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*Worldwide knowledge and understanding of Australian Indigenous cultures, past and present*

NTER Review Board Secretariat  
GPO Box 7576  
Canberra Mail Centre ACT 2610.  
12 August 2008

**Re: Northern Territory Emergency Response Review Submission**

The Australian Institute of Aboriginal and Torres Strait Islander Studies (AIATSIS) has had a strong research focus on Indigenous decision-making, dispute management and community engagement, the findings of which have significant bearing on the NTER.

Between 2003 and 2006, the Indigenous Facilitation and Mediation Project (IFaMP), supported by the Department of Families, Housing, Community Services and Indigenous Affairs was based in the Native title Research Unit (NTRU) at AIATSIS. A major body of ground breaking evidence based research, particularly through the work of Visiting Research Fellow, Toni Bauman, has arisen from IFaMP activities and can be found on its web pages (<http://ntru.aiatsis.gov.au/ifamp/index.html>). Research activities included a wide range of consultations, workshops with a variety of stakeholders including practitioners and users of services, a participatory decision-making and dispute management case study and pilot training with Native Title Representative Bodies (NTRBs). IFaMP's Final Report is attached to this submission (Attachment 1) as is a paper titled 'You mob all agree?' The Chronic Emergency of Culturally Competent Engaged Indigenous Problem Solving' (Attachment 2).

Toni Bauman continues to be involved in researching and developing policy around decision-making, dispute management and engagement for AIATSIS, specifically as an adviser to the Federal Court of Australia's Indigenous Dispute resolution and Conflict Management Case Study Project. Dr Strelein, the Manager of the NTRU, is also a member of the Project's Reference Group. The Project is due to report to the National Alternative Dispute Resolution Advisory Council in September 2008.

The *Native Title Act 1993* places a strong emphasis on consensus driven agreement-making through non-adversarial approaches such as mediation, facilitation and negotiation. Native title has also given rise to a significant level of disputation amongst Indigenous people, at least some of sources of which can be traced to poor decision-making, engagement and consultation processes. Native title also provides a platform for a range of apparently unrelated grievances and cannot be addressed in isolation from other issues in the community.

Whilst the IFaMP Project arose in the context of native title, IFaMP's research findings are relevant to all who work in Indigenous affairs and for whom Indigenous decision-making and dispute management processes are core business. This includes Shared Responsibility and Regional Partnership Agreements.

However, the capacity of the system for meaningful engagement with Indigenous people to arrive at sustainable outcomes is extremely low. An absence of free, prior, informed and involved consent in Indigenous decision-making processes has contributed significantly to failures over many years, including in the NTER.

## **What isn't working?**

There have been many complaints about the heavy-handed manner in which the Federal Government commenced its intervention into Aboriginal communities in the Northern Territory. The lack of consultation and information sessions, coupled with the use of the Army, gave rise to significant misunderstandings, fear and uncertainty amongst a number of communities. Stories abounded of women packing up Toyotas with swags and supplies and heading bush with their children.

In many areas, these misunderstandings continue as misinformation has provided fodder not only for gossip and innuendo, but also for a persistent uncertainty. This is particularly the case for those for whom a range of intervention initiatives including income quarantining are still to come.

Long term success can only be assured by partnerships and relationships with Aboriginal communities which are built on trust, mutual respect and the negotiation of outcomes as equal partners through shared planning processes. This is the case whether there is an intervention or not.

How an outcome is achieved has a major bearing on the nature of the outcome, its sustainability and its successful implementation. That is, it is critical to understand the direct link between process and outcome, that decisions must be owned to be sustainable, and that *all* parties (including governments) need to take responsibility for them. There are no quick fixes or 'one size fits all' answers to problem solving in Indigenous communities.

Whilst various commentators have urged increased consultation around the NTER, it is not 'consultation', at least as it has been practiced, which is required. Rather locally tailored, transparent and inclusive processes of decision-making, problem solving and negotiation are the keys to achieving successful outcomes and partner-to-partner accountability.

Yet, there are very few people working with Indigenous communities who possess the cultural competence and specialised micro process skills which are required to carry out effective problem solving processes of engagement with Indigenous communities, let alone negotiate the conditions for accountable partnership conditions.

There are many instances in doing business with Indigenous communities where independent process management is required by an arms length third party. IFaMP's research demonstrates the importance of distinguishing between the *procedural* responsibilities of managing negotiations and the *substantive* interests of the negotiator. Mixing or blurring the two can make it difficult for all participants, particularly an NTER government representative who seeks to both negotiate with a group and manage the process around which negotiation takes place.

'Experts', such as administrators, lawyers, bureaucrats and politicians are unable to identify when information is not understood if they are simultaneously attempting to manage the process in which information is conveyed. They may also have a particular view, which they unconsciously or otherwise impose upon parties, but which should be objectively explored. The procedural expert remains alert to miscommunications, monitors how to manage them and acts as a 'circuit-breaker' without being seen as a stakeholder in particular outcomes.

Many mediation, facilitation and negotiation training courses teach the 'satisfaction triangle' in which the emotional, procedural and substantive rights and interests of all parties must be accounted for in arriving at sustainable outcomes. The specialised communication skills which are required involve assisting *all* parties, including governments, to arrive at meaningful and responsible outcomes. They include: exploring options, negotiating solutions, reality checking,

putting in place detailed processes for implementation and monitoring and ensuring government and Indigenous joint operational planning which is based on transparent understandings of the short, medium and long term availability of resources.

Engagement, decision-making and dispute management processes in Indigenous communities invoke the interpersonal, situational and systemic. Successful outcomes are dependent upon supportive and effective government systems, structures and processes, as well as upon the building of relationships and respect between relevant parties. Dispute management and decision-making processes which are solely focussed on the interpersonal will ultimately be ineffective if they are unable to address the underlying structural and systemic issues which in many cases are the cause of or significantly exacerbate interpersonal or community conflict.

Similarly decision-making processes are not single events isolated from other aspects of communities and from government services and engagement. They are nested in webs of relationships and systems and structures. Solutions are often reliant upon the effective delivery of a range of Government services, and the most significant underlying dispute in a community may well be a dispute between the community and the government department required to deliver a much needed resource.

Success is also heavily dependent upon the commitment, understanding and engagement skills of Government agents, who lack capacity in engaging and problem solving with Aboriginal communities effectively. A solution which has often been proposed by Governments is for public servants to have 'cultural awareness' training, but this is only a very small part of the answer. Being aware of issues which impact on Indigenous people does not equate to the necessary skills of engagement and communication, and not all individuals will be suited to effective engagement with Indigenous people. Moreover, there are government departments with major organisational communication problems and a range of 'cultures' within them which give rise to internal misunderstandings and conflict which have a flow-on effect to Indigenous communities. These in turn intersect with those of other departments as whole-of-government approaches flounder.

A more promising policy approach lays in an emphasis on 'whole-of-community' which shifts the gaze outwards and focuses on the community and the client rather than looking inward to inter-Departmental and interpersonal politics and the apparent impossibility of Government Departments working together across 'jurisdictions'.

Above all it is locally and regionally grown and owned approaches to community engagement, decision-making and dispute management which work best. Yet a number of apparently successful local programs such as the Ali-Curung Law and Justice Committee have not received ongoing Government support and have collapsed.

IFaMP has identified the urgent need for procedural experts not only in the NTER, but across all Indigenous communities, who can assist government, other stakeholders and Indigenous communities in:

- ensuring informed decision-making processes and greater co-ordination of whole-of-government and whole-of-community approaches;
- negotiating ways in which Indigenous people can take control of community business in ways they prefer and in which they can secure equal partnerships with government representatives and other parties; and
- ensuring that parties have what is required to enable them to negotiate effectively.

In particular, there is a need to foster Indigenous capacity in the following areas:

- identifying and exploring the causes and potential solutions to problems;
- responding in meaningful and sustainable ways to changing government requirements and agendas;
- developing appropriate strategies and capacities to engage, manage and utilise relevant technical expertise;
- ensuring decision-making and dispute management processes are embedded in good governance structures;
- planning and implementing workable community strategies and solutions including the identification of:
  - the appropriate group to be involved in decision-making;
  - how decisions should be made about particular issues;
  - strategies for managing conflict; and
- monitoring, renegotiating, modifying or adapting, strategies and solutions as required.

**Will the suite of NTER measures deliver the intended results and what alternative measures should be considered?**

An evaluation culture goes hand in hand with an evidence based culture for policy design. Best practice decision-making processes require evaluation procedures to be built in to programs at their commencement. However, there has been little substantive baseline information developed for communities targeted in the NTER against which to evaluate outcomes. There has been even less emphasis on evaluating NTER processes and their bearing on outcomes. Yet, the *manner* in which an ‘agreement’ is entered into will have a bearing on its success, as will the engagement and communication skills of individuals involved on the ground in building mutually respectful and trusting relationships.

It is noteworthy that the current NTER measures and sub-measures say little about evaluating processes. At best, the only mention of ‘community engagement’ is in Measure 7 which relates to ‘Co-ordination’ and includes 7.4 ‘Community engagement and Volunteering’. It would be extremely useful to the NTER to build a body of comparative data which observes and compares processes relating to the same substantive issues in different communities and their outcomes over the short, medium and long term.

Examples of critical factors to inform alternative measures might be associated with the following sample questions.

- How was NTER information provided to the community?
- How well did the community understand the information?
- What are relationships like between community and NTER staff?
- What preparation was undertaken for the decision-making process?
- How were the participants decided?
- How many people participated in making any decisions or projects?
- Who did the participants represent?
- How many men and women, and youth were involved?
- How were they involved?
- How were other interest groups in the community represented and involved?
- How was the decision-making process established before any decisions were made?
- What was the decision-making framework that was agreed? (Who made decisions about what issues?)
- Were any contingencies put in place in the event of conflict or agreement not being reached?

- What avenue does the community have for making complaints?
- What effects have misunderstandings had on the success of the NTER?
- How was free, prior and informed consent established?
- How sustainable has the outcome been?
- What processes were put in place for implementation, and its monitoring?
- How were whole-of-government and whole-of-community activities co-ordinated?
- How is the internal governance of the community being affected?
- What short term, medium and long term planning was undertaken?
- How was it implemented?
- Who is monitoring its implementation?

Secondly, there is a need for measures for mutual accountability between Government and Aboriginal communities. Whether these relationships are called ‘partnerships’ or not, they should be characterised by compliance (holding each other to account), transparency (giving each other and external stakeholders progress and activity accounts) and responsiveness (taking account of each other’s needs and concerns).<sup>1</sup>

Examples of the factors which should be reflected in indicators and measures are:

- Compliance:
  - Do the partners have clear definitions of their responsibilities to each other?
  - What resources are available to the partnership and are they sufficient?
  - Has appropriate staff been allocated (with the appropriate skills, mandate, support and motivation to complete their tasks)?
  - Are their clear agreements on sanction mechanisms for breach of commitment?
- Transparency:
  - What are the understandings that partners have of the roles and responsibilities?
  - What are the review and monitoring procedures?
  - Are there clear internal decision making processes?
  - Do partners understand the time and resource restrictions on each other?
- Responsiveness:
  - What are the channels of communication for questioning a partner?
  - How is information shared regarding changes in circumstances?
  - How do communication channels account for partner’s styles?
  - What channels are in place for resolving conflict between partners?

**Are there other ways of working that would better address the circumstances facing remote communities and town camps?**

The missing link in the NTER and in government approaches to Indigenous communities generally is an adequately resourced infrastructure of community decision-making, engagement, problem solving and negotiation. Ultimately, it is only those who live in remote communities and town camps, ideally assisted by third party skilled community facilitators, who have the answers to how their circumstances can be better. Responses will vary according to circumstance. The effective and fair negotiation of equal partnerships or relationships between Governments and communities will also require arms length third party assistance.

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<sup>1</sup> Caplan, Ken. 2005. Practitioner Note Series: Partnership Accountability-Unpacking the Concept.[http://www.bpdws.org/bpd/web/d/doc\\_4.pdf?statsHandlerDone=1](http://www.bpdws.org/bpd/web/d/doc_4.pdf?statsHandlerDone=1)

At least 6 significant reports to Governments have now recommended the need for Indigenous community facilitators – variously referred to as mediators, facilitators, agents, cultural brokers, and external planners - in whole-of-community/whole-of-government responses to Aboriginal and Torres Strait Islander needs and interests.

These reports include the Aboriginal and Torres Strait Islander Social Justice Commissioner's 2006 Social Justice Report and his 2008 report on a National Indigenous Representative Body, the Northern Territory 'Little Children are Sacred' report, the Final Report of the Northern Territory Emergency Response Task Force, NADRAC's (National Alternative Dispute Resolution Advisory Council's) report on Indigenous Dispute Resolution and the Final Report of the Indigenous Facilitation and Mediation Project at AIATSIS.

This is not to suggest an ongoing dependence on third party expertise. Nor to imply that governments do not have to make significant improvements in the delivery of services.

Rather it is the responsibility of community facilitators to build on existing capacity and to assist communities in:

- setting up their own processes of informed decision-making and dispute management and conducting mediation processes as appropriate;
- developing preferred protocols for doing business with governments and other stakeholders (as opposed to the random inundation of communities by representatives of various government departments);
- ensuring the involvement of representatives of appropriate interest groups in community decision-making including gender and youth, health and housing etc;
- engaging with governments in mutually accountable ways including the negotiation of partnerships as appropriate;
- short, medium and long term planning for whole-of-community and whole-of-government outcomes;
- dialogue around health, housing design and allocation, education, child abuse, and violence and possible solutions;
- the implementation and monitoring of decisions;
- the negotiation of research;
- the establishment of local justice groups which could:
  - provide a resource for courts, police and others working in the mainstream justice system, including provision of information or evidence about Indigenous law and culture; and
  - set community rules and community sanctions provided they are consistent with applicable laws;
- organising community education around a wide range of issues via user-friendly audio-visual materials;
- implementing complaints processes in the community including reporting community complaints to government;
- identifying and arranging appropriate therapeutic interventions where dispute resolution may not be appropriate;
- ensuring succession planning for community facilitation; and
- promoting the use of local dispute resolution and conflict management processes to government agencies.

Locally based community engagement or facilitation officers should be part of a tiered regional, State/Territory and national network of highly trained, skilled, monitored and mentored – particularly Indigenous – mediators, facilitators and negotiators. As procedural experts, they would

be skilled at working locally, able to make timely interventions and to tailor processes to local capacity, needs and interests. Parties could make a choice as to the most appropriate practitioner for their situation, including opting for non-Indigenous practitioners. Local community engagement officers could call upon external practitioners from the network when the need arises – particularly if they find themselves placed in situations of conflict of interest.

A similar need has been recognised internationally in the establishment of the Native Dispute Resolution Network US Institute for Environmental Conflict Resolution, Udall Foundation.

At the national level, and over the long term, the proposed national network could:

- build on existing networks including those of State and Territory based community mediation centres (some of whom have significant numbers of trained Indigenous mediators but with insufficient work), the Australian Indigenous Leadership Centre, and the Leadership Branch of FaHSCIA;
- co-ordinate the roll out of regional networks of Indigenous process experts and enlist non-Indigenous practitioners as required;
- develop the Register of Indigenous practitioners which was commenced by IFaMP, possibly through advertising for expressions of interest and statements of qualifications;
- pilot a range of processes and evaluate them including, in the first instance, a Northern Territory pilot;
- provide for a clearing house to ensure that what works is communicated effectively;
- provide a range of training and develop a nationally accredited training curriculum in Indigenous community engagement;
- provide ‘internships’ for business, government, and others who wish to improve ways of doing business with Indigenous groups;
- provide Indigenous employment opportunities, academic and vocational pathways;
- develop common process standards, monitoring and evaluation procedures; and
- establish ways of matching process expertise with community needs and tendering processes.

### **Implementation of initiatives**

Both long and short term approaches are required for the implementation of IFaMP’s findings and the tiered network must be build from the ground up. In the short term, the Northern Territory through the NTER Emergency Response would constitute an ideal pilot.

In the long term, a range of initiatives is required, not all of which would necessarily be undertaken by a single agency, but which would be managed and coordinated by a small national program or secretariat – possibly based at AIATSIS, and perhaps ultimately in any proposed Indigenous Governance Institute.

In the 08-09 financial year, the national co-ordinating secretariat could:

- lay the foundations for a long term approach through the development of a new policy proposal;
- commence some of the initiatives listed above; and
- co-ordinate a Northern Territory pilot as part of the NTER.

The Northern Territory Emergency Response pilot might involve:

- obtaining community permissions from possibly three (not intractable) communities to be involved in the pilot;
- working and coordinating activities with:
  - the 20 Northern Territory Indigenous community agents for whom FaHSCIA's Leadership Group has obtained funds through the NTER;
  - others who live in the NT who have graduated from the Australian Indigenous Leadership Centre programmes and FaHSCIA's courses;
  - the Northern Territory community mediation centre/s;
  - ex Family Court mediators, a number of whom are now unemployed having been replaced by Family Relationship Centres networks;
  - Family Relationship Indigenous advisers;
  - locally grown services such as the Tiwi Islands Youth Diversion/Development Unit which manages family and community conflicts;
  - Family Violence Legal Prevention Services;
  - Mawul Rom directors and mediators; and
  - others as identified.
- upskilling carefully selected existing mediators and facilitators through a range of training;
- enlisting the services of some of the mediators already on IFaMP's register;
- building up panels of local community expertise over 12 months through a 10 day intensive mediation training program, on-ground mentoring, debriefing, and 3-6 in-services and evaluation. This could involve a maximum of 20 candidates. At the end of 12 months, these trainees could then undertake train the trainee and roll out further training; and
- 4 day Facilitation training for government staff involved in the NTER including staff of ICCs.

### **Final Comments**

The approach to be taken needs to be a facilitative/transformational/community orientated one rather than one which is commercially or legally based. An inappropriate process can do harm by reinforcing a paradigm of failure.