The Stronger Futures Legislative Package

Assessment of Non-Compliance With Human Rights

29 June 2012

On the afternoon of 28 June 2012, the Department of FAHCSIA released statements entitled 'Assessment of Policy Objectives with Human Rights' on the three bills known as the 'Stronger Futures bills'.

The Australian Lawyers Alliance is a national association of lawyers, academics and other professionals dedicated to the promotion and protection of justice, freedom and the rights of the individual.

In light of the Attorney General, Nicola Roxon's refusal to refer the Stronger Futures bills for human rights review by the Joint Parliamentary Committee on Human Rights on 28 June 2012, we have drafted our own Statement of Non-Compliance with Human Rights, to indicate a number of rights affected or directly undermined by this legislative package.

Our Statement does not purport to be legal advice, but a brief commentary that aims to ventilate the issues that might have been by a Joint Parliamentary Committee.

This Statement comes too late.

The passing of the legislation in the Senate in the early hours of the morning on 29 June 2012, represents a reckless disregard for the value of human rights in the Parliament of Australia.

The legislation is composed of three bills: the *Stronger Futures in the Northern Territory Bill 2012* (Cth); the *Stronger Futures in the Northern Territory (Consequential and Transitional Provisions) Bill 2012* (Cth) and the *Social Security Legislation Amendment Bill 2011* (Cth).

The *Stronger Futures in the Northern Territory Bill 2012* (Cth), implements three main Parts:
Part 2 – Tackling alcohol abuse;
Part 3 – Land reform; and
Part 4 – Food security.

Under section 9 of the Racial Discrimination Act 1975 (Cth), it is unlawful to:

> *do any act involving a distinction, exclusion, restriction or preference based on race, colour, descent or national or ethnic origin which has the purpose or effect of*

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nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of any human right or fundamental freedom in the political, economic, social, cultural or any other field of public life.

The three core Parts of Stronger Futures are implemented as 'special measures'. 'Special measures' are an exception to the above. However, such laws must truly fulfil the legal character of special measures to be valid. Otherwise, they are discriminatory.

The Government's Overview and Assessment

The stated purpose of the *Stronger Futures in the Northern Territory Bill 2011* (Cth), as prepared by the Department of Family, Housing, Community Services and Indigenous Affairs was:

> *'To build stronger futures for Aboriginal people in the Northern Territory. Its object is to support Aboriginal people in the Northern Territory to live strong, independent lives, where communities, families and children are safe and healthy.*
>
> *The Bill comprises three measures aimed at building stronger futures for Aboriginal people in the Northern Territory. These are the tackling alcohol abuse measure, the land reform measure and the food security measure.*
>
> *The Government considers that these are special measures within the meaning of section 8(1) of the Racial Discrimination Act 1975 (Racial Discrimination Act). The Bill is being enacted to address specific Aboriginal disadvantage and help Aboriginal people to enjoy their human rights equally with others in the Australian community. The object clauses relating to each of these measures reflect that intention. The Bill is intended to operate, and to be construed, consistently with the Racial Discrimination Act.*
>
> *The measures in the Bill have been developed taking into account the views of the Aboriginal people expressed during the extensive consultation process following the release of the Stronger Futures in the Northern Territory Discussion Paper in June 2011. The results of these consultations were published in the Stronger Futures in the Northern Territory Report on Consultations in October 2011.*
>
> *All measures in the Bill will be the subject of an independent review of the first seven years of operation. The review must include an assessment of the effectiveness of the special measures. The report of that review must be completed eight years after the*

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measures commence and must be tabled in Parliament. All measures will sunset after 10 years of operation.'[1]

In the 'Assessment of Policy Objectives with Human Rights: Stronger Futures in the Northern Territory Bill 2012' ('the Assessment'), the Department of FAHCSIA notes that 'careful consideration was given to Australia's obligations under the key human rights instruments in the development of [the Bills]'.

The Assessment states that 'the policy objectives of the Bills are compatible with the human rights and freedoms recognized in those instruments'. The Assessment states that 'the Australian Government recognizes 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.'

Australian Lawyers Alliance Views of the Government's Assessment

Claims of compatibility with human rights

The Australian Lawyers Alliance notes that the above claims of compatibility with human rights, asserted within the Assessment are not supported by Australian case law, international case law, or detailed attention to general recommendations issued by UN Commitees.

Supporting evidence

No reference has been made to the fact that the Stronger Futures consultations were not transcribed.

No reference has been made to receipt of communication by parties opposed to the Bills, whether Indigenous or non-Indigenous; legal or non-legal; and no reference is made to the Senate Community Affairs Inquiry Report on the legislation, or any of the submissions provided to the Senate Inquiry.

No reference is made to the Jumbunna Indigenous House of Learning report, 'Listening but not Hearing', which analysed the consultations based on independently obtained transcripts.

[1] Explanatory Memorandum, *Stronger Futures in the Northern Territory Bill 2012* (Cth)

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This Bill does not present the requisite evidence to support the Department's view that the bill will support Aboriginal people to 'live strong, independent lives'; and that these measures were consented to at the Stronger Futures consultations.

Special measures

The Assessment does not evaluate how the 'special measures' within the legislation fulfill legal tests.

The Assessment states that:

'The *Convention on the Elimination of All Forms of Racial Discrimination* (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.'

This paragraph is used to justify 'tackling alcohol abuse' (Part 2); land reform (Part 3) and food security (Part 4).

No explanation is given of how each component fulfills legal tests or recommendations provided internationally.

The measures in the Bill may not be considered by a Court as special measures within the meaning of section 8(1) of the *Racial Discrimination Act 1975,* and in reference to CERD.

The CERD provides some guidance regarding special measures, in Article 1(4), which provides that:

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

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Article 2(2) also provides guidance:

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

General Recommendation 32 (GR32), which was developed in 2009 by the Committee on the Elimination of Racial Discrimination, also specifies a large number of elements that define the legal character of 'special measures' as considered by the Committee.[2]

While we will not address these criteria in full here, some essential elements within GR32 include:

- Special measures should be **appropriate to the situation to be remedied; legitimate; necessary in a democratic society; respect the principles of fairness and proportionality; and be temporary.**
- The measures should be **designed and implemented on the basis of need**, grounded in **a realistic appraisal** of the current situation of the individuals and communities concerned.
- Appraisals of the need for special measures should be **carried out on the basis of accurate data**, disaggregated by race, colour, descent and ethic or national origin and incorporating a gender perspective, on the socio-economic and cultural status and conditions of the various groups in the population and their participation in the social and economic development of the country.
- States parties should ensure that special measures are designed and implemented on the **basis of prior consultation** with affected communities and the active participation of such communities.
- Measures **must not lead to the maintenance of separate rights** for different racial groups. The notion of inadmissible 'separate rights' must be distinguished from rights accepted and recognised by the international community to secure the existence and identity of groups such as indigenous peoples.
- Measures must be for the **sole purpose of ensuring equal enjoyment of human rights** and fundamental freedoms. Such a motivation should be made apparent from the nature of the measures themselves.

[2] See Committee on the Elimination of Racial Discrimination, *General Recommendation 32, Special Measures*.

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- 'Adequate advancement in Article 1(4) implies **goal directed programmes** which have the objective of alleviating and remedying disparities in the enjoyment of human rights and fundamental freedoms.
- **Special measures must not be continued** after the objectives for which they have been taken have been achieved. This limitation is essentially functional and goal related.

It is clear that the Department is aware of such specific provisions and views General Recommendation 32 as relevant to the Stronger Futures Bills, as GR32 is referenced in the Department's first footnote in the Assessment.

Very few of the points stated above, or stated in Australian case law, were addressed by the Department in their justification of the measures within Stronger Futures.

Given that the three core components of the Stronger Futures in the Northern Territory Bill 2012 (Cth) were framed as 'special measures', there was an absolute failure for the Department to adequately justify how this legal test was satisfied.

Maintenance of separate rights

We consider that the legislation may lead to the 'maintenance of separate rights for different racial groups' under the meaning of Article 1(4) of the CERD. The Bill undermines legal rights across a range of areas of law, and creates special conditions that purport to resolve issues relating to poverty in the Northern Territory, but that may fail to fulfil the necessary tests for special measures as defined internationally.

Lacking evidence

The object clauses relating to each of the special measures while reflecting the intention to address specific Aboriginal disadvantage are not supported by adequate evidence,[3] or by transcribed evidence of communities' views, that these legislative approaches will in reality increase the fulfilment of human rights for Aboriginal people.

We also view that there is a lack of clear and concrete objectives regarding how these measures will be achieved. There is no standard by which they can be measured or attained, including by reference to data or evidenced research. These two components are suggested by the UN Committee on the Elimination of Racial Discrimination in General Recommendation 32.

[3] While we acknowledge that there have been a number of reports received by government departments, we unfortunately do not have faith in the independence of these reports, or their academic rigour, to be relied upon as adequate supporting evidence.

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Consultation requirements

The clauses within the Bill relating to consultation on future acts under this legislation may not be compatible with definitions of special measures due to the consultation requirements. The 'Assessment of Policy Objectives of Human Rights' provides that:

> 'Provisions in the Bill providing 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.*'[4]

Such construction by the Department of FAHCSIA that consultation on issues that are special measures under Stronger Futures bills is comparative to the tests under other legislation; fails to recognise the 'wishes of the beneficiaries as perhaps essential'[5] in the construction of special measures.

Distance from legitimate aim

The many specific references to law enforcement and regulation, rather than poverty reduction, throughout the Bill, do not address how law enforcement and regulation will promote the human rights of Aboriginal people. For example, a large number of components within Part 4 – Food security; and Part 2 – Tackling alcohol abuse, may be seen as too distant from the object of special measures to be adequately considered to be 'applied to a legitimate aim'[6].

The wishes of Aboriginal people

Aboriginal communities have issued statements that they do not support the Bills. These include:

- Yolngu Nations statement;
- Ampilatwatja Nations statement;
- National Congress of Australia's First Peoples; and
- Aboriginal Catholic Ministry.

There is no evidentiary proof that the measures in the Bill have been developed taking into account the views of Aboriginal people.

[4] Department of FAHCSIA, (2012) Assessment of Policy Objectives With Human Rights, at 4, in Footnote 3; and at 6, Footnote 6.
[5] *Gerhardy v Brown* [1985] HCA 11; (1985) 159 CLR 70, Brennan J at [135].
[6] General Recommendation 32.

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The drafting instructions and subsequent changes to the Bills directed to the Office of Parliamentary Counsel by the Department, and the dates upon which these requests were made, are protected by legal privilege.

Therefore, it cannot be seen as to whether legislative drafts were altered at all after the Stronger Futures consultations.

No transcripts were taken by the Department of FAHCSIA at community consultations. The group Concerned Australians, arranged for transcription within some community consultations, and their findings of communities' views contrast with the legislative provisions within the Bill.

No consultation with communities was conducted prior to the *Northern Territory National Emergency Response Act 2007* (Cth) (NTNER). An assessment of the second reading speeches of Hon. Mal Brough, introducing the NTNER and that of Hon. Jenny Macklin, introducing the *Stronger Futures* bills, demonstrates a continuation of policy intent in the main objectives sought within the NTNER Act, and the Bills.

While Stronger Futures purports to repeal the NTNER, in reality it extends and expands many of its essential elements and policy intentions.

The objectives of the NTNER have not been met since 2007 and have been openly opposed by communities.[7]

This appears to violate Articles 2(2) and Article 3 of CERD, the latter which calls for State Parties to particularly condemn racial segregation and apartheid and undertake to prevent, prohibit and eradicate all practices of this nature in territories under their jurisdiction.

Time period

The timeline set for review indicates a permanency to these laws. This is supported further by Clause 114 in the *Stronger Futures Bill 2012*, which provides that any part of these laws may be preserved via government regulation.

This has been supported further by the Department's website[8] informing the public on Stronger Futures, which previously provided on or at 14 June 2012 that the Bills – the majority of which is formulated as 'special measures' – provided a 'long term, sustainable approach'. This website was initially removed, following our highlighting of the issue on Twitter on 14 June 2012. It has since been edited to omit this phrase.

[7] See independently produced report, Concerned Australians, *NT Consultations Report 2011* (2012).
[8] This was previously accessible at http://www.indigenous.gov.au/detailed-information-on-the-stronger-futures-legislation/

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Human Rights Implications

Self determination

This Bill undermines important civil and political rights set out in the *International Covenant on Civil and Political Rights.* Article 1(1) provides that: 'all peoples have the right to self determination'.

The centralisation of decision-making powers in the Minister in the development of alcohol management plans; licence conditions on community stores; regulation-making power on all Aboriginal land; and decision making to remove welfare payments from families, disempowers Aboriginal people and removes decision making power from individuals and communities.

This amounts to direct breach of the right to self determination.

Free, prior and informed consent

Article 19 of the *Declaration on the Rights of Indigenous People* provides that: ' states shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their **free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them.'**

Failure to engage appropriately to secure the evidenced consent of Indigenous communities before adopting and implementing these Bills amounts to undermining of the right to self determination.

The imposition of the legislation on all Aboriginal peoples in the Northern Territory, despite their strong opposition to the Bills, also fails to provide adequate remedy for Indigenous Peoples to opt in or opt out of the legislative requirements.

This also violates Article 2(3)(a) of the ICCPR, which states that:

> 'Each State party undertakes to ensure that any person whose rights or freedom herein recognised are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity.'

There is no effective remedy or redress for Indigenous people to avoid the Stronger Futures legislation being imposed upon them. The significance of Aboriginal people's dissent to the legislation has been identified previously in joint statements, such as the Yolngu Nations

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statement, and most recently in the media, in the article, 'Aboriginal leaders declare day of mourning.'[9]

In this article, elder Rev Dr Djiniyini Gondarra stated that:

"For those of us living in the Northern Territory the anguish of the past five years of intervention has been almost unbearable…."We have been burying people who can no longer live with the pain and despair."

This indicates that the legislative measures previously imposed in the Northern Territory, and being extended via this legislation, may amount to a violation of Article 12 of ICESCR, which provides that everyone has the right to the highest attainable standard of physical and mental health.

Privacy rights

This Bill undermines Article 17(1) of the ICCPR, in its proposals to provide information about individuals to any State, Federal or Territory, government agency or authority, or the police or AFP in cl105 and 106 of the *Stronger Futures Bill 2012*.

Freedom from discrimination

Article 20(2) provides that any advocacy of racial hatred that constitutes incitement to discrimination shall be prohibited by law. The implicit messaging within and around these Bills encourages racial discrimination in that it assumes that Indigenous people require centralised government to manage their decision making across a scope of areas from food choice to choosing to send their children to school.

Equality before the law

Article 26 of ICCPR provides that all persons are equal before the law and are entitled without any discrimination to the equal protection of the law.

Article 5 of CERD provides that State Parties undertake to prohibit and eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law.

[9] AAP, 'Aboriginal leaders declare day of mourning', June 27 2012, http://www.heraldsun.com.au/news/breaking-news/aboriginal-leaders-declare-day-of-mourning/story-e6frf7jx-1226409672043

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The removal of the consideration of customary law in sentencing applications removes judicial discretion to assess an individual's background and context; thus prejudicing Aboriginal people. It also effectively invalidates recognition of customary law.

This was recognised in APO NT's briefing paper, 'Stronger Futures and Customary Law', which stated that:

> *These provisions deny the existence of a fundamental truth – that customary law affects the lives of many Aboriginal people. These provisions compel a court to sentence Aboriginal people in an artificial and false context. In doing so, the rule of law is undermined, and community respect for the law is diminished.*
>
> ***The provisions also deliver a strong message to Aboriginal people that customary law is not valued; that customary law is not sufficiently important for a court to take it into account in sentencing, or indeed that it is part of 'the problem'**.*
>
> *This message is deeply troubling and insulting for Aboriginal people.* ***Customary law is central to the identity of Aboriginal people. It always has been, and always will be, a core part of Aboriginal culture.***
>
> *Between 1994 and 2006 the Supreme Court of the Northern Territory convicted 3976 persons of criminal offences3. Customary law was raised in 36 cases (less than one per cent and an average of three a year).*

The briefing paper also cited the opinion of former NT Chief Justice, Honorable Brian R Martin, who said that 'the justice of the application of customary law, practices and beliefs to the substantive law and sentencing is readily apparent. There is no evidence that these considerations have been abused.'

The customary law provisions therefore also undermine right to participate in cultural life, under Article 15 of ICESCR.

Article 27 of ICCPR provides that persons shall not be denied the right to enjoy their own culture, profess and practice their religion, and use their own language. The removal of customary law in sentencing applications, and the previous enforcement of English in Indigenous schools, undermines this important legal right.

The SEAM measure, although being rolled out in other locations, is discriminatory in its approach to both indigenous people and people with a disability. It provides a condition with which some persons may not be able to comply, due to illness or cultural reasons, such as funerals. Such condition will cause subsequent detriment in the removal of welfare payments.

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Similarly, the extremely punitive provisions in Part 4 – Food security, of the *Stronger Futures Bill 2012,* amount to unequal and disproportionate treatment before the law. As one example, we refer to clause 75, which allows for a limitation period of 6 years in relation to applying for an order that a person has contravened a civil penalty. Such a limitation period is excessive and in comparison to other limitation dates imposed across other areas of laws for Australians, unnecessary and disproportionate.

The removal of the application of s15C of the *Acts Interpretation Act 1901* (Cth) as per clause 103(3) may also undermine the right to equality before the law.

Rights of the child

Article 3(1) of the *Convention on the Rights of the Child* provides that in all actions concerning children, the best interests of the child shall be a primary consideration. The SEAM measure, in its removal of welfare payments for the families of children not attending school, does not address the best interests of the child to have access to food and financial support.

This also undermines Article 9 of the *International Covenant on Economic, Social and Cultural Rights* (ICESR) which states that everyone has the right to social security.

Property rights

The bills undermine the right to own property alone as well as in association with others, under Article 5(d)(v) CERD.

The importance of certainty in land dealings in Australia is indicated via the existence of s51(xxxi) in the Constitution.

The Commonwealth regulation making power over town camps and community living areas provides ultimate power to the Commonwealth to alter laws relating to land in Aboriginal areas only.

This amounts to unequal treatment before the law.

Right to food

The food security provisions are not appropriate, legitimate or necessary, to address the issue of access to fresh, healthy food in the Northern Territory. Part 4 provides a punitive, law enforcement focused response to food access in the Northern Territory.

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There has been no adequate evidenced causal connection that small business regulation will be the appropriate step to address the cost of healthy food in community stores.

33 recommendations were previously provided in the House of Representatives Inquiry Report *Everybody's Business* into Community Stores. Two of these are targeted in the Stronger Futures bills, one of which was a reluctant recommendation regarding licensing.

By omission to address freight subsidies or any of the other alternatives posed, in the Northern Territory, instead opting for a punitive licensing regime on community stores and specific restrictions on injunction applications and limitation dates as an alternative policy, the legislation undermines Article 11 of the ICESCR.

The Declaration on the Rights of Indigenous People

Noting that the *Declaration on the Rights of Indigenous People* (DRIP) is not listed as an instrument under the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth), we provide our response regarding articles that may be violated within DRIP briefly:
Articles 1, 2, 3, 4, 5, 7, 8, 9, 10, 11, 12, 14, 15, 18, 19, 20, 21, 22, 23, 24, 26, 27, 28, 32, 34, 35, 38, 39, 40, 43, 44, 46.

Conclusion

While this Paper provides only a brief assessment of the legislation, many of these concerns have already been ventilated with the Minister for Families, Community Services and Indigenous Affairs.

Many of these issues were also highlighted to the Senate Community Affairs Committee in the various submissions provided by organisations opposed to the Bills, including ourselves.

Many of these issues have also been highlighted previously to the United Nations, and have attracted the concern and commentary of UN Special Rapporteurs.

We close this brief commentary with the view of Djapirri Mununggirritj, elder from Yirrkala, in Concerned Australians' 2012 report, *Walk With Us:*

'Is it the Aboriginal people that have not listened to the government or it is the government not listening to the grass root people? So intervention finally came about in our community and there were many, many very angry people and I can gather that if this angriness starts in the community, it can affect businesses, education, homes, health and poverty. This Intervention has brought about brokenness in family lives. That's why we see young people

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go into depression because they are lost, lost because of someone else's culture, coming in and interfering with our culture.

These are the things that we need to sort out with your help as Australians, our fellow countrymen as a whole.'[10]

[10] Concerned Australians, *Walk With Us,* at 25.

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