nni.arizona.edu/whoweare/aboutnni.php> (accessed 25 July 2008)

⁴¹ Begay, Cornell, Jorgenson & Kalt, Development, Governance, Culture, above, note 27, 53

⁴² Cornell & Kalt, Two Approaches, above, note 22, 14

and managers in their organisational roles and responsibilities. They identify an urgent need for a nationally coordinated approach to the provision of governance capacity development and training that is targeted, high quality and place-based.⁴³ State and federal government policies, funding arrangements and initiatives are not consistent or coherent and also require urgent review.⁴⁴

- **Implications of the Research for the NTNER**

69. The research findings above are set out in some detail simply to emphasise the complex array of factors that must be incorporated into solutions to intractable problems faced by Indigenous communities. The NTNER does not exhibit the characteristics identified by the research as foundational.

70. To recognise that durable and sustainable solutions are necessary is not to deny the urgent need for fully costed service delivery and health and welfare initiatives that Indigenous communities have requested for decades. However, the research indicates that sustainable solutions require complex cultural considerations concentrating on process. Unfortunately, sustainable and enduring solutions to intractable issues will require timeframes well exceeding electoral cycles.⁴⁵

71. The NTNER has been criticised for its lack of engagement with the communities that it most affected.⁴⁶ Rather than facilitating the exercise of Indigenous jurisdiction, the NTNER sought to remove it. Short term, top down measures were introduced without consultation rather than building on existing successful programs, organisations and leadership and identifying Indigenous priorities.

⁴³ Hunt & Smith, above, note 20., 6, 7, 13, 23, 28, 34, 42

⁴⁴ Hunt & Smith, above, note 20, 36ff

⁴⁵ In formulating strategic planning for Native nations, NNI works in 25 to 50 year timeframes.

⁴⁶ Aboriginal & Torres Islander Social Justice Commissioner, above, note 1

72. The NTNER lacks long term strategic planning, exemplified by confusion as to its aims. While the stated aim was to protect Aboriginal children, the measures were of such breadth that it is not possible to characterise all measures as being directed to that aim. Further, it is not possible to detect a long term or coordinated approach. The NTNER lacks suitable monitoring and evaluation, such that measures of its success are unclear and accountability to Indigenous people lacking.

73. Instead, the former Indigenous affairs minister, Mal Brough, has admitted that the NTNER was planned in 48 hours.⁴⁷ Putting to one side the assertion by the government that immediate and drastic action was necessary,⁴⁸ reflex action does not illustrate a serious attempt to alleviate complex social problems.

74. Again, this is borne out by the evidence. Professor Jon Altman from the Centre for Aboriginal Economic Policy Research has observed that "comparative crisis research suggests that the more radical the reform (income quarantining, abolition of permits, abolition of CDEP, compulsory acquisition of land, grog bans, linking income support to school attendance) the more likely that implementation will be problem ridden and fail. History in Australia also suggests that there can be quite a disjuncture between Canberra and the bush and that crash through approaches rarely succeed."⁴⁹

- **Breach of International Human Rights Standards**

75. We have concerns that the Northern Territory National Emergency Response breaches several international conventions that Australia has ratified and that set a benchmark for acceptable basic human rights standards. We have identified breach of the Convention on the Rights of the Child, the Convention to Elimination all Forms of Racial Discrimination,

⁴⁷ ABC News, "Intervention created in just 48 hours: Brough" at <http://www.abc.net.au/news/stories/2008/06/16/2275863.htm> (accessed 12 August 2008)

⁴⁸ Media Releases by the former Minister for Families, Community Services and Indigenous Affairs and the Minister Assisting the Prime Minister for Indigenous Affairs, the Hon Mal Brough MP, http://www.facsia.gov.au/internet/Minister3.nsf/content/emergency_21june07.htm

⁴⁹ <http://www.crikey.com.au/NT-Intervention/20080619-Reflections-on-the-NT-Intervention-one-year-on.html>

the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights.

76. We believe the aspects of the Northern Territory National Emergency Response as detailed above violate the principles of international law as contained in the Convention on the Rights of the Child, namely:

Article 3

1. In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

2. States Parties undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her, and, to this end, shall take all appropriate legislative and administrative measures.

3. States Parties shall ensure that the institutions, services and facilities responsible for the care or protection of children shall conform with the standards established by competent authorities, particularly in the areas of safety, health, in the number and suitability of their staff, as well as competent supervision.

Article 30

In those States in which ethnic, religious or linguistic minorities or persons of indigenous origin exist, a child belonging to such a minority or who is indigenous shall not be denied the right, in community with other members of his or her group, to enjoy his or her own culture, to profess and practise his or her own religion, or to use his or her own language.

77. We believe the aspects of the Northern Territory National Emergency Response as detailed above violate the principles of international law as contained in the International Covenant to Eliminate all forms of Racial Discrimination, namely:

Article 2

1. States Parties condemn racial discrimination and undertake to pursue by all appropriate means and without delay a policy of eliminating racial discrimination in all its forms and promoting understanding among all races, and, to this end: (a) Each State Party undertakes to engage in no act or practice of racial discrimination against persons, groups of persons or institutions and to ensure that all public authorities and public institutions, national and local, shall act in conformity with this obligation;

(b) Each State Party undertakes not to sponsor, defend or support racial discrimination by any persons or organizations;

(c) Each State Party shall take effective measures to review governmental, national and local policies, and to amend, rescind or nullify any laws and regulations which have the effect of creating or perpetuating racial discrimination wherever it exists;

(d) Each State Party shall prohibit and bring to an end, by all appropriate means, including legislation as required by circumstances, racial discrimination by any persons, group or organization;

(e) Each State Party undertakes to encourage, where appropriate, integrationist multiracial organizations and movements and other means of eliminating barriers between races, and to discourage anything which tends to strengthen racial division.

2. States Parties shall, when the circumstances so warrant, take, in the social, economic, cultural and other fields, special and concrete measures to ensure the adequate development and protection of certain racial groups or individuals belonging to them, for the purpose of guaranteeing them the full and equal enjoyment of human rights and fundamental freedoms. These measures shall in no case entail as a consequence the maintenance of unequal or separate rights for different racial groups after the objectives for which they were taken have been achieved.

Article 5

In compliance with the fundamental obligations laid down in article 2 of this Convention, States Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights:

- (a) The right to equal treatment before the tribunals and all other organs administering justice;
- (b) The right to security of person and protection by the State against violence or bodily harm, whether inflicted by government officials or by any individual group or institution;
- (c) Political rights, in particular the right to participate in elections-to vote and to stand for election-on the basis of universal and equal suffrage, to take part in the Government as well as in the conduct of public affairs at any level and to have equal access to public service;
- (d) Other civil rights, in particular:
 - ...
 - (v) The right to own property alone as well as in association with others;
- (e) Economic, social and cultural rights, in particular:
 - ...
 - (iii) The right to housing;
 - (iv) The right to public health, medical care, social security and social services;
 - (v) The right to education and training;
 - (vi) The right to equal participation in cultural activities;

78. We believe the aspects of the Northern Territory National Emergency Response as detailed above violate the principles of international law as contained in the International Covenant of Civil and Political Rights, namely:

Article 1

1. All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

2. All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.

3. The States Parties to the present Covenant, including those having responsibility for the administration of Non-Self-Governing and Trust Territories, shall promote the realization of the right of self-determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations.

Article 2

1. Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

2. Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such laws or other measures as may be necessary to give effect to the rights recognized in the present Covenant.

3. Each State Party to the present Covenant undertakes:

(a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;

(b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;

(c) To ensure that the competent authorities shall enforce such remedies when granted.

Article 4

1. In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.

2. No derogation from articles 6, 7, 8 (paragraphs 1 and 2), 11, 15, 16 and 18 may be made under this provision.

3. Any State Party to the present Covenant availing itself of the right of derogation shall immediately inform the other States Parties to the present Covenant, through the intermediary of the Secretary-General of the United Nations, of the provisions from which it has derogated and of the reasons by which it was actuated. A further communication shall be made, through the same intermediary, on the date on which it terminates such derogation.

Article 26

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

Article 27

In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.

79. We believe the aspects of the Northern Territory National Emergency Response as detailed above violate the principles of international law as contained in the International Covenant of Economic, Social and Cultural Rights, namely:

Article 1

1. All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

2. All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.

3. The States Parties to the present Covenant, including those having responsibility for the administration of Non-Self-Governing and Trust Territories, shall promote the realization of the right of self-determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations.

Article 2

1. Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.

2. The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

3. Developing countries, with due regard to human rights and their national economy, may determine to what extent they would guarantee the economic rights recognized in the present Covenant to non-nationals.

Article 3

The States Parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all economic, social and cultural rights set forth in the present Covenant.

Article 4

The States Parties to the present Covenant recognize that, in the enjoyment of those rights provided by the State in conformity with the present Covenant, the State may subject such rights only to such limitations as are determined by law only in so far as this may be compatible with the nature of these rights and solely for the purpose of promoting the general welfare in a democratic society.

Article 5

1. Nothing in the present Covenant may be interpreted as implying for any State, group or person any right to engage in any activity or to perform any act aimed at the destruction of any of the rights or freedoms recognized herein, or at their limitation to a greater extent than is provided for in the present Covenant.

2. No restriction upon or derogation from any of the fundamental human rights recognized or existing in any country in virtue of law, conventions, regulations or custom shall be admitted on the pretext that the present Covenant does not recognize such rights or that it recognizes them to a lesser extent.

Article 9

The States Parties to the present Covenant recognize the right of everyone to social security, including social insurance.

Article 12

1. The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.

Article 13

1. The States Parties to the present Covenant recognize the right of everyone to education. They agree that education shall be directed to the full development of the human personality and the sense of its dignity, and shall strengthen the respect for human rights and fundamental freedoms. They further agree that education shall enable all persons to participate effectively in a free society, promote understanding, tolerance and friendship among all nations and all racial, ethnic or religious groups, and further the activities of the United Nations for the maintenance of peace.

2. The States Parties to the present Covenant recognize that, with a view to achieving the full realization of this right:

(a) Primary education shall be compulsory and available free to all;

(b) Secondary education in its different forms, including technical and vocational secondary education, shall be made generally available and accessible to all by every appropriate means, and in particular by the progressive introduction of free education;

...
(d) Fundamental education shall be encouraged or intensified as far as possible for those persons who have not received or completed the whole period of their primary education;

(e) The development of a system of schools at all levels shall be actively pursued, an adequate fellowship system shall be established, and the material conditions of teaching staff shall be continuously improved.

3. The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to choose for their children schools, other than those established by the public authorities, which conform to such minimum educational standards as may be laid down or approved by the State and to ensure the religious and moral education of their children in conformity with their own convictions.

4. No part of this article shall be construed so as to interfere with the liberty of individuals and bodies to establish and direct educational institutions, subject always to the observance of the principles set forth in paragraph 1 of this article and to the requirement that the education given in such institutions shall conform to such minimum standards as may be laid down by the State.

Article 15

1. The States Parties to the present Covenant recognize the right of everyone:
(a) To take part in cultural life.

C. Conclusions and Recommendations

80. That recommendation 1 of the Little Children are Sacred Report be implemented, namely,

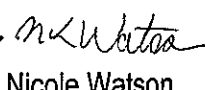

That Aboriginal child sexual abuse in the Northern Territory be designated as an issue of urgent national significance by both the Australian and Northern Territory Governments, and both governments immediately establish a collaborative partnership with a Memorandum of

Understanding to specifically address the protection of Aboriginal children from sexual abuse. It is critical that both governments commit to genuine consultation with Aboriginal people in designing initiatives for Aboriginal communities.

81. That the Racial Discrimination Act 1975 (Cth) be applied to the NTNER;
82. That protections under the Northern Territory anti-discrimination legislation be re-introduced to the NTNER;
83. That appeals to the Social Security Reviews Tribunal be allowed for people who are subject to welfare-quarantining and other social security measures employed by the NTNER , state-based legislation;
84. That the provisions that threaten the independence of Indigenous community organisations in Part Five, *Northern Territory National Emergency Response Act 2007* (Cth) be repealed.
85. That s 51 *Northern Territory National Emergency Response Act 2007* (Cth) be repealed and the procedural rights of native title holders under the future act regime in the *Native Title Act 1993* (Cth) be restored.
86. That Part four *Northern Territory National Emergency Response Act 2007* (Cth) be substantially amended in order to address the immense power imbalance between the Commonwealth and Indigenous property holders.
87. That a proper evidence-based analysis be undertaken of the NTNER in a time-frame that allows for the adequate collection of data;
88. That the policy of linking welfare payments to school attendance be properly trialled and evaluated;

89. That the approach of blanket application of welfare quarantining be replaced by a case-by-case approach that includes access to financial literacy programs such as FIMS and Centrepay.
90. That CDEP be re-introduced or a similar program developed that understands that there are only going to be a limited number of jobs in some areas of Australia and that programs like CDEP provide valuable training opportunities as well as being an effective mechanism for providing additional services, infrastructure and opportunities to Aboriginal communities; and,
91. That the NTNER be thoroughly assessed to ensure its compliance with international human rights benchmarks.
92. The government phase out the aspects of the NTNER that have not worked and replace them with alternative mechanisms based on an evidence-based approach;
93. That the Federal Government and the Northern Territory Government commit to meeting their obligations to provide:
 - a. Adequate levels of basic services for health and education, including adequate numbers of doctors, nurses, teachers and teacher's aides.
 - b. Adequate infrastructure for communities, including housing, schools, electricity and sewerage.
 - c. Programs that promote capacity building within Aboriginal communities.

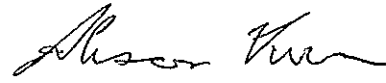
Thank you for the opportunity to make this contribution to the review of the Northern Territory National Emergency Response.



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