Aboriginal Peak Organisations Northern Territory

An alliance of the CLC, NLC, CAALAS, NAAJA and AMSANT

Submission to the Senate Community Affairs Committee Inquiry into the Stronger Futures in the Northern Territory Bill 2011 and two related bills

Aboriginal Peak Organisations Northern Territory

[APO NT]

February 2012

Contents

Executive Summary

In August 2011, the Aboriginal Peak Organisations of the NT (APO NT) made a submission in response to the Government's *Stronger Futures* discussion paper. That submission identified ways that the Government could make good its commitment to a new way of working in partnership with Aboriginal people, leaders and communities to address Aboriginal and Torres Strait Islander disadvantage. We attach a copy of that submission for the Committee's consideration in its present inquiry (Attachment 1).

The following comments complement that submission, and specifically concern the Stronger Futures in the Northern Territory Bill and two related bills jointly referred to the Senate Committee for inquiry and report:

1. Stronger Futures in the Northern Territory Bill 2011 ('Stronger Futures Bill')

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

3. Social Security Legislation Amendment Bill 2011 ('Social Security Bill')

APO NT continues to emphasise the need to move beyond 'intervention', for the reasons set out in our August 2011 submission. We urge the Committee to acknowledge in its findings that 'intervention' as an approach to policy-making is fundamentally flawed and contrary to the evidence of what works to overcome Indigenous disadvantage. APO NT is disappointed that the Government has not taken the opportunity of the Stronger Futures legislation to move more comprehensively beyond an 'intervention' approach.

APO NT acknowledges that the Government has made some positive steps towards improving aspects of NTER measures. In particular, we welcome the:

- requirement that 'alcohol protected area' signs be respectful;
- provision for the development of Alcohol Management Plans, and an independent evaluation of alcohol measures;
- provision for the Minister to request an assessment of a licensed premise;
- addition of conferencing and school attendance plans in addition to the more punitive aspects of SEAM;
- provision of greater flexibility for recipients seeking exemptions under income management;
- maintenance of the store licensing regime and a focus on food security issues; and
- amendments allowing customary law and cultural practice to be considered in offences involving cultural heritage or cultural objects.

This submission provides detailed comments on the legislation and proposes amendments to the Bills that will avoid negative and perverse outcomes for our communities and will improve the

fairness and workability of individual measures. We have also called for a number of the measures to be withdrawn.

The following comments specifically concern the Stronger Futures Bill the Consequential and Transitional Bill and the Social Security Bill.

10 year Sunset Clause

APO NT supports the adoption of a long-term development approach to tackling indigenous disadvantage, underpinned by consistent and recurrent program funding. However, justification for a 10-year sunset period for the Stronger Futures Bill and pornography section of the Consequential and Transitional Bill to sunset after 10 years has not been provided. The Government should have been upfront about its intention to legislate for a 10 year period during the consultation process. APO NT advocates for a 5-year sunset period and that an independent evaluation of Stronger Futures be undertaken within that timeframe. We would also note that some evaluations, such as over alcohol measures, should occur within three years.

10 year commitment to resourcing

Nevertheless, APO NT is encouraged by the non-legislative elements of Stronger Futures insofar as there is—at last—a commitment to embedding much of the resourcing of the former NTER that directly benefits Northern Territory Aboriginal people, over a period of 10 years rather than the short termism that so often blights the sector. This commits, for example, sustained resources to Aboriginal Primary Health Care, the justice sector, housing and employment among others. This extends the capacity to the Closing the Gap program, thus allowing long term planning, implementation and evaluation that is so often lacking in resourcing in Aboriginal affairs.

Land Reform

APO NT welcomes the provision for repeal of compulsory five year leases acquired under the NTER and the commitment of the Commonwealth Government to proceed on the basis of voluntary leasing on Aboriginal communities.

The focus that the Stronger Futures land reform measures bring to the issue of leasing on Aboriginal communities on community living area (CLA) title is welcomed. CLAs were granted by the Northern Territory Government and there is a suite of Northern Territory legislation that constrains land dealings on CLAs. These include, but are not limited to, the inability (in all but a few limited circumstances) to grant leases and licences to third parties.

There is a genuine and pressing need for comprehensive reform of the Northern Territory legislation affecting CLAs to allow for leases or licences to be granted by the Aboriginal landowners of CLAs in relation to critical community infrastructure such as police stations, power and water assets, offices, Aboriginal businesses etc.

See the submissions of the Central Land Council and Northern Land Council to this inquiry for further detail on this issue.

Income Management

- APO NT continues to oppose the current regime of compulsory income management in the Northern Territory and its proposed expansion under the Social Security Bill. APO has a number of specific concerns that need addressing in the Bill:

Referral by a state or territory authority

- APO NT opposes the proposed broad extension of powers to state or territory authorities.
- APO NT advocates that the Secretary (Centrelink) should have final discretion to accept or reject a written notice from a state or territory authority requiring that a recipient be subject to income management. Centrelink should maintain ultimate decision-making power as to whether a referral from state and territory authorities is implemented.
- Affording the Secretary final discretion will:
  (a) ensure that the income management regime functions in a consistent and procedurally fair manner, and ensures that all Centrelink recipients' appeal rights are uniform and protected regardless of the state or territory within which they reside; and
  (b) encourage greater collaboration between Centrelink and state and territory authorities regarding the decision to place a recipient on income management.

Unwritten law

- APO NT recommends that the executive power be removed as a basis for referral and that the legislation be redrafted to require all referrals to Centrelink by recognised state and territory authorities be based on written law. APO NT submits that scrutiny of state and territory referral processes by each respective state and territory parliament is an essential component of sound and transparent law making.

Percentage of income quarantined

- APO NT is concerned that recipients referred for income management by recognised state and territory authorities under the Social Security Bill will have 70% of their payments quarantined. This figure is arbitrary and too high.
- We do not support the provision of a power whereby the Minister may stipulate that up to 100% of a recipient's income may be income managed.

Recognising a state or territory by legislative instrument

- We do not support allowing the Minister to determine that a specified state or territory is a 'recognised state or territory' by legislative instrument. This would mean that the Minister has the potential to declare an entire state or territory subject to income management without further consultation with the community or parliamentary scrutiny.

Privacy concerns

- The proposed legislation should include restrictions and guidelines on the type of information that may be shared between Centrelink and state / territory authorities and the circumstances in which sharing is permissible. The current information sharing provisions are too broad and could effectively dispense with both Centrelink and state and territory authorities' obligations concerning a recipient's right to privacy and confidentiality.

Exemption criteria for parents with dependant children

- Proposed amendments to exemption criteria for recipients on income management with dependant children requiring attendance at school to the satisfaction of the person responsible for the operation of the school are likely to result in culturally inappropriate decisions.
- APO NT recommends that school councils should be included as a class of 'persons who are responsible for the operation of the school' in their Aboriginal community, and thus able to participate in decision-making regarding 'unsatisfactory' absences.

- Guidelines should be developed for determining whether an absence is 'satisfactory', and should include appropriate consideration of cultural practices and obligations. These guidelines should be developed prior to the commencement of the legislation.

School attendance measures

Expansion of the SEAM measure

- APO NT is concerned at the expansion of the School Enrolment and Attendance Measure (SEAM) in the absence of evidence validating its capacity to contribute to significant and long-term improvements in school attendance.
- APO NT supports the adoption of a culturally relevant, strength-based intensive case management approach which seeks to work with parents to address the underlying reasons impacting on their children's school enrolment and/or attendance. The suspension of income support and family assistance payments should only be considered as part of such an approach.
- Suspension of payments may result in unintended consequences that will further compound existing barriers to improving school attendance and may dissuade potential carers of young people who are disinterested or disengaged from school, to provide care to the child.
- There is a demonstrated need for programs that address the social and economic factors that underpin social exclusion that many Aboriginal children, parents and communities face.

Increase community empowerment and engagement in schools

- The Government should foster greater community empowerment and engagement in the operation of schools.
- School councils should be included as a class of persons who are responsible for the operation of the school in their Aboriginal community.

Guidelines needed for determining "satisfactory" absences

- Guidelines should be developed for determining whether an absence is "satisfactory", and should include appropriate consideration of cultural practices and obligations. These guidelines should be developed in consultation with school councils and Aboriginal community controlled organisations prior to the commencement of the legislation.

Conferences, School Attendance Plans and compliance notices

- Conferences and School Attendance Plans are a welcome addition to SEAM and should be one component of a culturally relevant, intensive case management approach.
- APO NT recommends that the legislation stipulates that a Conference and School Attendance Plan must be requested prior to any consideration of suspension or cancellation of payments.
- School Attendance Plans must be in writing, in a form that is understood by the recipient, and must be considered appropriate by the recipient and be developed consultatively with contents that are mutually agreed on. Interpreters must be made available.
- We support the employment of additional social workers to monitor and work with families subject to SEAM to assist them to improve their children's school attendance and comply with School Attendance Plans. Social workers employed for the administration of SEAM would be best located within the Aboriginal Community Controlled Comprehensive Primary Health Care sector.

- School councils should be involved in decision-making regarding conferences and School Attendance Plans.
- In order to ensure access to appeal mechanisms we recommend that the Bill expressly state that persons responsible for the operation of a school are officers under the social security law for the purposes of section 129.
- APO NT recommends that section 124NG be harmonised with section 124N, to enable the person responsible for the operation of the school to give Centrelink written notice that a recipient is complying with a compliance notice.

Education about SEAM

- Significant community education is needed to ensure Aboriginal people fully understand the new SEAM measure.

Duplicated NT and Federal school attendance regimes

- Duplicated NT and Federal school attendance regimes provide a confusing and inconsistent policy environment for parents to negotiate and indicate an unwillingness or incapacity to provide a coherent whole-of-government approach to this critical issue. While APO NT appreciates that SEAM will not apply to a family fined under the NT scheme for their child's non-attendance at school, the possibility of varied consequences is unnecessarily confusing.

Alcohol

Premise of prohibition

- Until communities are in a position to *own* a decision to ban alcohol, they will find ways to circumvent it.
- The continuation of blanket bans ('alcohol protected areas') perpetuates the status quo, which has resulted in a drift to unsafe drinking areas and to townships.

Alcohol Management Plans

- APO NT supports the rollout of Alcohol Management Plans (AMPs), provided there is adequate resourcing, support and engagement for communities to take ownership of this process.

- We are concerned about the way consultants will be used by the Government to assist communities to develop AMPs. The process and protocols to be used by consultants must be made explicit.

- Communities must be provided access to independent and culturally appropriate expertise to assist in preparing an AMP and appropriately equipped Aboriginal organisations should be considered for this role.

Urgent review of drinking areas needed

- The present 'alcohol protected area' boundaries are dangerous for communities as they push drinkers further away from their community and essential services (compared with previous general restricted area boundaries) when they are potentially at greater risk due to their alcohol consumption.

Urgent changes to police powers needed

- The amendment has not addressed the widespread concerns about excessive police powers to enter and search people's houses.

- Police search powers should be the same in all parts of the Northern Territory.

Increasing imprisonment

- We strongly oppose the Government's intention to 'crack down on grog running' by increasing penalties for possession, consumption and supply of alcohol under 1.35 litres to now include imprisonment for up to six months. The NT already has amongst the harshest penalties in Australia for bringing alcohol into remote Aboriginal communities. These include heavy fines, imprisonment and seizures of vehicles used in the transporting of alcohol. A punitive response has not worked and there is no evidence that an additionally punitive response is what is needed. There is an existing power to impose a sentence of imprisonment for people bringing more than 1.35 litres of alcohol into prescribed communities. It is difficult to see the imperative of imposing jail sentences on people who are bringing small amounts of alcohol into a remote community. It is unlikely that this will advance efforts to reduce alcohol-related harm in remote communities in any meaningful way. All it will do is send more Aboriginal people to jail for low-level public order offending, precisely the type of offending that the Royal Commission raised as disproportionately impacting Aboriginal people.
- Infringement Notices should be available and preferred for charges of bring, possess, consume or control less than 1.35 litres of alcohol in an alcohol protected area, rather than the proposed significant increase to a maximum penalty of 100 penalty units or six months imprisonment.

Counselling and rehabilitation services

- There is an urgent need for culturally relevant alcohol counselling and rehabilitation services to be more accessible to people living in remote communities.

Seizure of motor vehicles

- Individuals should not have motor vehicles seized where they are ordinarily resident in a remote community and there would be disproportionate hardship to family members resulting from the seizure.

Liquor permits and licenses

- APO NT welcomes the addition of a procedure by which people can bring to the Minister a request that a license be assessed but recommends that the application process be made explicit.

- The double standard that currently exists with liquor permits in prescribed communities erodes public confidence and should be addressed. The legislation should make explicit the process for making applications to the Minister.

- The defence to recreational boaters and commercial fishers for having possession of alcohol in 'alcohol protected areas' should be removed. This creates a double standard and genuine sense of grievance amongst Aboriginal people who are subject to blanket bans.

Review of current laws

- We support the proposed review of current alcohol laws to assess their effectiveness in reducing alcohol related harm, which must be completed within three years.

Customary Law

- We welcome amendments allowing customary law and cultural practice to be considered in offences involving cultural heritage or cultural objects.
- However, APO NT remains opposed to current provisions prohibiting consideration of customary law or cultural practices in bail and sentencing.
- APO NT urges the Government to remove clauses 3 and 8 from the Consequential and Transitional Bill 2011.
- If the Government decides to introduce the legislation, APO NT calls for a review of the operation of the exclusion after three years and for an evidence base to be collected as to its impact.

Australian Crime Commission

- The 'Star Chamber' powers are unnecessarily draconian and open ended and their application in prescribed communities should be immediately repealed.
- A commitment by the Commonwealth and NT Governments to building stronger futures for Aboriginal people in the Northern Territory should be focused on improving support services on the ground in local communities that promote community safety and improved engagement between community leaders and police.

Pornography

- We do not support the continuation of the pornography restrictions that apply to material that is Refused Classification or classified as X18+. There is no evidence to support their ongoing need, or that the pornography restrictions have reduced offences against women and children.

Food Security

- APO NT supports the continuation of a stores licensing regime, including on-going monitoring and assessment of community stores to ensure licensing standards are maintained.
- APO NT would like to see better clarification around the consultation process which will take place in order to decide whether a store should hold a license.
- Aboriginal communities in the Northern Territory continue to be greatly disadvantaged in their ability to access affordable, fresh and varied produce.
- Store committee governance structures and systems are integral in developing sustainable changes in store food supplies.
- Store committees should be provided with intensive governance and financial management support and training.
- Any consultation that takes place in assessing a community store should include a requirement to consult with Aboriginal community members, the primary health care sector, as well as the store committee. APO NT is very concerned that the draft Stronger Futures Bill proposes documentation requirements which attract a criminal offence if breached.
- While APO NT is broadly supportive of the licensing procedures under the Stronger Futures Bill, we are concerned that in some instances the penalties and injunctive powers are considerable and unnecessarily coercive.

1. Introduction

In August 2011, the Aboriginal Peak Organisations of the NT (APO NT) made a submission in response to the Government's *Stronger Futures* discussion paper. That submission identified ways that the Government could make good its commitment to a new way of working in partnership with Aboriginal people, leaders and communities to address Aboriginal and Torres Strait Islander disadvantage. We attach a copy of that submission for the Committee's consideration in its present inquiry (Attachment 1).

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This submission provides detailed comments on the legislation and proposes amendments to the Bills that will avoid negative and perverse outcomes for our communities and will improve the fairness and workability of individual measures. We have also called for a number of the measures to be withdrawn.

The following comments specifically concern the Stronger Futures Bill the Consequential and Transitional Bill and the Social Security Bill.

2. Ten Year Sunset Period

APO NT understands and supports the Government's desire to demonstrate a long-term commitment to Aboriginal people in the Northern Territory and that it will take time for changes to take effect. APO NT advocates the adoption of a long-term development approach to tackling indigenous disadvantage, underpinned by consistent and recurrent program funding.

However, we are disappointed that the Government only announced its intention for the Stronger Futures in the Northern Territory legislation to sunset after 10 years at the time of introducing it. The Government should have been upfront about its intention to legislate for a 10 year period during the consultation process. Justification for a 10-year sunset period has not been provided.

APO NT strongly submits that the legislation should sunset after a period of 5 years and that an independent evaluation of Stronger Futures should be undertaken within that period. This sunset period should also apply to the SEAM trial expansion.

10 year commitment to resourcing

Nevertheless, APO NT is encouraged by the non-legislative elements of Stronger Futures insofar as there is—at last—a commitment to embedding much of the resourcing of the former NTER that directly benefits Northern Territory Aboriginal people, over a period of 10 years rather than the short termism that so often blights the sector. This commits, for example, sustained resources to Aboriginal Primary Health Care, the justice sector, housing and employment among others. This extends the capacity to the Closing the Gap program, thus allowing long term planning, implementation and evaluation that is so often lacking in resourcing in Aboriginal affairs.

3. Land Reform

APO NT welcomes the provision for repeal of compulsory five year leases acquired under the NTER and the commitment of the Commonwealth Government to proceed on the basis of voluntary leasing on Aboriginal communities.

The focus that the Stronger Futures land reform measures bring to the issue of leasing on Aboriginal communities on community living area (CLA) title is welcomed. CLAs were granted by the Northern Territory Government and there is a suite of Northern Territory legislation that constrains land dealings on CLAs. These include, but are not limited to, the inability (in all but a few limited circumstances) to grant leases and licences to third parties.

There is a genuine and pressing need for comprehensive reform of the Northern Territory legislation affecting CLAs to allow for leases or licences to be granted by the Aboriginal landowners of CLAs in relation to critical community infrastructure such as police stations, power and water assets, offices, Aboriginal businesses etc.

See the submissions of the Central Land Council and Northern Land Council to this inquiry for further detail on this issue.

4. Income Management - General Concerns

APO NT remains concerned about the current income management scheme and its proposed expansion under the Social Security Bill. It is disappointing that the Government is seeking to expand the operation of income management without a clear evidence base that demonstrates its success in achieving its objectives of protecting vulnerable women and children and

encouraging socially responsible behaviour amongst welfare recipients. To date, a thorough and independent evaluation of income management has not been completed and publically released.

APO NT has previously recognised that there may be value in income management where it is part of a well administered, case-by-case, trigger-based or voluntary regime designed to provide adequate and appropriate services and supports to those within its purview. However, this is not the case with the current regime and we submit that the expansion of income management as proposed in the Social Security Bill is inappropriate and will be damaging in its entrenchment of an unfair regime.

APO NT is disappointed that the Government has not utilised the opportunity presented by *Stronger Futures* to repeal compulsory income management based on the age and length of time a person has been in receipt of Centrelink payments. The assumption that Territorians in receipt of Centrelink payments are unable to manage their finances is offensive to many and income management provides no record of assisting people to improve their financial management.

We further note that the Government is not seeking to roll out compulsory income management in any other jurisdiction outside the Northern Territory (NT), highlighting the discriminatory application of income management in our jurisdiction.

It is also regrettable that the Government has not taken this opportunity to amend Voluntary Income Management requirements to make it more flexible and truly voluntary. As previously submitted by APO NT, Voluntary Income Management should be amended to enable recipients to enter and exit income management at any time; and stipulate the percentage of their payments subject to income management.

We are concerned that the Social Security Bill empowers the Minister to recognise a state or territory, by legislative instrument, as a jurisdiction in which income management may operate.[1] This provision essentially enables income management to be extended throughout Australia without further legislative amendment. Given that income management does not have unanimous support across Australia, the inclusion of a provision which enables the executive arm of government to extend it so significantly is troubling.

Given the absence of evidence to support the effectiveness of income management and the expense of administering the income management regime[2], APO NT queries the Government's goals and justification in continuing and extending income management.

The following section provides more detailed concerns and comments on provisions in the Social Security Bill regarding income management.

5. Income Management- Powers of referral

Part 1 – State/territory referrals

Item 2 of Schedule 1 of the Social Security Bill seeks to expand the categories by which a recipient may be referred for income management. Specifically, it seeks to insert section 123TA(ga) into the *Social Security (Administration) Act 1999* (Cth) ('the Social Security Administration Act') which

[1] *Social Security Legislation Amendment Bill 2011,* Item 6 introducing section 123TGAB into the *Social Security (Administration) Act 1999 and* Item 3 introducing a definition of 'recognised state or territory.'
[2] Approximately $350million over four years, Federal Budget 2009-10.

empowers an officer or employee of a recognised state or territory authority to make a decision requiring that a recipient be subject to the income management regime.[3]

APO NT opposes the proposed broad extension of powers to state or territory authorities. APO NT considers that social security decisions, such as whether a recipient be subject to the complex income management regime, should be solely retained by the Centrelink income management team who are appropriately informed and experienced.

Should the Government proceed with including section 123TA(ga), APO NT strongly submits that an additional section is required to ensure that the Secretary has the final discretion to accept or reject a written notice from a state or territory authority requiring that a recipient be subject to income management. Were such a discretion given to the Secretary, APO NT would not oppose the Northern territory Alcohol and Other Drugs Tribunal having a specific power of referral (See below part 7).

In outlining our concerns with this Item of the Social Security Bill, APO NT draws on the experience of CAALAS and NAAJA advising clients who have been placed on Child Protection Income Management (CPIM) in the Northern territory under the current income management regime.[4] This experience has highlighted problems in the administration of the current CPIM regime in the Northern territory. APO NT notes that insufficient opportunity was provided to comment on the legislative measures governing CPIM when the regime was rolled out in 2010. APO NT encourages the Government to take this opportunity to reflect on the current operation of CPIM in the NT when considering the inclusion of the proposed section 123TA(ga), by the Social Security Bill, as currently drafted.

Under section 123UC of the Social Security Administration Act, which establishes the current CPIM regime, a child protection officer of a state or territory may refer a recipient for income management by providing written notice under a written or unwritten law of a state or territory (other than a law of the Commonwealth) or in the exercise of the executive power of a state or territory.[5] The drafting in Part 1 of the Social Security Bill mirrors section 123UC of the Social Security Administration Act and is intended to function identically.

Under section 123UC of the Social Security Administration Act, and Part 1 of the Social Security Bill in its current form, the Secretary has no discretion to review or consider the state or territory authority's referral of a recipient to income management.

APO NT submits that this lack of discretion on the part of the Secretary, mirrored in the Social Security Bill, is dangerous and will result in inconsistent and procedurally unfair decision making for social security recipients under the same federal scheme.

Based on APO NT's experience, referrals made by the Northern Territory Department of Children and Families (DCF) have been problematic. As a recognised Territory authority, DCF are empowered to make referrals for income management based on their own assessment and decision making processes. Centrelink have no option but to accept and action a DCF written referral requiring a person to be subject to income management. Centrelink have no oversight or input into DCF decision making processes. Consequently, instances arise where people are referred to income management contrary to both DCF policy and the objectives of CPIM.

The following de-identified case study highlights APO NT's concerns.

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[3] *Social Security Legislation Amendment Bill 2011,* Item 2.
[4] Specifically, section 123UC of the *Social Security (Administration) Act 1999.*
[5] *Social Security (Administration) Act 1999*, s 123UC.

Sophie is a 24 year old Aboriginal woman with a 6 year old daughter in her care. Sophie was forced to move to Alice Springs from a remote community in order to escape domestic violence. Sophie had 50% of her Centrelink benefits compulsorily income managed. Sophie approached CAALAS, worried she was not receiving enough money in her bank account. When CAALAS contacted Centrelink to ask about the lack of funds, Centrelink advised that Sophie had been placed on CPIM. Sophie had not been notified that she had been placed on CPIM.

CAALAS assisted Sophie in requesting a copy of the documentation regarding DCF's decision to refer her for CPIM. Upon obtaining this documentation, it was apparent that the referral had not been made correctly in accordance with DCF policies or decision making principles. The referring document lacked relevant information, and no evidence was provided as to why CPIM would help Sophie or her child. No assessment had been made as to whether quarantining an extra 20% of Sophie's benefits would be in the best interests of Sophie or her child. Importantly, mandatory sections of the referral form had been left blank.

Centrelink received only basic notification from DCF that Sophie was to be placed on CPIM. Centrelink's lack of discretion as to whether to implement a notice from DCF contributed to Sophie being placed on CPIM unnecessarily and contrary to the objectives of CPIM. In this instance, Centrelink were forced to implement a notice that was defective.

CAALAS spoke to DCF about the referral. After protracted communications, DCF agreed that the referral had not been made correctly and agreed to revoke the notification to Centrelink. Because of "system issues" with the electronic notification between Centrelink and DCF, it took four business days for this revocation to occur. During this time, Sophie and her child were left without funds over a long weekend.

Safeguarding better decision making

The above example highlights the administrative risks inherent in denying discretion to Centrelink to review a referral of a recipient to income management from a state or territory authority.

It is APO NT's experience that there is insufficient understanding amongst NT authorities of how income management works and how it may assist or disadvantage a recipient. APO NT notes that Centrelink staff, in particular the income management team and social workers, are more experienced in determining a recipient's eligibility for income management and receive specific training in relation to the highly complex regime. Therefore, they are better positioned to make assessments about suitability for income management.

APO NT submits that the insertion of a Secretarial discretion to accept or reject a referral would be beneficial for the referring state/territory authority (and ultimately the recipient) given Centrelink's experience and expertise in assessing a recipient's eligibility for income management. This will also provide a means of review on the part of the Secretary and inserts an additional step in the process, increasing the likelihood that the placement of a recipient onto income management is an appropriate and considered action.

When this proposal was raised with FaHCSIA, the response from the Department, in an email dated 23 January 2011, was:

> ... as the relevant state/territory authority will have already considered whether to make a notification according to its own processes and procedures and based on its knowledge of the person concerned, requiring the Commonwealth to revisit that decision would be a duplication of effort and inefficient use of Commonwealth resources.

APO NT respectfully submits, as stated above, that recognised state and territory authorities will often be ill equipped to make notification decisions as evidenced in the previous example. Furthermore, the application of varied processes and procedures, as established within individual state and territory authorities, in determining whether a person be referred for income

management, will create irregularities. Consequently, Centrelink review of referrals will be integral to ensuring consistent decision making which, in APO NT's submission, cannot be considered as duplication or an inefficient use of Commonwealth resources.

Ensuring consistent and procedurally fair administration of income management

Centrelink recipients are customers of a national scheme governed and regulated federally. It is imperative that the decision to refer them to income management ultimately rests with the Secretary.

The absence of Centrelink discretion in implementing a referral from a state/territory authority limits a recipient's right to appeal the decision. As Centrelink exercises no substantive decision-making powers with respect to a referral from a state or territory authority, a recipient is unable to appeal the decision for them to be income managed through the usual channels that govern Centrelink decisions, specifically the federal Social Security Appeals Tribunal (SSAT) and the Administration Appeals Tribunal (AAT). Instead, the recipient will need to rely upon the internal appeal channels of the referring authority (assuming such channels exist)[6] and any other appeal mechanisms available in the relevant state or territory. Due to inevitable variations between review and appeal mechanisms available within and between authorities and in different states and territories, APO NT submits this will result in inconsistent appeal rights and an increased risk of procedural unfairness for recipients of the same federal scheme. This lack of streamlining will also increase the overall administrative and operational costs of income management as review processes will need to be established and administered in all recognised state or territory authorities.

A recipient who resides in the NT and is referred for income management under the proposed section 123TA(ga) will not have the same access to justice as, for example a recipient in Victoria,[7] given the absence of an Administrative Appeals Tribunal in the NT. APO NT is concerned that an NT recipient will be disadvantaged given the costs associated with appealing a decision beyond an authority's internal review stage.

APO NT understands that the intent of the Government, initially, is to provide a power of referral only to the NT Alcohol and Other Drugs Tribunal. APO NT welcomes the fact that under the *Alcohol Reform (Prevention of Alcohol related Crime and Substances Misuse Act* (NT) there is provision for appeal to a local court from a decision of the Tribunal.[8] However the costs of such an appeal are still considerable. In other cases, should the Minister determine that another NT authority may make such referrals, the only option for independent review for an NT recipient may be to lodge an originating motion in the Federal Court, which is extremely expensive and requires legal support and representation.

[6] APO NT notes that many NT Departments are under resourced, experiencing staffing shortages or over-burdened. APO NT understands that it was for these reasons DCF took considerable time to establish an internal review and appeal mechanism for recipients placed on CPIM by child protection workers. APO NT is concerned other state/territory authorities will experience similar delays in establishing internal appeal mechanisms.

[7] The variation between external appeal mechanisms in different States will further complicate matters. For example, a recipient referred under the proposed section 123TA(ga) who is residing in Victoria can access the internal review mechanism of the relevant referring authority of the Victoria government, and if unsuccessful, may then lodge an appeal to the Victorian Civil and Administrative Appeals Tribunal (VCAT), following which the decision is reviewed by an independent Tribunal member. In the NT there is no Administrative Appeals Tribunal.

[8] *Alcohol Reform (Prevention of Alcohol-related Crime and Substances Misuse Act* (NT) s 68.

The insertion of a clause affording the Secretary discretion regarding the implementation of a state or territory authority's referral will safeguard consistency of decision making Australia wide and ensure that the usual Centrelink appeal mechanisms are available to all recipients. These include appealing the decision through the SSAT and AAT, both of which are free, quick and easily navigated by the recipient in the absence of legal representation. This will ensure procedural fairness and consistent decision making for all recipients of the federal scheme, regardless of their state or territory of residence.

Item 10 - Unwritten law and exercise of executive power

Item 10 of the Social Security Bill would insert section 123UFAA into the Social Security Administration Act. Section 123UFAA(c) stipulates the notice requirements for a referral of a recipient for income management by a state or territory authority to the Secretary. Specifically, it prescribes that the notice must be given under a state or territory law (written or unwritten)[9] or in the exercise of the executive power of a state or territory[10]. APO NT notes that this section mirrors the drafting of section 123UC(1)(c) of the Social Security Administration Act.

APO NT recommends that to maintain transparency around government decision making that directly impacts on individuals, the term "unwritten" be removed from this section of the Social Security Bill, so that referrals may only be made on the basis of written law. APO NT is concerned that granting state or territory authorities powers to refer recipients to income management based on 'unwritten' law carries the potential for this term to be interpreted inappropriately broadly.

APO NT is further concerned by the proposed insertion of subsection 123UFAA(1)(c)(ii) into the Social Security Administration Act which states that a notice may be given in the exercise of the executive power of a state or territory. This proposed section removes the requirement that each state and territory government pass legislation authorising the referral of recipients to income management. APO NT is concerned about the likely operation of proposed subsection 123UFAA(1)(c)(ii) of the Social Security Administration Act based on our experience of the operation of CPIM under the current regime. APO NT understands that the referral of recipients for CPIM by DCF in the NT is conducted under executive power as there is no Territory legislative power enabling DCF to make referrals for CPIM or stipulating the basis for any such referrals.

We are concerned by the manner in which this proposed section bypasses the important parliamentary processes of state and territory governments. APO NT recommends that the executive power be removed, and subsection 123UFAA(1)(c) be redrafted to require all referrals to Centrelink by recognised state and territory authorities be based on written law. APO NT submits that scrutiny of state and territory referral processes by each respective state and territory parliament is an essential component of sound and transparent law making.

Item 15 - Deductable portion – Subdivision DAA – section 123XPAA(3)

APO NT is concerned that recipients referred for income management by recognised state and territory authorities under the Social Security Bill will have 70% of their payments quarantined.[11] APO NT submits that this figure is arbitrary and too high and calls on the Government to provide evidence in support of 70% income quarantining under CPIM and referrals pursuant to Part 1 of the Social Security Bill.

[9] *Social Security Legislation Amendment Bill 2011,* Item 10- proposed section 123UFAA(1)(c)(i).
[10] *Social Security Legislation Amendment Bill 2011,* Item 10 – proposed section 123UFAA(1)(c)(ii).
[11] *Social Security Legislation Amendment Bill 2011,* Item 15 – proposed section 123XPAA(3)(a).

APO NT is further alarmed that under proposed section 123XPAA(3)(b) of the Social Security Administration Act, the Minister may stipulate that up to 100% of a recipient's income may be income managed.[12]

Quarantining 70 to 100 per cent of a recipient's income constitutes an unnecessarily severe restriction on the lives of recipients and their families, either inordinately limiting or eliminating discretionary spending available for normal activities and necessities not covered by BasicsCards. This includes essential transport services (eg, Centre Bush Bus—the most common public transport servicing Central Australian communities, and some taxi services), as well as family activities, such as participation at the Alice Springs Show and other regional shows.[13]

It is inappropriate that such extreme measures may be applied in the absence of provision of intensive case management, necessary services and supports targeted to the individual needs of recipients. There is nothing in the explanatory materials or policy statements that suggest such services and support will be available.

Item 17- Privacy concerns

Item 17 of the Social Security Bill would insert section 123ZEAA into the Social Security Administration Act, which empowers an officer or employee of a recognised state or territory authority to provide to Centrelink information about a person subject to income management under proposed section 123UFAA, or a person being considered for a referral under that section, which is relevant to the income management regime (under Part 3B of the Social Security Administration Act).

In cases where information has been disclosed to Centrelink pursuant to this section, the Social Security Bill also allows Centrelink to provide that information to recognised state or territory authorities in a manner that could breach a recipient's right to privacy and confidentiality.

APO NT welcomes mechanisms that enable better communication between state and Federal government departments which aim to ensure a more efficient administration of the income management regime.[14] APO NT is concerned, however, regarding the drafting of the proposed section 123ZEAA, specifically the manner in which it purports to give an officer or employee of a recognised state or territory authority broad and wide ranging information sharing powers.

Although the Social Security Bill stipulates that only 'relevant'[15] information may be disclosed, the provision remains discomfortingly broad given that there is little certainty around which state or territory authorities may be empowered to make referrals to income management and the bases for these referrals. APO NT is particularly concerned given the highly sensitive information that Centrelink and state and territory authorities hold about customers, including medical records.

[12] Social Security Legislation Amendment Bill 2011, Item 15.

[13] While an option to pay for show tickets was made available in 2011 it was not in previous years.

[14] For example, the Government recently established a formal arrangement through which Centrelink is able to obtain school enrolment records directly from the NT Department of Education in cases where a recipient has applied for an exemption to income management under section 123UGD of the Social Security Administration Act. This has saved considerable time and effort on the part of the recipient seeking the exemption, who was previously required to request a copy of their child's enrolment record and provide it to Centrelink within 28 days. For recipients living in remote communities whose children attend school some distance from home and who may speak little or no English, this had proved highly difficult. APO NT welcomed the streamlining of the process for recipients in this case.

[15] S 123AEAA(1)(b).

APO NT submits that section 123ZEAA, by overriding existing privacy law, could effectively dispense with both Centrelink and state and territory authorities' obligations concerning a recipient's right to privacy and confidentiality.

APO NT submits that the proposed section 123ZEAA be amended to include greater restrictions and guidelines on the type of information that may be shared between Centrelink and state and territory authorities and the circumstances in which sharing is permissible.

Part 2 – Other amendments

Part 2 of the Social Security Bill repeals and substitutes subparagraph (i) of subsection 123UGD(1)(b)(i) of the Social Security Administration Act regarding exemption criteria for recipients on income management with dependant children. The Social Security Bill seeks to amend the criteria by prescribing that in order to qualify for an exemption to income management, the recipient's child must be enrolled in school, and be attending school in accordance with the relevant state or territory's laws to the satisfaction of a person responsible for the operation of the school. In the Northern Territory the attendance benchmark required of children is no more than five absences. Under the proposed legislation, any additional absences must be for reasons satisfactory to the person responsible for the operation of the school. Proposed subsection 123UGD(1)(b)(ia) provides discretion on the part of the "person responsible for the operation of the school" provided the recipient is taking "reasonable steps to ensure that the child attends school".

APO NT welcomes measures by the Government to provide greater flexibility for recipients seeking exemptions, particularly where parents are engaging in bona fide attempts to ensure their child attends school.

However, APO NT is concerned that the proposed subsection, in its current form, allows unbridled discretion on the part of the "person responsible for the operation of the school" to determine whether a reason for a non-attendance is "satisfactory".[16] APO NT is aware, for example, of cases in which a non-Aboriginal principal has refused to acknowledge Aboriginal cultural reasons or business as satisfactory explanations for a child's absence from school.

APO NT encourages the Government to take this opportunity to foster greater community empowerment and engagement in the operation of schools. APO NT submits that school councils should be included in an express definition of "person responsible for the operation of the school". This will allow for local Elders to be involved in decisions through participation in the school council. This is preferable to decisions being made solely on the advice of principals or the Northern Territory Department of Education. Such an inclusion will provide a safeguard against culturally inappropriate decisions being made about whether a reason for an absence is satisfactory or whether parents are taking reasonable steps to ensure their child attends school.

APO NT further encourages the Government to work with the Northern Territory Government in developing guidelines governing the process by which a "person responsible" may determine whether an absence is "satisfactory", to include appropriate consideration of cultural practices and obligations. FaHCSIA have advised APO NT that such guidelines will be jointly developed by the Commonwealth Department of Education, Employment and Workplace Relations, Northern Territory Department of Education, FaHCSIA and the Commonwealth Department of Human Services in line with Northern Territory Government policy on authorised and unauthorised absences from school.[17] APO NT submits that Aboriginal school councils and Aboriginal

[16] We understand that the NT Department of Education and Training is, in practice, this person and that they will act on advice of the principal.
[17] FaHCSIA email to APO NT dated 23 January 2011.

community controlled organisations should also be involved in the development of these guidelines. APO NT would welcome the opportunity to assist in this development. APO NT submits that these guidelines must be finalised prior to the commencement of the proposed provisions.

6. School Attendance Plans (SEAM) Measure

APO NT strongly supports the object of ensuring that more children are enrolled in and regularly attending school. We also support efforts to "ensure greater engagement between schools and families and link families with the support they need to help their children to attend school every day."[18]

APO NT supports the adoption of a culturally relevant, strength-based intensive case management approach which seeks to work with parents to address the underlying reasons impacting on their children's school enrolment and/or attendance. The suspension of income support and family assistance payments should only be considered as part of such an approach.

Need for action based on evidence

Improving School Enrolment and Attendance through Welfare Reform Measure (SEAM) trials began in January 2009 in Wallace Rockhole, Hermannsburg, Tiwi islands, the Katherine area and Wadeye. The measure is being evaluated over a two-year period by the Department of Education, Employment and Workplace Relations (DEEWR). The *SEAM Evaluation Report for the Northern Territory in 2009 with early findings for 2010* (the 2009 Evaluation Report) is principally focussed on evaluating the effectiveness of SEAM in the NT trial sites during 2009.

The official evaluation of the SEAM trials is incomplete. Nevertheless, the 2009 Evaluation Report makes clear that in 2009 there was no observable improvement in school attendance. On this basis, APO NT submits that the introduction of the Social Security Bill, seeking to continue and in fact extend SEAM, is unjustifiable.

Whilst there is optimism in the 2009 Evaluation Report that changes made to SEAM in 2010 have improved its effectiveness on school attendance, this is as yet unconfirmed.[19] The 2010 changes to the administration of SEAM included a new process of attendance data being conveyed directly from the NT Department of Education to Centrelink, bypassing school principals. The 2009 Evaluation Report states, "The data collected as part of this new process has allowed some early, but limited, assessment of that process".

APO NT does not support the expansion of SEAM in the absence of evidence validating its capacity to contribute to significant and long-term improvements in school attendance.

[18] *Stronger Futures* Policy Statement, p 4.

[19] APO NT notes the 2009 Evaluation Report's assertion that "The majority of children (59 of 72; or 82 per cent) demonstrated improved attendance during their compliance period, although many of these improvements were slight." The 2009 Evaluation Report further contended that 25 % of children failed to sustain improved attendance after the 28 day compliance period and in six cases the relapse into old attendance patterns outweighed any gains that had been made during the compliance period.
APO NT notes that the sample considered in the evaluation was very small (72 children). Data for attendance after the 28 day compliance period was only available for 48 of the 59 children whose attendance improved during the compliance period. APO NT questions the weight that can be attributed to the findings of the 2009 Evaluation Report as reflective of the impact of SEAM on a larger scale given its small sample size.

Dangers of suspension and cancellation of payments under SEAM

It is acknowledged that not all payments are subject to suspension or cancellation under SEAM. SEAM will only affect "schooling requirement" payments. However, SEAM suspensions and cancellations will apply to all significant carers of a child with poor school attendance. Consequently, the suspension of these payments can have unintended consequences.

For example, in an effort to practice sound financial management, encouraged under the objectives of income management, many Aboriginal families have automatic Centrepay deductions that are transferred directly from their income support payments. Regular deductions may be for standard payments such as rent, fine repayments and bills. When a recipient's income support is suspended or cancelled, there are insufficient funds available for regular Centrepay deductions. This can cause the recipient and their family to accrue rental arrears which could ultimately lead to eviction; incomplete fine repayments which could ultimately result in cancellation of drivers licences; unpaid utility bills that may cause electricity or telephone services to be suspended. These significant repercussions will only serve to further compound the difficulties experienced by the family and the barriers they face to improving their children's attendance at school.

A further unintended consequence of SEAM may be that it will dissuade potential carers of young people, who are disinterested or disengaged from school, from providing care to the child. As SEAM may be applied to any person with substantial care of the child, a grandparent or other relative, particularly one responsible for other children, may be unwilling to offer assistance to parents who are struggling to raise an unruly child for fear of having their payments suspended as a consequence of the other child's behaviour.

Complex reasons for low school attendance rates

In 1997, the Australian Law Reform Commission stated in its report, *Seen and heard: priority for children in the legal process (ALRC Report 84),* that punitive responses penalising parents who fail to ensure their children attend school:

> … may well be a counter-productive approach to truancy. Students who are chronically truant are often from poorer families experiencing the second or third generation of unemployment. Fining them is unrealistic. It imposes an additional financial burden on the family. It would be better to address the causes of truancy through early intervention and family support programs ... In addition, research suggests that punishing parents for the acts of their children does not decrease delinquency. It would also be better to stress the positive by having schools convince students and their families of the benefits that can flow from secondary qualifications.[20]

As noted by the ALRC, there is need for programs that address the social and economic factors that underpin social exclusion that many Aboriginal children, parents and communities face. In order to improve school attendance in Aboriginal communities, practical efforts must be made to encourage Aboriginal children, families and communities to view school as meaningful and relevant.[21]

Conferences and school attendance plans may form part of this intensive case management, but should be one component of an intensive case management approach. Similarly, collaboration between schools and their communities to create a curriculum and teaching practices that are appealing, engaging and relevant is essential.

[20] See http://www.alrc.gov.au/publications/10-children-education/truancy#_ftn108
[21] See APO response to the Stronger Futures discussion paper for more detail.

APO NT notes the intensive case management model used by the Cape York Family Responsibilities Commission. Whilst we do not suggest the Cape York model is immediately transferable to the NT, we strongly advocate intensive case management models that are designed and driven by local Aboriginal communities and that utilise local Elders in the process.

In this regard we reiterate our recommendation that the Government seek to foster greater community empowerment and engagement in the operation of schools by including school councils in an express definition of "person responsible for the operation of the school". This would allow for local Elders to be involved in decisions—including those in relation to conferences, School Attendance Plans and compliance notices—through participation in the school council.[22]

Incorporation of Conference notices and School Attendance Plans in SEAM

APO NT broadly supports the provisions in the Social Security Bill whereby, prior to the suspension or cancellation of income support and family assistance payments to recipients whose children are not adequately attending school, additional steps may be taken to assist recipients reengage their children in education. Specifically, instead of recipients having payments suspended or cancelled for failing to comply with school attendance and enrolment notifications, the recipient may receive a conference notice requiring them to attend a conference for the purpose of discussing their child's school attendance.[23] Additionally, the Secretary or person responsible for the operation of the school may require the recipient to enter into a School Attendance Plan which sets out requirements with which the recipient must comply to ensure improved school attendance of the children covered by the plan.[24], [25]

APO NT is concerned that the legislation relating to School Attendance Plans does not require the plans to be in writing[26] or in a form that is understood by the recipient. Similarly, the Bill only states that the *notifier* must consider the plan 'appropriate'. There is no concurrent requirement that the recipient considers it appropriate or that the plan be developed consultatively with contents that are mutually agreed as reasonable. APO NT recommends that proposed section 124NC be amended to reflect that the 'Form of plan' must be in writing; that the 'Purpose of plan' include requirements contained within it be agreed by both the notifier and the recipient (the 'schooling requirement person') as reasonable and appropriate; and informed consent by the recipient to the plan be obtained with the assistance of an interpreter as required.

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[22] Note, however, that an intensive case management approach also requires access to suitable services. It is instructive to note in the Cape York Family Responsibility Commission's 2011 Annual Report: "The capacity of the Commission to conduct early interventions and to source appropriate solutions to complex client needs has been adversely affected by the lack of suitable service provision in all of the communities." This echoes to the situation in most remote NT Aboriginal communities.

[23] Proposed section 124NB of the *Social Security Administration) Act 1999* as introduced by section 11, Schedule 2 of the Bill.

[24] Proposed section 124NC of the *Social Security Administration) Act 1999* as introduced by section 11, Schedule 2 of the Bill.

[25] While this is a preferable avenue that better supports recipients in improving their children's school attendance, APO NT notes that the Social Security Bill does not *require* the Secretary or person responsible for the operation of a school to request recipients participate in a conference or enter a School Attendance Plan prior to the suspension or cancellation of their income support and family assistance payments. Instead, the existing unacceptable SEAM regime, where payment suspension may immediately follow the issuing of a school attendance notice, remains available. Advice from the relevant Department suggests that the old model will not be used in the NT but APO NT remains concerned about its retention.

[26] Proposed subsection 124NC(5) requires only that it is in a form approved by the notifier.

APO NT has further concerns about the issuance of compliance notices pursuant to the proposed section 124ND of the Social Security Administration Act. The Social Security Bill would empower a notifier (that is, the Secretary or the person responsible for the operation of the school) to issue a compliance notice if a recipient fails to attend a conference, fails to enter a School Attendance Plan or fails to comply with a School Attendance Plan. APO NT notes that the general discretion of a 'person responsible for the operation of a school' to issue a compliance notice for a failure to comply with a School Attendance Plan may create anomalies.

APO NT recommends that proposed section 124ND be amended to stipulate that a compliance notice can only be issued if a person substantially fails to comply with a reasonable requirement of their School Attendance Plan. Additionally, clear guidelines will need to be developed by Centrelink and the NT Department of Education to stipulate the circumstances in which a School Attendance Plan is considered to have been breached. These guidelines should be provided to principals and school councils in addition to being made available publically and to communities subject to the SEAM trial.

Social workers

APO NT supports the Government's commitment, as evidenced in the joint media release of Ministers Macklin and Garrett of 14 November 2011, to employ additional social workers to monitor and work with families subject to SEAM to assist their attempts to improve their children's school attendance. If SEAM is to have any chance of operating effectively and contribute to improved school enrolment and attendance, Aboriginal people must be equipped with the skills to actively participate in the processes that will affect them. Professionals, such as social workers, who are experienced and can work intensively with families to address barriers to school attendance, such as substantial family dysfunction, are integral to any plan aimed at improving enrolment and attendance rates.

APO NT encourages the Government to commit resources to ensure that the development of and parental compliance with School Attendance Plans is the responsibility of social workers. APO NT further submits that the social workers employed for the administration of SEAM would be best located within the Aboriginal Community Controlled Comprehensive Primary Health Care sector rather than Centrelink. Placement of social workers within existing social and emotional wellbeing multidisciplinary teams is likely to increase the efficacy of their role in addressing school attendance. It will also improve their interaction with families. Aboriginal people need to feel that they can openly and candidly disclose issues that may be adversely impacting on school enrolment and attendance. Unless measures are taken to ensure a culturally safe context (for example, local Elders being part of the process, social workers operating independently of Centrelink from within Aboriginal community controlled organisations), there is a serious danger of non-meaningful participation, affected by cross-cultural barriers such as gratuitous concurrence. The placement of SEAM social workers within Centrelink may contribute to a perception that they are part of the punitive process of income suspension and inhibit the willingness of recipient carers and their children to engage with them.

APO NT further proposes that the Government consider developing gender balanced teams of social workers and placing them within the existing multidisciplinary primary health teams as this will benefit both the operation of SEAM and the cultural safety of employed social workers.

Decision making around suspension, cancellation and reinstatement of payments

The new regime with conference notices and School Attendance Plans, while an improvement, has the potential for added confusion. Under the new regime, conference notices, requirements to enter into a School Attendance Plan and compliance notices can be issued by both the Secretary (Centrelink) and the 'person responsible for the operation of the school'. This differs

from the previous SEAM legislation where school enrolment and school attendance notices could only be issued by Centrelink. This variation is likely to cause confusion to recipients who are unaccustomed to receiving welfare related directions from schools (or the Department of Education).

Significantly, under the new SEAM regime, while the Secretary or a person responsible for the administration of the school can issue a compliance notice, the Bill does not stipulate who makes the final decision that such a notice has not been complied with. As this is the decision that triggers suspension or cancellation of income support and family assistance payments[27] it is important that this point be clarified to establish the review and appeal mechanisms available to recipients wishing to challenge a decision to suspend or cancel their payments under SEAM.

Appeal

Appeal mechanisms under social security law are set out in section 129 of the Social Security Administration Act. Subsection 129(1) allows a person affected by a decision of an officer under the social security law to apply to the Secretary for review of the decision. The *Social Security Act 1991* (Cth) defines an "officer" as a person performing duties or exercising powers or functions under or in relation to the social security law. APO NT is pleased by confirmation from FaHCSIA that a "person responsible for the operation of a school" would be performing duties or exercising powers or functions under the social security law and therefore a decision made by them would be subject to the appeal mechanisms stipulated in section 129 of the Social Security Administration Act.[28] APO NT notes that the legislation envisions decisions to suspend a payment will be subject to reconsideration pursuant to applications under section 129.[29] Nevertheless, APO NT recommends that the Bill expressly state that persons responsible for the operation of a school are officers under the social security law for the purposes of section 129 to avoid any doubt.

Recipient notification onus

APO NT is concerned by the onus placed on recipients with suspended payments to notify Centrelink of their eventual compliance with a compliance notice or school attendance plan in order for payments to be reinstated. Under the current SEAM regime, where payments are suspended or cancelled due to a child's non-attendance at school, section 124N allows a person responsible for the operation of a school at which the recipient's child is enrolled to give the Secretary written notice that the child is satisfactorily attending school. This acts as a trigger to create the 'reconsideration day' when the Secretary must determine whether the payment should be resumed and arrears reimbursed. In contrast, proposed section 124NG which specifies when payments become payable after suspension following a failure to conform with a compliance notice, does not have such a trigger. This appears to mean that the decision to suspend the payment is only reconsidered if Centrelink review it on its own initiative or the recipient applies for a reconsideration under section 129.

APO NT submits this is anomalous with the rest of Division 3A which empowers the person responsible for the operation of a school to take steps to penalise a recipient for their children not attending school, but does not enable the person responsible to reward a recipient for their efforts and compliance with conferences and School Attendance Plans.

In order to ensure payment suspensions and cancellations do not continue unnecessarily, APO NT recommends that section 124NG be harmonised with section 124N, to enable the person responsible for the operation of the school to give Centrelink written notice that a recipient is

[27] Proposed subsection 124NE(1).
[28] FaHCSIA email to APO NT dated 23 January 2011.
[29] Subsection 124NG(b).

complying with a compliance notice, thereby triggering reconsideration. This is also likely to improve parents' trust and confidence in the school and willingness to better engage with it.

Education about the new SEAM regime

The draft legislation presumes parental understanding of the new regime. Significant community education is needed to ensure Aboriginal people fully understand and are able to participate in the mainstream legal and education system. The proposed seminars to be held in each community, and letters sent to parents at the beginning of each school term outlining their responsibilities, fall well short of the intensive education campaign that is needed.[30]

The Government will need to ensure that information about the SEAM regime is presented to parents in an accessible and culturally appropriate manner. Non-government organisations with expertise in communicating effectively with Aboriginal people in remote communities should be partnered with to deliver this information.

Parents must be able to understand the legal requirements for school enrolment and attendance, including the legislative framework of the Northern Territory Government's '*Every child, Every day*' initiative and SEAM. The two frameworks impose similar but distinct regimes.

APO NT supports the introduction of subsection 124NE(3) into the Act, by Schedule 2 section 11 of the Bill, which excludes the suspension of payments under SEAM where a person has already been fined in relation to the failure of the recipient's children to attend school. This provision recognises steps that are being taken by the Northern Territory Government to address school attendance issues and avoids a person facing two penalties for the same course of behaviour.

However, it must also be noted that the concurrent existence of two distinct punitive regimes targeting school attendance, operated separately by the Northern Territory and Commonwealth Governments is confusing and problematic.

7. Alcohol

The premise of prohibition

Whilst APO NT fully supports the emphasis on AMPs, which allow communities the opportunity to take ownership of local alcohol issues, they are prefaced on a starting point continuing the imposition of prescribed areas (to be known as 'alcohol protected areas'). This perpetuates the status quo, which has resulted in a drift to unsafe drinking areas and to townships for alcohol consumption.

APO NT submits that unless communities are in a position to *own* a decision to ban alcohol, they will find ways to circumvent it. 'Stronger Futures' does not change the starting point of imposed prohibition but entrenches it for a further 10 years unless and until communities develop an AMP that receives ministerial approval.

[30] APO NT recognises the difficulties faced by Government in engaging parents in remote Aboriginal communities. During Stronger Futures consultations attended by APO NT representatives it was noted that parents of school aged children were not often well-represented. Moreover, the Government is well aware of poor English literacy rates in remote Aboriginal communities and the consequent ineffectiveness of letters or written materials to inform community members of their responsibilities under new legislative requirements.

Urgent review of drinking areas is needed

The Northern Territory National Emergency Response Act 2007 (Cth) (NTER Act) greatly expanded the 'prescribed area' boundaries from those previously in place in most communities under the NT Liquor Act. Many of the 73 prescribed communities have raised their serious concerns, since the commencement of the Northern Territory Emergency Response (NTER), of the unintended, life-endangering consequences of pushing drinkers further away from their home community and further away from essential services. Tragically these calls have largely gone ignored.

Ngukurr is one of many examples of a community which already had community-driven bans on the consumption, possession, supply and transport of alcohol prior to the NTER. The NTER extended the boundaries of the area in which these bans were effective. The NTER changes were imposed without consultation with the community. Instead of drinking by the river, as people had previously done in relative safety, those who wish to consume alcohol must now travel some 40 kilometres out of the community.

This has led people to drink in unsafe circumstances where there are no Night Patrol services; no drinking water; no transport services and no shade. Since the NTER, at least two people have tragically passed away who were complying with the law and drinking outside the prescribed area. Similar stories can be heard across remote NT communities.[31]

The NTER Re-Design Consultations also heard this strong message:

> In many communities, the prescribed areas are much larger than the general restricted areas in which alcohol restrictions applied under previous Northern Territory licensing controls … A consistently expressed concern was that extensive use of 'drinking paddocks' outside the boundaries of the prescribed areas has raised serious concerns about the safety of drinkers, and also about the emergence of a binge drinking culture. The problem of drinking outside the boundaries of the prescribed areas was reported more frequently in northern communities than in southern communities.[32]

The NTER Review Report also heard:

> Some communities have also expressed increased safety concerns for children when parents are moving further away to drink and leaving their children for longer periods. In some instances parents are taking their children with them to unsafe drinking areas.[33]

Urgent action is needed to provide access to safe drinking places and basic essential services to these drinkers. This is not to condone excessive alcohol consumption, but to avoid more lives being lost and children placed at risk. The current situation of people exercising their lawful choice to drink but in dangerous circumstances, without access to shelter, toilets, water, night patrol, food or police cannot be allowed to sensibly or rationally continue in the name of "reducing alcohol related harm".

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[31] d'Abbs P (1990a) 'Restricted areas and Aboriginal drinking'. In Vernon J (ed) *Alcohol and Crime Proceedings* of a conference held 04-06 April 1989, Canberra: Australian Institute of Criminology.

[32] Report on the NTER Re-Design Consultations at pp 31-2. See : https://docs.google.com/viewer?a=v&q=cache:lwRPkELXdd4J:www.fahcsia.gov.au/sa/indigenous/pubs/nter_reports/Documents/redesign_consultations/FAHCSIA_1923_NT.pdf+nter+what+they+said&hl=en&gl=au&pid=bl&srcid=ADGEESjvdK5zTF2BA_yAbCeIhGxcsqD53iTIvznkR4XoRKlcL00IqmJOGL-R8kkmOk0qCxUvEnx8WXrxDsbilPRG2LoUbq2v1kx5I8ahX1cbrHG2tS6PWE1opV8I-GRf6mD7L9AxfuVS&sig=AHIEtbTNY-SR5h9kJId3EkTECoFEUToayg

[33] NTER Review Board Report 2009, p. 24.

Urgent changes to police powers are needed

In announcing the June 2009 NTER Re-Design, the Minister for Indigenous Affairs, Jenny Macklin stated that "in response to community concerns" about police powers to "without warrant, enter a private residence and apprehend and take into custody a person who was believed to be intoxicated", the NTER Act will be amended. Police would only have these extended powers in a particular prescribed area if someone from that area has requested that police be allowed that power.[34]

Aboriginal people in prescribed communities have repeatedly raised concerns about excessive police powers since the commencement of the NTER. A research report commissioned by NAAJA and CAALAS, concluded:

> Many complaints centre around the intrusiveness of the police; the most common was regarding police coming into houses to conduct searches without permission, but also extended to (in particular) people's bags. Complaints about police entry to houses came from communities A (one), C , D, F, H (few), K, L (one), M and N, e.g.: "Trespass into your yard. They go in house without asking."[35]
>
> The strong belief in the privacy of the house and the yard has evolved from the strong rules around who can and cannot enter a particular family group's camp. Aboriginal sense of private space is as strong as (or stronger than) in western cultures and contained in Aboriginal law in a similar way to private property being codified in Western law. Aboriginal people are aware of provisions in Australian law that reinforce this common value in both cultures, for example:
>
> > Some people not happy about police. Meeting a couple of months ago, shouting at them to go away. Because police coming into houses without warrant paper. That's against our law.
>
> This private space extends to yards and also to homelands/outstations, where small family groups live in a set up in some ways analogous to a cattle station. In communities F and N there were complaints of police driving into outstations. During the research a number of people asked about the law and when police have the legitimate right to enter houses and when it is considered trespassing. People appear to be unsure of their rights in this matter. The status quo, in which many police appear to go where they want, when they want, without limitations, appears to be a clear case of 'overpolicing' in which police have more power to intrude into the lives of Aboriginal people as compared to non-Aboriginal people.[36]

In 2009 on Elcho Island, police searched the house of David and Rosemary Yangarriny to look for yeast — possible evidence of a home brewing kit. NT Police told *Crikey*:

> Police have powers under the Liquor Act NT, to search a premises where they reasonably suspect alcohol is in the premises (including residences) within the restricted area. Such a search is permitted without warrant. Police explained their powers under the act to the occupants of each house and what they were searching for, and asked for the occupier to assist them, before each search was carried out.[37]

The June 2009 NTER Re-Design has not addressed the community concerns about unjustified searches of people's houses. Instead, the Government removed section 18 of the NTER Act which relates to the police power to enter houses to apprehend intoxicated persons, and replaced it

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[34] http://www.jennymacklin.fahcsia.gov.au/speeches/2009/Pages/ss_legislation_amend_25nov2009.aspx

[35] James Pilkington, 'Aboriginal Communities and the Police's Taskforce Themis: Case studies in remote Aboriginal community policing in the Northern Territory. http://www.naaja.org.au/documents/Themis%20Report.pdf at p 52.

[36] Above n 31 at pp. 52-53.

[37] See http://www.crikey.com.au/2009/02/17/yeast-search-raises-questions-about-nt-police-powers/

with a new section 18 that now requires a Declaration by the Minister following an application by "a person who is ordinarily resident in the prescribed area or in the part of the prescribed area" before police can enter houses to apprehend intoxicated persons.

This amendment has not addressed the widespread concerns about excessive police powers to enter and search people's houses. Police retain an almost unfettered power to enter land and vehicles and search people where they have a reasonable suspicion that there is alcohol. Police search powers should be the same in all parts of the Northern Territory and must be urgently addressed as part of the Stronger Futures legislation which, as drafted, would continue to treat all 'alcohol protected areas' as General Restricted Areas subject to the extended police powers.[38] Addressing these increased police powers would:

(a) end the unfair searches that have occurred since the NTER began;
(b) remedy community concerns about police powers; and
(c) most importantly, remove a major impediment to police being viewed as supporters of remote communities and their inhabitants and remove a barrier to relationships of trust and confidence being formed between local police and communities.

Alcohol Management Plans

We support the rollout of AMPs, provided there is adequate resourcing for communities to take ownership of this process. If properly resourced and developed they will empower local communities to determine the circumstances and manner, if any, in which alcohol can be consumed in their community.

APO NT is concerned about the way consultants will be used by the Government to assist communities to develop AMPs. We seek clarity as to the process and protocols that consultants will follow. For example, how will they select the representatives from the community with which they will work? How many people will represent a sufficient consultative group from the community? Will interpreters be used? What accreditation will these interpreters have? Will communities have access to independent and culturally relevant advice to allow them to consider different approaches to alcohol management and to work through differing individual views? Will relevant Aboriginal community organisations, such as health and justice, be included in the consultation process?

There must also be resources made available to communities to support and assist them to prepare an AMP. Communities must be provided access to independent and culturally appropriate experts who can assist in preparing an AMP and enable them to participate on an equal footing in this process with Government consultants.

Aboriginal organisations with expertise in cross cultural communication, who have high levels of trust with Aboriginal people in remote communities, should be considered for this role.

Increased penalties for grog-related offending

The Government has stated its intention to 'crack down on grog running.' However, rather than just increasing the penalties for offence of bringing and supplying significant quantities of alcohol in alcohol protected areas, penalties for bringing, possessing, consuming or controlling smaller quantities of alcohol (under 1.35 litres) have been significantly increased and will now include the possibility of imprisonment for up to six months. Previously, the maximum penalty for these offences was a fine of up to 10 penalty units for a first offender and 20 penalty units for a second

[38] Stronger Futures Bill subclause 9(1).

or subsequent offender. This is a substantial divergence from the proposed maximum fine of 100 penalty units or six months imprisonment proposed by the Stronger Futures Bill.

APO NT highlights that it is important to consider whether people bringing small amounts of alcohol into remote communities or consuming minimal quantites of alchol in these communities are currently "getting off light". The Northern Territory already has amongst the harshest penalties in Australia for bringing alcohol into remote Aboriginal communities. These include heavy fines, imprisonment and seizures of vehicles used in the transporting of alcohol.

A study on alcohol consumption in remote communities found that "there are more Aboriginal people in remote communities who do *not* drink alcohol when compared to urban populations. However, the people who do drink tend to drink at harmful and hazardous levels." [39] As it is only the minority who are consuming alcohol to excess, we need more targeted resources to assist problem drinkers. We urgently need culturally relevant alcohol counselling and rehabilitation services to be more accessible to people living in remote communities.

A punitive response has not worked and there is no evidence that an additionally punitive response is what is needed. There is an existing power to impose a sentence of imprisonment for people bringing more than 1.35 litres of alcohol into prescribed communities. It is difficult to see the imperative of imposing jail sentences on people who are bringing, possessing, controlling or consuming small amounts of alcohol in a remote community. It is unlikely that this will advance efforts to reduce alcohol-related harm in remote communities in any meaningful way. It is likely however that these increased penalties will contribute to higher incarceration rates for Aboriginal people in the Northern Territory.

The Northern Territory's imprisonment rate of 762 prisoners per 100,000 adult population[40] is almost four times as high as anywhere else in Australia. 82% of our prison population is Aboriginal.[41]

Our jails are full of people who are serving relatively short sentences, for relatively minor offending. In the Northern Territory, half of the prison population are serving sentences of six months or less. The Royal Commission into Aboriginal Deaths in Custody made recommendations about 'low-level' offences that disproportionately cause Aboriginal people to be in contact with police, and the potential for escalation. Commissioner Wootton remarked in relation to offensive language offences:

> Charges about language just become part of an oppressive mechanism of control of Aborigines. Too often the attempt to arrest or charge an Aboriginal for offensive language sets in train a sequence of offences by that person and others – resisting arrest, assaulting police, hindering police and so on, none of which would have occurred if the police were not so easily 'offended'.[42]

Similar to offensive language offences, there is grave potential for increased penalties for "grog running" to lead to more Aboriginal people being sent to jail for low level alcohol possession

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[39] Watson et al 1988:59 See: http://www.nt.gov.au/health/healthdev/health_promotion/bushbook/volume2/chap1/major.htm

[40] See http://www.ausstats.abs.gov.au/Ausstats/subscriber.nsf/0/7B05CD44A0E2FC8ACA25795F000DBD0F/$File/45170_2011.pdf

[41] See http://www.ausstats.abs.gov.au/Ausstats/subscriber.nsf/0/7B05CD44A0E2FC8ACA25795F000DBD0F/$File/45170_2011.pdf at p. 32.

[42] Royal Commission into Aboriginal Deaths in Custody 1991, *National Report, Overview and Recommendations* Vlm3 p21, QGPS, Canberra.

offences as well as for increased adverse contact with police that can also lead to other offences such as resist, hinder and assault police. This is not a desirable result.

Infringement notices

Rather than a punitive approach, Infringement Notices should be available and preferred for possession, consumption, supply of alcohol under 1.35 litres. Infringement Notices are a form of diversion, in that they divert people from the mainstream criminal justice system, thereby avoiding the often stigmatising and alienating impacts that bringing people into the justice system can have. These include the prospect of having a criminal record and the possibility of being remanded in custody if a person fails to attend court. Studies show that introducing people into the criminal justice system often leads to them becoming entrenched in it.[43]

Even though the power currently exists for police to issue Infringement Notices for low-level liquor offences, NAAJA and CAALAS often represent clients who are before a court for possessing, consuming or supplying small quantities of alcohol.

Research has consistently indicated that Aboriginal people are less likely to be diverted when compared with non-Aboriginal people.[44] In 2008, 46% of non-Aboriginal young people were denied a diversion option, compared with 52% of Aboriginal young people.[45] The wide discretion of individual police officers can mean that individuals face formal criminal charges for possession, consumption and supply of alcohol, sometimes for as little as one can of beer.

A recent study by the Australian Institute of Criminology found that young people who were diverted from the court system were less likely to have further involvement in the criminal justice system.[46] Accordingly, the decision not to divert a person is loaded with adverse implications, and may lead to a sequence of events, which subsequently become serious.

Infringement penalties are an important way of diverting low-level offenders out of the criminal justice system and recognising that the courts are not the appropriate mechanism to respond to minor offending.

APO NT therefore advocates that clause 11 of the Stronger Futures Bill, which only makes an infringement available for the offence of defacing an 'alcohol protected area' sign also include a reference to proposed sections 75B(1) and 75C(1) of the Liquor Act. This would ensure that Infringement Notices are available for possession, consumption, supply of alcohol under 1.35 litres.

With the rampant over-criminalisation of Aboriginal people in the NT's justice system, police discretion to issue Infringement Notices for low-level possession, consumption and supply of alcohol offences must be urgently detailed and particularised. Further powers of imprisonment are not supported.

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[43] See, for example Larissa Behrendt, Chris Cunneen and Terri Libesman (eds), *Indigenous Legal Relations in Australia* (2000) 101.

[44] Kelly Richards, *Police Referred Restorative Justice for Juveniles in Australia* (August 2010) Australian Institute of Criminology http://www.aic.gov.au/documents/8/B/B/{8BB6EC00-2FDD-4CB9-A70F-DC451C3C22BD}tandi398.pdf

[45] Ibid.

[46] Troy Allard, Anna Stewart, April Chrzanowski, James Ogilvie, Dan Birks and Simon Little, *Police Diversion of Young Offenders and Indigenous Over Representation* (March 2010) Australian Institute of Criminology http://www.aic.gov.au/documents/0/9/2/{092C048E-7721-4CD8-99A6-1BC89C47D329}tandi390.pdf

Seizing motor vehicles

APO NT seeks the inclusion of a provision in the Stronger Futures Bill to ensure that individuals should not have motor vehicles seized where they are ordinarily resident in a remote community and there would be disproportionate hardship to the owner or their family members resulting from the seizure.

It is not uncommon for NAAJA and CAALAS to represent clients charged with possession of small amount of alcohol who, upon a plea of guilty, are liable to forfeit a motor vehicle worth tens of thousands of dollars. Many of these clients actually have their vehicles seized, which causes enormous hardship to themselves and their families.

The Stronger Futures Bill seeks to introduce section 95A into the Liquor Act to ensure that a community is not disadvantaged by vehicle seizures resulting from using an asset intended for the benefit of a community. This includes night patrol vehicles and community buses.

This provision existed under the previous NTER legislation[47] and does not alter the disproportionate impact of seizing motor vehicles where community benefit cannot be established.

Importantly, this type of provision does not exist in other parts of Australia. Whilst there are provisions for motor vehicles to be seized, this usually would only occur after repeated similar offending, and would be a decision made by a court, and only after comprehensive consideration of the seriousness of the offending, previous history of similar offending, and the subjective circumstances of the offender.[48]

APO NT are concerned that there are instances where an individual will not be able to establish community hardship, but the consequences of seizing a motor vehicle will have widespread implications for an individual or their family, including women and children. It needs to be recognised that many remote communities do not have access to public transport (or only to inadequate public transport). Residents without access to private vehicles often have to use taxis at exorbitant cost (where taxis are, in fact, available). It must also be considered that cars are usually a family's only significant asset.

APO NT recommends that section 95A and mirror provisions in NT legislation be amended:

(a) To establish differing time periods for motor vehicles to be impounded and seized. The South Australian provides for vehicles to be impounded for 28 days, 3 months, 6 months, and permanently seized. This graduating regime would be of particular benefit in the NT, where issues of remoteness exacerbate the consequences of motor vehicle seizures;
(b) So that it is the Magistrates Court, and not Police who make a decision as to whether a motor vehicle be impounded for 28 days, 3 months, 6 months, or permanently seized. A

[47] See section 17(2), *NTER Act*: (2) In deciding whether to seize a vehicle under section 95 of the Liquor Act, an inspector must have regard to: (a) whether the main use of the vehicle is for the benefit of a community as a whole; and (b) the hardship that might be caused to the community if the vehicle were seized.

[48] See, for example The South Australian, *Criminal Law (Clamping, Impounding and Forfeiture of Vehicles) Act 2007*. Police are given powers to wheel clamp or seize motor vehicles for minimum periods of 28 days where prescribed offences are committed. The legislation also allows for Police to apply to the court for vehicles to be impounded for longer periods than 28 days and to have them forfeited to the Crown in certain circumstances, with the crushing of vehicles being the ultimate sanction.

decision to seize a motor vehicle is of great significance. Courts are best placed to balance the competing considerations and arguments of the parties as to whether and for how long a motor vehicle should be seized.

(c) To include an expanded list of factors to be considered by a court in determining whether to seize a vehicle. These should include not just whether the main use of the vehicle is for the benefit of a community as a whole and the hardship that might be caused to the community if the vehicle were seized, but also whether the seizure would cause disproportionate hardship to the owner or their family members, the previous history of similar offending (if any), and the objective seriousness of the present offending.

Liquor permits

We note that the Stronger Futures Bill provides that existing liquor permits continue, but can be subject to review if the Minister thinks this is needed in order to give full effect to efforts to reduce alcohol consumption in an Alcohol Protected Area. We welcome the review and Ministerial power to override permits, under clause 13 of the Stronger Futures Bill. APO NT does not support the double-standard that liquor permits create. These permits have been the subject of discontent amongst many Aboriginal people in prescribed communities who perceive a double-standard in operation. It is frequently the case that it is non-Aboriginal people working in prescribed communities who obtain permits.

APO NT would advocate, however, that better detail as to the process by which applications to the Minister are to be made be included in the legislation. Aboriginal people in prescribed communities are often marginalised from mainstream complaints processes. Greater clarity around the process will be important in order for such a review to be truly effective.

Licensed premises

APO NT welcomes clause 15 of the Stronger Futures Bill allowing the Minister to request an assessment of a licensed premise where the Minister 'reasonably believes' that the sale of liquor is causing 'substantial alcohol related harm to Aboriginal people.' An assessor must then be appointed and report within the time frame and on terms determined by the Minister.
APO NT recommends that the Bill be amended to specify the process by which applications to the Minister are to be made to ensure that Aboriginal people in prescribed communities and townships are able to access this process.

Recreational boating and commercial fishing

The provisions that provide a defence to recreational boaters and commercial fishers for having possession of alcohol in 'alcohol protected areas' should be removed. They create a double standard and genuine sense of grievance amongst Aboriginal people who are subject to blanket bans.

Alcohol and Other Drugs Tribunal: Income Management

As referred to above proposed section 123TA(ga) of the *Social Security Administration Act* provides that a person may be made subject to income management based on state or Territory referrals. This will enable the NT Alcohol and Other Drugs Tribunal to refer people for income management, similar to the current Child Protection category.

The APO NT supports this power being given to the NT Alcohol and Other Drugs Tribunal provided that the legislation also contains a clause affording the Secretary discretion regarding the implementation of a referral, as recommended earlier in our submission. We note our earlier

concerns regarding the lack of evidence that income management is an effective measure in isolation. Where combined with an order for intensive case management and available services and supports it may be that a referral for income quarantining is an appropriate option for a person before the Tribunal. We note, however, that income management already applies to most people on Centrelink in the NT and as such the measure is likely to be used to quarantine more than 50% of a recipient's income.

Signage

APO NT welcomes the inclusion of a provision to the effect that new signs denoting APAs must contain wording that is 'respectful to Aboriginal people.' It is well know that the existing blue signs are widely viewed by Aboriginal people in the Northern Territory as extremely disrespectful. APO NT strongly supports the inclusion in clause 14(6) that 'the views of *Aboriginal* people living in the area' must be had regard to in making a determination about such signage. It is Aboriginal people who have been hurt by the current signage and who should be consulted about efforts to remedy this.

Independent review

We support the proposed review, under clause 28, of NT alcohol laws, including those proposed to be introduced under the Stronger Futures Bill, to assess their effectiveness in reducing alcohol related harm, which must be completed within three years. APO NT welcomes the provision that the review be independent. It is essential that those conducting the review have expertise in cross cultural communication with Aboriginal people and a strong background in considering questions of alcohol related harm.

8. Customary Law

The Stronger Futures in the Northern Territory (Consequential and Transitional Provisions) Bill 2011 amends provisions prohibiting the consideration of any form of customary law or cultural practice in determining bail or sentencing. The amendments allow customary law and cultural practice to be considered in offences involving cultural heritage or cultural objects.

APO NT welcomes these amendments as they are important in protecting and preserving the value of cultural heritage sites and cultural objects as evidenced in *Aboriginal Areas Protection Authority v S & R Building and Construction Pty Ltd.* However, the amendments are not sufficient to restore the independence and discretion of the courts or the value of Aboriginal culture that have been eroded by the current provisions prohibiting consideration of customary law or cultural practices in bail and sentencing.

Sections 90 and 91 of the *Northern Territory National Emergency Response Act 2007* ('NTER Act') are now incorporated through the Consequential and Transitional Bill into sections 15AB and 16AA of the *Crimes Act 1914.* These provisions devalue Aboriginal culture and customary law, seriously curtail the discretion of the courts and distort well established sentencing principles.

Prior to the introduction of the NTER Act and related legislation, courts in the NT were able to take into account traditional Aboriginal law and customs where such laws or practices were relevant to the objective seriousness of an offence or the level of moral culpability of an offender. This was in accordance with established general sentencing principles under the *Sentencing Act* and under the relevant provisions of the *Bail Act*.

APO NT shares the Australian Government's view that the protection of Aboriginal women and children in the NT is paramount. It is not proposed that Aboriginal customary law or culture be permitted as an excuse for acts that are illegal and threaten the safety of vulnerable NT citizens.

Customary law and cultural practice are not now, nor have they previously been, considered in determining the guilt or innocence of an accused person. However, it is important that Aboriginal culture and tradition is recognised and able to be considered, where relevant, as a factor that may have contributed to offending. Precluding such consideration in bail and sentencing creates a system which is artificial in its disregard of relevant material, and consequently unfair.

The NT is the jurisdiction with the highest proportionate and percentage increase in prison numbers between 2010 and 2011. Additionally there has been a 150% increase in female imprisonment rates in the same period. The NT continues to have the highest imprisonment rate of any Australian jurisdiction.[49] A system that inhibits the discretion of the court and the power of the experienced and qualified decision maker to consider and weigh up all relevant facts, can only contribute to this alarming and increasing imprisonment rate.

For example, a young woman, who has previously held a drivers licence but is currently disqualified from driving, who is directed to attend cultural business and, as the only experienced driver, to transport elders to the site, would not be able to explain to the courts the reason for her offending. In the NT, driving disqualified often carries a custodial sentence. While it is not suggested the young woman should not be sentenced for her offending, it is important that in determining an appropriate sentence, the Magistrate have regard to her reason for driving, rather than assuming an absolute disregard for the law.

Similarly, where an under-aged couple participate in consensual sexual relations and the boy, despite also being under 16 years, is charged with serious sex offences, information about the cultural status of their relationship must be relevant in determining the objective seriousness of the offence and the young boy's moral culpability. As such, they are equally relevant to questions of bail and sentence. In Central Australia, there have been at numerous matters since 2007 in which a young Aboriginal boy has been charged with offences for sexual relations with an under aged girl with whom he was in a relationship. While many of these charges were eventually withdrawn and dismissed, bail decisions required an assessment of the seriousness of the offending, risk to the victim and risk to the community which are impacted upon by the boy's criminal intent, related to his cultural understanding of his relationship.

Appropriately protecting Aboriginal women and children, including avoiding unnecessary contact with prisons and detention centres, necessitates courts having sufficient discretion to duly consider Aboriginal culture and customary law where relevant.

In a context where the Government is striving to rebuild its relationship with Aboriginal people, it is imperative that Aboriginal people are well informed about and able to comment on the proposed sections 15AB and 16AA of the *Crimes Act* and their potential impact. It is equally important that Government consider the proposed legislation in light of those views.

It was disappointing that the Stronger Futures consultations did not include any discussion questions around the exclusion of customary law and cultural practice from sentencing and bail considerations. Given this notable deficiency, it was unsurprising that "few respondents commented on the prohibitions on customary law in bail and sentencing decisions" as noted in the Stronger Futures in the Northern Territory Report on Consultations ('consultation report').[50]

It is APO NT's experience that many Aboriginal community members are unaware or do not fully understand the impact of the exclusion of customary law and cultural practice from sentencing

[49] Australian Bureau of Statistics , 'Prisoners in Australia', 8 December 2011.
[50] Stronger Futures in the Northern Territory Report on Consultations, October 2011, p11.

and bail considerations. These provisions have not been well explained to Aboriginal Territorians and were definitely not raised or explained by Stronger Futures consultation facilitators.

Equally clear however is that many Aboriginal people consider culture to be integral to improving community safety. The Government's consultation report quoted suggestions around community safety such as "the way to make community safe is to strengthen culture" and "resource those activities that community want, to strengthen culture and stay strong." It was noted that "elders are very important in the community" and "we want Aboriginal people dealing with Aboriginal problems". This emphasis on strengthening Aboriginal culture was expressed by both Aboriginal men and women and articulated in both the Stronger Futures consultations and during consultations about the constitutional recognition of Indigenous Australians, which ran concurrently.

The emphases on culture that is often observed in Government consultations with Aboriginal people must be recognised. Aboriginal customary law and culture has the potential to be used as a means of empowering Aboriginal people to take responsibility for offending within their own communities. Its exclusion sends the wrong message: that Aboriginal culture and customs are not valued; and is in direct conflict with the expressions of Aboriginal people that culture must be strengthened.

APO NT urges the Government to remove clauses 3 and 8 from the Northern Territory (Consequential and Transitional Provisions) Bill 2011. If the Government is uncertain about removing these sections, APO NT urges the Government to undertake a thorough consultation with the judiciary and legal stakeholders prior to introducing the legislation and further excluding cultural considerations from bail and sentencing. If the Government decides to introduce the legislation, APO NT calls for a review of the operation of the exclusion after three years and for an evidence base to be collected as to its impact.

9. Australian Crime Commission (ACC)

The ACC powers are extremely broad—the ACC is empowered to investigate the offence of aggravated assault under the Northern Territory Criminal Code. An assault is aggravated if the defendant is a male and the victim a female, or if "harm" is caused which includes a bruise or a scratch, as well as much more serious consequences. It is difficult to see how this falls within the definition of investigating *serious* violence and child abuse in Aboriginal communities.

The "Star Chamber" powers (including removal of the right to silence and prohibition on disclosing to others what was said in proceedings) are unnecessarily draconian and too open ended. "Star Chamber" powers should be reserved only for those offences which are extremely difficult to detect, such as to combat serious and organised crime such as corruption, terrorism, money laundering, and the drug trade.

APO NT submits that the ACC should not have specific law enforcement powers in relation to Aboriginal people that it does not have in relation to non-Aboriginal Australians and their application in prescribed communities should be immediately repealed.

There is no evidence to support their ongoing need, or that existing policing powers are inadequate to detect offences against women and children.

It is important to recognise that the ACC powers actually run counter to what Stronger Futures is designed to achieve. Stronger Futures is supposed to be a partnership between the Commonwealth Government, NT Government and Aboriginal people in the Northern Territory "to build stronger futures together."

A commitment by the Commonwealth and NT Governments to building stronger futures for Aboriginal people in the Northern Territory should be focused on improving support services on the ground in local communities that promote community safety and improved engagement between community leaders and police.

Giving the ACC draconian powers which people do not understand and which treat them in the same manner as terrorists or organised crime syndicates is not consistent with partnership.

It is also of great concern that the ACC powers are not time limited. The government must be able to be held to account as to why these draconian powers are still needed. If not immediately removed, there should be an immediate review of its operation and an evidence base collected as to its impact.

10. Pornography

APO NT does not support the continuation of the pornography restrictions that will continue to apply in 'prohibited material areas' as declared by the Commonwealth Minister for Indigenous Affairs to material that is Refused Classification or classified as X18+. There is no evidence to support their ongoing need, or that the pornography restrictions have reduced offences against women and children.

There is no evidence to suggest that pornography is more of an issue on Aboriginal communities than in the Territory as a whole. As well as a lack of quantitative and qualitative data, NAAJA and CAALAS' direct experience is that we have not encountered Aboriginal people from prescribed communities charged with pornography offences.

APO NT supports actions against pornography, but we advocate a national approach, and not the targeting of particular groups.

We query the Commonwealth Government's claim that during the Stronger Futures consultations, people expressed their support for the continuation of the pornography restrictions. In our experience, most Aboriginal people stated:

- that they did not understand what constitutes pornography or what material was banned; and/or
- pornography was not an issue in their community.

Draconian actions like banning access to any item should only be taken on the basis of clear evidence. It should not be based on the vague and unreferenced comments made in public consultations such as that "a majority of comments expressed the view that pornography was not wanted in their community".[51]

The pornography restrictions run counter to the supposed partnership between the Commonwealth Government, NT Government and Aboriginal people in the Northern Territory "to build stronger futures together". The pornography restrictions and the NTER signs that have drawn public links between prescribed communities and pornography have caused enormous shame and stigma to Aboriginal people and should be immediately revoked.

[51] See http://www.indigenous.gov.au/wp-content/uploads/2011/10/consult_1710111.pdf at 48.

11. Food Security

General points

APO NT's August 2011 submission to *FaHCSIA* in response to the *Stronger Futures* discussion paper outlined our support for the continuation of a store licensing regime, including on-going monitoring and assessment of community stores to ensure licensing standards are maintained.

Improvements have been made to community stores including the provision of a greater range of fruit and vegetables. However, Aboriginal communities in the NT continue to be greatly disadvantaged in their ability to access affordable, fresh and varied produce. During the *Stronger Futures* consultations, many community members suggested that prices in stores are too expensive and some prefer to shop in major commercial centres (where such centres are accessible). Governments should consider investing in tax subsidies on fresh food, price caps for basic goods and ensuring that the standard market basket is only 25% of remote families' weekly income. Advice from health experts suggests that access to good, affordable food makes more difference to what people eat than health education.

APO NT supports the resolutions developed and adopted at the AMSANT Fresh Food Summit[52] in 2010 (See **Appendix 1**).

Store governance

Store committee governance structures and systems (where they exist) are integral in developing sustainable changes in store food supplies. No plans for long-term improvement can ignore the need to improve the ability of store committees to manage effective community stores. Governments should invest in building the capacity of store committees to contribute to improvements to community nutrition and health outcomes.

In order for community stores to benefit communities, store committees (where they exist) should be provided with intensive governance and financial management support and training. In addition to the strong need for more jobs for local people in community stores, to the extent feasible local people should also be facilitated to own and control stores and have the chance to be managers (a good example being the ALPA run stores).

APO NT continues to support the availability of Outback Stores as a management option for stores, but believes that the decision of communities to introduce or retain Outback Stores must be voluntary. Given that Outback Stores is wholly owned by FaHCSIA, the long-term strategy of community stores managed by Outback Stores should be directed to building the capacity of local people. The new licensing regime is proposed to operate for 10 years. Where Outback Stores are managers, their ultimate aim should be to explicitly develop community governance capacity such that a community body is able to take over the operation of its store within 10 years.

The proposed enhanced store licensing regime

The Stronger Futures Bill considerably widens the scope of the stores licensing regime. Whereas previously a store licence was a precondition for accepting the basics card, it is now theoretically possible that *any* business in the NT that is determined by the Secretary to be an 'important source of food, drink or grocery items for an Aboriginal community' will be subject to the considerable regulatory powers. This is so even if only a part of the business is the sale of food, drink or grocery items.

[52] AMSANT Fresh Food Summit, Tennant Creek, May 2010.

Whilst the stated intention is to enhance the contribution made by community stores in the Northern Territory to achieving food security for Aboriginal communities—which means 'a reasonable ongoing level of access to a range of food, drink and grocery items that is reasonably priced, safe and of sufficient quantity and quality to meet nutritional and related household needs'[53] —there are no measures imposed in the draft bills to ensure that costs remain low and no suggestion that subsidisation has been considered by the Government.

Though APO NT supports a comprehensive licensing system, we would like to see better clarification around the consultation process which will take place in order to decide whether a store should hold a license.

We note that the fact that if a store is defined as a community store under the Stronger Futures Bill this does not in itself mean that the store is required to be licensed. The Secretary, under clause 41, still has to determine that a community store is required to hold a licence. APO NT welcomes the notice requirements and the capacity to make submissions to the Secretary in this context provided sufficient time is allowed to make such submissions.

Compellable information

APO NT is very concerned that the draft Bill proposes documentation requirements which attract a criminal offence if breached.[54] The Explanatory memorandum suggests "this penalty is commensurate with the penalty applicable to a provision in the A New Tax System (Family Assistance) (Administration) Act 1999 and applicable to occupiers of child care services that has a similar purpose (clause 219L)." However, we believe that it is an unnecessarily harsh penalty and should be amended. Moreover, elsewhere in the Explanatory Memorandum it is noted that "breaches of licence conditions that create an immediate threat to personal or community safety already attract criminal penalties under other legislation".

Division 8 enforcement provisions

While APO NT is broadly supportive of the licensing procedures under the Stronger Futures in the Northern Territory Bill we are concerned that in some instances the penalties and injunctive powers are considerable and unnecessarily coercive. While APO NT notes that the enforcement provisions are intended, according the Explanatory Memorandum, to be used where less intrusive attempts have failed, there is nothing in the legislation that requires this.

APO NT is concerned that the enforcement regime for a licence breach is extremely harsh, and that many stores will be unable to pay penalties.[55] It will be it extremely difficult for people in some communities to access any food and grocery items if community stores are forced to close (by virtue of incapacity to pay fines or by injunction). Such a consequence would be antithetical to the achievement of food security. To that end we welcome the lesser infringements and the capacity to issue warnings and hope that policy guidelines will mandate an approach that makes use of the lesser regulatory powers in all but the most exceptional circumstances.

The Explanatory Memorandum states that 'In relation to community stores [Injunctions] are intended to be used in situations where the conduct or the refusal to do certain things carries unacceptable risks of harm either to the store or its customers.' APO NT therefore questions the basis for the provision, under clause 110, that certain accepted limits on the grant of injunctions do not apply. Subclause 101(1) provides that a court may grant an injunction restraining a person

[53] Stronger Futures in the Northern Territory Bill 2011, Part 4.
[54] Stronger Futures in the Northern Territory Bill 2011: Part 4 Division 6, clause 72.
[55] Stronger Futures in the Northern Territory Bill 2011, Part 4, Div 2- s38 states that the maximum penalty could reach $6875 per day (under clause 87).

from taking a certain action whether or not it appears to the court that there is a risk that the person will take that action. Similarly subclause 101(2) provides that a court may grant an injunction requiring a person to do a certain action whether or not it appears that there is a risk of the person refusing to or failing to take such action. Where such a risk is not apparent to the court there is unlikely to be an unacceptable risk of harm to either the store or its customers.

Division 9- Other matters

Clause 109 proposes to create exceptions under section 51(1) of the *Competition and Consumer Act 2011 (Cth)*. Section 51(1) requires specific conduct that may otherwise constitute a "restrictive trade practice" under Part 4 of the *Competition and Consumer Act 2011 (Cth)*. APO NT notes with concern the potential for restrictive trade practices, potentially including misuse of market position, to occur without recourse to the *Competition and Consumer Act 2011* (Cth) in a context where FaHCSIA holds one hundred percent shares in Outback Stores.

12. Permits

APO NT remains concerned that no mention of the changes made under the NTER to the permit system for access to Aboriginal land was included in the Stronger Futures discussion paper. No acknowledgement of the changes to the permit system is included in the policy documents or the Stronger Futures bills. Many residents of communities on Aboriginal land in the Northern Territory continue to feel as though they have lost control over who can and cannot come onto their land and wish to see the permit system reinstated in full.

Appendix 1: Resolutions from AMSANT Fresh Food Summit, Tennant Creek, 2010

- Support the work of Remote Indigenous Gardens Network, and promote its extension into the NT;
- Recognise the important role of family, community and market gardens in supplying fresh food to families and communities; promoting health and well being for participants; and contributing to job creation;
- The Comprehensive Aboriginal Primary Health Care sector should be encouraged to work with existing and potential family, community and market gardens, including in supporting their growth, expansion and sustainability;
- Support urgent action in investigating the development of food labelling mechanisms that will inform, educate and promote the consumption of healthy foods, using effective cultural social marketing;
- Support the initiatives of Centrefarm in creating viable Aboriginal remote area food production enterprises. Centrefarm provides considerable opportunities for Aboriginal people to work on their land to supply their communities with fresh foods and to develop a sustainable horticultural industry that works closely with the Aboriginal health services and provide a positive step in closing the gap and an alternative to the welfare economy;
- Support the creation of an overarching body to monitor utilisation of underground waters; sustain all forms of family, community, market gardens and agribusinesses and evaluate benefits to Aboriginal health;
- Support urgent research to carry out a cost-benefit analysis of subsidising the cost of fruit and vegetables with equivalent of, for example, 1% of annual cost of running clinics, that is $10,000 per $1M;
- Promote research into freight, logistics and packaging and good food subsidies into remote communities to build an evidence base towards achieving food security (i.e. availability of good food);
- Encourage Outback, ALPA and other stores to work together to source competitively priced fresh food through joint purchasing;
- Encourage Outback, ALPA and other stores to support the development of community and market gardens through strategic purchasing to allow such gardens to compete against external sources of fresh food;
- Governments should improve transport networks and infrastructure in remote areas, both as a long-term mechanism to reduce freight costs, as well as to allow capacity to build large scale horticultural projects such as those proposed by Centrefarm;
- Core service standards should be developed for all stores, and these core service standards form the basis for store licensing;
- Mandate a relationship between stores and the primary health care sector, using the store licensing system, such that there are consequences on stores and their

management that do not meet requirements of the PHC sector in ensuring food security;

- Recognise that the NT Market basket survey is too restricted and should extend to monitoring prices and availability across a wider range of fruit and vegetables, carried out independently by the primary health care sector represented by AMSANT; and
- Support recommendation 3 of the Parliamentary Inquiry into remote Aboriginal and Torres Strait community stores and require a nutritionist to be immediately appointed to the Outback Stores Board.