Debating the Intervention

With Jenny Macklin*

In February this year, a group of prominent Aboriginal and non-Aboriginal Australians delivered a statement to Indigenous Affairs Minister Jenny Macklin, contesting the Northern Territory Intervention. Their concerns canvassed the 'delayed, incomplete and flawed' reinstatement of the *Racial Discrimination Act* (*RDA*), the widening of compulsory income management to the rest of the NT, the failure of SIHIP and the lack of evidence supporting the controversial policy.

Those who signed their names included former Prime Minister Malcolm Fraser, former Family Court Chief Justice Alastair Nicholson, New South Wales Australian of the Year Larissa Behrendt and Aboriginal policy expert Jon Altman. Ms Macklin responded by penning a letter, claiming those who signed the statement had 'misunderstood' the facts of the policy. Professor Altman also responded to Ms Macklin's rebuttal. The following are edited extracts of the two letters.

She Said…

On the Beginning:

> I acknowledge the instigation of the NTER by the previous Government was a major shock to many Aboriginal people and communities in the NT and was seen as a serious affront.
> There was no consultation before it was initiated and the nature of some of the measures and coercive tone utilised undoubtedly caused anger, fear, and distrust.
> It also needs to be acknowledged, however, that a widespread emergency did exist and continues to exist in many remote communities, with high levels of family violence, child neglect, appalling health status, low rates of school attendance, and high levels of crime including violent crime, and widespread drug and substance abuse.
> Any one of these factors has the potential to permanently damage or destroy a person's life opportunities; taken together, they constituted a fundamental and endemic threat to the human rights not just of individuals, but of whole communities.

On the Racial Discrimination Act:

> The Australian Government has fully reinstated people's rights and protections under the RDA in relation to the NTER …
> In addition, all of the provisions in the NTER legislation that deemed certain measures, such as income management, five-year leases, and alcohol and pornography restrictions to be special measures, have been repealed. These changes are neither flawed nor incomplete.
> The statement argues that the changes were delayed. I accept the criticism. The reason was that not only did we have to make the legislative changes, but we redesigned the

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> actual measures to improve them, make them sustainable in the long-term and make them more clearly special measures or non-discriminatory within the terms of the RDA. The redesign took some time given the complex and extensive nature of the NTER provisions, and the imperative to consult with Aboriginal people affected.

On the Community Consultations:

> Before introducing this legislation, the Government undertook extensive consultations with Indigenous people across the Northern Territory on future directions for the NTER.
> The consultation process included over 100 whole-of-community meetings covering all communities and town camps affected by the NTER, 11 workshops with regional leaders and key stakeholder organisations, and over 440 face-to-face discussions between Government Business Managers and individuals and small groups in communities. This was the most comprehensive engagement ever undertaken by government with Indigenous people in Australia.

On Income Management:

> I absolutely and unequivocally reject the inference that our policy on income management is designed or intended to be discriminatory behind a 'veneer of non-discrimination'. Indeed, far from it being a veneer, the new model of income management has been designed to apply in a non-discriminatory way to all welfare recipients in the specified categories.
> … With regard to income management in the Northern Territory, it is irrefutable that it has been effective in ensuring that a significant proportion of welfare payments are spent where most needed—on the essentials of life for recipients and their children.
> Under the Government's changes to income management, compulsory income management now applies only to targeted categories of disengaged and disadvantaged welfare recipients, across the whole of the NT, and not to specific locations—so called prescribed communities. In addition there are now specific criteria for people in these categories to apply for exemption from income management.
> Under the roll-out of the new income management scheme in the Northern Territory, around 60 per cent of people who are no longer subject to compulsory income management have decided to continue voluntary income management rather than exit the system.
> Clearly, a substantial proportion of those on the previous scheme found income management to be beneficial, as we have always intended it to be.
> In response to the inference that the new income management model has a discriminatory impact on Indigenous people, I can advise that both Indigenous and non-Indigenous Australians are now being income managed based on their payment status and other objective criteria.
> The high proportion of income managed welfare recipients who are Indigenous reflects the general income support recipient population in the NT, and the fact that many Indigenous people have chosen to participate voluntarily in the new income management scheme.

On Housing:

> The [Strategic Indigenous Housing and Infrastructure] Program is not only on track but is now demonstrating a capacity to deliver housing faster and on a larger scale than previous delivery models. To take advantage of this, the Australian Government has recently accelerated the program so that new houses and rebuilds can be delivered ahead of schedule.

> As a result a further 180 new houses and 180 rebuilds will be delivered by 2013—over and above the original targets of 750 new houses and 2730 rebuilds and refurbishments. An appropriate mix of housing is being built to cater for different size families.

On Land Leasing:

> Long term leasing, based on voluntary agreements with land owners, is essential on communal title if we are to secure major public investments.
> Underlying title remains with traditional owners. Without a lease, any fixtures including houses are owned by the traditional owners.
> They do not have the financial capacity to manage the assets nor to fund ongoing repairs and maintenance. Leasehold arrangements ensure that governments and not land owners must take responsibility, and be accountable, for housing construction standards, for long term repairs and maintenance programs and to underpin tenancy management systems.
> … Broader reforms to land tenure arrangements are also necessary to allow for the pursuit of home ownership and business opportunities on Indigenous land. Commercial investment on Indigenous land is hampered by its inalienable status, preventing land owners individually or corporately from raising finance for commercial purposes and home ownership. Leasehold arrangements, voluntarily entered into, hold out the hope that this obstacle can be overcome without adversely affecting underlying Aboriginal ownership.

On the Universal Periodic Review:

> The Government's commitment to improved engagement has been acknowledged by the United Nations Human Rights Council at the recent Universal Periodic Review process.
> The establishment of the National Congress of Australia's First Peoples was welcomed by the Council as a strong gesture of the Government's commitment to engagement with Indigenous Australians.
> Australia also received encouraging support from many countries for its efforts to improve the human rights of Indigenous Australians, through its endorsement of the UN Declaration on the Rights of Indigenous Peoples, for the National Apology and for our commitment to pursue constitutional reform to recognise Indigenous Australians.

He Said…

On Dialogue:

> I respond to your letter for a number of reasons, but mainly because I believe it is my duty and role as a policy academic to try and hold you accountable for the quality of policy and outcomes that the Australian Government is delivering to Indigenous Australians; note I am not referring here just to the quantum of taxpayer dollars spent. This is especially important for three reasons.
> First, as all nationally representative institutions of Aboriginal Australia have been dismantled and as the Government and Opposition are in broad consensus, it is hard to know how else the Australian Government is to be held accountable—majoritarian democracy does not work well for demographically weak and marginalised groups.
> Second, if I did not respond you might interpret my silence as agreement at best or acquiescence at worst with views that I do not share.

Third, I have worked long and hard as a social scientist in the difficult area of Indigenous development, since 1976 when I first came to this country. I have not lent my support to this statement lightly.

*On the Racial Discrimination Act***:**

… I provide my support for the statement because I concur with its broad sentiment that your Government's coercive approach in the Northern Territory is race based, inequitable and unlikely to succeed (although criteria for success in the NT are not specified, unless you continue to pursue the Howard Government's commitment to 'normalise' prescribed communities and their members by 21 June 2012).

I think you would agree that historically and today negative racism by the wider society provides an important explanation for Indigenous disadvantage.

So in my view it is desirable to stay away from any policy measures that might be interpreted by anyone, especially the subjects of the state project of improvement, as race-based in a negative sense. In the absence of constitutional recognition and an Australian human rights framework, the RDA takes on iconic status in Australia for Indigenous minorities.

There are many reasons why I interpret specific measures as race-based. Let me provide four examples. For the original people caught in the net when it was race-based, income management remains a race-based measure irrespective of the fact that the measure has been extended to others. The evidence on whether this is a beneficial special measure is hardly factually unambiguous as a now well-worn debate has indicated. My point here is that there are moral dimensions to supposed legal facts, hence the reference to 'veneer of non-discrimination'.

The High Court in Wurridjal found that just terms compensation is payable. You note that the government has taken action to reverse boundaries and pay rent to land councils to disburse to traditional owners of prescribed communities. Rent is not the same thing as 'just terms' or even 'reasonable terms' compensation that should include many forms of Indigenous valuation of loss associated with compulsory leasing of their freehold title land. Mr Justice Kirby highlighted in Wurridjal that no other privately-owned Australian township would be treated in this manner and I concur, hence this strikes me as a race-based measure.

I have been following with interest the case of a contractor who desecrated a sacred place in a prescribed township, but who owing to s91 of the *NTER Act* cannot be properly prosecuted. This strikes me as race-based flaunting of what matters most to many Aboriginal people in remote communities.

The legally mandated powers of Government Business Managers and police under the *NTER Act* remain extraordinary. It is hard to believe that they would be promulgated in relation to any township whose residents were predominately white or non-Indigenous.

On the Consultations:

I have directly observed (in July 2009) and have read a great deal about these consultations. The options to reverse decisions to quarantine income or cease compulsory leasing of land were never on the table (or whiteboard) let alone raised as possibilities. Your attempts to give some measures a veneer of respectability by your actions imply that they were race-based between August 2007 and June 2010.

On Income Management:

> I should emphasise here that I have absolutely no issue with the BasicsCard, every Australian welfare beneficiary should be offered one as a debit card and as a form of free banking.
> What I and many others object to is the compulsory nature of the card for certain categories of people, initially Aboriginal welfare recipients, now certain categories of Aboriginal welfare recipients and others.
> While some may choose to retain their BasicsCard, this can be variably interpreted: What incentives have been provided for people to stay? And what barriers have been constructed to make exit difficult? You suggest that criteria for exit have been designed to assist people to 'overcome the insidious impact of passive welfare and aspire to education, training or employment'. So the only means to escape income management is to join the mainstream, as John Howard so clearly stated in August 2007 at Hermannsburg, a Eurocentric and narrow view of skills acquisition and form of livelihood that many Aboriginal people may not share with you—a view of development that envisages no alternate.

On Long Term Leasing:

> After uncritically accepting the traducing of community-based housing associations first outlined in consultancy to then Minister Mal Brough by a team headed by an ex-Ministerial staff member of John Howard, you seek to maintain the fiction that public housing is the only possible model of delivery.
> We have discussed this issue before in December 2009 and I thought that at least at an intellectual level you agreed that there could be a diversity of models, private, private/public, private/community and community for the provision of housing, but you continue to prefer a duopolistic approach that requires traditional owners either to sign up for long term leasing arrangements of 80 to 99 years under s19A of the *Aboriginal Land Rights Act* (and receive some rent for use of their land paid from the Aboriginals Benefit Account (ABA)) or else sign s19 agreements for 40 years and receive no rent for the use of their land. On the issue of race-based policy one has to ask would any other holder of freehold title in Australia be presented with such a stark choice that is arguably tantamount to blackmail.

On Housing:

> How effective might housing have been under the community housing model if the allocations of resources now being invested had been available to ATSIC and the Indigenous Housing Authority of the Northern Territory (IHANT)?
> How many sustainable jobs might have been generated if community organisations had been provided with the resources wasted in the Home Ownership on Indigenous Land (HOIL) experiment as outlined by the Australian National Audit Office (ANAO)? There is much reference to anticipated benefits of the current approach, but little evidence yet on which to base such optimism. No factual evidence is provided that 'asset life spans were low, often less than 10 years', a better metric here might be person years of housing use given the extent of overcrowding—if the economic life of a non-Indigenous public house with four tenants is 40 years, and the economic life of an Aboriginal house with 20 occupants is 10 years clearly the latter house has had the longer economic life, an example of the variable interpretation of 'facts'.

On the Universal Periodic Review:

> In my view, the articles in the *Declaration of the Rights of Indigenous Peoples* provide an important template against which many NTER measures might be tested.
> When the UN Universal Periodic Review of Australia 2011 is undertaken perhaps this would be a useful basis for assessment of the Australian Government's track record and statutory regime of governmentality in the Northern Territory.
> Certainly it is my view that external accountability would be very desirable because domestic accountability is probably at its lowest ebb since the 1970s.
> There are also many other important issues that an independent arbiter might look at including: Why the Australian Government has stood by and allowed remote communities in the NT to be effectively disempowered by the establishment of Super Shires; why a Memorandum of Understanding signed on behalf of the Australian Government in September 2007 to effectively channel funds away from outstations has not been rescinded; why the Australian Government has included extremely ideological wording in the National Indigenous Reform Agreement that will effectively result in bias against smaller, remoter places that might be in greatest need; and why some successful programs like CDEP with track records in community and economic development in many places are being dismantled on ideological, not factual grounds.
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> *10 May 2011*