

# EVIDENCE? WHAT EVIDENCE? GOVERNMENT POLICY DEVELOPMENT AND THE NORTHERN TERRITORY INTERVENTION<sup>1</sup>

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## Introduction

Notwithstanding governments' assertions to the contrary, the gap between the evidence of what provides sustainable economic, social and cultural outcomes for Aboriginal and Torres Strait Islander peoples<sup>2</sup>, and government policies appears to be widening. Consecutive Australian Governments have stated and continue to argue that they are committed to an evidence-based approach to developing Aboriginal and Torres Strait Islander policy. They claim to have rejected ideological based policy in order to 'look to the evidence of what works and what does not work' to 'what is successful in overcoming indigenous disadvantage'.<sup>3</sup> However, rarely does any government identify the evidence that provides the basis for policy. This paper seeks to identify the principles – emerging from the evidence – that should frame Indigenous policy.

Like the Howard Government's practical reconciliation that preceded it and the Hawke Government's earlier pursuit of statistical equality, the current Australian Government's Closing the Gap initiatives<sup>4</sup> centre government policy

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<sup>2</sup> In this paper, the term 'Indigenous' will be used in reference to Australian Aboriginal and Torres Strait Islander people or peoples. The majority of Indigenous people in the Northern Territory are Aboriginal and will be referred to as Aboriginal people or peoples.

<sup>3</sup> Senator Chris Evans cited in Will Sanders, 'Ideology, Evidence and Competing Principles in Australian Indigenous Affairs: From Brough to Rudd via Pearson and the NTER' (2010) 45(3) *Australian Journal of Social Issues* 307, 309.

<sup>4</sup> The Closing the Gap strategy sets a number of ambitious targets with defined timeframes related to the life expectancy gap, mortality rates for Indigenous children under five, access to early childhood education, literacy and numeracy levels for Indigenous children, Year 12 attainment and employment outcomes based on seven building blocks, namely early childhood, schooling, health, economic participation, healthy homes, safe communities, governance and leadership. See *Closing the Gap: Targets and building blocks*, Department of Families, Housing, Community Services and Indigenous Affairs <<http://www.fahcsia.gov.au/sa/indigenous/progserv/ctg/Pages/targets.aspx>>.

on the narrow aim of reducing socioeconomic disparity.<sup>5</sup> Putting to one side the important question of the adequacy of an approach focussed on socioeconomic indicators alone,<sup>6</sup> this paper seeks to explore the evidence for the most crucial aspect of policy making, namely what approach *would* be adopted by governments seeking to achieve these stated aims, *if* indeed they were implementing evidence-based policy? Fortunately, comprehensive and robust research has been undertaken that has explored the conditions required for the achievement of sustained economic development and social outcomes in Aboriginal and Torres Strait Islander communities.

Mirroring the striking North American finding that stable political governance is a more critical factor to achieving economic development and other socioeconomic indicators than any other factor, the most comprehensive governance research conducted in Australia, the Indigenous Community Governance Project ('ICGP'),<sup>7</sup> identified that, while not the only factor, governance capacity was at the 'heart of sustainable Indigenous socioeconomic development.'<sup>8</sup> Importantly, in addition to a detailed analysis of Indigenous governance in Australia, the ICGP also explores the capacity of government policy, programs and practices to facilitate or undermine effective Indigenous governance and the achievement of community aspirations.

Simply put, North American and Australian evidence demonstrates that Indigenous control is central to achieving desired outcomes, whether governments' aspirations to close socioeconomic gaps or the broader social, economic, cultural and political aspirations of Indigenous peoples. Where

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<sup>5</sup> Will Sanders, 'Destined to fail: the Hawke government's pursuit of statistical equality in employment and income status between Aborigines and other Australians by the year 2000 or a cautionary tale involving the new managerialism and social justice strategies' (1991) 1991(2) *Australian Aboriginal Studies* 13; Jon Altman, 'Beyond Closing the Gap: Valuing Diversity in Indigenous Australia' (Working Paper No 54, Centre for Aboriginal Economic Policy Research, Australian National University, 2009).

<sup>6</sup> See for example, Altman, *Beyond Closing the Gap*, above n 6; Kerryn Pholi, Dan Black and Craig Richards, 'Is 'Close the Gap' a useful approach to improving health and wellbeing of Indigenous Australians?' (2009) 9(2) *Australian Review of Public Affairs*, 1.

<sup>7</sup> The ICGP was a partnership between the Centre for Aboriginal Economic Policy Research ('CAEPR') and Reconciliation Australia, which undertook research over five years on Indigenous community governance with participating Indigenous communities, regional Indigenous organisations, and leaders across Australia. For the ICGP research findings, see Janet Hunt et al, *Contested Governance: Culture, power and institutions in Indigenous Australia, Research Monograph No 29* (Centre for Aboriginal Economic Policy Research, Australian National University, 2008) ('Contested Governance'); Janet Hunt and Diane Smith, 'Indigenous Community Governance Project: Year Two Research Findings' (Working Paper No 36, Centre for Aboriginal Economic Policy Research, Australian National University, 2007) ('ICGP Year Two Findings'); Janet Hunt and Diane Smith, 'Building Indigenous community governance in Australia: Preliminary research findings' (Working Paper No 31, Centre for Aboriginal Economic Policy Research, Australian National University, 2006) ('ICGP: Preliminary Findings').

<sup>8</sup> Hunt and Smith, ICGP: Preliminary Findings, above n 7, 50.

initiatives are Indigenous driven towards Indigenous goals, Indigenous resources, knowledge and leadership are mobilised. It follows that strengthening the capacity of Indigenous peoples to exercise genuine decision making control and to implement those decisions efficiently and effectively should underpin government policy and programs as a necessary precondition for community development and economic prosperity. The evidence suggests that much more is required than Indigenous input into services and programs through consultation or Indigenisation of mainstream services. Rather, strengthening Indigenous community governance systems to enable Indigenous peoples to articulate their vision, set the agenda for their people and determine their own solutions is paramount.

The task set for governments by the evidence is not simple. Indigenous governance systems in Australia are complex and often exceedingly difficult for outsiders to understand – they may even be invisible to outsiders. Authority is often fluid and negotiable, with jurisdiction potentially varying depending on issue or geography. Engaging with Indigenous governing systems may involve negotiating with networks of people and organisations with overlapping rights and interests and variable boundaries for ‘community’ depending on the issue at hand. Imposed, prescribed structures for the convenience of dealing with government are likely to be illegitimate and centres of discord within the community.

Given the force of the research findings, it is obvious that a policy and programs approach with targets and direction set from outside is unlikely to be successful. The challenge for governments is to facilitate the development of culturally and practically legitimate Indigenous community capacity through processes that are under Indigenous control; to support rather than intervene. Simple, one size fits all solutions continue to be disastrous. Importantly, rather than continuing to look to Indigenous ‘problems’, governments necessarily must review their own processes to assess the extent to which they are supporting or facilitating Indigenous self-determination.

This paper seeks to explore the validity of the Government’s claim that it is implementing evidence-based Indigenous policy. First, the paper will attempt to provide an overview of Australian and international research that mandates the centrality of effective Indigenous governance systems. Given the comprehensive, especially complex and nuanced nature of the research, such a summary will necessarily be crude. It will argue that it is these principles that should provide the basis for government policy. Next, the paper will provide an overview of the nature of Indigenous governance in Australia. Finally, it will outline the lessons for governments emerging from that research.

The second stage of the paper will evaluate the Australian Government’s actual rather than stated approach to policy formation, by examining the Northern Territory Emergency Response (commonly referred to as the ‘Northern

Territory Intervention’). The Northern Territory Intervention was chosen as unquestionably the most significant Government initiative in Indigenous affairs recent times, and therefore, it is indicative of the Government’s underlying approach to policy formation. The evaluation considers to what degree the measures implemented by the Government accord with the evidence. It will analyse the means by which the Intervention was implemented and the impact and operation of certain measures to determine whether the principles emerging from the evidence are embodied in the policy. It is beyond the scope of this paper to investigate the evidence relating to the effectiveness of individual measures of the Intervention and whether they achieve their specific aims. Instead, the paper will concentrate on approaches and objectives that would exemplify evidence-based policy.

## **I WHAT DOES THE EVIDENCE SAY WILL MAKE A DIFFERENCE IN INDIGENOUS COMMUNITIES?**

Australia and the United States have different legal and political colonial histories, although Indigenous communities’ continuing assertions of sovereignty and resistance to assimilation provides a common narrative. Perhaps the most significant difference is that Australia, unlike the United States, has never formally recognised the continuing sovereignty of Aboriginal and Torres Strait Islander peoples, either at law or in the political sphere. This absence of recognition has precluded formal dealing on a nation-to-nation basis, such that issues of Indigenous jurisdiction and autonomy continue to be vigorously contested in Australia. By contrast, Native nations in the US are distinct, independent political communities exercising inherent tribal jurisdiction, although under direct authority of the federal government, which also has a trust relationship with Indigenous nations. Further, the US Government, at least nominally, adopted a policy of self-determination resulting in some Indigenous management of government programs.

Despite the different jurisdictional, political and historical circumstances of Indigenous peoples in Australia and North America, there are important similarities in research findings on the two continents that identify the fundamental characteristics of Indigenous communities that are achieving their own economic, political, social and cultural goals. Evidence from the Harvard Project on American Indian Economic Development (‘Harvard Project’) and Native Nations Institute for Leadership, Management and Policy (‘NNI’), and the Centre for Aboriginal Economic Policy Research’s (‘CAEPR’) Indigenous Community Governance Project (‘ICGP’) similarly identify the centrality of Indigenous self-determination to attaining desired outcomes. Thus, institutions that facilitate Indigenous control over their destinies through effective decision making and implementation of decisions are crucial. It follows that government policy should be directed at such institution building.

## Harvard Project on American Indian Economic Development

There is a common and simplistic misconception that Native nation economic development in the United States is based on gaming and casino revenue. This denies the vibrant and extraordinarily diverse economies of Native nations who own banks, telephone companies, construction companies and hotel chains, which run fish and game, forestry and eco-tourism operations or dot com enterprises, which manufacture goods and are major employers of Indigenous and non-Indigenous people.<sup>9</sup> Simultaneously, however, Native Americans rank 'near the bottom of the scale' in relation to 'income, employment, health, housing, education and other indices of poverty'.<sup>10</sup> It was this contrast that provided the genesis for the Harvard Project's<sup>11</sup> investigation into why some American Indian nations were able to break away from a seemingly intractable pattern of poverty and what conditions were necessary for sustained economic development.<sup>12</sup>

<sup>9</sup> For a comprehensive survey of the current position of Native American nations and communities, see Harvard Project on American Indian Economic Development, *The State of the Native Nations: Conditions under US Policies of Self-determination* (Oxford University Press, 2008) ('State of the Native Nations').

<sup>10</sup> Stephen Cornell, 'Indigenous Peoples, Poverty and Self-Determination in Australia, New Zealand, Canada and the United States' in Robyn Eversole, John-Andrew McNeish and Alberto D Cimadamore (eds), *Indigenous Peoples & Poverty* (Zed Books, 2005) 199, 206.

<sup>11</sup> For an excellent 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 Jorgensen (ed), *Rebuilding Native Nations: Strategies for Governance and Development* (University of Arizona Press, 2007). See also Harvard Project, State of the Native Nations, above n 9. For publications see:

< <http://www.hks.harvard.edu/programs/hpaied>>.

<sup>12</sup> It is important to note that whether HP-NNI research findings are reconcilable with Aboriginal and Torres Strait Islander political life and contemporary post-colonial realities in Australia is not without question. The different historical, political and legal factors that shape the broader governance environment within which Indigenous people operate have led some academics to question whether the findings are applicable, or indeed desirable, in Australia. See Martin Mowbray, 'What matters? Policy driven evidence, Indigenous government and the Harvard Project' (Paper presented at the Australian Social Policy Conference 2005, University of New South Wales, 20-22 July 2005); Martin Mowbray, 'Localising Responsibility: The Application of the Harvard Project on American Indian Economic Development in Australia' (2006) 41(1) *Australian Journal of Social Issues* 87; Patrick Sullivan, 'Indigenous Governance: The Harvard Project on Native American Economic Development and appropriate principles of governance for Aboriginal Australia' (Research Discussion Paper No 17, Australian Institute of Aboriginal and Torres Strait Islander Studies, 2006); Patrick Sullivan, 'Indigenous Governance: The Harvard Project, Australian Aboriginal Organisations and Cultural Subsidiarity' (Working Paper No 4, Desert Knowledge CRC, 2007); Australian Collaboration & Australian Institute of Aboriginal and Torres Strait Islander Studies, *Organising for Success. Policy Report. Successful strategies in Indigenous organisations* (Australian Institute of Aboriginal and Torres Strait Islander Studies and Australian Collaboration, 2007); and David F Martin, 'The governance of agreements between Aboriginal people and resource developers: Principles for sustainability' in Jon Altman and David Martin (eds), *Power, Culture, Economy: Indigenous Australians and Mining* (Research Monograph No 30, Centre for Aboriginal Economic Policy Research, Australian National University, 2009) 99. This author considers that many specific criticisms can be reconciled,

Strikingly, Indigenous economic prosperity in the United States is not dependent on the existence of conventional economic factors alone. Instead, stable political governance of Native nations was demonstrated to be a more crucial factor than availability of natural resources, market proximity or educational attainment of the community, although these factors contribute to the ability to harness opportunity. Researchers from the Harvard Project and its sister institute, the Native Nations Institute for Leadership, Management and Policy ('NNI')<sup>13</sup> clarify that economic prosperity is rarely an end in itself for Native nations. Instead, the goal is self-determination and the freedom that it generates.<sup>14</sup> Relevantly, Indigenous self-determination is not only a necessary precursor for economic development, but contributes to effective service delivery in health, education, natural resource management etc.<sup>15</sup> Thus the Harvard Project and NNI chronicle Indigenous nations' drive for self-determination in the areas of the arts and religion, in politics and economics, in culture and language and education and the environment in accord with 'contemporary, Indigenous conceptions of the right, the proper and the possible'.<sup>16</sup>

### **Indigenous Community Governance Project**

The findings of the most comprehensive and detailed research into Indigenous governance undertaken in Australia strongly resonate with those of the Harvard Project-NNI. The ICGP was established to understand the effectiveness of different forms of governance and their consequences for Indigenous policy, service delivery, self-determination and socioeconomic development.<sup>17</sup> It was designed to 'explore the diverse conditions and attributes of Australian Indigenous community governance arrangements, elucidate culturally based

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especially in light of the work of the ICGP. It is beyond the scope of this paper to address these concerns, other than to note them.

<sup>13</sup> NNI's central focus 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.

<sup>14</sup> Manley A Begay et al, 'Development, Governance, Culture: What Are They and What Do They Have to Do with Rebuilding Native Nations?' in Miriam Jorgensen (ed), *Rebuilding Native Nations: Strategies for Governance and Development* (University of Arizona Press, 2007) 34, 36.

<sup>15</sup> Alyce S Adams, Andrew J Lee and Michael Lipsky, 'Governmental Services and Programs: Meeting Citizens' Needs' in Miriam Jorgensen (ed), *Rebuilding Native Nations: Strategies for Governance and Development* (University of Arizona Press, 2007) 223.

<sup>16</sup> Harvard Project, State of the Native Nations, above n 9, 2.

<sup>17</sup> Diane Smith, 'Researching Australian Indigenous Governance: A Methodological and Conceptual Framework' (Working Paper No 29, Centre for Aboriginal Economic Policy Research, Australian National University, 2005).

foundations of Indigenous governance and extricate broad universal principles of what constitutes effective, legitimate Indigenous governance, identifying transferable lessons to contribute to policy formulation'.<sup>18</sup>

The ICGP concluded that governance capacity is a fundamental factor in generating sustained economic development and social outcomes:

Important factors in the link between governance and socioeconomic development outcomes include strong visionary leadership; strong culturally based institutions of governance, sound stable management, strategic networking into the wider regional and national economy; having prerequisite social infrastructure in place; and relevant training and mentoring opportunities.<sup>19</sup>

The research highlighted that building 'strong legitimate and effective governance appears to enable communities to make headway in generating and sustaining real improvement in their economic outcomes'.<sup>20</sup>

Hunt and Smith observe that while 'governance capability is at the heart of sustainable Indigenous socioeconomic development',<sup>21</sup> it is not the sole determinant of positive development outcomes. Other influential factors include 'investments in infrastructure, communications, health, education' and 'geography may define certain structural limitations'.<sup>22</sup> Strong governance and management within Indigenous communities and community organisations enable them to achieve socioeconomic outcomes by utilising available forms of capital, even within environments with significant capital deficiencies.<sup>23</sup> The ICGP hypothesises that it may be that effective governance is a prerequisite for mobilising other forms of capital – human, business, infrastructure, natural, public institutional, knowledge, social – and that 'good governance' provides better conditions for that capital to be developed and sustained.<sup>24</sup>

### **Characteristics of Indigenous peoples achieving their goals**

Essentially, Indigenous peoples achieving their goals exercise genuine decision making control over their internal affairs and utilisation of resources (described in Australia as exercising 'political jurisdiction');<sup>25</sup> have capable mechanisms of self-governance that get things done predictably and reliably, are accountable to internal and external stakeholders and have cultural legitimacy

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<sup>18</sup> Ibid 1- 4.

<sup>19</sup> Hunt and Smith, ICGP Preliminary Findings, above n7, x.

<sup>20</sup> Ibid 35.

<sup>21</sup> Ibid 50.

<sup>22</sup> Ibid 33.

<sup>23</sup> Ibid 34.

<sup>24</sup> Ibid 33.

<sup>25</sup> Michael Dodson and Diane Smith, 'Governance for sustainable development: Strategic issues and principles for Indigenous Australian communities' (Discussion Paper No 250, Centre for Aboriginal Economic Policy Research, Australian National University, 2003) 10.

with the community they serve; and base their actions on long term systemic strategies with leadership focussed on creating stable political institutions.

Simply put, North American and Australian research similarly identified that Indigenous skills, abilities, knowledge and leadership are most effectively mobilised and exercised when initiatives are Indigenous-driven, towards Indigenous goals; where Indigenous people call the shots.<sup>26</sup> Where Indigenous people are driving the agenda and making decisions about future direction, capacity can be productively released and mobilised.<sup>27</sup> Where decision-makers exert genuine decision making control, greater risk and accountability results in them 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.<sup>28</sup> Cornell and Kalt assert that they cannot find in the United States ‘a single case of sustained economic development in which an entity other than the Native nation is making the major decisions about development strategy, resource use or internal organisation.’<sup>29</sup>

Decision making is not sufficient alone. Indigenous communities and organisations require capable and effective governance arrangements that are considered ‘legitimate’ by their constituencies. Unsurprisingly, as in every aspect of Indigenous governance, legitimacy is itself complex and multifaceted, measured against a range of potential criteria: ‘cultural match’, practical capability, and internal and external accountability. What constitutes accountability varies according to who is making the assessment and the issue at hand. Thus, legitimacy in relation to traditional law, kinship, land ownership and ceremony etc will differ quite markedly from the legitimacy of Indigenous organisations acting as service providers in an inter-cultural environment and will differ again to concepts of legitimacy held by outsiders.

Legitimacy has a cultural element because governance is not culture neutral.<sup>30</sup> A central finding of Australian and North American research is the necessity for governance structures and mechanisms that embody contemporary Indigenous notions of appropriate form and organisation – that have legitimacy with those who they purport to serve.<sup>31</sup> Governance arrangements in Indigenous groups, communities, organisations or societies reflect attempts to embody their own values, norms and views about how authority and leadership

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<sup>26</sup> Hunt and Smith, ICGP Year Two Findings, above n 7, 34; Stephen Cornell and Joseph P Kalt, ‘Two Approaches to the Development of Native Nations: One Works, the Other Doesn’t’ in Miriam Jorgensen (ed), *Rebuilding Native Nations: Strategies for Governance and Development* (The University of Arizona Press, 2007) 3, 19-22 (‘Two Approaches’).

<sup>27</sup> Hunt and Smith, ICGP Year Two Findings, above n 7, 29-30.

<sup>28</sup> Cornell and Kalt, Two Approaches, above n 26, 21.

<sup>29</sup> Ibid 22.

<sup>30</sup> Hunt and Smith, ICGP Preliminary Findings, above n 7, 13.

<sup>31</sup> Ibid 14; Hunt and Smith, ICGP Year Two Findings, above n 7, 27; Cornell and Kalt, Two Approaches, above n 26, 24-25.

should be exercised – achieving desired results in the ‘proper way’. International and national experience indicates that informal norms or ‘intangibles’ – unwritten institutions, accepted values, norms, communication styles, social systems, political processes, and practices – give form to governance arrangements and critically impact on governance effectiveness.<sup>32</sup>

Cultural legitimacy is increasingly complicated due to the legacies of colonialism and the diverse aims and ambitions within Indigenous constituencies.<sup>33</sup> Vitality, while governing arrangements should embody contemporary Indigenous notions of appropriate form and organisation, this does not mean a return to pre-colonial systems and traditions,<sup>34</sup> although it has been interpreted as such.<sup>35</sup> Traditional forms of governing and practices, developed in response to quite different circumstances, may be inadequate for contemporary demands and there may be irreconcilable mismatch between aspects of Indigenous culture and corporate culture.<sup>36</sup> Thus, the modern challenge is to develop governing institutions that still resonate with deeply held community principles and beliefs about authority but which also meet contemporary needs.<sup>37</sup> Such a challenge may be met through the ‘process of Indigenous choice’ where an Indigenous controlled process of fashioning new governance tools can itself be a source of legitimacy.<sup>38</sup> As Hunt and Smith observe, process is fundamental to legitimacy, such that means may be more important than the ends.<sup>39</sup>

While cultural match is necessary, it provides but one aspect of legitimacy and is not sufficient without the practical capacity to get things done – to take action, carry out functions, and respond to opportunities and challenges.<sup>40</sup> Culturally appropriate organisations that do not deliver outcomes will not maintain legitimacy for very long. Finally, the North American and Australian research emphasises the central role of visionary leaders who operate in exceedingly complex environments and under great pressure.<sup>41</sup> They are often

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<sup>32</sup> Hunt and Smith, ICGP Preliminary Findings, above n 7, 40.

<sup>33</sup> Stephen Cornell, 'Remaking the Tools of Governance: Colonial Legacies, Indigenous Solutions' in Miriam Jorgensen (ed), *Rebuilding Native Nations: Strategies for Governance and Development* (University of Arizona Press, 2007) 57, 73 (Remaking the Tools).

<sup>34</sup> Cornell and Kalt, Two Approaches, above n 26, 25.

<sup>35</sup> Patrick Sullivan, 'Indigenous Governance: The Harvard Project, Australian Aboriginal Organisations and Cultural Subsidiarity' (Working Paper No 4, Desert Knowledge CRC, 2007) 11.

<sup>36</sup> Cornell and Kalt, Two Approaches, above n 26, 25; Hunt and Smith, ICGP Preliminary Findings, above n 7, 16.

<sup>37</sup> Cornell and Kalt, Two Approaches, above n 26, 25.

<sup>38</sup> Diane E Smith, 'From Gove to Governance: Reshaping Indigenous Governance in the Northern Territory' (Working Paper No 265, Centre for Aboriginal Economic Policy Research, Australian National University, 2004) 27; Cornell, Remaking the Tools, above n 33, 73.

<sup>39</sup> Hunt and Smith, ICGP Preliminary Findings, above n 7, 16.

<sup>40</sup> Ibid 21.

<sup>41</sup> Manley A Begay et al, 'Rebuilding Native Nations: What Do Leaders Do?' in Miriam

operating at the interface of the two worlds, faced with the challenge of putting in place the strategic foundations for sustained development and enhanced community welfare, while balancing family and community obligations, ensuring financial and program compliance, undertaking advocacy and resistance, all day, every day.

## II THE NATURE OF INDIGENOUS GOVERNANCE IN AUSTRALIA

Governance is about power, jurisdiction, control and choice – it is about the relative scope and extent of power, who has influence, who makes the decisions and ‘calls the shots’, who makes the rules, and how decision-makers are held accountable, both internally and externally.<sup>42</sup> Systems of governance are the rules and institutions – both formal and informal – that ‘societies put in place to organise themselves and get done what needs to be done, and the mechanisms they use to implement and enforce those rules.’<sup>43</sup>

It is difficult to overstate the multifaceted complexity and diversity of Indigenous governance, involving a plurality of actors, institutions and systems.<sup>44</sup> Indigenous systems of social and political organisation are complex, fluid and negotiable<sup>45</sup> and potentially opaque to the non-Indigenous eye. Nonetheless, despite, or perhaps because of their complexity, Indigenous peoples are effectively governing and producing outcomes.<sup>46</sup>

Even the term ‘governance’ as it applies to Indigenous political and social systems lacks clarity. In Australia, there is a tendency for governments in particular, to narrowly define ‘governance’ in terms of corporate governance principles. ‘Capacity building’ for Indigenous communities as a means of overcoming socioeconomic disadvantage has been a mantra adopted by various governments but as Hunt and Smith note, ‘exercises currently being undertaken under the rubric of ‘governance training’ are focussed largely around competencies or knowledge related to management and compliance issues.’<sup>47</sup> The inadequacy of ‘capacity building’ as currently conceived is that, while

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Jorgensen (ed), *Rebuilding Native Nations: Strategies for Governance and Development* (University of Arizona Press, 2007) 275ff; Hunt and Smith, ICGP Year Two Findings, above n 7, 8-12.

<sup>42</sup> Hunt and Smith, ICGP Preliminary Findings, above n 7, 18.

<sup>43</sup> Begay et al, *Development, Governance, Culture*, above n 14, 41.

<sup>44</sup> Diane Smith and Janet Hunt, 'Understanding Indigenous Australian governance - research, theory and representations' in Janet Hunt et al (eds), *Contested Governance: Culture, power and institutions in Indigenous Australia* (Centre for Aboriginal Economic Policy Research, Australian National University, 2008) 1, 11. ('Understanding Indigenous Australian Governance')

<sup>45</sup> Hunt and Smith, ICGP Year Two Findings, above n 7, 20.

<sup>46</sup> *Ibid* 22.

<sup>47</sup> Hunt and Smith, ICGP Preliminary Findings, above n 7, 53.

corporate governance or management and business administration are undoubtedly important to effectively producing outcomes, they are only one facet of the ‘whole-of-community’ approach to the broader processes of making and implementing decisions<sup>48</sup> and may indeed be counterproductive to workable forms of Indigenous governance.<sup>49</sup> Indigenous community governance encompasses the more complex ‘whole of community’ environment entailing multi-layered, multi-component, networked systems of groups, organisations and communities.

Unsurprisingly, given the invisibility of Indigenous governance systems to non-Indigenous people, ‘community’ and ‘community organisation’ are often conceptually conflated and there is ambiguity in use of the terms. Outsiders often wrongly perceive Indigenous organisations as governing institutions in themselves, failing to appreciate that ‘Indigenous organisations are embedded within wider systems of so-called ‘traditional’ or ‘classical’ Indigenous governance and are tightly linked to the Indigenous society around them.’<sup>50</sup> More holistically, the ICGP defines ‘community’ as ‘a network of people and organisations linked together by a web of personal relationships, cultural and political connections and identities, networks of support, traditions and institutions, shared socioeconomic conditions, or common understandings and interests.’<sup>51</sup>

Indigenous ‘community’ may refer to discrete geographic locations or dispersed communities of identity or interest. Even physically discrete settlements may be internally comprised of multiple communities of identity with different rights and interests,<sup>52</sup> themselves enmeshed in wider communities of identity and regional networks<sup>53</sup>. Nor are ‘communities’ of fixed composition. Most Indigenous communities - whether discrete settlements or dispersed communities of interest or identity - are complex mixes of residents with different cultural and historical ties and different, sometimes overlapping, rights and interests.<sup>54</sup> High rates of mobility amongst some groups may also alter composition.<sup>55</sup> The result is complex, layered, sometimes fluid and unbounded sets of affiliations that individuals draw upon at different times to express their ‘community’ identities.<sup>56</sup> Indigenous collective identities are permeable<sup>57</sup> and social layers intersect and overlap, such that small scale groups form larger alliances and confederacies – some

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<sup>48</sup> Ibid.

<sup>49</sup> Smith and Hunt, *Understanding Indigenous Australian Governance*, above n 44, 12.

<sup>50</sup> Hunt and Smith, *ICGP Preliminary Findings*, above n 7, 26.

<sup>51</sup> Hunt and Smith, *ICGP Year Two Findings*, above n 7, 4.

<sup>52</sup> Ibid.

<sup>53</sup> Hunt and Smith, *ICGP Preliminary Findings*, above n 7, 9.

<sup>54</sup> Ibid.

<sup>55</sup> Ibid.

<sup>56</sup> Hunt and Smith, *ICGP Year Two Findings*, above n 7, 4.

<sup>57</sup> Hunt and Smith, *ICGP Preliminary Findings*, above n 7, 24.

enduring, some opportunistic – in a concertina effect according to need.<sup>58</sup> All of these incarnations are ‘community’.

### **Common principles of Australian Indigenous governance – networked governance, relational autonomy, subsidiarity and nodal leadership**

The ICGP research has identified particular Indigenous principles and mechanisms that underpin effective and legitimate governance systems that appear to be broadly relevant across different governance environments in Australia.<sup>59</sup> The fluidity and negotiability of Indigenous governance is demonstrated in the balancing of a preference for localism and local autonomy against a compulsion towards collectivism, connectedness and interdependence.<sup>60</sup> For example, a very strong desire for local autonomy and small-scale residence operates alongside a social propensity to generate larger-scale forms of representation and alliance.<sup>61</sup> A strong preference for decision making at the most local level possible is balanced against an acknowledgment that some decisions should be made at higher, more centralised levels when more inclusive matters require consideration.<sup>62</sup>

Indigenous peoples reject the notion that governance arrangements should be centralised, bounded and unitary.<sup>63</sup> Rather, Indigenous preferences lend themselves to regional models of governance with federalised and decentred systems of governance.<sup>64</sup> Hunt and Smith describe governance arrangements encompassing networks of relatively autonomous but interdependent entities – groups and categories of people – in on-going negotiation of roles, rights and responsibilities between the constituent parts,<sup>65</sup> and existing within an increasingly complex array of public, private and non-government organisational interests.<sup>66</sup> Decision-making power, governing functions and economic activities are dispersed among these multi-layered sets of entities.<sup>67</sup> They found that where roles and responsibilities are not clarified, organisations within communities end up competing for constituents, resources and leaders, usually to their detriment.<sup>68</sup> While relations between components of networks are relatively egalitarian, some social, cultural and leadership connections are valued more highly than others and given greater priority.<sup>69</sup> Thus, ‘nodes’ in

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<sup>58</sup> Ibid 19.

<sup>59</sup> Hunt and Smith, ICGP Year Two Findings, above n 7, 14-23.

<sup>60</sup> Hunt and Smith, ICGP Preliminary Findings, above n 7, 24.

<sup>61</sup> Hunt and Smith, ICGP Year Two Findings, above n 7, 14.

<sup>62</sup> Ibid 14-15, 22; Hunt and Smith, ICGP Preliminary Findings, above n 7, 19.

<sup>63</sup> Hunt and Smith, ICGP Year Two Findings, above n 7, 14-15.

<sup>64</sup> Ibid; Hunt and Smith, ICGP Preliminary Findings, above n 7, 20.

<sup>65</sup> Hunt and Smith, ICGP Year Two Findings, above n 7, 15.

<sup>66</sup> Smith and Hunt, Understanding Indigenous Australian Governance, above n 44, 13.

<sup>67</sup> Hunt and Smith, ICGP Preliminary Findings, above n 7, 14.

<sup>68</sup> Ibid 20.

<sup>69</sup> Hunt and Smith, ICGP Year Two Findings, above n 7, 20.

Indigenous networks are formed where relative power coalesces and authority is greater depending on the ability to access and mobilise resources.<sup>70</sup>

A major advantage of federalised forms of regional governance appears to lie in their tolerance of diversity, complex identities, and the inter-dependency of groups.<sup>71</sup> However, these same features provide the challenge for ‘community’ governance to sustain a networked model accommodating dispersed residence and inherently fluid and negotiable relationships.<sup>72</sup>

It is rare to find a single organisation as representative body in Australia as you might find in the United States. Instead, plurality of organisations is the norm in Indigenous community governance, as is some degree of dispersal of governance roles and responsibilities.<sup>73</sup> Embedded within the broader community governance system, different communities utilise organisations in a variety of ways to meet community needs. Some exist to receive funds or hold assets, others provide a range of services or have a more representative role. How Indigenous organisations function within the governance network is a product of the history of the governance arrangements of that location and what constitutes legitimacy.<sup>74</sup> In some cases, powerful people hold key positions in community organisations and make decisions through those organisations; in others, senior people stand behind the decision makers in organisations but exert considerable influence.<sup>75</sup>

Finally, the research emphasises the crucial role that Indigenous leadership plays in effective community governance. Leadership is expressed through nodes of influential individuals connected through networks formed by their relationships, shared histories, values, experience and knowledge.<sup>76</sup> Some leaders are more influential than others, and some are acknowledged for particular expertise.<sup>77</sup>

Importantly, Indigenous leadership is subject to different authorising networks – Indigenous and non-Indigenous – that may be invisible or incomprehensible to others.<sup>78</sup> Consequently, non-Indigenous parties should exercise care to ensure they are engaging with the ‘right’ leaders for the specific issue at hand since undermining properly authorised leadership, whether inadvertently or deliberately, cannot strengthen Indigenous governance.<sup>79</sup> Care should also be taken not to impose values that will undermine legitimate leadership. It may be

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<sup>70</sup> Ibid.

<sup>71</sup> Hunt and Smith, ICGP Preliminary Findings, above n 7, 25.

<sup>72</sup> Hunt and Smith, ICGP Year Two Findings, above n 7, 20.

<sup>73</sup> Hunt and Smith, ICGP Preliminary Findings, above n 7, 27.

<sup>74</sup> Hunt and Smith, ICGP Year Two Findings, above n 7, 5.

<sup>75</sup> Hunt and Smith, ICGP Preliminary Findings, above n 7, 16.

<sup>76</sup> Hunt and Smith, ICGP Year Two Findings, above n 7, 12.

<sup>77</sup> Ibid.

<sup>78</sup> Ibid.

<sup>79</sup> Ibid.

a challenging notion to outsiders to appreciate that the forced imposition of western liberal ideas about electoral processes, individual equality, or gender equity is unlikely to be effective.<sup>80</sup> Rather, given the opportunity and support, Indigenous people will more effectively determine their own representative and decision-making processes, and how they wish to respond to western ideas in their governance arrangements, if at all.<sup>81</sup>

## **Legitimacy**

Today, Indigenous governance in Australia is the product of attempts to retain many aspects of culturally-based guiding principles, while simultaneously establishing organisational structures that deliver services, administer programs and grants, and satisfy external demands for financial accountability.<sup>82</sup>

Aboriginal and Torres Strait Islander governance structures are relational models. When establishing new representative arrangements, Indigenous people first seek to work out, and through, relationships.<sup>83</sup> They must resolve who are the right people to speak (leadership and power); who are the right members of the group to be served or represented (membership and constituency); and who can make decisions, and how can people be held accountable for their decisions (decision making).<sup>84</sup> A primary focus is on getting these relationships right.<sup>85</sup> Much of this work done by Indigenous communities is often ‘invisible’ to outsiders, and usually takes precedence over issues of structure.<sup>86</sup> That is, organisational structures arise out of these largely ‘invisible’ dimensions and informal processes, not the other way around.<sup>87</sup>

In the Australian environment where there are significant differences in jurisdictional and political power, and economic status, there are important differences between Indigenous and non-Indigenous views as to what constitutes ‘legitimacy’.<sup>88</sup> Non-Indigenous assessments of governance tend to relate to aspects of 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.<sup>89</sup> Tensions will almost inevitably arise because of differing perceptions of role. While government departments may conceive of Indigenous organisations as *deliverers* of services and

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<sup>80</sup> Ibid.

<sup>81</sup> Ibid.

<sup>82</sup> Hunt and Smith, ICGP Preliminary Findings, above n 7, 23.

<sup>83</sup> Hunt and Smith, ICGP Year Two Findings, above n 7, 20.

<sup>84</sup> Ibid.

<sup>85</sup> Ibid 24.

<sup>86</sup> Hunt and Smith, ICGP Preliminary Findings, above n 7, 22.

<sup>87</sup> Ibid.

<sup>88</sup> Ibid 14ff; Hunt and Smith, ICGP Year Two Findings, above n 7, 24ff.

<sup>89</sup> Hunt and Smith, ICGP Preliminary Findings, above n 7, 15.

*implementers* of government programs, Indigenous organisations perceive themselves in a more fundamental way as *decision-makers* and government funding as being available to support *their priorities and goals more holistically* (original emphasis).<sup>90</sup> The focus of Indigenous assessments of legitimacy appears to relate primarily to the processes, relationships, and cultural institutions involved. Important considerations include how structures of governance are created, leaders chosen and how they perform; how consensus in decision making is secured; whether resources are shared, and whether culturally-based capabilities and knowledge are supported.<sup>91</sup> As described above, for Indigenous peoples, legitimacy is about process and governance arrangements need to be ‘developed *by them* as a result of informed choice’ (original emphasis).<sup>92</sup>

To further complicate matters, Indigenous assessments of the legitimacy of their own arrangements can be affected by external stakeholders’ requirements and assessment criteria. For example, failing to conform to reporting or acquittal requirements can impact on funding, which in turn may impact on the ability to deliver practical outcomes or services which can erode community confidence.<sup>93</sup>

Nor is there unanimity in relation to measures of ‘effectiveness’. Indigenous people may judge the effectiveness of an organisation by how well it ‘looks after them’, responds to their cultural and socioeconomic goals, delivers services, and maintains relationships and credibility with its membership.<sup>94</sup> By contrast, government departments are more likely to judge effectiveness in terms of an organisation’s ability to acquit grants and meet program targets related to higher level departmental and government policy goals.<sup>95</sup>

As noted above, contemporary legitimacy is complicated by histories of colonisation, dispossession and assimilationist public policy. Indigenous communities, however defined, reflect complex mixes of family, cultural and historical affiliations.<sup>96</sup> ICGP research indicates that while no single model of governance is suitable, neither are all formal governance models equally effective.<sup>97</sup> Hunt and Smith suggest that there may be aspects of Indigenous cultures that are not amenable to, or easily integrated into the ‘culture’ of corporate management and business<sup>98</sup> and that some elements of Indigenous family and political systems may undermine or counteract the governance

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<sup>90</sup> Hunt and Smith, ICGP Year Two Findings, above n 7, 41.

<sup>91</sup> Hunt and Smith, ICGP Preliminary Findings, above n 7, 15.

<sup>92</sup> Hunt and Smith, ICGP Year Two Findings, above n 7, 24.

<sup>93</sup> Ibid.

<sup>94</sup> Ibid 41.

<sup>95</sup> Ibid.

<sup>96</sup> Hunt and Smith, ICGP Preliminary Findings, above n 7, 9.

<sup>97</sup> Ibid 12.

<sup>98</sup> Ibid 16.

effectiveness of organisations.<sup>99</sup> In order to deal with these challenges, Indigenous leaders and groups are utilising mainstream corporate tools to support effective governance and customising them to accord with their preferred Indigenous cultural styles of interaction.<sup>100</sup>

The ICGP has identified the severe challenge to achieving cultural match and governance legitimacy when power inequalities are so great and Indigenous groups feel constrained by little choice as to how they do things.<sup>101</sup> Indigenous people feel that they do everything that the government asks of them but receive little in return.<sup>102</sup> The ICGP describes the power imbalance operating in Indigenous communities and organisations whereby the non-Indigenous world encapsulates and penetrates the other, describing the ‘cultural mismatch and contestation that occurs when organisations try to adapt or accommodate Indigenous cultural practices into their governance arrangements but in the end generally have to comply with western norms and program requirements’.<sup>103</sup>

### **How non-Indigenous governments undermine Indigenous governance**

Crucially, the research emphasises that Indigenous governance is but part of the story when the actions of governments and the private and voluntary sector can enable or disable the achievement of community aspirations.<sup>104</sup> The research findings suggest a critical need for top-level support from government and provision of integrated funding mechanisms, backed by bureaucratic leadership and collaboration to generate a positive enabling environment.<sup>105</sup> State and federal governments’ policies, funding arrangements and initiatives demonstrate neither consistency nor coherency and require urgent review.<sup>106</sup>

The ICGP reports that at least half the so-called ‘Indigenous governance problem’ results from governments’ own political and bureaucratic incapacity and, in particular, governments’ inability to formulate and implement enabling policy and integrated financial frameworks.<sup>107</sup> Many of the factors that determine the sustainability of Indigenous governance relate to the extent to which policy, service-delivery, funding, program and legal frameworks either enable or disable Indigenous governance. Rapidly changing national policy and funding environments and poor coordination and collaboration between government departments within and across jurisdictions are placing an

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<sup>99</sup> Ibid 17.

<sup>100</sup> Ibid.

<sup>101</sup> Hunt and Smith, ICGP Year Two Findings, above n 7, 26.

<sup>102</sup> Ibid 27.

<sup>103</sup> Ibid 26.

<sup>104</sup> Smith and Hunt, Understanding Indigenous Australian Governance, above n 44, 13.

<sup>105</sup> Hunt and Smith, ICGP Preliminary Findings, above n 7, 52.

<sup>106</sup> Hunt and Smith, ICGP Year Two Findings, above n 7, 36ff.

<sup>107</sup> Hunt and Smith, ICGP Preliminary Findings, above n 7, 48; Hunt and Smith, ICGP Year Two Findings, above n 7, 29.

increasing burden on Indigenous organisations.<sup>108</sup> Unfortunately, there is little sense of governments responding in a collaborative, integrated way that could lead to structural reform in engaging with Indigenous communities and their governance arrangements.<sup>109</sup>

Governments' culture of risk avoidance and financial micro-management can stifle community organisations, preventing them from responding to community-led priorities and planning.<sup>110</sup> Day-to-day compliance issues can dominate leaving important strategic governance and functional responsibilities neglected. Yet the evidence demonstrates that it is those organisations that ignore or are unable to give attention to governance development which experience 'greater internal conflict, dominating leadership, poor outcomes, difficulty in delivering services, and problems with internal and external accountability.'<sup>111</sup> This, in turn, undermines an organisation's internal legitimacy and accountability, adversely impacting on its overall effectiveness and creates a negative feedback loop operating between these internal and external dimensions of effectiveness.<sup>112</sup>

One specific area in which governments undermine Indigenous governance is through current funding models and reporting requirements. The need for pooled, streamlined funding to Indigenous communities has been recommended in countless government reviews and inquiries. Yet uncoordinated and overly stringent compliance requirements disable better governance when organisations spend significant amounts of limited staff time on financial accountability and reporting requirements, which detract from their other governance work.<sup>113</sup> Indigenous organisations need considerable management and financial skill to consolidate funds from disparate programs that have changing guidelines and uncertain implementation procedures,<sup>114</sup> balancing funded core functions and unfunded constituency expectations, further complicated by cost shifting practices of governments.<sup>115</sup>

## Lessons for governments

A central message from the ICGP is that what is required is for a more sophisticated understanding of how Indigenous peoples are inserting their culturally based worldviews, values and institutions into their contemporary governance arrangements, and the ways these interact with the cultural values

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<sup>108</sup> Hunt and Smith, ICGP Preliminary Findings, above n 7, 48.

<sup>109</sup> Hunt and Smith, ICGP Year Two Findings, above n 7, 41.

<sup>110</sup> Hunt and Smith, ICGP Preliminary Findings, above n 7, 61.

<sup>111</sup> *Ibid* 17.

<sup>112</sup> *Ibid* 61.

<sup>113</sup> *Ibid*.

<sup>114</sup> Hunt and Smith, ICGP Year Two Findings, above n 7, 42.

<sup>115</sup> *Ibid* 6.

and institutions underlying the western systems of governance in Australia.<sup>116</sup> Unfortunately, the ICGP research findings seriously question whether conditions currently exist in Australia to enable Indigenous community leadership and decision-making authority to be adequately exercised.

The evidence exposes the contradiction for governments claiming to be implementing evidence-based policy that, while governance capability is at the heart of sustainable Indigenous socioeconomic development, it is the issue most easily forgotten in both Indigenous and government approaches.<sup>117</sup> In this regard, the ICGP highlights the failures of governments' policies, programs and practices that inhibit capacity and good governance of Indigenous organisations and communities. The research concluded that the 'delivery and funding of governance capacity development remains ad hoc, poorly coordinated, poorly funded and poorly monitored.'<sup>118</sup> Conversely, 'where a facilitated, community development approach is taken to Indigenous governance development, greater progress is made in creating sustained capacity and legitimacy'.<sup>119</sup> Indeed, where governance 'problems' have been addressed separately from a more holistic, community-wide development approach, governance 'solutions' appear to be less resilient.<sup>120</sup> The ICGP identified an 'urgent need for a nationally coordinated approach to the provision of governance capacity development and training.'<sup>121</sup>

A key hurdle for government policy makers is the fact that the issues involved are complicated, conceptually challenging, multi-layered and do not lend themselves to straightforward or instant solutions. Thus, a 'one size fits all' policy approach is unworkable and unsustainable and likely to produce sub-optimal outcomes.<sup>122</sup> Hunt and Smith have documented major problems when governments 'attempt to unilaterally impose 'single solution' models of governance, especially when these diverge significantly from a networked governance approach, or attempt to externally impose the form of the network itself.'<sup>123</sup> By contrast, strengthening Indigenous governance capacity relies on governments devolving power and authority to community and regional levels.<sup>124</sup> Capacity development for governance should actively strengthen Indigenous decision-making and control over their core institutions, goals and identity, and enhance cultural match and legitimacy.<sup>125</sup>

Policy frameworks and capacity development strategies for building

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<sup>116</sup> Smith and Hunt, *Understanding Indigenous Australian Governance*, above n 44, 13.

<sup>117</sup> Hunt and Smith, *ICGP Preliminary Findings*, above n 7, 50.

<sup>118</sup> Hunt and Smith, *ICGP Year Two Findings*, above n 7, 34.

<sup>119</sup> *Ibid.*

<sup>120</sup> Hunt and Smith, *ICGP Preliminary Findings*, above n 7, 20.

<sup>121</sup> Hunt and Smith, *ICGP Year Two Findings*, above n 7, 34.

<sup>122</sup> *Ibid.* 43.

<sup>123</sup> *Ibid.* 21.

<sup>124</sup> Hunt and Smith, *ICGP Preliminary Findings*, above n 7, 55.

<sup>125</sup> *Ibid.*

Indigenous governance must appreciate that Indigenous people's preparedness to support them, depends on their having representative structures and decision-making processes that reflect contemporary Indigenous views of 'proper' relationships, forms of authority and cultural geographies, *combined with* a practical management and service capacity to deliver outcomes.<sup>126</sup> The complexity of 'legitimacy' in its various manifestations necessitates an approach from governments that facilitates and provides the time for Indigenous communities and organisations to undertake their own processes of governance development. Misguided attempts by agencies to start with establishing governance structures first are likely to fail, if they ignore the more complex issues of relationships and representation.<sup>127</sup>

In addition, more innovative approaches to community development need to recognise that building capable governance is a developmental process where change is incremental and requires a long-term commitment.<sup>128</sup> Contemporary Indigenous governance and cultural match arrangements need room to evolve to meet internal and external changing conditions and challenges. Some communities and their organisations have experienced difficulties when their early experiments with cultural match become too quickly concretised or juridified by formal legal and technical mechanisms (constitutions, regulation and statutes) that require external permission to be changed.<sup>129</sup> Indigenous people need time to assess how well their governance initiatives are working, and the power to adapt or completely change arrangements when they are found to be insufficient to the task, or lose credibility.<sup>130</sup> This has considerable implications for governments and mainstream legal and regulatory frameworks that must enable flexibility in the search for effective governance and culture match.<sup>131</sup>

Perhaps the greatest hurdle for governments is recognising that success is most likely achieved when the Indigenous governance building process is under Indigenous control. Governance capacity is greatly enhanced when Indigenous people create their own rules, policies, guidelines, procedures, codes, and design the local mechanisms to enforce those rules and hold their own leaders accountable.<sup>132</sup> Governments and their departments need to support Indigenous people but avoid the temptation to take over the process.<sup>133</sup> When unilateral intervention has occurred in the past, the internal legitimacy of organisations and leaders have been diminished, their effectiveness reduced, and objectives potentially undermined.<sup>134</sup> The effect is that the weakening of internal

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<sup>126</sup> Hunt and Smith, ICGP Year Two Findings, above n 7, 27.

<sup>127</sup> Ibid 21.

<sup>128</sup> Hunt and Smith, ICGP Preliminary Findings, above n 7, 52.

<sup>129</sup> Ibid 21.

<sup>130</sup> Ibid.

<sup>131</sup> Ibid.

<sup>132</sup> Hunt and Smith, ICGP Year Two Findings, above n 7, 34.

<sup>133</sup> Hunt and Smith, ICGP Preliminary Findings, above n 7, 18.

<sup>134</sup> Ibid.

legitimacy ‘permeates into external stakeholders’ negative perceptions of an organisation’s credibility and effectiveness, which in turn further undermines the organisation, creating a debilitating cycle.’<sup>135</sup>

Further, community governance capability will only flourish in an environment of mutual respect. The research confirms that Indigenous people and ‘mainstream’ Australian society differ as to what constitutes valued capabilities. Thus, governments may value effective corporate management while Indigenous people value communication, relationship-building and managing internal and external politics.<sup>136</sup> The common approach is to focus mainly on corporate and financial accountability but is not producing sustained improvements in good governance, because ‘the key issues Indigenous people are grappling with relate to embedding shared values and relationships, and developing their institutions of governance.’<sup>137</sup>

Finally but vitally, efforts to improve the effectiveness of Indigenous governance at the local level will also need to focus considerably more attention on the wider public, private and voluntary environment and the extent to which it is either enabling or disabling Indigenous governance efforts.<sup>138</sup> A significant challenge for governments is to overcome the inertia or self-interest of policy makers who seek to maintain policy and implementation practices that are counterproductive to effective, legitimate Indigenous governance.<sup>139</sup>

Based on ICGP research, Hunt and Smith have made a variety of specific recommendations to foster environments conducive to the achievement of economic and social aspirations of Indigenous communities that should shape government policy.<sup>140</sup> Unfortunately, to date, there is little suggestion that governments are adopting approaches consistent with the evidence.

#### **IV GOVERNMENT POLICY FORMATION, THE EVIDENCE AND THE NORTHERN TERRITORY INTERVENTION**

The Northern Territory Intervention now rebranded as ‘Closing the Gap in the Northern Territory’, is unquestionably the most significant policy initiative in Indigenous affairs in recent times and arguably illustrates the principles that the Government seeks to implement through its policies and programs affecting Indigenous Australians. Underpinning the National Indigenous Reform Agreement<sup>141</sup> are seven Indigenous specific National Partnership Agreements,

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<sup>135</sup> Ibid 19.

<sup>136</sup> Ibid 52.

<sup>137</sup> Ibid 55.

<sup>138</sup> Ibid 40.

<sup>139</sup> Smith and Hunt, *Understanding Indigenous Australian Governance*, above n 44, 13.

<sup>140</sup> Hunt and Smith, *ICGP Year Two Findings*, above n 7, 7, 13, 23, 28, 34-35, 42-43.

<sup>141</sup> The National Indigenous Reform Agreement commits all Australian governments to the

including the *Closing the Gap in the Northern Territory Partnership Agreement* that maintains and strengthens the core measures of the Northern Territory Intervention, while claiming to place a greater emphasis on community engagement and partnerships and building capability and leadership within Indigenous communities.<sup>142</sup> It requires an enormous expenditure, estimated at \$1.4 billion over 5 years.<sup>143</sup> This represents a dramatic shift from the Intervention's original justification relating to child protection to mainstream Indigenous policy initiatives relating to reducing socioeconomic disparity.

In this second part of the paper, the Northern Territory Intervention will be assessed against the principles emerging from the evidence that would underpin government policy. Based on the North American and Australian evidence, crudely summarised above, governments seeking to implement evidence-based policy would promote Indigenous capacity and authority; would facilitate the development of governance institutions and mechanisms that are effective and have cultural legitimacy with those they purport to serve; would recognise that a process driven approach – a means rather than ends preference – is time consuming but crucial to developing appropriate governance systems; would appreciate that Indigenous aspirations may not accord with non-Indigenous ambitions; and would provide support and mentoring for Indigenous leaders and other key people. Crucially, governments would evaluate their own policies, programs and practices to determine to what extent they enable or disable effective governance of Aboriginal and Torres Strait Islander communities and the effective operation of Indigenous organisations. Most fundamentally, top down, 'one size fits all' initiatives would cease.

Three fundamental principles that government policy would embody are:

- Genuine Indigenous control over decision making and their governance arrangements;
- Capable, effective mechanisms and organisations that can get things done; and
- Institutions and organisations that have cultural legitimacy in the eyes of the people they are designed to serve.

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Closing the Gap targets and sets out the strategy for achieving them. Department of Families, Housing, Community Services and Indigenous Affairs, *Closing the Gap: National Indigenous Reform Agreement*

<<http://www.fahcsia.gov.au/sa/indigenous/progserv/ctg/Pages/NIRA.aspx>>.

<sup>142</sup> Ibid.

<sup>143</sup> Senate Standing Committee on Community Affairs, *Government expenditure on Indigenous affairs and social services in the Northern Territory* (2008) [3.7] <[http://www.aph.gov.au/senate/committee/clac\\_ctte/gov\\_exp\\_indig\\_affairs/report/c03.htm](http://www.aph.gov.au/senate/committee/clac_ctte/gov_exp_indig_affairs/report/c03.htm)> .

## **Background to the Northern Territory Intervention**

In June 2007, six days after the public release of the report of an inquiry into the protection of children from sexual abuse in Aboriginal communities in the Northern Territory, entitled *Ampe Akelyernemane Meke Mekarle: 'Little Children Are Sacred'* ('*Little Children are Sacred*'),<sup>144</sup> the Howard Government announced a 'national emergency intervention' into Aboriginal communities in the Northern Territory.<sup>145</sup>

The consistent and unequivocal message of *Little Children are Sacred* was the urgent need for radical change in the way government and non-government organisations consult, engage with and support Aboriginal people.<sup>146</sup> The report held that previous approaches had left Aboriginal people 'disempowered, confused, overwhelmed, and disillusioned.'<sup>147</sup> The weakening of communities was observed to be due to a:

... combination of the historical and on-going impact of colonisation and the failure of governments to actively involve Aboriginal people, especially Elders and those with traditional authority, in decision making.<sup>148</sup>

Central to each of its 97 recommendations was the critical need for sincere consultation with Aboriginal people in designing initiatives for Aboriginal communities. The repeated emphasis throughout the report was on 'genuine partnerships', 'immediate and on-going effective dialogue with Aboriginal people', and 'genuine consultation in designing initiatives that address child sexual abuse'.<sup>149</sup> It called for an approach that facilitated voluntary engagement and community consent for policy, instead of token consultation as a means of imparting information.<sup>150</sup>

Nonetheless, within eight weeks of publication of the report, the Howard Government passed an expansive legislative package<sup>151</sup> with bi-partisan

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<sup>144</sup> Northern Territory Board of Inquiry into the Protection of Aboriginal Children from Sexual Abuse, *Ampe Akelyernemane Meke Mekarle – 'Little Children are Sacred' Report of the Northern Territory Board of Inquiry into the Protection of Aboriginal Children from Sexual Abuse* (2007). ('*Little Children are Sacred Report*').

<sup>145</sup> Mal Brough, 'National emergency response to protect Aboriginal children in the NT' (Media release, 21 June 2007) <[http://www.formerministers.fahcsia.gov.au/malbrough/mediareleases/2007/Pages/emergency\\_21june07.aspx](http://www.formerministers.fahcsia.gov.au/malbrough/mediareleases/2007/Pages/emergency_21june07.aspx)>.

<sup>146</sup> *Little Children are Sacred Report*, above n 144, 50.

<sup>147</sup> *Ibid.*

<sup>148</sup> *Ibid.*

<sup>149</sup> *Ibid.*

<sup>150</sup> *Ibid* 52.

<sup>151</sup> *Northern Territory National Emergency Response Act 2007* (Cth) ('*NTNER Act*'); *Families, Community Services and Indigenous Affairs and Other Legislation Amendment (Northern Territory National Emergency Response and Other Measures) Act 2007* (Cth) ('*FaCSIA Amendment Act*'); *Social Security and Other Legislation Amendment (Welfare*

support, imposing blanket application of non-discretionary measures. The provisions of the Northern Territory Intervention legislation were targeted directly at Aboriginal people, and the operation of the *Racial Discrimination Act 1975* (Cth) was excluded in respect of all acts or omissions made for the purposes of the Northern Territory Intervention,<sup>152</sup> although it was purportedly reinstated on 31 December 2010.<sup>153</sup>

Similar concerns to those expressed in *Little Children are Sacred* were articulated in the report of the Northern Territory Emergency Response Review Board (Review Board).<sup>154</sup> The Review Board had been ‘established to conduct an independent and transparent review’<sup>155</sup> of the Intervention after its first year of operation. Notwithstanding its observations of definite gains and widespread, if qualified, community support for many measures,<sup>156</sup> the Review Board reported vehement opposition to the racially discriminatory nature of the Northern Territory Intervention:

Experiences of racial discrimination and humiliation as a result of the NTER were told with such passion and such regularity that the Board felt compelled to advise the Minister for Indigenous Affairs during the course of the Review that such widespread Aboriginal hostility to the Australian Government’s actions should be regarded as a matter for serious concern.

There is intense hurt and anger at being isolated on the basis of race and subjected to collective measures that would never be applied to other Australians. The Intervention was received with a sense of betrayal and disbelief. Resistance to its imposition undercut the potential effectiveness of its substantive measures.<sup>157</sup>

Nonetheless, it concluded that the situation in remote Northern Territory communities and town camps remained ‘sufficiently acute to be described as a national emergency’ and that the Northern Territory Intervention should continue.<sup>158</sup> It made three overarching recommendations including that governments establish a ‘relationship with Aboriginal people based on genuine consultation, engagement and partnership’.<sup>159</sup>

Importantly, the Review Board observed that an essential requirement for

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*Payment Reform Act 2007* (Cth) (*Welfare Payment Reform Act*).

<sup>152</sup> *NTNER Act 2007* (Cth) s 132(2); *FaCSIA Amendment Act 2007* (Cth) s 4(2); *Welfare Payment Reform Act 2007* (Cth) ss 4(3) 6(3).

<sup>153</sup> *Social Security and Other Legislation Amendment (Welfare Reform and Reinstatement of Racial Discrimination Act) Act 2010* (Cth) s 2.

<sup>154</sup> Northern Territory Emergency Response Review Board, ‘Report of the Northern Territory Emergency Response Review Board’ (2008). (‘NTER Review Board Report’)

<sup>155</sup> Jenny Macklin, ‘NT Emergency Response Review Board’ (Media release, 6 June 2008) <[http://www.jennymacklin.fahcsia.gov.au/mediareleases/2008/Pages/nt\\_emergency\\_reponse\\_06jun08.aspx](http://www.jennymacklin.fahcsia.gov.au/mediareleases/2008/Pages/nt_emergency_reponse_06jun08.aspx)>.

<sup>156</sup> NTER Review Board Report, above n 154, 10.

<sup>157</sup> *Ibid*, Foreword.

<sup>158</sup> *Ibid* 10.

<sup>159</sup> *Ibid* 12.

‘ensuring the on-going stability and sustainability of communities is that they have capable and culturally legitimate systems of leadership and governance.’<sup>160</sup> The required systems should involve processes through which communities ‘make important decisions, including setting strategic decisions, determine who participates in decision making and how, and decide who exercises what power and how they are held accountable.’<sup>161</sup> In a detailed analysis, the Review Board supported a ‘community development approach to both the building of capacity and governance in communities and regions.’<sup>162</sup> The Review Board recommended, among other things, that governments support ‘programs and structures designed to enhance Indigenous governance bodies at local and regional levels that will enable communities to achieve their cultural, political, economic and social development goals.’<sup>163</sup>

The Rudd Government acknowledged that to achieve long-term outcomes, and for them to be effective, they must be created through meaningful engagement with Indigenous peoples.<sup>164</sup> It committed to ‘real consultation with Aboriginal people in the Northern Territory so the NTER measures can be improved’.<sup>165</sup> As an initial step in the resetting of the relationship and to provide a framework for a consultation process, the Rudd Government released the *Future Directions for the Northern Territory Emergency Response Discussion Paper* (‘Future Directions Discussion Paper’), which outlined the Government’s proposals to amend eight Intervention measures, and formed the basis for the so called Redesign Consultation process in 2009. The Government claimed that it was open to ideas and proposals and that it would ‘listen to ideas put forward in consultations’.<sup>166</sup>

The resulting consultation process was conducted on an extraordinary scale. Over 500 meetings were conducted in all 73 prescribed areas targeted for intensive application of the Northern Territory Intervention measures, other Northern Territory communities and town camps.<sup>167</sup> It involved several

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<sup>160</sup> Ibid 54.

<sup>161</sup> Ibid.

<sup>162</sup> Ibid 56.

<sup>163</sup> Ibid 57.

<sup>164</sup> Jenny Macklin, ‘Compulsory Income Management to Continue as Key NTER Measure’ (Press Release, 23 October 2008)

<[http://www.jennymacklin.fahcsia.gov.au/mediareleases/2008/Pages/nter\\_measure\\_23oct08.a.spx](http://www.jennymacklin.fahcsia.gov.au/mediareleases/2008/Pages/nter_measure_23oct08.a.spx)>; Australian Government, ‘Future Directions for the Northern Territory Emergency Response’ (2009), 3

<[http://www.fahcsia.gov.au/sa/indigenous/pubs/nter\\_reports/future\\_directions\\_discussion\\_paper/Pages/default.aspx](http://www.fahcsia.gov.au/sa/indigenous/pubs/nter_reports/future_directions_discussion_paper/Pages/default.aspx)>. (‘Future Directions’); Australian Government, *Report on the Northern Territory Emergency Response Redesign Consultations* (November, 2009) 5, 7 <[http://www.facs.gov.au/sa/indigenous/pubs/nter\\_reports/Pages/report\\_nter\\_redesign\\_consultations.aspx](http://www.facs.gov.au/sa/indigenous/pubs/nter_reports/Pages/report_nter_redesign_consultations.aspx)>. (‘NTER Redesign Consultations Report’).

<sup>165</sup> Australian Government, *Future Directions*, above n 164, 3.

<sup>166</sup> Ibid.

<sup>167</sup> The measures that constitute the Northern Territory Intervention apply only to Prescribed Areas. Defined under s 4(2) of the *NTNER Act*, Prescribed Areas are forms of Aboriginal

thousand people most of whom were Indigenous.<sup>168</sup> Four tiers of consultation were adopted, ranging from meetings with individuals and families, to community meetings, to intensive workshops.<sup>169</sup> The Government commissioned Cultural & Indigenous Research Centre Australia ('CIRCA') to assess whether the consultations were undertaken in accordance with the Government's engagement and communication strategy (but not best practice indicia) and it concluded that they were.<sup>170</sup> CIRCA's report, however, also identified serious flaws in the consultation process.

Allegedly emerging from the consultation process, the Australian Parliament enacted legislation in June 2010 that amended a number of Intervention measures in a stated attempt to bring the Intervention in conformity with the *Racial Discrimination Act*. The Government expanded the application of income quarantining and intended that the amended scheme would be independent of race and, as a result, non-discriminatory.<sup>171</sup> It intended that other amended measures – namely alcohol restrictions, pornography restrictions, five-year leases, community store licensing and the powers of the Australian Crime Commission ('ACC') – would remain as special measures under the *Racial Discrimination Act*.<sup>172</sup> The object provisions of the legislation make the intention explicit, other than in relation to the ACC powers.<sup>173</sup> Other measures remained unchanged. Under the amending legislation, the *Racial Discrimination Act* and other anti-discrimination laws were purportedly reinstated at the end of 31 December 2010,<sup>174</sup> although many lawyers and legal commentators, including the Australian Human Rights Commission, are concerned that in the absence of a 'notwithstanding clause', discriminatory measures will not be altered by the reinstatement of the *Racial Discrimination Act*.<sup>175</sup>

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tenure, covering an area of over 600 000 square kilometres and encompassing more than 500 Aboriginal communities. The focus of the Northern Territory Intervention measures is on 73 of the larger Aboriginal township settlements and associated outstations, as well as a number of Aboriginal town camps.

<sup>168</sup> Explanatory Memorandum, Social Security and Other Legislation Amendment (*Welfare Reform and Reinstatement of Racial Discrimination Act*) Bill 2009 (Cth), Outline.

<sup>169</sup> Australian Government, NTER Redesign Consultations Report, above n 164, 7.

<sup>170</sup> Cultural & Indigenous Research Centre Australia, 'Report on the NTER Redesign Engagement Strategy and Implementation' (September 2009), 5  
<[http://www.fahcsia.gov.au/sa/indigenous/pubs/nter\\_reports/Pages/report\\_nter\\_redesign\\_strat\\_implement.aspx](http://www.fahcsia.gov.au/sa/indigenous/pubs/nter_reports/Pages/report_nter_redesign_strat_implement.aspx)> ('CIRCA Report').

<sup>171</sup> Australian Government, 'Policy Statement: Landmark Reform to the Welfare System, Reinstatement of the Racial Discrimination Act and Strengthening of the Northern Territory Emergency Response' (2009), 6  
<[http://www.fahcsia.gov.au/SA/INDIGENOUS/PUBS/NTER\\_REPORTS/POLICY\\_STATEMENT\\_NTERR/Pages/default.aspx](http://www.fahcsia.gov.au/SA/INDIGENOUS/PUBS/NTER_REPORTS/POLICY_STATEMENT_NTERR/Pages/default.aspx)> ('Policy Statement: Landmark Reform').

<sup>172</sup> Explanatory Memorandum, Reinstatement of RDA Bill, above n 170, 32, 40, 44, 50, 85.

<sup>173</sup> *NTNER Act* ss 6A, 30A, 91A; *Classification (Publications, Films and Computer Games) Act 1995* (Cth) s 98A.

<sup>174</sup> *Social Security and Other Legislation Amendment (Welfare Reform and Reinstatement of Racial Discrimination Act) Act 2010* (Cth) s 2.

<sup>175</sup> Australian Human Rights Commission, 'Inquiry into the Welfare Reform and

## **Evidence based principles that should underpin government policy**

This section will assess the Northern Territory Intervention against the three principles outlined above that emerge from the research as those which should be embodied in Government policy.

### **1. Genuine Aboriginal control over decision making**

First, the paper will assess the extent to which Government policy facilitated genuine Aboriginal control over decision making in both the implementation and continuation of the Northern Territory Intervention, and in the imposition of certain measures. These include statutory imposition of compulsory five year leases over Aboriginal freehold land; the Minister's powers to intervene in the operation of Aboriginal organisations; appointment of Government Business Managers and removal of the future act process under the *Native Title Act 1993* (Cth) (*Native Title Act*).

#### ***Implementation and continuation of the Northern Territory Intervention***

Given the scale of the Northern Territory Intervention and potential impact of its non-discretionary measures, two striking features of it were the complete absence of Indigenous input into its design or implementation and the extent to which the measures undermine existing decision-making mechanisms – the antithesis of an approach proposed by the evidence of the conditions that facilitate economic and community development. This failure to engage Aboriginal people had further significance, being introduced at a time when there was no national representative body for Aboriginal and Torres Strait Islander people in Australia.<sup>176</sup> In this regard, the United Nations Committee on the Elimination of Racial Discrimination's criticism of Australia for abolishing the Aboriginal and Torres Strait Islander Commission, an act which the Committee considered could reduce Indigenous peoples' participation in decision-making and alter Australia's capacity to address the full range of issues relating to Aboriginal peoples, was prescient.<sup>177</sup>

The lack of consultation and the astonishing haste with which the legislation was passed<sup>178</sup> raised bitter condemnation from the outset and engendered deep

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Reinstatement of Racial Discrimination Act Bill 2009 and other Bills: AHRC Submission to the Senate Community Affairs Committee' (2010) 14-16 ('Reinstatement of RDA submission').

<sup>176</sup> The Aboriginal and Torres Strait Islander Commission was abolished in April 2004 and no representative Indigenous body existed until 2010 with the establishment of the National Congress of Australia's First Peoples.

<sup>177</sup> Committee on the Elimination of Racial Discrimination, *Concluding Observations: Australia*, 66th sess, UN Doc CERD/C/AUS/CO/14 (14 April 2005) [11].

<sup>178</sup> The legislative process took just 10 days, despite the fact that it introduced 480 pages of new legislation: See Aboriginal and Torres Islander Social Justice Commissioner, *Social Justice Report 2007* (2008), 215-19. Further, the former Minister for Indigenous Affairs, Mal

suspicion as to the motives for its implementation, especially given its proximity to a federal election. Unsurprisingly, hostility to government from Aboriginal people and a lack of support and cooperation that otherwise might have existed, were and are evident which diminished its potential effectiveness.<sup>179</sup> This frustration and anger was exacerbated by a 'profound lack of communication across all levels and between all key stakeholders', with 'little explanation of the rationale' linking the measures of the Northern Territory Intervention with child abuse.<sup>180</sup> One study found that 'dysfunctional communication strategies' produced undue hardship as well as 'confusion, fear, and frustration in Aboriginal communities, where information was conveyed by rumour'.<sup>181</sup>

In response, the Government undertook the 2009 consultation process as a means of undertaking 'real consultation' and resetting the relationship with Aboriginal people. The Government's report of the process noted the extensive scale and comprehensive approach and describes it as being 'open and fair' where 'open discussions' that 'emphasised the importance of people having their say' were facilitated.<sup>182</sup> Examples cited of the Government's responsiveness to feedback arising from the consultations include amended proposals in relation to income quarantining, police powers relating to alcohol laws, the pornography measure and the business management area powers.<sup>183</sup> The Government reported support for the continuation of the Intervention and 'the need for and desire of Aboriginal people to take greater ownership of solutions to the problems that the NTER is seeking to address'.<sup>184</sup>

However, a closer examination of the content of the Future Directions Discussion Paper and the conduct of the consultation process suggests that the Government's positive account is highly questionable, especially when the inadequacy of the consultation process is appreciated. Serious flaws in the consultation process undermine its credibility and rendered reliance on the

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Brough, revealed in June 2008 that it took just 48 hours to formulate the policy that was the foundation for the measures: See ABC News (online), 'Intervention created in just 48 hours: Brough,' 16 June 2008 <<http://www.abc.net.au/news/stories/2008/06/16/2275863.htm>>.

<sup>179</sup> NTER Review Board Report, above n 154, 10; Central Land Council, 'Northern Territory Emergency Response: Perspectives from Six Communities' (2008)

<[www.clc.org.au/media/issues/intervention/CLC\\_REPORTweb.pdf](http://www.clc.org.au/media/issues/intervention/CLC_REPORTweb.pdf)> ('Community Survey'); Australian Indigenous Doctors Association, 'Submission to the Northern Territory Emergency Response Review Board' (2008), [9]-[11] <<http://www.aida.org.au/submissions.aspx>> ('Review Board Submission'); Claire Smith and Gary Jackson, 'A Community-Based Review of the Northern Territory Emergency Response' (Institute of Advanced Study for Humanity, University of Newcastle, August 2008) 5 ('Community-Based Review').

<sup>180</sup> AIDA, Review Board Submission, above n 179, [9]-[10].

<sup>181</sup> Smith and Jackson, Community-Based Review, above n 179, 128.

<sup>182</sup> Australian Government, NTER Redesign Report, above n 164, 18.

<sup>183</sup> Evidence to Senate Community Affairs Legislation Committee, Parliament of Australia, Canberra, 26 February 2010 (Rob Heferen, Deputy Secretary, FaHCSIA), 52. ('Heferen Evidence')

<sup>184</sup> Australian Government, NTER Redesign Report, above n 164, 8.

process unsafe. In particular, the process has been criticised for a range of fundamental flaws: some related to the process whilst others were of a substantive nature.<sup>185</sup> These criticisms include lack of independence; absence of Aboriginal input into design and implementation; insufficient notice in some communities; absence of interpreters or qualified interpreters at some meetings; consultation limited to existing government proposals; inadequate explanations and description of measures; failure to explain complex legal concepts; and concerns about the government's motives in undertaking the consultation.<sup>186</sup>

Perhaps the most grave failing of the consultation process was that people were asked to comment on measures about which they had no knowledge or limited understanding, precluding the minimum level of comprehension that Kennedy identifies as a fundamental pre-requisite for consultation with Indigenous peoples.<sup>187</sup> Inadequate information was given as to the potential impact of measures and there was a failure to explain complex legal concepts, including special measures.

Despite the extensive scale, the consultation process was manifestly inadequate. Rather than a genuine opportunity to craft or refine measures, people were asked to comment on previously formulated government proposals, made or in the making by non-Indigenous policy makers and bureaucrats, while being reminded of the Government's view that positive outcomes were being delivered. Best practice guidelines were ignored.<sup>188</sup> Indeed, the consultation process could not properly be described as genuine 'consultation', let alone as having been undertaken in good faith with the objective of achieving agreement or consent.<sup>189</sup> It most certainly was not an

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<sup>185</sup> For a detailed analysis of the consultation process see Alison Vivian, 'The NTER Redesign Process: Not Very Special' (2010) 14(1) *Australian Indigenous Law Review* 46; Alastair Nicholson et al, 'Will They Be Heard? A Response to the NTER Consultations: June to August 2009' (Report, Jumbunna Indigenous House of Learning, University of Technology Sydney, 2009).

<sup>186</sup> Nicholson et al, *Will They Be Heard?*, above n 185, 3-36.

<sup>187</sup> Annie Kennedy, 'Understanding the 'understanding': Preliminary findings on Aboriginal perspectives on engagement with governments' (Paper presented at the Centre for Remote Health Monthly Seminar Series, Alice Springs, 29 May 2009).

<sup>188</sup> Various government and non-government entities have addressed the question of best practice community consultation, including the Australian Human Rights Commission ('AHRIC') that has published Draft Guidelines for ensuring income management measures are compliant with the *Racial Discrimination Act*. The publication distils best practice guidelines for community consultations based on the Government's Best Practice Regulation Handbook encompassing pre-consultation, consultation and post-consultation phases and key elements of free, prior and informed consent. See Australian Human Rights Commission, 'Draft Guidelines for ensuring income management measures are compliant with the Racial Discrimination Act' (2009) 29

<[http://www.hreoc.gov.au/racial\\_discrimination/publications/RDA\\_income\\_management2009\\_draft.html](http://www.hreoc.gov.au/racial_discrimination/publications/RDA_income_management2009_draft.html)>.

<sup>189</sup> States' duty to consult with Indigenous people has increasingly been recognised in international law and has been enshrined in a number of international instruments. The Special Rapporteur has outlined the broad parameters and content of the duty. See Special

opportunity for Aboriginal participants to determine their own destiny. Rather, it was a continuation of policy development from above, continuing a long tradition of consulting Indigenous people on decisions already made.

### ***Specific measures***

The absence or undermining of community decision-making is not only illustrated by the means through which the Northern Territory Intervention was and is being implemented, but is also reflected in certain measures, where governance and decision making control are removed from Aboriginal traditional owners, organisations and communities. Examples include the statutory imposition of compulsory five year leases over Aboriginal freehold land; the Minister's powers to intervene in the operation of Aboriginal organisations; appointment of Government Business Managers and removal of the future act process under the *Native Title Act*. Finally, the Minister's removal of tenancy management from Aboriginal housing associations by threatening a takeover of the Alice Springs Town Camps could be a case study of the likely outcome when Indigenous priorities do not accord with those of the Government.

### ***Statutory imposition of compulsory five year leases over Aboriginal freehold land***

The *NTNER Act* allows the Commonwealth to compulsorily acquire leases over Aboriginal freehold land held by Aboriginal Land Trusts or Land Councils and 'Aboriginal community living areas' held by Aboriginal associations and other specified areas.<sup>190</sup> These five year leases come into effect by operation of the legislation without any requirement for consent by the relevant Aboriginal land owner.

It is difficult to reconcile the Government's claim that the consultation process demonstrated higher levels of support for continuing compulsory five year leases over Aboriginal land than discontinuing them,<sup>191</sup> with the overwhelming opposition reported in research conducted by the University of Newcastle and the Central Land Council.<sup>192</sup> Very few people living in Prescribed Areas in 2008 were aware of the five year lease regime<sup>193</sup> and, when informed of their

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Rapporteur on the Rights of Indigenous Peoples, *Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People*, Human Rights Council, 12th sess, Agenda Item 3, UN Doc A/HRC/12/34 (15 July 2009).

<sup>190</sup> *NTNER Act* s 31(1). 'Aboriginal land' is land granted to Aboriginal Land Trusts in fee simple under the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth). Aboriginal community living areas are created by grant to associations in fee simple under the *Lands Acquisition Act* (NT).

<sup>191</sup> Australian Government, NTER Redesign Report, above n 164, 11.

<sup>192</sup> Central Land Council, Community Survey, above n 179, 58-59; Smith and Jackson, Community-Based Review, above n 179, 121.

<sup>193</sup> Central Land Council, Community Survey, above n 179, 58-59; Smith and Jackson,

existence, were overwhelmingly (85 percent to 95 percent) opposed to them.<sup>194</sup> People's anger, indignation and worry was based on the perception that the lease gave more control to the government at the expense of the community and gave inadequate respect to traditional owners in decision making.<sup>195</sup> Further, distrust of the Australian Government's intentions was exacerbated by its failure to pay rent as a tenant or compensation for the compulsory acquisition of land subject to the leases.<sup>196</sup>

Although the Government is nominally the lessee, Aboriginal land owners do not possess the rights ordinarily enjoyed by lessors. The terms and conditions of the compulsory five year leases are able to be determined by the Australian Government and include the ability to vary or terminate the lease at will without reference to the Aboriginal landholders,<sup>197</sup> while the Aboriginal land owners are explicitly precluded from doing so,<sup>198</sup> and the ability to terminate the underlying right, title or interest,<sup>199</sup> by giving notice in writing.<sup>200</sup> On 17 August 2007, the former Minister approved additional terms and conditions,<sup>201</sup> providing for wide ranging control of the land, including the right to use, and permit the use of the land for *any purpose* the Australian Government considers to be consistent with the objectives of the *NTNER Act*,<sup>202</sup> and the right to carry out any activity on or in relation to the land consistent with permitted use.<sup>203</sup>

The compulsory lease regime was amended in June 2010 to insert a new object clause<sup>204</sup> and provision that the Government is entitled to use, and permit the use of, land under a five year lease for any use that the Commonwealth considers to be consistent with the fulfilment of the object,<sup>205</sup> except exploration or mining.<sup>206</sup> The amended legislation also provides for the development of guidelines for the Commonwealth to consider when subleasing or otherwise dealing with the lease<sup>207</sup> and specifies that regard must be had to the body of traditions, observances, customs and beliefs of Indigenous persons

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Community-Based Review, above n 179, 93-94; NTER Review Board Report, above n 154, 39.

<sup>194</sup> Central Land Council, Community Survey, above n 179, 58-59; Smith and Jackson, Community-Based Review, above n 179, 121.

<sup>195</sup> Central Land Council, Community Survey, above n 179, 58; Smith and Jackson, Community-Based Review, above n 179.

<sup>196</sup> NTER Review Board Report, above n 154, 40.

<sup>197</sup> *NTNER Act* ss 35(5)-(8).

<sup>198</sup> *Ibid* s 35(4).

<sup>199</sup> *Ibid* s 37(1).

<sup>200</sup> *Ibid* s 37(3).

<sup>201</sup> Mal Brough, Minister for Families, Community Services and Indigenous Affairs, *Additional Terms and Conditions for Leases Determination 2007*, 17 August 2007.

<sup>202</sup> *Ibid* cl 2.1.

<sup>203</sup> *Ibid* cl 4.

<sup>204</sup> *NTNER Act* s 30A.

<sup>205</sup> *Ibid* s 35(2A).

<sup>206</sup> *Ibid* s 35(2B).

<sup>207</sup> *Ibid* s 35A.

when *administering* leases (emphasis added).<sup>208</sup> The Commonwealth is required to enter into negotiations with the relevant owner in relation to terms and conditions of new leases in good faith, if requested to do so by the owner.<sup>209</sup>

As Turner and Watson note, for Indigenous people, land is the source of their 'identity, economy and spirituality'; in essence, their 'life force'.<sup>210</sup> While there have been some marginal improvements to the compulsory lease regime,<sup>211</sup> it continues to overtly remove Aboriginal control over Aboriginal land and resources, treating Aboriginal freehold owners as tenants on their own land, subject to terms that the Government can dictate and control. Alarm about the impact of five year leases on communities is magnified by the concern that the partial reinstatement of the *Racial Discrimination Act* will leave that racially discriminatory regime unable to be challenged.<sup>212</sup>

The Australian Government has a legitimate responsibility for providing better housing and infrastructure in Aboriginal townships. Overcrowding and poor living conditions in remote Aboriginal communities have been identified over decades as issues requiring a concerted and long term response from governments. However, the argument that the five year leases were necessary for community clean ups or to build accommodation for Government Business Managers and service providers, or to allow better tenancy arrangements or refurbishments,<sup>213</sup> cannot be sustained. As the Social Justice Commissioner has commented in the *Native Title Report 2009*, provision of necessary infrastructure or the refurbishment of housing could easily have been achieved

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<sup>208</sup> Ibid s 36A.

<sup>209</sup> Ibid s 37A.

<sup>210</sup> Pat Turner and Nicole Watson, 'The Trojan Horse' in Jon Altman and Melinda Hinkson (eds), *Coercive Reconciliation. Stabilise, Normalise, Exit Aboriginal Australia* (Arena Publications Association, 2007) 206.

<sup>211</sup> The *Indigenous Affairs Legislation Amendment Act 2008* (Cth) included a process for land owners and the government to agree on an amount to be paid by the Australian Government for the five-year leases. The Australian Government requested that the Northern Territory Valuer-General determine a reasonable rent for the five-year leases and rent payments commenced on 2 October 2009. The Government also undertook a review of the boundaries of five-year leases and reduced the size of the land to which the leasehold arrangements apply to those lands that are necessary. This was due to concerns that the boundaries of leases were excessive and took in land that was not necessary to deliver essential services to communities. See Jenny Macklin and Warren Snowdon, 'Commencement of rent payment for five year leases' (Media release, 2 October 2009)

<[http://www.jennymacklin.fahcsia.gov.au/mediareleases/2009/Pages/rent\\_payment\\_2oct09.aspx](http://www.jennymacklin.fahcsia.gov.au/mediareleases/2009/Pages/rent_payment_2oct09.aspx)>.

<sup>212</sup> Central Land Council, Submission to the Senate Community Affairs Committee, *Inquiry into Social Security and Other Legislation Amendment (Welfare Reform and Reinstatement of Racial Discrimination Act) Bill 2009 and related bills*, 2010, 15-17

<[http://www.aph.gov.au/Senate/committee/clac\\_ctte/soc\\_sec\\_welfare\\_reform\\_racial\\_discrim\\_09/submissions/sublist.htm](http://www.aph.gov.au/Senate/committee/clac_ctte/soc_sec_welfare_reform_racial_discrim_09/submissions/sublist.htm)> ; AHRC, Reinstatement of RDA submission, above n 175, 14-16.

<sup>213</sup> Australian Government, Policy Statement: Landmark Reform, above n 171, 10.

in other ways, as this infrastructure has been installed and refurbished for years without the compulsory acquisition of five-year leases.<sup>214</sup>

Nor does the Government's commitment to 'voluntary' leasing to replace compulsory five year leases<sup>215</sup> of itself solve the problem without guarantees of Aboriginal control. The entry into subleases by the Alice Springs Town Camps Housing Associations under the threat of compulsory acquisition (described below), described as taking up 'the Government's offer',<sup>216</sup> raises serious concerns as to the Government's commitment to genuine decision making by Aboriginal landowners.

### ***Minister's powers to intervene in the operation of Aboriginal organisations***

Along with the ACC's coercive powers and restrictions on publicly funded computers, the Minister's powers to intervene or appropriate to herself the operation of Aboriginal organisations are virtually unknown by Aboriginal people in the Northern Territory.<sup>217</sup> The powers in Part 5 of the *NTNER Act* were introduced to support Government Business Managers, whose role it is to coordinate services in Aboriginal communities, implement the Northern Territory Intervention and become the key liaison and consultation contact.<sup>218</sup> The powers are not vested in Government Business Managers personally, but are vested in the Commonwealth or the Minister.<sup>219</sup>

Despite their breadth and magnitude, there are no specific criteria for assessing when such powers should or will be exercised and there has been no suggestion that the powers were introduced to deal with allegations of illegality, incompetence, mismanagement, corruption or fraud. The powers were introduced as a measure of 'last resort', yet are to be exercised where 'normal processes of discussion and negotiation had failed, or where community organisations are unable, or unwilling, to make the changes that are *necessary* to benefit their community and their children' (emphasis added)<sup>220</sup> but without any indication of what this externally determined necessary benefit might

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<sup>214</sup> Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2009* (Australian Human Rights Commission, 2010), 155.

<sup>215</sup> Commonwealth of Australia, *Parliamentary Debates*, House of Representatives, 25 November 2009, 12787 (Jenny Macklin, Minister for Families, Housing, Community Services and Indigenous Affairs).

<sup>216</sup> Jenny Macklin, 'Agreement on Alice Springs Transformation Plan' (Media Release, 29 July 2009).

<[http://www.jennymacklin.fahcsia.gov.au/mediareleases/2009/Pages/alice\\_springs\\_transformation\\_plan\\_29jul09.aspx](http://www.jennymacklin.fahcsia.gov.au/mediareleases/2009/Pages/alice_springs_transformation_plan_29jul09.aspx)> .

<sup>217</sup> CIRCA Report, above n 170, 13.

<sup>218</sup> NTER Review Board Report, above n 154, Appendix 11, 114.

<sup>219</sup> *Ibid*.

<sup>220</sup> *Ibid*; Commonwealth of Australia, *Parliamentary Debates*, House of Representatives, 7 August 2007, 15 (Mal Brough, Minister for Families, Community Services and Indigenous Affairs and Minister Assisting the Prime Minister for Indigenous Affairs) ('NTNER Second Reading Speech').

entail. In addition, it seems that the powers may be exercised regardless of whether negotiations are being conducted in good faith, which is alarming in light of the Government's unilateral cessation of negotiations with the Tangentyere Council discussed below.

The powers allow the Minister to intervene in the operation of 'community services entities' in 'business management areas', which are forms of Indigenous tenure.<sup>221</sup> Community service entities include Indigenous councils and organisations, and other organisations providing services to Indigenous people.<sup>222</sup> The Minister can unilaterally vary or terminate funding agreements between the Commonwealth and a 'community services entity' that is funded to provide services in a 'business management area'; direct how funds may be spent, appoint a person to control funds, and direct reporting requirements; direct how and what kind of services are to be provided; direct the use and management of assets and even transfer possession and ownership of assets; appoint observers to attend any or all meetings of the community services entity; and take over management of community, council and incorporated associations.<sup>223</sup> The powers allow complete control over the operation of Indigenous councils and organisations, but exhibit some unusual features, seemingly applying to assets or organisations unrelated to Commonwealth funding. Further, statutory managers can be appointed for 'wilfully contraven[ing] a direction given by the Minister under the powers in relation to service delivery, use of funding or use of assets',<sup>224</sup> without the investigation into the affairs of the association that is normally required.<sup>225</sup>

Extraordinarily, given CIRCA's conclusion that there was little awareness or understanding of the powers demonstrated throughout the consultation process,<sup>226</sup> the Government's proposal to remove the power from the legislation because it had 'other ways to ensure its funds are managed properly'<sup>227</sup> was rejected. Apparent community support for their continuation means that they continue without amendment.<sup>228</sup> Support for the measure was said to arise from regional community leaders and stakeholder organisation

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<sup>221</sup> Business management areas include areas covered by five-year leases; 'Aboriginal land'; 'Aboriginal community living areas'; places specified to be business management areas under the *NTNER Act*; and areas declared by the Minister to be business management areas: *NTNER Act* s 3.

<sup>222</sup> A community service entity can be a community government council under the *Local Government Act* (NT), an incorporated association under the *Associations Act* (NT), an Aboriginal corporation under the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (Cth); or any person or entity that performs functions or provides services in a business management area and is specified by the Minister to be a community service entity: *NTNER Act* s 3.

<sup>223</sup> *NTNER Act* s 65.

<sup>224</sup> *Ibid* Item 2 of Table 2 in sch 4.

<sup>225</sup> *Ibid* Item 3 of Table 2 in sch 4.

<sup>226</sup> CIRCA Report, above n 170, 13.

<sup>227</sup> Australian Government, *Future Directions*, above n 164, 22.

<sup>228</sup> Australian Government, *NTER Redesign Report*, above n 164, 12.

representatives, who expressed support for allowing the ‘Government to cease funding non-performing community organisations and to bolster their governance.’<sup>229</sup>

Powers that shift decision making authority from Aboriginal communities to Government Business Managers, who do not necessarily have any professional community development training and who, in some cases, are ‘distant and apart from the community and in some cases, from the key local service providers,’<sup>230</sup> serves to remove Aboriginal considerations from the decision process entirely. Government Business Managers are Government employees required to implement Government policy and programs and examples are beginning to emerge of Aboriginal communities frustrated, even incredulous, with decisions being made on their behalf.<sup>231</sup> Even the mere threat of their usage has the potential to impact on the decision making of Indigenous organisations. The powers have the potential to shift the balance in negotiations to pressure Aboriginal organisations to ignore community direction as a result of Government coercion.

### ***Threatened compulsory acquisition of Alice Springs Town Camps***

One of the more extreme examples of the Government’s disregard for the exercise of Aboriginal autonomy and genuine Aboriginal control over decision making was the removal of Aboriginal Housing Associations’ authority by means of the Minister’s threat to compulsorily acquire the Alice Springs Town Camps (‘Town Camps’) under s 47(1) of the *NTNER Act*.<sup>232</sup> The threat was to be exercised unless the relevant Housing Associations, which hold Special Purposes Leases or Crown Leases in perpetuity, entered into 40-year ‘voluntary’ subleases with the Government. The Government contended that ‘secure tenure’ was necessary for a \$125 million investment in infrastructure and essential services, conditional on agreement to the subleases.

Acting in concert through the Tangentyere Council (‘Council’), the relevant Town Camp Housing Associations had agreed one year earlier to enter into the subleases subject to satisfactory negotiations on tenancy management to be undertaken with mutual goodwill.<sup>233</sup> The ‘negotiations’ ended when the

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<sup>229</sup> Ibid.

<sup>230</sup> NTER Review Board Report, above n 154, 44. In one case, the Review Board found it necessary to introduce the Government Business Manager to senior staff at the local health clinic.

<sup>231</sup> For example, despite its request for work to be done to its football oval, the community of Ampilatwatja was given a \$20,000 BMX track consisting of bulldozed piles of dirt. The bikes are locked away. See Chris Graham, ‘The grass is always greener’, *National Indigenous Times (online)*, 18 March 2010 <<http://www.nit.com.au/news/story.aspx?id=19546>>.

<sup>232</sup> Jenny Macklin, ‘Alice Springs Town Camps’ (Media release, 24 May 2009) <[http://www.jennymacklin.fahcsia.gov.au/mediareleases/2009/Pages/alice\\_springs\\_town\\_camps\\_24may09.aspx](http://www.jennymacklin.fahcsia.gov.au/mediareleases/2009/Pages/alice_springs_town_camps_24may09.aspx)>.

<sup>233</sup> Tangentyere Council, *Leases on Town Camps*.

Government presented the Council with the ultimatum that tenancy management be transferred from the Council to the Northern Territory Government or Northern Territory Housing Association ('Territory Housing').<sup>234</sup> The Council rejected the same ultimatum when pressed by the former government two years earlier.<sup>235</sup>

Faced with the threat of losing the very land over which town campers had waged such protracted struggle to secure tenure, all but two of the Housing Associations passed identical resolutions to enter into the subleases. However, in accepting the 'offer', lawyers for Tangentyere Council clarified that it was acceptance under duress 'for the simple reason that [the Minister had] threatened them with compulsory acquisition if they do not'.<sup>236</sup> The letter of acceptance stated that the 'loss of tenure to these lands is something that is abhorrent to the housing associations and they could not run the risk that it might occur.'<sup>237</sup> A number of Town Camp residents unsuccessfully challenged the subleases and compulsory acquisition, concerned that the Housing Associations had been coerced into the subleases before the actual terms of the under-leases that residents were required to enter into with Territory Housing were known.<sup>238</sup> The subleases have now been executed.

The very existence of the Town Camps is a clear expression of self-determination by Aboriginal people who have resisted repeated attempts at removal or assimilation. The Town Camps have their origin in 'illegal' fringe camps on the outskirts of Alice Springs inhabited since the 1860s by Aboriginal people forced from their traditional lands by encroachment of the pastoral industry. Efforts to secure tenure finally succeeded from the 1970s when the residents formed incorporated Housing Associations to apply for leases over the land. Until that time, without legal tenure and treated as 'illegal' settlements, fringe camps were not eligible for housing, power, water or sewerage services so that people were forced to live in appalling conditions in humpies and old car bodies, without basic facilities.

While all parties are agreed that there is a desperate need for repairs, maintenance, and housing construction to alleviate overcrowding and poor living conditions, the Council identifies insufficient funding over the long term that hampered service delivery. Indeed, the promised \$125 million does not

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<[http://www.tangentyere.org.au/news/2008\\_Leases\\_on\\_Town\\_Camps.html](http://www.tangentyere.org.au/news/2008_Leases_on_Town_Camps.html)>.

<sup>234</sup> Tangentyere Council, 'Tangentyere supports open and transparent tenancy reform' (Media release, 25 May 2009) <<http://www.tangentyere.org.au/publications/>>.

<sup>235</sup> Tangentyere Council, 'Alice Springs Town Camp Residents Reject Conditional \$60m Offer' (Media release, 18 May 2007) <<http://www.tangentyere.org.au/publications/>>.

<sup>236</sup> Chris Graham, 'Macklin's town camp takeover derailed by big guns' (2009) *Crikey (online)* <<http://www.crikey.com.au/2009/07/31/macklins-town-camp-takeover-derailed-by-big-guns/>>.

<sup>237</sup> Ibid.

<sup>238</sup> *Shaw v Minister for Families, Housing, Community Services and Indigenous Affairs* [2009] FCA 1397 (26 November 2009).

equalise the dramatic under spending in key social welfare areas, estimated by the Northern Territory Council of Social Service at \$542 million in 2006/2007 alone.<sup>239</sup> The Government's approach was not to engage with the Housing Associations in a genuine partnership, but to intimidate them into entering into subleases that effectively prevent them from having any role in housing management other than one of 'consultation' over their own land.

***Summary: genuine decision making authority***

As Hunt and Smith observe, capacity cannot be imposed but it can be facilitated.<sup>240</sup> The evidence demonstrates that to enhance governance effectiveness, capacity development needs to enhance genuine decision making powers and authority, not undermine them.<sup>241</sup> By contrast, the measures described above are an attack on Indigenous self-determination and autonomy at the most fundamental level and illustrate the protectionist approaches that many Aboriginal people in the Northern Territory describe as the 'return to mission days' and the white overseer. Stepping into the shoes of Aboriginal decision makers has the potential to erode community support and reduce the effectiveness of the body concerned.

## **2 Development of capable institutions and organisations**

The second requirement of government policy designed to achieve government and Indigenous aspirations is that it should facilitate the development of institutions and organisations, capable of effective and efficient implementation of Indigenous priorities and strategy.

The imagery surrounding the Intervention was of extreme dysfunction and despair, requiring the immediate mobilisation of the army, police and volunteer doctors en masse, justified by the claim that there was 'nothing less than a war zone in Australia'.<sup>242</sup> There are divergent views about the extent to which the situation in the Northern Territory represents a crisis, but it cannot be denied that the Intervention represents government action on a grand scale.

The measures were and are designed to facilitate government control of Aboriginal organisations and communities, which is argued to be for 'their benefit'. Combined with Northern Territory Government policies of

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<sup>239</sup> Northern Territory Council of Social Services, 'Inquiry into Government Expenditure on Indigenous Affairs and Social Services in the Northern Territory' (October 2008) <[http://www.aph.gov.au/senate/committee/clac\\_ctte/gov\\_exp\\_indig\\_affairs/submissions/sublist.htm](http://www.aph.gov.au/senate/committee/clac_ctte/gov_exp_indig_affairs/submissions/sublist.htm)>.

<sup>240</sup> Hunt and Smith, ICGP Year Two Findings, above n 7, 29.

<sup>241</sup> Ibid.

<sup>242</sup> Mal Brough, 'Northern Territory Intervention' (Speech delivered at the 40th Alfred Deakin Lecture, Melbourne University, 2 October 2007).

amalgamating Aboriginal councils into mandatory, regionalised local government<sup>243</sup> and transferring support from homelands to Territory Growth Towns,<sup>244</sup> the impact has been to dramatically shift decision making from Aboriginal hands and reduce the capabilities of Aboriginal organisations.

In many instances, the implementation of the Northern Territory Intervention measures did not take into account the individuality of each Aboriginal community.<sup>245</sup> Research undertaken by the Central Land Council indicated that where 'good governance structures and systems were in place, they were ignored and undermined', undermining self-management and autonomy.<sup>246</sup> On a practical level, lack of consultation and haste resulted in unnecessary duplication of services in critical areas, such as childhood health.<sup>247</sup> Excellent programs that were in place before the Intervention did not receive recognition and support. Consequently, the Intervention was seen to belittle and sideline all the efforts and energy that individual communities and individual people have put into tackling their own problems.<sup>248</sup>

Aboriginal communities and organisations in the Northern Territory have not been encouraged to devise solutions to their own problems, but have been sidelined by public servants and bureaucrats. The number of federal public servants in the Northern Territory since the Intervention's inception has more than doubled, almost being equal in number to frontline personnel in remote communities,<sup>249</sup> leading remote communities to complain of wastage and frustration that the increase has not been matched by increases in Aboriginal employment.<sup>250</sup> Doctors, teachers and police are increasingly frustrated with escalating red tape and with the over-governance and duplication of programs.<sup>251</sup> The Australian Medical Association noted that 'huge teams of distant public servants created policies that often had no connection with the reality on the ground'.<sup>252</sup>

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<sup>243</sup> Bill Ivory, 'Indigenous leaders and leadership: agents of networked governance' in Janet Hunt et al (eds), *Contested Governance: Culture, power and institutions in Indigenous Australia, Research Monograph No 29* (Centre for Aboriginal Economic Policy Research, Australian National University, 2008) 233, 246.

<sup>244</sup> Sean Kerins, 'The First Ever Northern Territory Homelands/Outstations Policy' (Topical Issue No 9, Centre for Aboriginal Economic Policy Research, Australian National University, 2009) 1.

<sup>245</sup> Central Land Council, Community Survey, above n 179, 79.

<sup>246</sup> *Ibid.*

<sup>247</sup> Smith and Jackson, Community-Based Review, above n 179, 129.

<sup>248</sup> *Ibid.*

<sup>249</sup> Natasha Robinson, 'Bureaucrats 'too remote' from Indigenous front line', *The Australian (online)*, 12 October 2010 <<http://www.theaustralian.com.au/national-affairs/bureaucrats-tto-remote-from-indigenous/story-fn59niix-1225937395679>>.

<sup>250</sup> Natasha Robinson, 'Intervention Inc exposed in wastage', *The Australian (online)*, 11 October 2010 <<http://www.theaustralian.com.au/national-affairs/intervention-inc-exposed-in-wastage/story-fn59niix-1225936875941>> .

<sup>251</sup> *Ibid.*

<sup>252</sup> *Ibid.*

**Summary: effective institutions**

As Hunt and Smith observe, government approaches can enable or disable Indigenous governance. The evidence emphasises that capability building requires long term commitment and preparedness to support incremental change. However, rather than facilitating the development of effective Indigenous institutions, the approach adopted by successive Australian governments in relation to the Intervention has been to unilaterally remove responsibility from Indigenous organisations and undermine Indigenous governance. It is conceivable that certain bodies and organisations were so ineffective as to require immediate action. However, the complaint is that all organisations have been treated in the same fashion. The frustration has been with increased bureaucracy, duplication and blanket measures, without sufficient consideration of the particular Aboriginal community or organisation involved.

**3. Governance arrangements that have cultural legitimacy in the eyes of the people they are designed to serve**

The denigration of Aboriginal cultural norms and practices that has been observed during the course of the Intervention appears inescapable when the ideological objectives underpinning the Intervention are examined. The former Minister for Indigenous Affairs, Mal Brough, explicitly condemned Aboriginal social and cultural norms, which he contrasted with ‘normal’ values in ‘normal suburbs’. Aboriginal disadvantage was attributed to the breakdown of ‘normal community standards, social norms and parenting behaviours’ where ‘grog, pornography and gambling filled the void created where the ‘natural social order of production and distribution’ was lacking.<sup>253</sup> In language later echoed by the current Minister for Indigenous Affairs (‘Minister’), social norms were to be rebuilt.<sup>254</sup> Socioeconomic disadvantage amongst Indigenous Australians should be addressed through training and ‘real jobs’, home ownership, small business and taking responsibility for one’s own welfare.<sup>255</sup> Town Camps were to be turned into ‘normal suburbs’.<sup>256</sup> Reciprocal kinship obligations such as that of sharing resources were directly targeted as undesirable. Brough criticised land rights for locking people into collective tenure<sup>257</sup> and for

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<sup>253</sup> Brough, NTNER Second Reading Speech, above n 220, 6,11.

<sup>254</sup> Ibid 9; ABC Television, ‘Govt Responds to Northern Territory Intervention Review’, *The 7:30 Report*, 23 October 2008 (Jenny Macklin) <<http://www.abc.net.au/7.30/content/2008/s2399696.htm>>.

<sup>255</sup> Brough, NTNER Second Reading Speech, above n 220, 2-11.

<sup>256</sup> Ibid 14.

<sup>257</sup> Mal Brough cited in ‘Brough Questions Worth of Land Rights’, *The Age (online)*, 15 August 2007

<[http://www.theage.com.au/news/national/brough-slams-land-rights/2007/08/15/1186857579661.html?s\\_cid=rss\\_news](http://www.theage.com.au/news/national/brough-slams-land-rights/2007/08/15/1186857579661.html?s_cid=rss_news)>.

harming Indigenous culture.<sup>258</sup> Aboriginal land tenure was described as working against ‘developing a real economy’, requiring transformation so that people can ‘own and control’ their own houses and obtain loans to establish small businesses.<sup>259</sup>

Extremely damaging to non-Indigenous perceptions of Aboriginal culture, the rhetoric justifying the implementation of the Northern Territory Intervention was melodramatic and encouraged highly prejudicial views of Aboriginal communities and culture. It is difficult to conceive of a more serious allegation than that of Aboriginal communities being complicit in child sexual abuse, predicated on cultural acceptance of abuse and violence. Just as damaging were allegations that senior Aboriginal elders and leaders were exercising their authority to cover up abuse. Reports of extreme levels of sexual abuse in Aboriginal communities, sophisticated paedophile rings, sexual slavery and the deliberate cloaking of abuse by Aboriginal elders could ultimately not be sustained.<sup>260</sup> Nonetheless, such reports distorted and demeaned the integrity of Aboriginal culture.

It is therefore unsurprising that cultural legitimacy in the operation of Aboriginal organisations and institutions is both directly and indirectly attacked in the measures of the Northern Territory Intervention. Effective governance arrangements are achieved when Indigenous people build their own governing structures according to their own values, norms and views of how authority should be exercised. The removal of tenancy management from Aboriginal Housing Associations, and the broad powers of the Minister to intervene in the operation of Aboriginal organisations are blatant attempts to ‘normalise’ governance in Aboriginal organisations, which have the potential to remove Aboriginal conceptions of authority and proper decision making. In fact, the rationale behind the enforced removal of housing management from Aboriginal housing associations was that of privileging financial accountability and ‘objective fairness’ over cultural considerations.

Other measures do not so directly relate to the cultural legitimacy of Aboriginal institutions and organisations per se, but have profound impact on non-Indigenous people’s support for or understanding of the validity of cultural legitimacy as a consideration. Importantly, the rhetoric used by the Government conflating Aboriginal culture with sexual misconduct resulted in

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<sup>258</sup> Brough, Alfred Deakin Lecture, above n 242.

<sup>259</sup> Brough, NTNER Second Reading Speech, above n 220, 11.

<sup>260</sup> The allegations of organised paedophile rings operating in Aboriginal communities were ultimately rejected by the ACC, a joint Police and Family and Community Services Taskforce and the Little Children Are Sacred Report. See Little Children are Sacred Report, above n 144, 61; Rachel Siewert, ‘No evidence of organised paedophile rings: ACC’ (Media Release, 27 May 2008) <<http://rachel-siewert.greensmps.org.au/content/media-release/no-evidence-organised-paedophile-rings-acc>>; Chris Graham, Brian Johnstone and Amy McQuire, ‘Mutitjulu ups the Auntie’, *National Indigenous Times (online)*, 7 September 2006 <<http://www.nit.com.au/News/story.aspx?id=7734>>.

suspicion of the exercise of Aboriginal authority, especially where accusations were made that such authority condoned violence and sexual assault. Mainstream community confidence in Aboriginal cultural norms and practices was deliberately eroded to allow the Intervention to be implemented with little scrutiny.

Measures including the removal of future act provisions under the *Native Title Act* and removal of the consideration of customary law and cultural practice in bail applications and sentencing reinforce a notion of Aboriginal authority as illegitimate and in need of non-Indigenous supervision. The suspension of the *Racial Discrimination Act* also arguably contributed to an undermining of respect for Aboriginal cultural and social norms.

***Removal of housing management from Aboriginal Housing Associations in Alice Springs – a direct attack on cultural legitimacy of Aboriginal organisations***

The rationale for transferring tenancy management from Aboriginal into non-Indigenous hands was the failure of Tangentyere Council to agree to a ‘fair and consistent tenancy management system’. The Minister claimed:

The Australian Government cannot agree to a system where houses are not allocated on the basis of need, where upgrades and maintenance may not be delivered, or where tenancies may not be administered with objective standards of transparency and fairness.<sup>261</sup>

The Government’s adoption of Brough’s ambition to transform Alice Springs Town Camps into ‘normal suburbs’ is to entirely misunderstand their social and cultural significance.

Geographically, Town Camps map the distribution of Aboriginal language groups of the Northern Territory and South Australia.<sup>262</sup> Thus, in itself a form of cultural expression, Town Camps are carefully sited according to the direction of traditional country, dreaming tracks and sacred sites; traditional, social and historical factors; and advice of the traditional owners, the Arrente. Western Arrente camps are west of the town, eastern Arrente, east of the town, Warlpiri, north east, Alyawarr and Anmatjira, north west, and Pitjantjantjara,

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<sup>261</sup> Macklin, Alice Springs Town Camps, above n 232.

<sup>262</sup> Frances Coughlan, *Aboriginal Town Camps and Tangentyere Council: The Battle for Self-Determination in Alice Springs* (Mater of Arts Thesis, La Trobe University, 1991) <<http://www.tangentyere.org.au/publications/>>; M Heppel and JJ Wigley, *Black out in Alice: A history of the establishment and development of town camps in Alice Springs* (Australian National University, 1981); *Mpwetyerre & Ors v Alice Springs Town Council* [1996] NTSC 30 (14 May 1996); *Tangentyere Council v Commissioner of Taxation* (1990) 21 ATR 239 (Angel J).

south. Importantly, permission to use particular land for a permanent camp was granted by the traditional owners.<sup>263</sup>

While non-Indigenous perspectives might regard Town Camps as disordered or chaotic, planning of Town Camps is complex and subject to clearly understood requirements of interdependent groups of people, bound by kinship allegiances linked to defined territory. Strong ties to traditional country are maintained and kinsmen exercising reciprocal obligations are unequivocally welcome. Planning must account for different family groups, visitor camping, ceremonial areas and sacred site protection such that the location of roads, houses, community facilities and visitor camping sites are affected by the relationships of residents. This has caused ongoing dispute with the Northern Territory Government, which claims that it was wasteful for the provision of essential services that the land was not being fully utilised. In 1981, the Northern Territory Government declared a moratorium on further applications for land tenure until 'adequate and rational use is made by Aboriginals of existing land grants'.<sup>264</sup>

In reality, the Housing Associations effectively operate as institutions between two normative systems. They are incorporated under Commonwealth or Northern Territory legislation and have been granted statutory leases to provide housing and housing services. However, cultural legitimacy is fundamental to the operation of Housing Associations where adherence to Aboriginal law is explicitly enshrined in their constitutions.<sup>265</sup> Even individual residential tenancies are culturally determined, with rules for 'house bosses' sanctioned by the Four Corners Committee comprised of senior Aboriginal law people. By contrast, Territory Housing has a poor reputation with Aboriginal people in Alice Springs. The residents fear that culturally appropriate tenancy management will end, resulting in evictions for cultural and social practices and the loss of control over culturally determined allocation of housing in Town Camps.

Town Camps are not a 'stepping stone' to assimilation and mainstream society but provide a constructed environment, allowing retention of their cultural and social values for people living at the interface of two different cultures.<sup>266</sup> The failure of the Government to appreciate the depth of the social and cultural significance of the Town Camps to the residents is revealed, for example, in the Minister's observation that the Housing Associations' perpetual leases were not

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<sup>263</sup> Coughlan, *Aboriginal Town Camps and Tangentyere Council*, above n 262, 73-74.

<sup>264</sup> *Ibid* 117.

<sup>265</sup> For example, the Mount Nancy Housing Association's constitution includes the objects of developing programs to advance living conditions, developing social cohesion and community development and improving the environment 'in accordance with Aboriginal law'. See Mt Nancy Housing Association Incorporated Constitution, 30 November 2006, item 1.3, sch 1.

<sup>266</sup> *Mpwetyerre & Ors v Alice Springs Town Council* [1996] NTSC 30 (14 May 1996) [14], [18].

granted under Northern Territory land rights legislation and are not based on traditional ownership, so acquisition could be addressed by adequate monetary compensation.<sup>267</sup> This approach fails to appreciate that Aboriginal residents have utilised mainstream statutory tenure for the express purpose of protecting and sustaining cultural and social legitimacy.

When the Town Camps are understood as living manifestations of Aboriginal social and cultural values, the stalemate between Government and the Housing Associations seems inevitable. While there is no dispute between the Council, the Housing Associations and the Government as to the urgent necessity for repairs, maintenance, and housing construction to alleviate overcrowding and unacceptable living conditions, the contrasting accountabilities are stark. On the one hand, the Minister asserts the, on its face, reasonable requirement of accountability for public funds. However, removing control over housing allocation is to undermine the very social and cultural values that the Housing Associations exist to protect. That the town campers could be relocated ‘on the basis of need’, or that people be allocated housing with a different language group, is anathema to residents who live in small groups with a shared identity bound by defined kinship rules and laws and customs. Residents are fearful of profound and potentially irreparable harm that would be invisible to non-Indigenous eyes.

The breakdown in negotiations reveals the contradictory positions held by the parties as to what should properly underpin decision making – Aboriginal social and cultural norms based on relationships or western norms with an emphasis on financial accountability and objective fairness. Government insistence that tenancy management be removed from Aboriginal Housing Associations privileges accountability to government expectations and aspirations, rather than accountability to Aboriginal members of the Housing Associations.

The removal of the Housing Associations’ authority also demonstrates the potential threat to Aboriginal expressions of authority and decision making posed by the Minister’s powers to intervene in the operation of Aboriginal organisations. The Minister’s powers are to be exercised when negotiations fail and community organisations are unwilling to make changes that are *necessary* to benefit their communities. In light of the Housing Associations’ experience, Aboriginal organisations are justifiably concerned about potential intervention when community priorities do not accord with those of the Government.

### ***Summary: cultural legitimacy***

The specific intention of the Intervention is to ‘normalise’ Aboriginal communities in the Northern Territory by altering Aboriginal social norms and

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<sup>267</sup> Macklin, Alice Springs Town Camps, above n 232.

imposing western values. It seeks to undermine communal, in preference for individual, ownership of land. It explicitly prevents traditional owners from exercising their rights to speak for country through the right to negotiate in the native title application process and prevents Aboriginal offenders from having customary law and cultural practice considered before the courts. Normalisation is to be achieved through a comprehensive suite of oppressive measures that impact on almost every aspect of the lives of Aboriginal people, organisations and communities, ranging from: control of personal income without redress; prescriptions as to where income can be spent and what can be bought; control of Aboriginal organisations, assets and land by Government employees; and the removal of the rights of traditional owners to fulfil cultural obligations.

Such extreme and draconian measures were achieved by unjustifiably conflating sexual predation and violence with Aboriginal cultural practices and traditional law, by denigrating land rights and by replacing Indigenous authority with that of Government employees implementing Government policy. The cumulative effect of these measures is to show tremendous disrespect to Aboriginal cultural rights and obligations, effectively declaring them unworthy of preservation. Combined with the justification for the Intervention that denigrated Aboriginal culture, the impact of these kinds of measures is to undermine non-Indigenous confidence in Aboriginal organisations and communities.

## Conclusion

In light of analysis undertaken by Altman, Biddle and Hunter, Australian Aboriginal and Torres Strait Islander policy is in need of urgent, dramatic and transformative overhaul. Professor Altman and his colleagues estimated when existing statistical gaps between Indigenous and non-Indigenous outcomes might close by extrapolating from data collected over 35 years in censuses from 1971 to 2006.<sup>268</sup> Acknowledging the difficulty of the policy task set by the Government in Closing the Gaps, they only focused on optimistic scenarios where variables had been converging over the last 35 years.<sup>269</sup> They emphasised that their estimates are not predictions of what will happen, but rather a description of what will happen if improvements continue at the same pace.<sup>270</sup>

In summary, they found that in absolute and relative terms Indigenous socioeconomic outcomes have improved at the national level over the last 35

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<sup>268</sup> Jon Altman, Nicholas Biddle and Boyd Hunter, 'The Challenge of 'Closing the Gaps' in Indigenous Socioeconomic Outcomes' (Topical Issue No 8, Centre for Aboriginal Economic Policy Research, Australian National University, 2008).

<sup>269</sup> *Ibid* 2, 8.

<sup>270</sup> *Ibid* 8-10.

years.<sup>271</sup> However, while the gaps between some Indigenous and non-Indigenous outcomes are narrowing, it is not consistent. Some variables, such as the percentage of adults who never attended school, who gained private employment, or earned post school qualifications, might achieve parity by 2041.<sup>272</sup> Some outcomes, including employment to population ratio and labour force participation, are worsening and the gap will never be closed.<sup>273</sup> Frighteningly, closing the gap for some outcomes would occur so slowly that it may not be achieved for hundreds of years. Indeed, parity in median household income was predicted to take over 2,000 years to achieve.<sup>274</sup>

A blueprint for the type of dramatic reform to government policy posited by Altman and colleagues to be necessary to close the gaps is readily available in the research findings and recommendations of the ICGP and international evidence. Regrettably for governments operating on short term electoral cycles, community based capability building is complicated, requires long term support and necessitates a change in government approach from decision making and directing, to supporting and facilitating. No simple solutions are available, especially given governments' reluctance to relinquish control. An equally difficult challenge for governments would be to reflect on their own processes and the extent to which they contribute to or impede progress. Unsurprisingly, the Government's own assessment of how well Commonwealth Indigenous programs and associated whole-of-government coordination is supporting the achievement of its policy objectives found that, 'past approaches to remedying Indigenous disadvantage have clearly failed and new approaches are needed for the future.'<sup>275</sup>

At a time when calls for a return to assimilationist policy are becoming more strident and Aboriginal and Torres Strait Islander cultures are being more frequently demeaned,<sup>276</sup> the need to urgently act on the evidence has never been greater. If the Government's approach to evidence-based policy is to be gleaned from the Northern Territory Intervention however, then the facilitated community development approach that Hunt and Smith advocate is unlikely to be adopted. In light of the potential for profound harm, let alone the extraordinary financial burden imposed by the Intervention, the Government's reluctance to actually engage with Aboriginal communities to design initiatives

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<sup>271</sup> Ibid 7.

<sup>272</sup> Ibid 8-9.

<sup>273</sup> Ibid.

<sup>274</sup> Ibid 8.

<sup>275</sup> Australian Government, 'Strategic Review of Indigenous Expenditure: Report to the Australian Government' (February 2010).

<sup>276</sup> Gary Johns, 'Whiteman's dreaming', *The Australian (online)*, 26 March 2011 <<http://www.theaustralian.com.au/news/features/whitemans-dreaming/story-e6frg6z6-1226027909493>> ; Christopher Pearson, 'Clutching at culture in a world without pity', *The Australian (online)*, 19 March 2011 <<http://www.theaustralian.com.au/news/opinion/clutching-at-culture-in-world-without-pity/story-e6frg6zo-1226024270116>>.

is troubling and ultimately doomed to failure. Indeed, the irony of the Prime Minister's exhortation to Indigenous people to demonstrate 'personal responsibility', to achieve 'progress through work and effort' and to make 'good decisions', while her Government promotes policies and programs that undermine Indigenous autonomy and the effectiveness of Indigenous governance arrangements, is profound.<sup>277</sup>

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<sup>277</sup> Julia Gillard, 'This work will go on' (Speech delivered at the House of Representatives, Commonwealth Parliament, Canberra, 9 February 2011) <<http://www.pm.gov.au/press-office/work-will-go-speech-house-representatives>>.