



FROM THE PERMANENT REPRESENTATIVE

AUSTRALIAN PERMANENT MISSION
GENEVA

20 July 2012

Ms Maria Magdalena Sepulveda Carmona
Special Rapporteur on Extreme Poverty and Human Rights

Mr James Anaya
Special Rapporteur on the Rights of Indigenous Peoples

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OHCHR REGISTRY

23 JUL 2012

Recipients: SPD.....

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Dear Ms Carmona and Mr Anaya

Thank you for your letter of 9 March 2012 concerning the Stronger Futures in the Northern Territory legislation.

The *Stronger Futures in the Northern Territory Act 2012* has now been passed by the Australian Parliament. Stronger Futures in the Northern Territory is the Australian Government's commitment to Aboriginal people in the Northern Territory to work in partnership with them over the next 10 years to drive positive change.

The Australian Government's commitment will see continued investment in making communities safer and families and children healthier. It is focused on ensuring children get a decent education, helping create jobs in communities, and giving people living in outstations and homelands certainty that basic services will continue to be provided.

Complementing this investment, the Stronger Futures legislation will help the Australian Government work in partnership with Aboriginal people to deal with the issues they have told us are the most urgent. The Australian Government will work with Aboriginal people in the Northern Territory to continue to tackle alcohol abuse and the damage it causes. The Australian Government will also work with Aboriginal people to ensure that children go to school every day to get a good education, and that parents play their part in making this happen.

Stronger Futures in the Northern Territory responds to the issues that Aboriginal people identified as the most urgent during the consultations held in 100 communities and town camps in 2011. Since late 2007, the Government has supported three successive consultations with Indigenous people in remote Northern Territory communities. Each of these consultations has involved an unprecedented number of communities and individuals participating in meetings, to have their say and influence the policy proposals. The Aboriginal and Torres Strait Islander Social Justice Commissioner and the Northern Territory Anti-Discrimination Commissioner were invited to attend all of the community consultation meetings in the Stronger Futures consultations held in the Northern Territory last year. Taken together, these consultations provide a strong basis for the Stronger Futures legislation.

Additionally an independent survey of 1,300 residents in remote Northern Territory communities was commissioned by the Government to help provide us with further information about the views of Aboriginal people in the Northern Territory. This survey found that the majority of people surveyed considered their communities and services had improved. We believe the survey may also be unprecedented in remote Australia in the number of people surveyed and numbers of communities that participated. Each of the research companies involved in the survey employed local researchers to help conduct the survey. This allowed the survey to be conducted in the participant's own language. All local researchers and interpreters were paid for their work. Over fifty local Aboriginal people were employed in work associated with the survey.

The Government's commitment to Aboriginal people being able to put their views on Stronger Futures forward included ensuring the legislation process allowed time for effective parliamentary scrutiny. The legislation has been examined by both the Senate Standing Committee on the Scrutiny of Bills and the Senate Community Affairs Legislation Committee. This included opportunities for submissions from the public and public hearings before the Senate Community Affairs Legislation Committee. Many Aboriginal organisations and human rights bodies made submissions to the Senate Community Affairs Legislation Committee and both the Australian Human Rights Commission and the National Congress of Australia's First Peoples appeared before the Committee. An officer from the National Congress of Australia's First Peoples accompanied the Committee on its hearings in the Northern Territory. The legislation was first introduced into the Parliament in November last year and was not passed until June this year, to allow time for all of these processes.

The Government has been clear from the outset of the development of the Stronger Futures legislation that all the measures in the Bills would be designed to be consistent with the *Racial Discrimination Act 1975* (the Racial Discrimination Act). The Stronger Futures legislation does not involve any suspension of the Racial Discrimination Act. Further, the Australian Parliament agreed to the Government's amendments to the *Stronger Futures in the Northern Territory Act 2012* and the *Stronger Futures in the Northern Territory (Consequential and Transitional Provisions) Act 2012*. These amendments inserted explicit provisions in the Stronger Futures in the Northern Territory Act and Part 10 of the *Classification (Publications, Films and Computer Games) Act 1995* (the prohibited material measure) which make it clear that these laws do not affect the operation of the Racial Discrimination Act.

The Stronger Futures legislation repealed the *Northern Territory National Emergency Response Act 2007* and a number of measures, such as the business management area

powers, which have now ceased. The compulsory five year leases over communities will end by 17 August 2012.

In developing the Stronger Futures legislation, careful consideration has been given to Australia's human rights obligations, including the International Convention on the Elimination of All Forms of Racial Discrimination and other key international instruments in the development of the Bills. I enclose copies of the assessments of the policy objectives with human rights. These assessments have also been provided to the Australian Parliament's Joint Committee on Human Rights.

The Australian Government has made a 10 year commitment to Aboriginal people in the Northern Territory because it recognises that the situation for many people and families remains critical. Too many children are not attending school, and alcohol-fuelled violence continues to devastate lives and families.

The Australian Government's 10 year Stronger Futures funding commitment of \$3.4 billion will continue the provision of programs and services that are critical to help close the gap, particularly in remote areas of the Northern Territory. This funding is over and above the substantial investment the Australian Government is already making in the Northern Territory towards closing the gap. I am pleased that this investment is having an effect and five years on from the start of the Northern Territory Emergency Response, positive changes have taken place. There is more housing and infrastructure in communities and improvements in the number and quality of teachers is evident. Communities have also reported improvements in a range of services including police, welfare services, health clinics and community stores.

The Stronger Futures commitment includes an investment of \$583.4 million in education. This will enable 200 additional teachers to continue to be employed in remote community schools. To help retain good teachers in communities the Australian Government will fund the building of 100 new teacher houses. The Australian Government will maintain and expand its strategies to build the skills and qualifications of teachers, including in teaching English as a second language and helping children cope with hearing issues and learning difficulties. Importantly, the Australian Government will work to develop better career pathways for Aboriginal people in the education sector. The Australian Government will also continue to support the School Nutrition Program which provides meals each day to around 5,000 students in remote Northern Territory schools, helping to improve their concentration, health and school results.

The Australian Government will spend \$713.5 million over 10 years to continue to provide essential funding for primary health care services in remote communities, involving more than 250 full-time staff in 80 clinics; and hearing checks and follow-up services and preventative oral health services. The Australian Government will support the Remote Area Health Corps which meets short-term workforce shortages, and the Mobile Outreach Plus program that provides counselling and education for children, families and communities experiencing trauma from child abuse and neglect.

The Australian Government will be investing \$619.3 million over the next 10 years in making communities safer. This will fund the continued employment of 60 additional Northern Territory police officers working in 18 remote communities, and will enable four new permanent police complexes to be built. Support will be provided for the continued

operation of community night patrols which provide a valuable service in 80 communities, as well as the operation of the Substance Abuse Intelligence Desks and Dog Operations Unit which play a vital role in controlling illicit drugs. The Australian Government will also provide \$75.6 million to support the development and implementation of local alcohol management plans that give communities greater capacity to deal with problems caused by alcohol.

The Australian Government will help support families by continuing to fund playgroups, crèches, youth workers and safe houses in communities at a cost of \$442.4 million over the next decade. The Australian Government will significantly increase the number of Communities for Children sites which provide services including early learning and literacy programs, parenting and family support programs and child nutrition advice. The Government will continue to fund two mobile child protection teams as well as additional Remote Aboriginal Family and Community Workers who provide intensive parenting support and education services to prevent children at risk from being placed in out-of-home care.

The Australian Government is also committed to providing additional employment opportunities for Aboriginal people in remote communities. Its investment in health, education and community safety will continue to support the direct employment of many local people, and steps are being implemented to ensure that service providers offer training and jobs for local Aboriginal people as part of the additional support we are providing for families, children and young people. The Government will be spending \$19.1 million over the next four years to create 50 additional Aboriginal ranger positions and offer up to 100 local traineeships for people in remote communities, and provide a job guarantee to young people completing Year 12 in Territory Growth Towns.

In addition, the Australian Government is investing \$283.5 million over the next six years to continue its work to improve and upgrade existing housing in remote communities and to remove asbestos from houses and community buildings. This is in addition to the \$1.7 billion that the Government has already committed to improve Indigenous housing in the Northern Territory.

The Australian and Northern Territory Governments have also agreed on a 10 year funding commitment to support the continued provision of municipal and essential services to outstations and homelands. The Australian Government will be providing \$206.4 million over 10 years and the Northern Territory Government will provide \$15 million in 2012-13, which will go directly to supporting the services that are fundamental to living a healthy and safe life, such as power, water, sewerage and road maintenance.

Integral to the Stronger Futures commitment, the Australian Government is determined to improve the way governments and communities work together. The Australian Government will continue to have government staff living and working in remote communities, and will considerably increase the number of local Aboriginal people employed as Indigenous Engagement Officers. These employees understand local issues and local language and help to strengthen government's relationship with Aboriginal people, and help to ensure that services and programs are well targeted and delivered effectively. The Australian Government will also continue to provide funding support to the Northern Territory Aboriginal Interpreter Service to help recruit, train and mentor interpreters.

The Government considered a wide range of evidence and input in the development of the Stronger Futures approach. Copies of a booklet which provides more information on Stronger Futures approach, *Stronger Futures in the Northern Territory - A ten year commitment to Aboriginal people in the Northern Territory*, will be sent shortly.

Once again, I thank you for your letter.

Yours sincerely

A handwritten signature in black ink that reads "Paul Wilson". The signature is written in a cursive style with a large initial 'P' and a long, sweeping underline.

Mr Paul Wilson
Chargé d'Affaires A.I.

Assessment of Policy Objectives with Human Rights

Stronger Futures in the Northern Territory Bill 2012

Stronger Futures in the Northern Territory (Consequential and Transitional Provisions) Bill 2011

Overview

Careful consideration was given to Australia's obligations under the key human rights instruments throughout the development of the *Stronger Futures in the Northern Territory Bill 2012*, the *Stronger Futures in the Northern Territory (Consequential and Transitional Provisions) Bill 2011* (the Bills) and the wider suite of measures seeking to address high levels of disadvantage in certain Aboriginal communities in the Northern Territory.

Consideration was given to the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*, and in particular to the International Convention on the Elimination of All Forms of Racial Discrimination (CERD), the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social and Cultural Rights (ICESCR), the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), and the Convention on the Rights of the Child (CROC).

The policy objectives of the Bills are compatible with the human rights and freedoms recognised in those instruments. An assessment of the policy objectives in the Bills against these instruments is set out below.

The way in which the policies were developed was also consistent with those instruments. The Australian Government recognises the importance of seeking the views of Aboriginal people on key policy decisions affecting them, and the policies in the Bills were informed by widespread consultations undertaken since 2008, including the Stronger Futures consultations in 2011.

The Australian Government considered a wide range of evidence as to the need for and likely effectiveness of the policy measures. Extensive information about the evidence to support the measures, the evaluation of measures and the consultation process has been provided in the joint Commonwealth agency submission to the Senate Community Affairs Legislation Committee, the Northern Territory Emergency Response Evaluation Report 2011, the Stronger Futures in the Northern Territory Report on Consultations 2011, the Community Safety and Wellbeing Research Study Consolidated Report, and the Explanatory Memoranda to the Bills. This statement does not seek to reproduce that evidence.

The Bills provide for the following measures:

- tackling alcohol abuse;
- land reform;

- food security;
- prohibited material; and
- customary law considerations in bail and sentencing decisions.

Tackling alcohol abuse measure, Stronger Futures in the Northern Territory Bill – human rights implications

The policy objective of the tackling alcohol abuse measure is to reduce alcohol related harm to Aboriginal people in the Northern Territory. In the 2012-13 Budget context, the Australian Government committed \$75.6 million over 11 years to 2021-22, to tackle alcohol abuse in Aboriginal communities in the Northern Territory. This includes supporting the development and implementation of community specific Alcohol Management Plans (AMPs). The tackling alcohol abuse measure in the Stronger Futures in the Northern Territory Bill proposes:

- continuation of alcohol restrictions in ‘dry’ communities, including penalties for ‘grog running’ (illegal possession and supply of alcohol);
- providing a legislative basis for local AMPs, which allow communities to develop local solutions to reduce alcohol-related harm and become ‘community managed alcohol areas’, where legislated alcohol restrictions may be lifted;
- provision for the Commonwealth to request that the Northern Territory Government appoint an assessor to examine the trading practices of any licenced premises that may be causing substantial alcohol-related harm to Aboriginal people;
- provision for an independent review of alcohol laws in the Northern Territory, including the Stronger Futures Bill, within two years; and
- provisions requiring that any signs about alcohol restrictions are respectful to Aboriginal people, with direct community input into their wording and design.

The Australian Government has responded to community views that restrictions may not be the only way over the longer term to respond to this serious problem. Many communities want to find their own ways to manage the use of alcohol and reduce harm caused by it. For this reason the Australian Government is proposing to strengthen the provisions for local AMPs so that they can work better for communities. The legislation therefore provides a mechanism to introduce new minimum standards to be met before plans are approved by the Minister, including to help make sure they are focused on reducing harm and protecting women and children. AMPs will be specific to the circumstances of the communities and the needs and aspirations of community members. In some circumstances alcohol restrictions could be lifted in communities, where the community supports that change and it would not jeopardise the safety of women and children, or increase the risk of alcohol-related harm.

The policy intention is that the tackling alcohol abuse measure is a 'special measure' within the meaning of art 1(4) of the CERD (and s 8(1) of the *Racial Discrimination Act 1975* (RDA)).

CERD provides that special measures are deemed not to be discrimination. Special measures are designed to 'secure to disadvantaged groups the full and equal enjoyment of human rights and fundamental freedoms'.¹

This measure is required because Aboriginal people in the Northern Territory are significantly disadvantaged by alcohol abuse and its effects.² In particular, children are significantly disadvantaged by the negative impact alcohol abuse has on a safe living environment. By reducing the effect of alcohol-related harm, the measures will advance human rights such as:

- The right to security of person and protection by the State against violence or bodily harm (art 5(b) of the CERD) and the right to liberty and security of person (art 9 of the ICCPR). There is clear evidence that alcohol abuse is a major factor in community and family violence in remote Northern Territory Aboriginal communities;²
- The obligation on States to provide to children such measures of protection as are required by their status as a minor (art 24 of the ICCPR), the obligation to take all appropriate legislative, administrative, social and educational measures to protect children from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation (art 19 of the CROC) and the rights of children in particular to high standards of health (art 24 of the CROC);
- The right of everyone to the enjoyment of the highest attainable standard of physical and mental health (art 12 of the ICESCR). There is a well-documented link between high alcohol consumption and health risks;² and

¹ Committee on the Elimination of Racial Discrimination, *General Recommendation No. 32: The Meaning and Scope of Special Measures in the International Convention on the Elimination of Racial Discrimination* (August 2009), at para [11].

- The right to standards of living adequate for the child's physical, mental, spiritual, moral and social development (art 27 of the CROC). Research evidence indicates that alcohol consumption and consequent alcohol-attributable deaths and hospitalisations for both Aboriginal and non-Aboriginal people in the Northern Territory has occurred at levels far higher than elsewhere in Australia and that rates for Aboriginal people are higher than for non-Aboriginal people. In the consultations it was reported that parents were spending time drinking and gambling rather than looking after children. Alcohol restrictions will assist in improving standards of living and care for children in affected communities. There is also evidence that alcohol abuse is a risk factor in child neglect in the Northern Territory.²

There are a range of consultation, review and appeal mechanisms in the Bill.³

This includes an independent review of relevant Northern Territory and Commonwealth laws to start two years after the commencement of the measure. The review will report on the effectiveness of these laws in reducing alcohol-related harm to Aboriginal people in the Northern Territory and whether any of those laws should be amended or repealed. That review will be published and tabled in Parliament.

The Bills as introduced proposed two further mechanisms to ensure that the tackling alcohol abuse measure is not continued after its objective is achieved, as is consistent with art 1(4) of the CERD: an independent review of the first 7 years of operation to be published and tabled in Parliament, and an automatic sunset after 10 years of operation. The Bills will subsequently be amended so that the independent review occurs after the first 3 years of operation of the measure.

To the extent that the measure restricts rights, those limitations are reasonable, necessary and proportionate having regard to evidence of the very high levels of alcohol-related harm to Aboriginal people in the Northern Territory, the improvement occasioned by the restrictions so far, and support received during consultations. The evidence and the results of consultation and evaluation are set out in detail in: the joint Commonwealth agency submission to the Senate Community Affairs Legislation Committee; the Northern Territory Emergency Response Evaluation Report 2011; the Stronger Futures in the Northern Territory Report on Consultations 2011 and the Community Safety and Wellbeing Research Study Consolidated Report.

² See, for example, National Health and Medical Research Council, 2009. *Alcohol Guidelines: reducing the health risks* (available from <http://www.nhmrc.gov.au/your-health/alcohol-guidelines>); Race Discrimination Commissioner, 1995. *Alcohol Report, Racial Discrimination Act 1975, Race Discrimination, Human Rights and the Distribution of Alcohol, Canberra*; Northern Territory Government 2010. *Growing them Strong, Together: Promoting the safety and wellbeing of the Northern Territory's children*, Summary Report of the Board of Inquiry into the Child Protection System in the Northern Territory, M.Bamblett, H. Bath and R. Roseby, Northern Territory Government, Darwin.

³ This includes mandatory consultation prior to key decisions by the Minister, such as whether to declare an area to be an alcohol protected area. Provisions in the Bill providing that a failure to consult does not affect the validity of decisions do not override the mandatory consultation provisions and are consistent with other Commonwealth legislation such as the *Legislative Instruments Act 2003* and the *Aboriginal Land Rights (Northern Territory) Act 1976*. Administrative decisions are subject to review in Australia's Administrative Appeals Tribunal. Legislative instruments are subject to Parliamentary scrutiny and disallowance.

The Senate Community Affairs Legislation Committee report on the Stronger Futures Bills acknowledged the serious challenges facing the Northern Territory to reduce alcohol related harm. The Committee indicated that it “is of the view that the evidence it received indicates that alcohol is causing substantial harm in parts of the Northern Territory”, and that it considers “the measures in the Stronger Futures Bill will go some way to supporting the Northern Territory as it seeks to address alcohol-related harm...”.⁴

Land reform measure, Stronger Futures in the Northern Territory Bill – human rights implications

The policy objective of the land reform measure is to enable the Commonwealth to make amendments to Northern Territory Government legislation to:

- facilitate the granting of individual rights or interests in relation to land in town camps and community living areas; and
- promote economic development in town camps and community living areas.

The policy intention is that the land reform measure is a ‘special measure’ within the meaning of art 1(4) of the CERD (and s 8(1) of the RDA).

CERD provides that special measures are deemed not to be discrimination. Special measures are designed to ‘secure to disadvantaged groups the full and equal enjoyment of human rights and fundamental freedoms’.⁵

These provisions are part of the Australian Government’s commitment to provide a platform for land tenure for Aboriginal communities that is secure and able to be used to the maximum extent, including for economic development and home ownership opportunities in Aboriginal communities.

The Australian Government is committed to negotiating voluntary long-term leases and ensuring fair rent payments to land owners affected by the compulsory five-year leases. Voluntary long-term leasing of Aboriginal land under the *Aboriginal Land Rights (Northern Territory) Act 1976* can facilitate the goals of secure tenure, however:

- Northern Territory legislation that provides for community living areas contains restrictions on dealings in land, including leasing, that prevent commercial leasing and leasing for public infrastructure and services such as police stations; and

⁴ Page 21, Report of Community Affairs Legislation Committee, March 2012. The Committee also noted the effect of illicit drugs such as marijuana, and that more needs to be done in the areas of alcohol education and rehabilitation. The Government has provided additional funding in the 2012-13 Budget to alcohol rehabilitation services as part of the wider suite of Stronger Futures measures.

⁵ Committee on the Elimination of Racial Discrimination, *General Recommendation No. 32: The Meaning and Scope of Special Measures in the International Convention on the Elimination of Racial Discrimination* (August 2009), at para [11].

- Northern Territory legislation that provides for town camps similarly contains statutory restrictions or procedural requirements that may prohibit certain dealings in the land, for example, mortgages and other security-type transactions and subdivision.

The land reform measure facilitates the removal of such restrictions by providing that the Commonwealth can make regulations that amend relevant Northern Territory legislation. The Northern Territory Government has indicated that it intends to implement such reforms. Commonwealth regulation will not be necessary if the reforms proposed by the Northern Territory Government are implemented in a timely manner.

Town camps and community living areas are areas of land only held by Aboriginal people.

The measure is required because without it, Aboriginal people who are community living area or town camp title holders are limited in their enjoyment of human rights and fundamental freedoms, in particular to own property, to housing and to participate in economic development.

The land reform measure will advance human rights, including:

- the right to equal protection and equality before the law (art 26 of the ICCPR); and
- the right to own property as well as in association with others (art 5(d)(v) of the CERD).

The Bills as introduced proposed two mechanisms to ensure that the regulation making power in the land reform measure does not continue after its objective is achieved, as is consistent with art 1(4) of the CERD: an independent review of the first 7 years of operation to be published and tabled in Parliament, and an automatic sunset after 10 years of operation. The Bills will subsequently be amended so that the independent review occurs after the first three years of operation of the measure.

Consultation is mandatory prior to making any regulations under the land reform measure, and any regulations made under the legislation are subject to Parliamentary scrutiny and disallowance.⁶ The Australian Government has commenced work with the relevant Northern Territory Land Councils and the Northern Territory Government on a stakeholder consultation process on community living area land reform.

The evidence and the results of consultation and evaluation are set out in detail in the joint Commonwealth agency submission to the Senate Community Affairs Legislation Committee, and the Stronger Futures in the Northern Territory Report on Consultations 2011.

The Senate Community Affairs Legislation Committee in its report on the Stronger Futures Bills agreed that land reform is needed in the Northern Territory and that the move toward voluntary leasing arrangements is positive.

⁶ Provisions in the Bill providing that a failure to consult does not affect the validity of regulations do not override the mandatory consultation provisions and are consistent with other Commonwealth legislation such as the *Legislative Instruments Act 2003* and the *Aboriginal Land Rights (Northern Territory) Act 1976*.

Food security measure, Stronger Futures in the Northern Territory Bill – human rights implications

The policy objective of the food security measure is to improve the quality and availability of fresh healthy food in Aboriginal communities. Under this measure:

- Existing community stores licences will be transitioned into the new regulatory framework established by the Bill;
- licensing will no longer be legislatively linked to stores being able to accept income managed funds;
- the requirement that stores outside the major centres operate with a licence will be continued but only if the store is an important source of food, drink or grocery items for an Aboriginal community;
- compliance arrangements will be more flexible, so that stores that consistently perform well will face less monitoring; and
- there will be a range of penalties for non-compliance to allow action to be taken against a store whilst it continues to trade.

The policy intention is that the food security measure is a 'special measure' within the meaning of art 1(4) of the CERD (and s 8(1) of the RDA).

CERD provides that special measures are deemed not to be discrimination. Special measures are designed to 'secure to disadvantaged groups the full and equal enjoyment of human rights and fundamental freedoms'.⁷

This measure is necessary to ensure that Aboriginal people outside of major centres in the Northern Territory do not suffer significant disadvantage due to the lack of a competitive market for food, drink and grocery items. Often there is only one store that is accessible to a community.

Access to reasonably priced food of sufficient quality to meet nutritional needs advances:

- the right to adequate food and continuous improvement of living conditions (art 11 of the ICESCR);
- the right to the enjoyment by everyone of the highest attainable standards of health (recognised in art 12 of the ICESCR); and

⁷ Committee on the Elimination of Racial Discrimination, *General Recommendation No. 32: The Meaning and Scope of Special Measures in the International Convention on the Elimination of Racial Discrimination* (August 2009), at para [11].

- the rights of children in particular to the highest attainable standard of health (recognised in art 24 of the CROC) and standards of living adequate for the child's physical, mental, spiritual, moral and social development (recognised in art 27 of the CROC).

There are a range of consultation, review and appeal mechanisms in the Bill both for store owners and managers and Aboriginal communities.⁸

The Bills as introduced proposed two mechanisms to ensure that the food security measure does not continue after its objective is achieved, as is consistent with art 1(4) of the CERD: an independent review of the first 7 years of operation to be published and tabled in Parliament, and an automatic sunset after 10 years of operation. The Bills will subsequently be amended so that the independent review occurs after the first three years of operation of the measure.

To the extent that the measure imposes additional requirements on store owners and managers, those requirements are reasonable, necessary and proportionate having regard to the importance of ensuring food security for Aboriginal people, the improvements resulting from the pre-existing community stores regime, and the support received during consultations.

The evidence and the results of consultation and evaluation are set out in detail in the joint Commonwealth agency submission to the Senate Community Affairs Legislation Committee, the Northern Territory Emergency Response Evaluation Report 2011, the Stronger Futures in the Northern Territory Report on Consultations 2011, Evaluation of the Community Stores Licensing Program and the Community Safety and Wellbeing Research Study Consolidated Report.

The Senate Community Affairs Legislation Committee in its report on the Stronger Futures in the Northern Territory Bills acknowledged that more needs to be done in the area of guaranteeing food security in Aboriginal communities.

⁸ Consultation with people serviced by a store is mandatory and must be taken into account by the Secretary when deciding whether a community store licence is required. Provisions in the Bill providing that a failure to consult does not affect the validity of decisions do not override the mandatory consultation provisions and are consistent with other Commonwealth legislation such as the *Legislative Instruments Act 2003* and the *Aboriginal Land Rights (Northern Territory) Act 1976*. The views of community members can also be taken into account for all other licensing decisions. Key decisions also require a procedural fairness process to be undertaken on proposed decisions, including seeking submissions from store owners and managers. Administrative decisions are subject to review in Australia's Administrative Appeals Tribunal. Any legislative instruments made under the legislation are subject to Parliamentary scrutiny and disallowance.

Prohibited material measure, *Classification (Publications, Films and Computer Games) Act 1995* as amended by the Stronger Futures in the Northern Territory (Consequential and Transitional Provisions) Bill – human rights implications

The policy objective of the prohibited material measure is to reduce the risk of children in certain Aboriginal communities in the Northern Territory from being exposed to sexually explicit and very violent material.

- This measure contributes to this objective by placing restrictions on the sale and possession of extremely violent and sexual material (prohibited material), and material that is or would be classified Category 1 or 2 Restricted, X18+, or RC (Refused Classification) in prohibited material areas.
- The measure operates through Part 10 of the *Classification (Publications, Films and Computer Games) Act 1995* (Commonwealth). These restrictions are additional to the classification restrictions which apply across the Northern Territory under the *Classification of Publications, Films and Computer Games Act* (NT) [1985].

The policy intention is that the prohibited material measure is a 'special measure' within the meaning of art 1(4) of the CERD (and s 8(1) of the RDA).

CERD provides that special measures are deemed not to be discrimination. Special measures are designed to 'secure to disadvantaged groups the full and equal enjoyment of human rights and fundamental freedoms'.⁹

The measure is required because Aboriginal children in the Northern Territory are disadvantaged in specific ways which limit their enjoyment of human rights and fundamental freedoms by increased risk to their wellbeing through exposure to such material. There are a range of factors in remote Aboriginal communities that increase the risk that exposure to material in the nature of prohibited material will adversely affect the wellbeing of children, including lower levels of supervision due to significant levels of misuse of alcohol and other substances. It is not a case that there is more of this material in Aboriginal communities but that children living in exceptional levels of disadvantage in remote areas may be more vulnerable to the harm it might cause. In addition, there are no other remote areas in Australia where this material is lawfully available.

⁹ Committee on the Elimination of Racial Discrimination, *General Recommendation No. 32: The Meaning and Scope of Special Measures in the International Convention on the Elimination of Racial Discrimination* (August 2009), at para [11].

The measure will advance the following rights:

- The right to security of person and protection by the State against violence or bodily harm (art 5(b) of the CERD).
- The right of children to such measures of protection as are required by his/her status as a minor (art 24 of the ICCPR).
- The obligation to take measures to protect children from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child (recognised in art 19 of the CROC).

The measure allows for communities to apply to the Minister to have restrictions lifted subject to prior consultation and certain criteria aimed to ensure the safety and wellbeing of people in communities, in particular children.

The Bills as introduced proposed two further mechanisms to ensure that the prohibited material measure is not continued after its objective is achieved, as is consistent with art 1(4) of the CERD: an independent review of the first 7 years of operation to be published and tabled in Parliament, and an automatic sunset after 10 years of operation. The Bills will subsequently be amended so that the independent review occurs after the first 3 years of operation of the measure.

To the extent that the measure restricts rights, those limitations are reasonable, necessary and proportionate having regard to the particular circumstances and living conditions in remote Northern Territory communities and the extreme nature of the material that is prohibited.

Clinical evidence in relation to the effect of the harm to children of exposure to very violent and sexually explicit material is limited, noting that studies would require parental consent for children to be exposed to such material. However, there is some evidence that indicates that children in Aboriginal communities are at risk due to exposure to such material.¹⁰ There are cultural sensitivities in Northern Territory Aboriginal communities concerning discussion of such material. However, the Report on the Northern Territory Emergency Response Redesign Consultations (2009) and the Stronger Futures in the Northern Territory Report on Consultations 2011 indicate that generally where the prohibited material restrictions were discussed there was support for continuation of the measure.

¹⁰ In the case of Aboriginal communities, reports on pornography are diverse, yet a number of sources report that pornography, and children's increasing exposure to sex is of significant concern. O'Brien W, 2008. *Problem Sexual Behaviour in Children: A Review of the Literature*, Australian Crime Commission: Northern Territory Government 2010. *Growing them Strong, Together: Promoting the safety and wellbeing of the Northern Territory's children*, Summary Report of the Board of Inquiry into the Child Protection System in the Northern Territory, M. Bamblett, H. Bath and R. Roseby, Northern Territory Government, Darwin; Northern Territory Board of Inquiry into Protection of Aboriginal Children from Sexual Abuse, 2007. *Ampe Akelyernemane Meke Mekarle*, "Little Children are Sacred", Northern Territory Government, Darwin.

Customary law considerations in bail and sentencing decisions, Stronger Futures in the Northern Territory (Consequential and Transitional Provisions) Bill – human rights implications

The policy objective of this measure is to enable customary law and cultural practice to be considered in bail and sentencing for certain offences against Commonwealth and Northern Territory law that protect cultural heritage, including sacred sites or cultural heritage objects.

Following a decision of the Council of Australian Governments in 2006, the *Crimes Act 1914* was amended to provide that customary law and cultural practice cannot be taken into account to lessen or aggravate the seriousness of a Commonwealth offence in bail and sentencing decisions: see ss 15AB(1)(b) and 16A(2A). Similar provisions were also inserted into the *Northern Territory National Emergency Response Act 2007*: see ss 90-91.

However, those limitations produced unintended effects in some instances: for example, see *Aboriginal Areas Protection Authority v S & R Building and Construction Pty Ltd [2011] NTSC 3* where the court was restricted in the penalty it could pass (in that it could not take into account customary law and culture) for an offence in which a pit toilet was dug on land that was part of a sacred site. This measure amends the *Crimes Act 1914* to tailor the effect of the prohibition by ensuring that it does not apply in circumstances where it would adversely impact on heritage or sacred sites.

This measure is not discriminatory. It accords with the obligation on the State to undertake not to engage in any act or practice of 'racial discrimination' against persons, groups of persons or institutions (art 2(1)(a) of the CERD); the right to equal protection and equality before the law (art 26 of the ICCPR), and the obligation to ensure that all persons are equal before courts and tribunals (art 14 of the ICCPR).

- Where the prohibition applies, it will apply to all people and all cultural backgrounds and will preclude the taking into account of not only Aboriginal cultural practices and background, but also others, such as Sharia law or other religious and customary laws. It will apply not only in the Northern Territory, but across Australia for federal offences in the *Crimes Act 1914*.
- Where the prohibition is being removed by the proposed measure, it will allow a court, in exercising its sentencing and bail powers, to take into account any relevant information as a matter of discretion. Courts generally have a wide scope for considering relevant factors in exercising that discretion, and the lifting of the prohibition in relation to particular offences will leave it to courts to decide what should be taken into account. Those rules will apply throughout Australia for federal offences, and to any cultural background or practice that may be relevant. This tailoring will ensure that where the prohibition on taking into account cultural factors does operate, it does so as originally intended, in a manner which promotes its intended protective effect.

The Senate Community Affairs Legislation Committee in its report on the Stronger Futures in the Northern Territory Bills indicated that it believes that the 2009 case *R v Wumungmurra* has demonstrated that the current provisions provide a framework within which customary law and cultural practice can play an appropriate role in cases involving Aboriginal and Torres Strait Islander Australians.¹¹ The amendments proposed in this Bill will ensure that there will be no unintended consequences regarding cultural heritage, including sacred sites and cultural heritage objects.

Conclusion

The policy objectives of the Bills are compatible with human rights because they advance some rights, and to the extent they may limit any rights, those limitations are reasonable, necessary and proportionate.

¹¹ In *R v Wumungmurra* the defendant, charged with aggravated assault submitted to the Court that customary laws entitled him to physically punish his wife for abandoning their family and failing to fulfil important community duties.

Assessment of Policy Objectives with Human Rights

Social Security Legislation Amendment Bill 2011

Overview

Careful consideration was given to Australia's obligations under the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011* in developing the *Social Security Legislation Amendment Bill 2011*.

This included consideration of the International Convention on the Elimination of All Forms of Racial Discrimination (CERD), the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social and Cultural Rights (ICESCR), the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), and the Convention on the Rights of the Child (CROC).

The policy objectives of the Bill are compatible with the human rights and freedoms recognised in those instruments. An assessment of the policy objectives of the Bill against these instruments is set out below.

This Bill amends provisions in the Social Security Law relating to:

- Income Management; and
- the Improving School Enrolment and Attendance through Welfare Reform measure (SEAM).

Income Management and SEAM are measures capable of national application. Income management has been rolled out in the whole of the Northern Territory¹ and in sites in Western Australia and Queensland. From 1 July 2012 the measure will be rolled out to sites in Victoria, New South Wales and South Australia.² SEAM has been trialled in three sites in Queensland and six sites in the Northern Territory. From 1 July 2012 SEAM as amended by the Bill would be rolled out in a phased approach to 22 sites in the Northern Territory. Both measures apply to income support recipients on the basis of criteria that are not race-based – that is, they apply to Indigenous and non-Indigenous income support recipients in the same way.

The Australian Government considered a wide range of evidence as to the need for and likely effectiveness of the policy measures. Information about the evidence to support the measures, the evaluation of measures and the consultation process has been provided in the

¹ As part of a package of reforms, including the reinstatement of the *Racial Discrimination Act 1975*, the Australian Government introduced a new income management scheme on 1 July 2010 that applied across the Northern Territory to certain vulnerable groups of income support recipients, on the basis of non race-based criteria.

² The *Building Australia's Future Workforce* package announced in the 2011-12 Budget includes the introduction of targeted place-based income management in five disadvantaged communities across Australia – Playford (SA), Bankstown (NSW), Shepparton (Vic) and Rockhampton and Logan (Qld).

Improving School Enrolment and Attendance through Welfare Reform Measure Evaluation Report for 2010, the joint Commonwealth agency submission to the Senate Community Affairs Legislation Committee, the Northern Territory Emergency Response Evaluation Report 2011 (which included an evaluation of income management in the Northern Territory), the Stronger Futures in the Northern Territory Report on Consultations 2011 and the Explanatory Memorandum to the Bill. This statement does not seek to reproduce that evidence.

Income management measure – human rights implications

The policy objective of income management is to support vulnerable individuals and families by helping to ensure that a portion of a person's income support and family payments³ is spent on essential needs, and limiting expenditure on excluded items, including alcohol, tobacco, pornography and gambling goods and activities.

The amendments in this Bill:

- Provide greater flexibility for the operation of income management, to facilitate its implementation in new sites across Australia. For example, income management will no longer automatically cease to apply if a person changes address.⁴
- Allow for income management referrals from state and territory authorities, including the Alcohol and Other Drugs Tribunal in the Northern Territory. This will facilitate more holistic and integrated support options for particular income support recipients.

Income management, including as amended by this Bill, is consistent with the right to social security (art 9 of the ICESCR and art 5(e)(iv) of the CERD):

- Income management does not limit access to social security, nor does it reduce the amount of the benefit provided. Rather, it provides that the benefit is provided in a particular way.
- The Committee on Economic, Social and Cultural Rights has stated that the right to social security encompasses the right to access and maintain benefits 'in cash or in kind'.⁵

³ Income support and family payments are referred to as 'income support' in the remainder of this document.

⁴ A range of changes will provide greater flexibility for the operation of income management – refer pp 8 – 11 of the Explanatory Memorandum to the Bill.

⁵ Committee on Economic, Social and Cultural Rights, *General Comment 19: The right to social security (art. 9)*, (23 November 2007) UN Doc E/C.12/GC/19, para [2].

- Substantial benefits can be achieved for individuals through income management, including ensuring that sufficient food is available to recipients and dependents, stable and adequate housing is secured, access to essential utilities is maintained and harassment is minimised.⁶

Income management, including as amended by this Bill, advances:

- the right to housing (art 5(e)(iii) of the CERD) by helping ensure that a portion of a person's income support payments is spent on priorities such as housing (rent); and
- the right of children to benefit from social security (art 26 of the CROC), the right of children to the highest attainable standard of health (art 24 of the CROC) and to adequate standards of living (art 27 of the CROC). The central purpose of income management is to ensure that a portion of income support payments are used to cover minimum basic essential goods and services, including food, rent and utilities. This improves living conditions for the children of income support recipients subject to income management.

Income management, including as amended by this Bill, is consistent with the obligation of the State to undertake not to engage in any act or practice of 'racial discrimination' against persons, groups of persons or institutions (art 2(1)(a) of the CERD).

- Income management applies in the same way to any person receiving a social security payment in a designated income management area, regardless of race.
- Income management does not apply in every part of Australia, although its operation is being expanded, and the legislation is capable of national application. The areas into which the measure will be expanded from 1 July 2012 were chosen having regard to a range of objective, non race-based criteria, including unemployment levels, youth unemployment, skills gaps, the number of people receiving welfare payments, and the length of time people have been on income support payments.
- The Australian Government recognises that a significant proportion of people on income management, in particular in the Northern Territory, are Indigenous. This reflects the fact that the proportion of Indigenous people in the Northern Territory on income support payments is high; and also reflects the fact that of the 4,096 people who chose voluntary income management in the Northern Territory, more than 98 per cent are Indigenous.

⁶ The Northern Territory Emergency Response Evaluation Report 2011 found that for Indigenous income support recipients in the Northern Territory, income management has reduced 'humbugging' – refer footnote 8.

- In areas where income management applies or will apply, it is and will be applied to income support recipients on the basis of non race-based criteria related to indicators of risk for the welfare recipient or to children in their care;⁷ following assessment by a delegate; or following assessment by a state or territory body exercising a discretionary power to apply income management. It can also be applied at the request of an income support recipient (voluntary income management).

Income management, including the amendments proposed in this Bill, is a reasonable and proportionate measure taking into account the importance of ensuring that vulnerable individuals and families have adequate food, housing and utilities, the protections and review rights that are in place, the results of evaluations and the support from consultations.

Evaluations in the Northern Territory and Western Australia indicate that income management is having a positive effect on the lives of many individuals. In a Western Australian evaluation a majority of participants believed income management has had a positive impact on the wellbeing of individuals, children and families. In relation to income management's application in the Northern Territory, there is evidence that income management is achieving positive outcomes, particularly for children.⁸

The Senate Community Affairs Legislation Committee received statements about income management from a wide range of stakeholders, some very supportive,⁹ others not. The Committee took the view that public opinion on the effectiveness and public benefit of income management remains divided. In relation to the amendments proposed in this Bill, the Australian Government has accepted the Committee's recommendation that income management referral powers only be given to state or territory bodies if the Minister is satisfied that the relevant body has appropriate internal and external review mechanisms in place. As any such referrals of power will occur by legislative instrument, the referrals will also be subject to Parliamentary scrutiny and disallowance.

⁷ For example, income management may be applied to 'vulnerable persons' within the meaning of the Social Security Law; to disengaged youth and certain long-term welfare recipients who are not working or studying; or where a state or territory authority considers children are at risk.

⁸ The Northern Territory Emergency Response Evaluation Report 2011 found that many people in Northern Territory communities believed that income management was bringing about positive outcomes, especially for children. The Australian Institute of Health and Welfare Evaluation (2010) found that income management in the Northern Territory had improved child and community well-being and reduced the incidence of humpbugging, gambling and alcohol consumption. The evaluation of income management in Western Australia (2010 ORIMA research) found that the positive impacts of income management included that people had eaten more fresh food, eaten less takeaway food and their children had eaten more food. People also said that they were far less likely to run out of money for food, utilities, rent and other bills.

⁹ For example, evidence at page 40 of the Senate Community Affairs Legislation Committee report that "without exception, women whom we know in remote communities have supported income management".

Improving School Enrolment and Attendance through Welfare Reform measure (SEAM) – human rights implications

The policy objective of SEAM is to improve school enrolment and attendance in areas where school attendance and enrolment is very low.

SEAM places certain conditions on income support payments received by parents to ensure that they receive the support they need to fulfil their basic responsibilities in relation to their children's schooling.

SEAM trials have been operating in the Northern Territory since January 2009 and operated in Queensland for an initial three year period from October 2009 to 30 June 2012. SEAM has covered a total of 44 schools (14 in the Northern Territory and 30 in Queensland) during this time.

The amendments in this Bill allow for greater interaction between this measure and state and territory enrolment and attendance initiatives, such as the Northern Territories *Every Child Every Day* strategy.

The amendments:

- provide for compulsory conferences with parent(s) and carer(s) whose children are not attending school regularly. At the conference parents/carers will discuss barriers impacting on their child's attendance and develop an attendance plan to address these barriers;
- allow for exceptions to the suspension of payments based on 'special circumstances'; and
- allow for an exception to the suspension of payments if a parent / carer has been subject to a fine for non-attendance under a state or territory law.

Schooling requirement income support payments are only withheld as a last resort when a parent / carer has:

- failed to attend a compulsory conference about their child's school attendance;
- failed to agree to an attendance plan; or
- failed to comply with the steps set out in an attendance plan and no special circumstances exist.

Parents / carers who are at risk of income support suspension will be issued with a compliance notice and given a period to rectify compliance before any payments are suspended.

SEAM does not apply to family payments such as Family Tax Benefit and Child Care Benefit, or to Carer's Allowance and Mobility Allowance. These payments will continue to be paid during any suspension of income support payments.

The suspension of payments under SEAM is as a last resort in a series of steps to ensure that parents / carers re-engage in the process of getting their children back to school. Provided parents / carers take steps to rectify compliance within 13 weeks, they will have their suspended income support payments back-paid.

SEAM is consistent with the right to social security (art 9 of the ICESCR; art 5(e)(iv) of the CERD, and art 26 of the CROC):

- SEAM does not make people ineligible for welfare payments, or reduce the amount paid, but places a condition on the receipt of payment.
- The qualifying condition is reasonable and proportionate. Under state and territory law it is compulsory for school aged children to be enrolled and attend school.
- There are a number of steps before a person's payment is suspended or cancelled, including the consideration of special circumstances the parent / carer may be facing, and parents / carers will be provided with assistance in meeting their obligation to ensure that their children are enrolled and attend school. Parents / carers will also be offered assistance by a social worker to assist them with any issues they may be having that impact on their child(ren)'s school attendance.
- There are appeal and review mechanisms in place, including the ability to challenge relevant decisions under the administrative law review provisions in Part 4 of the *Social Security (Administration) Act 1999*.

SEAM is consistent with the obligation of the State to undertake not to engage in any act or practice of 'racial discrimination' against persons, groups of persons or institutions (art 2(1)(a) of the CERD):

- SEAM applies in the same way to any person receiving relevant income support payments in a designated SEAM area, regardless of race.
- Whilst SEAM trial sites were in the Northern Territory and Queensland, the legislation as initially enacted and as amended allows for a broader roll-out in other areas of high need. Implementation is subject to agreement with local education authorities. Initial trial sites and additional sites for roll-out from 1 July 2012 were selected based on a range of non race-based criteria, including very poor school attendance and the likely effectiveness of funding the measure in that area.

- The Australian Government recognises that the additional Northern Territory sites selected for a phased roll-out from July 2012 have a significant Aboriginal population. As a key criterion is poor school attendance, this is consistent with evidence that school attendance declines with remoteness, that there is a higher proportion of Indigenous people living in remote communities, and that there is a recognised gap in educational attainment between Indigenous and non-Indigenous Australians.
- The Northern Territory has the lowest school attendance rates in Australia. In remote areas of the Northern Territory, school attendance is unacceptably low. The average primary school attendance is 60%, which equates to children missing school two days every week.¹⁰

SEAM advances:

- The right of children to education, in particular including compulsory, free primary education and the obligation on State parties to take measures to encourage regular attendance at schools and to reduce drop-out rates (art 28 of the CROC). There is evidence that SEAM improves attendance and enrolment.¹¹
- The right of everyone to education, including compulsory, free primary school education (art 13 of the ICESCR).

The conditions imposed on parents in receipt of social security in designated SEAM areas are reasonable taking into account the importance of children attending school, the evidence that SEAM improves educational outcomes, the support made available through SEAM such as school conferences and social work support, and the protections and review rights that are in place under the Social Security Law.

The evidence is discussed in the joint Commonwealth agency submission to the Senate Community Affairs Legislation Committee and the Improving School Enrolment and Attendance through Welfare Reform Measure Evaluation Report for 2010. In relation to SEAM's application in the Northern Territory, the Stronger Futures consultations showed that people in communities clearly recognise the importance of children attending school and agree that parents have a responsibility to make this happen.

¹⁰ For example, data from the MySchool website (9 May 2012) shows attendance at Gunbulunya School is 53%; attendance at Angurugu School is 42% and at Maningrida School is 46%.

¹¹ The Improving School Enrolment and Attendance through Welfare Reform Measure Evaluation Report for 2010 found that students involved in SEAM showed a greater increase in school attendance rates than their counterparts not involved in the measure; and that student attendance improved by more than 5 per cent (from 74.4 to 79.9 per cent) in the Northern Territory and by more than 4 per cent (from 84.7 to 88.7 per cent) in Queensland following referral to the Department of Human Services under SEAM. Evidence from the trial also suggests that where families engage with social work support, attendance improvements are better sustained.

The Senate Community Affairs Legislation Committee noted that there was broad support regarding the benefits of education leading to better life outcomes and the need to lift educational outcomes through school attendance. A number of submitters / witnesses, including the Australian Government and the Northern Territory Government, noted that SEAM needed to be supported by a range of other measures. In respect of the Northern Territory, the Australian Government has subsequently announced a total education funding package of \$583 million over ten years that includes funding for 200 extra teachers and engagement officers, ensuring teachers in remote schools have skills in specialist teaching for intensive numeracy and literacy for students with English as a second language and students with learning difficulties, professional development for Aboriginal school staff, funding of the school nutrition program, which provides nutritious meals to around 5,000 children per day, and funding for 100 teacher houses.

The Australian Government will, in accordance with Senate Committee's recommendations, provide more information to communities as to how SEAM and the Northern Territory Government's Every Child Every Day strategy interact, and publish further evaluations of the effectiveness of the SEAM measure.

Conclusion

The policy objectives of this Bill are compatible with human rights because they advance some rights, and to the extent they may limit any rights those limitations are reasonable, necessary and proportionate.