



**Submission to the Senate Community Affairs Committee**

**Inquiry into Stronger Futures in the Northern Territory Bill 2011  
and two related bills**

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## **ABOUT ANTaR**

ANTaR is a national advocacy organisation working for Justice, Rights and Respect for Australia's First Peoples. We do this primarily through lobbying, public campaigns and advocacy.

ANTaR's focus is on changing the attitudes and behaviours of non-Indigenous Australians so that the rights and cultures of Aboriginal and Torres Strait Islander peoples are respected and affirmed across the community.

ANTaR also seeks to persuade governments, through advocacy and lobbying, to show genuine leadership and build cross-party commitment to promoting rights and addressing disadvantage.

ANTaR works to generate a moral and legal recognition of, and respect for, the distinctive status of Aboriginal and Torres Strait Islander Australians as First Peoples.

ANTaR is a non-government, not-for-profit, community-based organisation.

ANTaR campaigns nationally on key issues including Constitutional Recognition, reducing Aboriginal imprisonment, the Northern Territory Emergency Response and health equality.

ANTaR has been working with Aboriginal and Torres Strait Islander organisations and leaders on rights and reconciliation issues since 1997.

## EXECUTIVE SUMMARY

1. ANTaR is a national advocacy organisation working for Justice, Rights and Respect for Australia's First Peoples. We welcome the opportunity to make a submission to the Senate Community Affairs Committee ('the Committee') Inquiry into the Stronger Futures legislation.
2. ANTaR believes that in order to achieve successful, long-lasting improvements to the health, safety and well-being of Aboriginal and Torres Strait Islander communities, the Commonwealth Government must engage with the principles that lie at the heart of its international and domestic commitments: self-determination of Aboriginal peoples, community-led development and evidence-based policy.
3. In making recommendations and assessing the legislation, ANTaR recognises that the *Stronger Futures in the Northern Territory Bill 2011* and two related bills are part of a larger package of Government efforts including future infrastructure and program funding. Although a general commitment has been made to ongoing resourcing, no details have yet been announced. ANTaR urges the Government to release details on new and ongoing expenditure well before the May Budget to enable communities and organisations to plan well in advance of current funding expiring.
4. ANTaR has made recommendations for future Government funding and action in remote Northern Territory communities in a Pre-Budget Submission for 2012-13 (see Appendix B) and in our response to the Stronger Futures discussion paper, *A Better Way: Building Healthy, Safe and Sustainable Communities in the Northern Territory through a community development approach* (Appendix A, 'A Better Way policy paper'). This submission is focused on the current bills and is intended to complement these publications.
5. The Stronger Futures Policy Statement outlines the Government's legislative package, rationale for change and supporting measures. It outlines the seven pillars of its Stronger Futures legislative and policy framework:
  - Jobs
  - Improving School Attendance and Enrolment
  - Tackling Alcohol Abuse
  - Community Safety and Child Protection
  - Food Security
  - Housing and Land Reform
  - Sunset and Review Provisions.<sup>1</sup>

Where possible, analysis of the legislation in this submission is structured around these themes, with the exception of the 'Jobs' theme, as employment programs are not directly addressed in the Stronger Futures legislation. The *A Better Way* policy paper makes a range of recommendations designed to generate sustainable economic development in Aboriginal communities by supporting community governance and capacity development.

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<sup>1</sup> Australian Government, Stronger Futures Policy Statement, November 2011.

6. While the Government's stated desire to begin a new chapter in its approach to Northern Territory communities is welcome, ANTaR believes that the hurried nature of the Stronger Futures consultations and continuation and extension of key sanctions-based measures are at odds with the Government's stated commitments to:
- "A stronger future, grounded in a stronger relationship between government and Aboriginal people in the Northern Territory.*
- A relationship built on respect for Australia's first peoples, for their custodianship of the land, for their culture and for their ongoing contributions to our shared nation.*<sup>2</sup>
7. Major reforms to social security and land tenure have been delegated to disallowable instruments and, in the case of social security changes, enacted without evaluation or review.
8. Further, the lack of transparency around the consultation objectives - along with the uncertain benefit of certain measures – make the use of special measures within the meaning of s. 8(1) of the *Racial Discrimination Act 1975* (Cth) ('RDA') legally questionable.
9. Given our serious concerns about the potential impacts of this legislative package, ANTaR is concerned that the 7 year review and 10 year sunset clauses for the *Stronger Futures Bill* and pornography provisions are too long. We urge the Government to rethink its approach in line with its commitments to an open dialogue and consultation process with Aboriginal people to improve community health and well-being.<sup>3</sup>

## OVERVIEW

10. The Commonwealth Government has introduced the three Bills currently under review by the Senate Community Affairs Committee ('the Committee'):
- Stronger Futures in the Northern Territory Bill 2011 ('Stronger Futures Bill');
  - Stronger Futures in the Northern Territory Bill (Consequential and Transitional Provisions Bill 2011 ('Transitional Provisions Bill')); and
  - Social Security Legislation Amendment Bill 2011 ('Social Security Bill')
11. The Stronger Futures Bill has three central provisions, all of which are deemed special measures within the meaning of s. 8(1) of the *Racial Discrimination Act* ('RDA'):

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<sup>2</sup> The Hon Jenny Macklin MP, Stronger futures in the Northern Territory Bill 2011 - Second reading speech, Parliament House, Canberra, 23 November 2011.

<sup>3</sup> The Hon Jenny Macklin MP and the Hon Warren Snowdon MP, Aboriginal people clear about their priorities for building stronger futures in the Northern Territory, Media Release, 18 October 2011.

- Tackling Alcohol Abuse (Part 2): would introduce new measures to enable recognition of community-developed Alcohol Management Plans and reinstate a maximum six month in prison for possession.
- Land Reform (Part 3): would introduce the capacity for the Executive to make regulations with respect to the use of land, dealings in land, planning, infrastructure or any matter prescribed by the regulations with respect to Town Camps (s. 34(1)) or Community Living Areas (s. 35(1)).
- Food Security (Part 4): would extend the Government's community store licensing program and increase the severity of certain penalties under the compliance regime.

12. The Transitional Provisions Bill would save two key features of the NTER (albeit with some amendments):

- Prohibitions on classified material: Schedule 3 of the legislation would save provisions which declare certain parts of the NT 'prohibited material areas' (previously 'prescribed material areas') and thereby ban very violent or pornographic material in those areas. This measure is deemed to be a special measure in the Explanatory Memorandum attached to the Bill.
- Bans on consideration of customary law in bail and sentencing: The ban on consideration of customary law in bail and sentencing would be saved by Schedule 4, which would amend the Crimes Act 1914 (Cth). Schedule 4 introduces an exception where a site or object of Aboriginal heritage has been damaged.

13. The Social Security Bill would:

- Modify and extend the School Enrolment and Attendance Measure (SEAM). The changes would introduce school attendance conferences and plans, with a 13-week payment suspension imposed for non-compliance (Schedule 2).
- Modify the income management scheme to enable Centrelink to accept referrals for income management from designated State / Territory authorities
- Allow for Executive determinations to apply income management to certain areas, including whole states or territories (Schedule 1).

14. The Stronger Futures Bill and Transitional Provisions Bill will be subject to parliamentary review after seven years<sup>4</sup> and sunset after 10 years<sup>5</sup>.

## **CONSULTATION AND SPECIAL MEASURES**

15. Consultations between FaHCSIA and communities in the Northern Territory were undertaken between June and mid-August 2011. They were of two types: individual or small group meetings with Government Business Managers and pre-arranged

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<sup>4</sup> s. 117, Stronger Futures in the Northern Territory Bill 2011; s. 114-115, Stronger Futures in the Northern Territory (Consequential and Transitional Provisions Bill) 2011

<sup>5</sup> s. 118, Stronger Futures in the Northern Territory Bill 2011; s. 116, Stronger Futures in the Northern Territory (Consequential and Transitional Provisions Bill) 2011

community consultations facilitated by FaHCSIA employees. Over 370 meetings in almost 100 communities were conducted.<sup>6</sup>

16. Consultations were audited by the Cultural and Indigenous Research Centre Australia ('CIRCA') and O'Brien Rich Research Group ('O'Brien Rich'). O'Brien Rich also undertook quantitative analysis of FaHCSIA's reports on consultations.

17. In seeking to design a ten-year program which will directly affect many Aboriginal people in the Northern Territory, the Government should aspire to meet its commitment under the United Nations Declaration on the Rights of Indigenous Peoples to:

*"consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain free, prior and informed consent before adopting and implementing legislative or administrative measure that may affect them."*<sup>7</sup>

18. Despite being roundly criticised for inadequate consultations in 2009, FaHCSIA appears to have repeated some of the same problems in the Stronger Futures 2011 consultation. Specifically, the consultations suffered from:

- An insufficient time-frame in proportion to the magnitude of the reforms;
- A lack of transparency, creating a perception of selective reporting of consultation feedback.; and
- A lack of respect for self-determination in the consultation process, with the perception that communities had very limited capacity to influence decisions.

19. ANTaR welcomed the partial reinstatement of the *Racial Discrimination Act 1975* (Cth) ('RDA') in 2010, but we believe some of the measures declared in this legislation are fundamentally at odds with the principles, if not the specific protections, of the Act.

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<sup>6</sup> Stronger Futures in the Northern Territory Report on Consultations at 7.

<sup>7</sup> United Nations Declaration on the Rights of Indigenous Peoples, UN Document A/HRC/1/L.3 at Article 20.

## **IMPROVING SCHOOL ATTENDANCE AND ENROLMENT**

20. As part of its drive to improve school enrolment, attendance, educational achievement and parental responsibility, the Commonwealth seeks to modify and extend SEAM, which links school attendance to social security payments.
21. ANTaR recognises the urgent need to improve educational outcomes in the Northern Territory but we believe that payment suspension is an extreme and disproportionate response. With a 13 week non-payment period for non-compliant parents or carers, this scheme introduces the most severe social security penalty in today's social security system and in the history of our modern social security system. The Government has failed to justify the need for a penalty period of unprecedented length which reinforces the perception that this is a punitive policy. Without any significant evidence to suggest that the program has been effective to date, ANTaR fears that it is unlikely to achieve the desired objectives and could in fact lead to worse outcomes for school children if their families face escalating poverty and, consequently, an increase in the number and intensity of life stress events.
22. Most importantly, there is a lack of evidence to support the expanded roll-out of SEAM. The 2009 trials were largely inconclusive and there is, more broadly, little evidence that sanctions-based social security measures address disadvantage. By focusing almost exclusively on individual responsibility, the Government has given insufficient attention to the pivotal role that improvements to educational institutions and access to culturally appropriate learning can play. In ANTaR's *A Better Way* policy paper (Appendix A), we make a number of recommendations to improve the availability and quality of education in Northern Territory communities, including a return to bilingual schooling, employment of additional English as a Second Language ('ESL') teachers, increased training for teachers to cater for students' unique needs in remote communities and measures to foster an inclusive and co-operative school climate. Our recent Pre-Budget Submission also makes recommendations for funding and programs to improve educational infrastructure and access.

## **TACKLING ALCOHOL ABUSE**

23. ANTaR welcomes the Minister's recognition that externally imposed, blanket alcohol restrictions are not a long-term solution<sup>8</sup>. We endorse the move to recognise locally-developed alcohol management plans in the legislation and suggest further measures to gradually transition to community-developed plans. However, we stress the importance of resourcing communities to undertake this process. We also note and welcome the Government's commitment to respectful signage. Finally, we endorse the National Indigenous Drug and Alcohol Council's ('NIDAC') proposal for a volumetric tax to establish a floor price on alcohol and drive investment in associated health and education programs.

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<sup>8</sup> The Hon Jenny Macklin MP, Second Reading Speech, 23 November 2011.

## **COMMUNITY SAFETY AND CHILD PROTECTION**

24. The Government's efforts in this area comprise bans on customary law in bail and sentencing and restrictions on access to pornographic and very violent material. In both cases, ANTaR believes that the Government does not have the evidence or the consent of traditional owners and affected Aboriginal communities to undertake these measures. The access restrictions unduly stigmatise Aboriginal men with little evidence that they have had a positive effect on community safety. We recommend withdrawal of both parts of this provision.
25. ANTaR is also concerned about the continuation of the Australian Crime Commission's powers to interrogate subjects in secret and restrict a person's right to silence. These were introduced in the *Families, Community Services and Indigenous Affairs Amendment (Northern Territory National Emergency Response) Bill 2007* under the pretext of targeting child sexual abuse organisations, but four years later no evidence to substantiate these claims has been found.

## **FOOD SECURITY**

26. ANTaR welcomes the Government's commitment to "improve the quality and availability of fresh, healthy food in communities."<sup>9</sup> However, we are concerned that new criminal penalties may be too severe. However, given the prohibitive cost of fresh food in remote communities, ANTaR believes that strategies to improve the quality and availability of food must be complemented by strategies to improve affordability. To this end, ANTaR recommends the application of a fresh food subsidy modelled on an existing Canadian program, Nutrition North America (formerly the Food Mail Program), in which the Canadian Government provides a transport subsidy to food providers in remote, isolated regions which must then be passed on to consumers. This recommendation is detailed in ANTaR's *A Better Way* policy paper and our Pre-Budget Submission.

## **HOUSING AND LAND REFORM**

27. The Stronger Futures Bill states that *Land Reform* (Part 2) has the object of facilitating individual rights and interests (at s. 33(1)) and promoting economic development (s. 33(2)). ANTaR welcomes the increased flexibility that this legislative provision offers and anticipates fruitful negotiations between land title holders, commercial and charitable stakeholders and governments. Nevertheless, ANTaR is concerned about the lack of detail in the Bill about the intended application of these provisions and the broad nature of Executive power.

## **SUNSET AND REVIEW PROVISIONS**

28. Since the beginning of the 'Emergency Response', ANTaR has advocated for the creation of a long-term community development strategy for remote communities in the Northern Territory. We therefore welcome the Government's long-term focus and commitment to working with remote communities to improve safety, health and well-being. However, we are concerned that the provisions in the current bill do not have

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<sup>9</sup> Stronger Futures Policy Statement at 9.



broad community support and continue to undermine rights and entitlements. The 10 year term of the *Stronger Futures Bill* and pornography provisions, with a 7 year review period, provide little opportunity for further consultation or review. Moreover, while welcoming the inclusion of a review provision, we suggest that 7 years is too long to wait before assessing the effectiveness of policies which will have direct and significant impacts on affected communities.

## THE STRONGER FUTURES PROCESS

### Consultation and Special Measures

29. Between the end of June and mid-August 2011, the Department of Families, Housing, Community Services and Indigenous Affairs ('FaHCSIA') conducted consultations with Aboriginal people and other Territorians on the future of the Northern Territory Emergency Response ('NTER'). A discussion paper, *Stronger Futures in the Northern Territory*, was prepared to guide discussions. It outlined the Government's eight priority areas:

- School attendance and educational achievement
- Economic development and employment
- Tackling Alcohol Abuse
- Community safety and the protection of children
- Health
- Food security
- Housing
- Governance

30. Consultations were of two types or 'tiers':

- Tier 1 consultations were meetings between individuals or small groups with Government Business Managers or Indigenous Engagement Officers.<sup>10</sup>
- Tier 2 consultations were 'whole-of-community' meetings conducted by 'experienced senior officers' from the Department of Families, Housing, Community Services and Indigenous Affairs.<sup>11</sup>

31. ANTaR acknowledges the Government's efforts to engage in discussions with Aboriginal people about the proposed changes and welcomes some improvements to consultation practices over time, including increased use of interpreters.

32. However, that is to start from a very low base. We remain concerned that the consultations undertaken by FaHCSIA between June and mid-August 2011, on which the Government has relied to support its legislation, were problematic in both their design and conduct.

33. Given the centrality of consultation and consent to the legality of special measures, this raises questions about the impact of this process on relationships of trust between Government and Aboriginal communities, as well as about the stability of the Government's legislative package.

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<sup>10</sup> Stronger Futures Report on Consultation, October 2011 at 8.

<sup>11</sup> Ibid. op. cit.

## Conduct and Design of Consultation

34. Despite the commission of two extensive analyses of the methodology used in the *Stronger Futures* consultations<sup>12</sup>, ANTaR is aware of widespread concerns about the design and conduct of the consultation program. As the Aboriginal Peak Organisations of the Northern Territory ('APO NT') has noted, the period of consultation (six weeks) and reliance on one, relatively short public consultation session for each community (up to three hours) was not proportionate to such a major legislative change.<sup>13</sup> Further, as with previous consultations, the framing of discussions around limited policy options constrained community input.
35. The restrictions placed on debate hindered meaningful public consultation and must now be revisited in further consultations on specific measures. APO NT notes that the Government precluded discussions of bans on customary law and income management in its Tier 2 consultations.<sup>14</sup> The Government's heavy reliance on community meetings to demonstrate the consent of Aboriginal peoples for all of its measures requires it to maintain a higher standard of rigour and allow for the full expression of views by community members. Given the restrictions placed on discussions, ANTaR does not believe this has occurred.
36. The UN Special Rapporteur on the Rights of Indigenous Peoples, Dr James Anaya, has previously stated that NTER measures "overtly discriminate against aboriginal peoples, infringe their right of self-determination and stigmatize already stigmatized communities".<sup>15</sup> It is therefore incumbent on the Government to engage fully with Aboriginal people in a way that respects their dignity, self-determination and collective rights. The design of the consultation process, including its individual focus, raises larger questions about why Aboriginal peoples' right to collective decision-making was ignored. No attempt was made to engage with existing community governance structures in seeking community views.
37. Expert legal commentary on the principles of Free, Prior and Informed Consent highlight the significance of respecting affected Aboriginal communities' right to determine their position through collective decision-making:

*"These rights, while fully consistent with norms of democratic consultation, are not equivalent to and should not be reduced to individual participation rights. Self-determination and FPIC [free, prior and informed consent], as collective rights, fundamentally entail the exercise of choices*

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<sup>12</sup> See Ibid. Op. Cit. and CIRCA Final Report

<sup>13</sup> Aboriginal Peak Organisations Northern Territory, Response to Stronger Futures, August 2011 at 12.

<sup>14</sup> APO NT, August 2011 at 13.

<sup>15</sup> United Nations Special Rapporteur on the Rights of Indigenous Peoples, Statement of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, James Anaya, as he concludes his visit to Australia, 27 August 2009. At <http://www.unhchr.ch/hurricane/hurricane.nsf/0/313713727C084992C125761F00443D60?opendocument> (viewed 15 January 2012).

*by peoples, as rights-bearers and legal persons about their economic, social and cultural development. These cannot be weakened to consultation of individual constituents about their wishes, but rather must enable and guarantee the collective decision-making of the concerned indigenous peoples and their communities through legitimate customary and agreed processes, and through their own institutions.*<sup>16</sup>

38. The Stronger Futures consultations were undermined by the exclusion of certain matters from discussion and the failure to respect collective decision-making structures in communities.

### **Tier 1 Consultations**

39. ANTaR notes the Federal Government's stated commitment to consult directly with Aboriginal people in the Northern Territory on measures affecting them. Moreover, ANTaR welcomes the Department's efforts to ensure methodological consistency in Tier 2 consultations.<sup>17</sup> However, key details about individual Tier 1 consultations are absent from both major analyses. CIRCA notes that:

*"CIRCA did not observe any Tier 1 consultations or stakeholder meetings, and is therefore unable to comment on these."*<sup>18</sup>

40. Similarly, key questions remain about how the O'Brien Rich Research Group Tier 1 reports were generated, including:

- What questions did Government Business Managers ask impromptu visitors?
- Was there a list of specified questions?
- How long were discussions?
- Were interpreters available on each occasion they were required?
- What proportion of individual respondents were given access to the discussion paper, consultation paper, PowerPoint presentation and other materials available to Tier 2 attendees?
- Were discussions conducted exclusively in government offices or in public?
- Were discussion papers available in languages other than English?
- What documentation was recorded for Tier 1 individual respondents?<sup>19</sup>

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<sup>16</sup> Working Group on Indigenous Populations, Standard-setting: Legal commentary on the concept of free, prior and informed consent, Expanded working paper submitted by Lulia-Antoanella Motoc and the Tebtebba Foundation offering guidelines to govern the practice of Implementation of the principle of free, prior and informed consent of indigenous peoples in relation to development affecting their lands and natural resources, UN Doc E/CN.4/Sub.2/AC.4/2005/WP.1 (2005) at para 45.

<sup>17</sup> See Cultural and Indigenous Research Centre Australia (CIRCA), FAHCSIA Stronger Futures Quality Assurance – CIRCA Final Report, September 2011.

<sup>18</sup> CIRCA, Final Report at 4.

<sup>19</sup> O'Brien Rich Research Group, Stronger Futures Quantitative Analysis Report, September 2011.

## Collecting Results

41. The O'Brien Rich Research Group notes in its detailed quantitative analysis of the Stronger Futures Tier 1 and Tier 2 consultations that:

*"The percentages presented in the tables are quite low. This is because only a limited number of people made any given point in consultations. Any issue in the tables which has a higher than ten percent response could be considered to be relatively important to the consultation participants; more than 20 percent could be considered very important"*

42. ANTaR is concerned that, on this basis, views expressed by a small minority of community members may have been taken to be 'very important' to the broader community.

43. ANTaR acknowledges the difficulties inherent in translating qualitative reports into quantitative data.<sup>20</sup> Nevertheless, the reliance of the Government on the significance of apparently low approval / disapproval rates in legislating major change means that the data must be further interrogated.

## SPECIAL MEASURES

- The Stronger Futures legislation declares that the following are special measures within the meaning of subsection 8(1) of the Racial Discrimination Act 1975 ('RDA'):
  - Part 2 – Tackling Alcohol Abuse, *Stronger Futures in the Northern Territory Bill 2011*<sup>21</sup>
  - Part 3 – Land Reform, *Stronger Futures in the Northern Territory Bill 2011*<sup>22</sup>
  - Part 4 – Food Security, *Stronger Futures in the Northern Territory Bill 2011*<sup>23</sup>
  - Schedule 3—Amendment of the Classification (Publications, Films and Computer Games) Act 1995 ('Classification Act'), *Stronger Futures in the Northern Territory (Consequential and Transitional Provisions) Bill 2011*<sup>24</sup>

44. ANTaR notes the definition of special measures under Article 1(4) of the International Convention for the Elimination of All Forms of Racial Discrimination (CERD):

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<sup>20</sup> See, for example, O'Brien Rich at 2 ('Data Limitations').

<sup>21</sup> Special measure declared at section 7.

<sup>22</sup> Special measure declared at section 33.

<sup>23</sup> Special measure declared at section 37.

<sup>24</sup> Special measure declared at s. 98A, Classification Act.

*Special measures taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals requiring such protection as maybe necessary in order to ensure such groups or individuals equal enjoyment or exercise of human rights and fundamental freedoms shall not be deemed racial discrimination, provided, however, that such measures do not, as a consequence, lead to the maintenance of separate rights for different racial groups and that they shall not be continued after the objectives for which they were taken to have been achieved.*<sup>25</sup>

45. Despite the reinstatement of the RDA in 2010, the absence of a notwithstanding clause has shielded special measures in the NTER from full judicial review.<sup>26</sup> While ANTaR welcomed the reinstatement of the RDA, we believe the Government's current attempt to save measures that arguably discriminate against Aboriginal peoples may be inconsistent with the requirements of the RDA. We urge review of those measures against established legal thresholds<sup>27</sup> for evidence, consultation, consent and demonstrable benefit as necessary to "secure the full and equal enjoyment of human rights and fundamental freedoms".<sup>28</sup>
46. The Australian Human Rights Commission also notes that if alternative, non-discriminatory means of achieving a special measure's objective are available then the measure will not meet the established legal standard.<sup>29</sup> ANTaR has compiled a report on success stories of Aboriginal development, which highlight the evidence for a more sustainable, community-development approach in the Northern Territory.<sup>30</sup> Our *A Better Way* policy paper develops this evidence further, by reference to international research (Appendix A). The Closing the Gap Clearing House report, *What works to overcome Indigenous disadvantage*, presents similar emphatic findings: genuine collaboration and a respect for comprehensive, community-

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<sup>25</sup> Article 1(4), International Convention for the Elimination of All Forms of Racial Discrimination, available at: <http://www2.ohchr.org/english/law/cerd.htm> .

<sup>26</sup> For detailed commentary on the limited applicability of the Act, see Australian Human Rights Commission, Submission to the Senate Community Affairs Committee Inquiry into the Welfare Reform and Reinstatement of Racial Discrimination Act Bill 2009 and other Bills, 10 February 2010. See also, Law Council of Australia, Submission to the Senate Community Affairs Committee Social Security and Other Legislation Amendment (Welfare Reform and Reinstatement of Racial Discrimination Act) Bill 2009, 11 February 2011.

<sup>27</sup> See *Gerhardy v Brown* (1985) 159 CLR 70

<sup>28</sup> Committee on the Elimination of All Forms of Racial Discrimination, General Recommendation no. 32 (2009): the meaning and scope of special measures in the International Convention on the Elimination of Racial Discrimination, UN Doc A/64/19 (Annex VIII) (2009) at paras 11-12.

<sup>29</sup> Australian Human Rights Commission, 11 February 2010.

<sup>30</sup> *A Better Way: Success stories in Aboriginal community-control in the Northern Territory*, available at: <http://antar.streetlinemedia.com/ANTaR.ABetterWay.pdf> at Appendix A.

controlled responses are the only sustainable, effective practices for overcoming disadvantage within the Aboriginal and Torres Strait Islander community.<sup>31</sup>

**Recommendation: ANTaR proposes that the Government's declaration of special measures in Stronger Futures be accompanied by a statement addressing the prerequisites for such measures in the RDA and CERD. Where compliance cannot be found, we request that the Government withdraw the relevant provision.**

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<sup>31</sup> Closing the Gap Clearing House, 2009, What works to overcome Indigenous disadvantage, Canberra: Australian Institute of Health and Welfare.

## 1. IMPROVING SCHOOL ATTENDANCE AND ENROLMENT

- Schedule 2 of the Social Security Bill amends the *Social Security (Administration) Act 1999* to allow Centrelink to require a parent to attend a conference on their child's poor school attendance and agree to a school attendance plan.
- It also empowers Centrelink to suspend a parent's Centrelink payment where that person fails to attend a conference or fails to enter into or comply with a school attendance plan (s. 124 ND, *Social Security (Administration) Act 1999*).
- This modifies the trial SEAM program, by adding additional engagement requirements (conference and plan) prior to payment suspension.

47. As part of its drive to improve school enrolment, attendance, educational achievement and parental responsibility, the Commonwealth proposes to modify and extend the SEAM program, which links school attendance to social security payments. ANTaR recognises the urgent need to improve educational outcomes in the Northern Territory and welcomes the Government's recognition that educational outcomes are linked to other aspects of disadvantage like the availability of housing and safe communities<sup>32</sup>.

48. However, ANTaR also notes with great concern that the 13 week suspension period under SEAM is unprecedented. The Government has provided no justification for the length of the penalty period and we urge Committee members to press the Government on this issue. Whereas 8 week non-payment periods are the maximum social security penalty for failure to comply to job seeker requirements, SEAM empowers Centrelink to suspend designated payments for up to 13 weeks. This includes all social security pensions, benefits, service pensions and income support supplements with the exception of Family Tax Benefit ('FTB'). For a single parent with 2 primary school age children (aged between 8 and 13), this will result in a drop in weekly income from \$484 to \$221 per week.<sup>33</sup> The deprivation suffered by Aboriginal people in the Northern Territory is already extreme. ANTaR is very concerned that families will be forced to go without basic essentials should their income be drastically reduced for such a long period of time. We strongly encourage the Government to withdraw this measure. At a minimum, the suspension period should be reduced.

49. There is no evidence to support the continuation or extension of SEAM, which has been trialled in eight communities (including 6 NT communities) since 2009. As a 2011 evaluation notes, that trial had no impact on attendance rates.<sup>34</sup> Reports that an additional evaluation is being withheld from public release because of adverse findings are of further concern.<sup>35</sup>

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<sup>32</sup> The Hon Jenny Macklin MP, Second Reading Speech, 23 November 2011.

<sup>33</sup> Based on the Newstart Single with dependant children rate, Family Tax Benefit Part A for children under 13 and FTB Part B for youngest child 5-15 years.

<sup>34</sup> Department of Education, Employment and Workplace Relations, Improving School Enrolment and Attendance through Welfare Reform Measure (SEAM) Evaluation Report for the Northern Territory in 2009, January 2011 at 29

<sup>35</sup> Australian Greens, Negative SEAM Evaluations Must Trigger NT Intervention Re-think, Press Release, 22 December 2011.



50. Importantly, linking SEAM to the Northern Territory's *Every Child Every Day* strategy<sup>36</sup> is a step forward in harmonising strategies across Federal and Territory Government. *Every Child Every Day* contains important measures to support active learning and involve local community representatives and Aboriginal Elders in improving school attendance. Changes to the scheme to provide for school conferences and attendance plans are improvements to the scheme, and provide better opportunities for parental engagement. It is vital that the contents of attendance plans are negotiated with and understood by parents and care-givers. It is also important that community leaders and Elders are involved in SEAM decision-making processes where they wish to be. We note that the Cape York welfare reform model is premised on community governance and decision-making and highlight the absence of these factors in the design of most Stronger Futures measures, including SEAM. Should the scheme be maintained despite broad opposition, this would at least give communities greater control over its outcomes and effects. We remain concerned that penalties for non-compliance are uniquely and unjustifiably harsh.
51. Available international evidence on parental sanctions for non-attendance demonstrates that there is little support for sanctions-based measures. ANTaR refers the Committee to ACOSS' submission on the *Schooling Requirements Bill 2008* (which introduced SEAM). This submission surveys international evidence and finds very little support for sanctions based schemes, with stronger support for incentive-based models, but intensive case management the critical variable.
52. As ACOSS has noted in its current submission, comparable social security suspension programs in the United States have had a negligible or statistically insignificant effect on school attendance.<sup>37</sup> A 2005 study noted the cost blow-out in verifying attendance that inevitably accompanies a sanctions-based enrolment measure.<sup>38</sup>
53. The World Bank recently published an analysis of incentive-based school attendance reforms, known as Conditional Cash Transfers ('CCTs'). It concluded that conditional payments for children's education often have only a "modest effect on 'final outcomes' in education".<sup>39</sup> This study looks exclusively at incentive payments given to poor families with directions for use (i.e. supplementary payments usually connected to health or education actions). Nonetheless, the findings are relevant given that sanctions based models are generally even less effective than incentives. The authors' note that while CCTs alleviate short-term poverty and increase use of education services<sup>40</sup>, left unsupported by associated increases to social services or

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<sup>36</sup> Stronger Futures in the Northern Territory Policy Statement at 4.

<sup>37</sup> David Campbell and Joan Wright, 'Rethinking Welfare School Attendance Policies', *Social Service Review*, 79(1), March 2005 in ACOSS, 2012 at 7.

<sup>38</sup> Campbell and Wright, 2005.

<sup>39</sup> Ariel Fiszbein and Nortbert Schady, 2009, *Conditional Cash Transfers*, World Bank Research Report at 21.

<sup>40</sup> *Ibid.* op. cit. at 27.

adequate parental support, “the potential for CCTs to improve learning *on their own* may be limited”<sup>41</sup>. The SEAM model is likely to exacerbate poverty and have an even less significant impact on learning outcomes.

54. In the absence of evidence for SEAM, ANTaR encourages the Government to examine the range of alternative policies available. We urge the Government to take seriously the proposals advanced by communities in consultations, including introducing Aboriginal culture into the curriculum, involving Elders and parents more in school activities, developing mentoring programs for parents, and doing more to attract and retain high quality teachers. We also refer the Committee to our *A Better Way* policy paper (Appendix A) which highlights the importance of an integrated approach between the school and the community, cultural inclusiveness and sensitivity, flexible responses to students needs and improving teaching skills and our Pre-Budget Submission (Appendix B) which makes a number of funding recommendations to improve the accessibility and quality of education.<sup>42</sup>

**ANTaR recommends the withdrawal of Schedules 1 and 2 until sufficient evidence is produced to demonstrate their need.**

## INCOME MANAGEMENT

- Schedule 1 of the Social Security Bill enables the Commonwealth to separately declare new income management areas (including entire states and territories) to be subject to the Child Protection, 'vulnerability' or voluntary schemes, without further consultation.
- Schedule 1 also details the mechanism by which designated State / Territory authorities can refer individuals for income management for a broad and unspecified range of reasons (of up to 70% of payments in child protection cases).

55. In addition to changes to SEAM, the *Social Security Bill* would also enable the extension of compulsory income management related to child protection, 'vulnerability' or under the voluntary scheme to new areas, States or Territories. The Government has indicated that the scheme will initially be extended to five new target sites: Logan, Bankstown, Playford, Shepparton and Rockhampton. However, at this stage the NT seems to be the only State or Territory slated for the roll out of compulsory income management across the jurisdiction. ANTaR is concerned that this may be indirectly discriminatory, with the NT having the highest Aboriginal population in the country.

56. ANTaR opposes compulsory income management and has outlined our concerns about the scheme in a range of policy publications including the *A Better Way* policy paper (Appendix A) and our submission to the Income Management Draft Guidelines in June 2010. In that submission we stated:

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<sup>41</sup> Ibid. op. cit. at 21.

<sup>42</sup> A Better Way, Appendix A at 49.

*“ANTaR reiterates our opposition to the Government’s new compulsory income management scheme. We remain concerned that it will affect broad categories of social security recipients, is not cost-effective and does not respect the rights and dignity of Indigenous or non-Indigenous social security recipients.*

*Although we are pleased that the new scheme will no longer directly discriminate against Indigenous social security recipients, the net effect of the changes will be that an increased number of Indigenous Australians will be affected. Further, we are disappointed that the Government has ignored community calls for changes to voluntary, trigger based and/or community supported models of income management. This was a key theme emerging from recent Government community consultations.”*

57. As noted above, while the measure is not formally or directly racially discriminatory, ANTaR is concerned that the implementation of the scheme is likely to disproportionately affect Aboriginal people and is being rolled out in the jurisdiction with the highest proportion of Aboriginal residents. Sanctions-based social security measures have a history of disproportionately impacting Aboriginal and Torres Strait Islander Peoples. When Welfare to Work was introduced, 68% of North Australians who had their payment suspended were Aboriginal.<sup>43</sup> It is therefore essential to examine to what extent this change is implemented with the consent of Aboriginal people and whether it is demonstrably effective at achieving its goal.
58. As ACOSS has noted, the open-ended extension of income management to new regions and to address new types of community dysfunction is a reversal of the standard policy formulation process. In particular, the Government has sought to develop a policy ‘solution’ without seeking to accurately diagnose the problem.<sup>44</sup> There is an ongoing failure to demonstrate the efficacy of this program or justify its expenditure. It is worth considering whether the cost (approximately \$4,000 per person in the Northern Territory and \$6,000 per person in the five new regions<sup>45</sup>) could be better spent addressing systemic disadvantage or community dysfunction.
59. The lack of guidance in the primary legislation on which State and Territory authorities can make a referral is worrying. Given the serious and direct impact of such a reform on the lives of individuals and their families, it is essential that the Government indicate which State and Territory authorities will be delegated the power to refer social security recipients. As it stands, the legislation does not indicate where the Government intends to expand income management beyond the five target sites, which State and Territory authorities will be undertaking referrals or the evidence base for extending the scheme.

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<sup>43</sup> National Welfare Rights Network, New data uncovers massively increased level of eight week no payment penalties hit Indigenous Australians hardest, Press Release, 14 April 2008

<sup>44</sup> ACOSS, 2012 at 1.

<sup>45</sup> ACOSS, 2012 a 2.

**Recommendations:**

- 1. ANTaR recommends that Schedule 1 (Income Management) be withdrawn from the Social Security Bill in the absence of compelling evidence for its introduction.**
- 2. If this section is not withdrawn, we ask that State/ Territory referrals are delayed until a list of authorities that can refer clients, and on what basis they can refer, is added to the primary legislation.**

## **2. TACKLING ALCOHOL ABUSE**

- Part 2 of the *Stronger Futures in the Northern Territory Bill* introduces new measures to recognise community-developed Alcohol Management Plans ('AMPs') (Division 6) and reinstates a maximum six month in prison for possession<sup>46</sup> (s. 75A).

60. The evidence base for Territory-specific action on alcohol management is well-established, with high levels of alcohol dependency within the Aboriginal and non-Indigenous community.<sup>47</sup> ANTaR is encouraged by the Government's commitment to work in partnership with communities to develop local solutions to the problem of alcohol abuse by enabling communities to develop their own Alcohol Management Plans ('AMPs').

61. However, even though the Government has made moves towards recognising the central role that community leaders and Elders can play in uniting communities behind alcohol measures, the *Stronger Futures* legislation nevertheless continues the legacy of the NTER by maintaining ultimate control over alcohol management in communities. Specifically, the Minister notes that AMPs developed by communities must 'meet stringent guidelines on harm reduction and the protection of vulnerable women and children' and are subject to Ministerial approval.<sup>48</sup>

62. The Government should acknowledge that the majority of dry communities were voluntarily and communally established prior to the passage of the NTER and, in doing so, make resources available to community leaders and Aboriginal Elders to act in concert with their communities in tailoring and implementing their own AMP.

63. ANTaR agrees with the Government that blanket "restrictions are not a long term solution"<sup>49</sup>. We share the concerns of NT organisations that the current restrictions have pushed people into unsafe drinking areas far away from communities and services.

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<sup>46</sup> The NTER over-rode the Liquor Act NT which provides a maximum penalty of 6 months imprisonment for possession at s. 75(1).

<sup>47</sup> Chondur Ramakrishna and Wang Zaimin, *Alcohol Use in the Northern Territory*, October 2011, NT Department of Health.

<sup>48</sup> *Ibid.* op. cit.

<sup>49</sup> The Hon Jenny Macklin MP, Senator Trish Crossin and the Hon Warren Snowdon MP, *Education, jobs and tackling alcohol abuse the key to building stronger futures in the Northern Territory*, Media Release, 14 November 2011.

64. We recommend a transition to AMPs across the Northern Territory. We also advocate for resources to support communities to undertake the community consultation and engagement process required to ensure broad community support and legitimacy (see *A Better Way* policy paper at Appendix A and ANTaR Pre-Budget Submission 2012-13 at Appendix B).
65. ANTaR supports changes to enable Ministerial requests for liquor licenses to be assessed where there is concern that the sale of alcohol is causing 'substantial alcohol related harm to Aboriginal people.' More information about the process of notifying the Minister of such harm and bringing her attention to relevant licensees should be provided to ensure that communities are able to trigger this process.
66. Finally, we oppose the continuation of commercial fishing and boating exceptions from alcohol restrictions as inequitable.

**Recommendation:**

- 1. Provide additional resources to assist community leaders and Aboriginal Elders to develop AMPs with their communities as per Recommendation 10 in ANTaR's Pre-Budget Submission 2012-13.**
- 3. Implement a minimum alcohol price established through volumetric taxation.**

**Alcohol penalties**

67. Perhaps the most worrying aspect of the current package of legislative changes is the reinstatement of 6 month prison sentences as a maximum penalty for illegally possessing any quantity of alcohol. By legislating a maximum six month imprisonment for simple possession of under 1,350 milliliters of alcohol, the legislation permits custodial sentences for possession of negligible quantities of alcohol. While we acknowledge this simply restores the penalties that existed before the NTER legislation, these measures are harsh, unnecessary and will exacerbate the epidemic of incarceration amongst Aboriginal Peoples in the Northern Territory. In 2008, Aboriginal and Torres Strait Islander peoples in Australia were fourteen times more likely to be incarcerated than their non-Indigenous counterparts<sup>50</sup> while the Northern Territory had the fastest growing rate of imprisonment and the highest proportion of Aboriginal and Torres Strait Islander prisoners (82%) in 2011<sup>51</sup>.
68. We reject imprisonment as an effective response to alcohol abuse, and believe that severe criminal penalties are likely to exacerbate social problems in communities. We therefore urge the Government to use diversionary responses in cases of bringing, possessing, consuming or controlling less than 1.35 litres of alcohol.

<sup>50</sup> Australian Institute of Criminology, Deaths in Custody in Australia: National Deaths in Custody Program 2008, Monitoring Report 10. At: [http://www.aic.gov.au/documents/B/2/5/%7BB25DD4D6-E0CF-4688-99CD-7A4EE3D149B2%7Dmr10\\_001.pdf](http://www.aic.gov.au/documents/B/2/5/%7BB25DD4D6-E0CF-4688-99CD-7A4EE3D149B2%7Dmr10_001.pdf) (viewed 17 January 2012).

<sup>51</sup> Australian Bureau of Statistics, 4517.0 - Prisoners in Australia, 8 December 2011. At: <http://www.abs.gov.au/AUSSTATS/abs@.nsf/Lookup/4517.0Explanatory%20Notes12011?OpenDocument> (viewed 17 January 2012).

69. More broadly, ANTaR advocates a justice reinvestment framework within which funding can be directed towards early intervention and diversionary initiatives to reduce the Aboriginal prison population. The House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs has endorsed this approach, noting that:

*The Committee supports the principles of justice reinvestment and recommends that governments focus their efforts on early intervention and diversionary programs and that further research be conducted to investigate the justice reinvestment approach in Australia.*<sup>52</sup>

70. As part of this framework, we advocate the following tangible reforms:

- Ongoing support for effective community safety initiatives, including night patrols;
- More support and resources to community-directed law and justice mechanisms;
- Programs and education to promote better understanding of Aboriginal culture among police, and a willingness to adopt community approaches to policing;
- Changes to enable Aboriginal communities to play a meaningful role in community safety and foster constructive partnerships with key stakeholders in the mainstream justice system.

71. For more information, see the ANTaR publication, *A Better Way*, at Appendix A.

### **Minimum Floor Price on Alcohol**

72. ANTaR echoes APO NT and the National Indigenous Drug and Alcohol Council (NIDAC) in their support for a minimum floor price on alcohol across the NT as the most effective and non-discriminatory way to restrict the supply of alcohol. This can be achieved by enacting a Territory-wide volumetric tax (similar to the alcopops tax implemented nationally in 2008) which is graduated to ensure low alcohol-content drinks are financially preferable.<sup>53</sup> The revenue raised must then be reinvested in childhood education programs, culturally-appropriate treatment and rehabilitation and support services for those with alcohol dependency issues.

#### **Recommendation:**

- 1. Withdraw 6 month imprisonment maximum penalties in favour of diversionary approaches.**
- 2. Amend the Stronger Futures legislation to introduce a tax to bring up the minimum price of alcohol to a level developed in good faith negotiations between government-appointed experts and representatives appointed by affected**

<sup>52</sup> House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs, *Doing Time - Time for Doing: Indigenous youth in the criminal justice system*, June 2011.

<sup>53</sup> NIDAC, *Addressing harmful alcohol use amongst Indigenous Australians*. At: [http://www.nidac.org.au/index.php?option=com\\_content&view=article&id=91%3Aaddressing-harmful-alcohol-use-amongst-indigenous-australians&catid=37&Itemid=63](http://www.nidac.org.au/index.php?option=com_content&view=article&id=91%3Aaddressing-harmful-alcohol-use-amongst-indigenous-australians&catid=37&Itemid=63) (viewed 18 January 2012).

**Aboriginal peoples. Use the funds to invest in childhood education programs, culturally appropriate treatment and rehabilitation and support services for those with alcohol dependency issues.**

### 3. COMMUNITY SAFETY AND THE PROTECTION OF CHILDREN

- Schedule 3 of the Transitional Provisions Bill would save an amendment to Part 10 of the Classification (Publications, Films and Computer Games) Act 1995 ('the Classification Act') made under the NTER legislation which allows the Minister for Indigenous Affairs to declare certain parts of the NT 'prohibited material areas' (previously 'prescribed material areas') and thereby ban very violent or pornographic material.
- The Transitional Provisions Bill would institute new criteria for evidence, consultation and the well-being of affected communities which the Minister must have regard to when making a determination to apply, revoke or vary a prohibited material area declaration (s. 100A(6)) or cease operation of any provision in Part 10 of the Classification Act (s. 115(5)).
- The Explanatory Memorandum notes that s. 98A of the Classification Act deems this provision to be a special measure.<sup>54</sup>
- The Bill would insert a sunset provision in the Classification Act (s. 116) and require a parliamentary review to be caused by the Minister 7 years after commencement (s. 114).
- Schedule 4 of the Transitional Provisions Bill would save exclusions on the consideration of customary law in bail and sentencing with the exception of minor changes which seek to protect cultural artefacts and sites.
- The Australian Crime Commission's extraordinary powers are continuing in existing legislation.

73. ANTaR considers the renewal of prohibitions on prohibited material to be unjustified and is concerned that their continuation may not be supported by local communities, and should not be classified as a 'special measure'. The Australian Government declares that a majority of respondents were in favour of ongoing restrictions on classified material.<sup>55</sup> However, in the face of the consultation's shortcomings (as detailed above), it is difficult to argue that the process was conclusive or adequate given the magnitude of changes proposed. The lack of quantitative data in the consultation report (i.e. how many people supported the proposals and what questions were they asked?) and the impact of taboos on public discussions of pornography<sup>56</sup> only heighten concerns that the views of affected Aboriginal people may have not yet been adequately canvassed. The shame and distress expressed by many community members regarding the nature of signage banning pornography also raises concerns about the continuation of this measure. Although we note the Government's commitment to respectful signage, we question how signage related to pornography will meet this criteria given the sensitivity of the subject matter and associated stigma.

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<sup>54</sup> Stronger Futures in the Northern Territory (Consequential and Transitional Provisions) Bill 2011 Explanatory Memorandum at 12

<sup>55</sup> Australian Government, Stronger Futures in the Northern Territory Report on Consultations, October 2011 at 48.

<sup>56</sup> For example, CIRCA reports that there were "a few communities where participants were reluctant to discuss pornography", Final Report at 13.



74. In the absence of community consent, it is difficult to argue that the restrictions in Schedule 3 are justified. The Aboriginal and Torres Strait Islander Legal Services ('ATSILS') note that they have not observed "any discernible increase in the number of persons charged with possessing pornography, despite an increased police presence in prescribed areas".<sup>57</sup>
75. Moves to introduce more flexibility into the implementation of these bans, including giving the Minister power to apply, vary or revoke a prohibited material area declaration are an improvement to the current situation.
76. In particular, we note that the Minister would have to consider a range of factors when making a decision to apply, lift or vary pornography bans. These criteria include:
- the well-being of people living in the area;
  - whether there is reason to believe that people living in the area have been the victims of violence or sexual abuse;
  - the extent to which people living in the area have expressed their concerns about being at risk of violence or sexual abuse;
  - whether there is reason to believe that children living in the area have been exposed to prohibited material; and
  - the extent to which people living in the area have expressed the view that their well-being will be improved if the ban were to be lifted (s. 115(5) and s. 100A(6)).
77. However, in the absence of clear, strong community support for these changes and the risk that the measures will continue "stigmatising already stigmatised communities"<sup>58</sup>, ANTaR recommends the removal of Schedule 3 of the Transitional Provisions Bill.

**Recommendation: Withdraw Schedule 3 amendments in the *Transitional Provisions Bill*.**

78. The Transitional Provisions Bill inserts new provisions which require the Indigenous Affairs Minister to provide the following when considering whether to apply or revoke a prohibition (Item 4 - s. 100A(4)) or deciding whether to cease the operation of any part of the provisions of Part 10 of the Classification Act (Item 14 - s. 115(3)):
- (a) *information setting out:*
- (i) *the proposal to make the determination; and*
  - (ii) *an explanation, in summary form, of the consequences of the making of the determination;*
- has been made available in the area; and*

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<sup>57</sup> ATSILS and APO NT, The Future of the Northern Territory 'Intervention' - Issues Paper, November 2010 at 8.

<sup>58</sup> United Nations Special Rapporteur on the Rights of Indigenous Peoples, Statement of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, James Anaya, as he concludes his visit to Australia, 27 August 2009. At <http://www.unhcr.ch/hurricane/hurricane.nsf/0/313713727C084992C125761F00443D60?opendocument> (viewed 15 January 2012).

*(b) people living in the area have been given a reasonable opportunity to make submissions to the Indigenous Affairs Minister about:*

*(i) the proposal to make the determination; and*

*(ii) the consequences of the making of the determination; and*

*(iii) their circumstances, concerns and views, so far as they relate to the proposal.*

79. However, a subsequent qualifying statement in Item 4 - s. 100A(5) notes that a failure to abide by this requirement would not affect the validity of determinations to cease operation of a provision of Part 10. Similarly, the new subsection 115(4) would ensure that a determination to apply, revoke or vary a prohibited material area declaration would still be valid in cases where the Minister has failed to comply with these important information and consultation requirements. These important new consultation provisions would therefore be stripped of practical effect.

80. New consultation provisions would be a step forward if subsequent clauses did not render them effectively meaningless. If the Parliament is not prepared to withdraw this provision, we recommend removing caveats in the current bill on the community consultation requirements.

**Recommendation: If the Schedule is not withdrawn, withdraw the caveats on consultation requirements.**

### **Customary Law**

81. ANTaR is concerned that bans on consideration of customary law in bail and sentencing are being extended “to help protect women and children from violence and abuse” without evidence of any links between customary law and family violence established.<sup>59</sup> ANTaR calls on the Commonwealth Government to withdraw provisions, which preclude a sentencing court from taking into account customary legal issues in bail and sentencing proceedings.

82. Like many of the measures in this Bill, the measure seems to go well beyond its stated objective. In particular, if the Government is concerned about the application of customary law in family violence cases, it should present evidence to support these concerns. This also begs the question of why such a broad exclusion is necessary to meet this objective.

83. ANTaR reminds the Government of its commitment under Article 34 of the UN Declaration on the Rights of Indigenous Peoples that:

*Indigenous peoples have the right to promote, develop and maintain their institutional structures and their distinctive customs, spirituality, traditions, procedures, practices and, in the cases where they exist, juridical systems or customs, in accordance with international human rights standards.<sup>60</sup>*

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<sup>59</sup> Stronger Futures Policy Statement at 8.

<sup>60</sup> Article 34, UN Declaration on the Rights of Indigenous Peoples, UN Doc A/61/295.

84. Sanctions which seek to restrict the extent to which a court can consider customary law issues in bail and sentencing are a violation of this commitment.
85. In practical terms, these bans will continue to result in sentencing, which Southwood J. has noted, “distorts well established sentencing principle of proportionately and may result in the imposition of ... disproportionate sentence.”<sup>61</sup> In seeking to exclude customary law from bail and sentencing, the Government ignores compelling evidence, highlighted in the *Little Children are Sacred* report, that Aboriginal law should be an important part of efforts to restore social norms in the Northern Territory.<sup>62</sup>

**Recommendation: ANTaR requests the withdrawal of Schedule 4 of the Transitional Bill, in the absence of compelling evidence for exclusions on consideration of customary law in bail and sentencing.**

### **ACC Powers**

86. The permanent establishment of extraordinary powers for the Australian Crime Commission’s (‘ACC’) National Indigenous Child Abuse and Violence Intelligent Taskforce (‘NIITF’) in the Northern Territory is at odds with the Government’s stated intention to move beyond ‘emergency response’. Some of the more draconian aspects of the ACC’s powers include the fact that individuals cannot inform anyone that they have been questioned by the NIITF<sup>63</sup> and the removal of the right to silence. Neither of these extreme measures should be enshrined permanently in our laws. Furthermore, the basis for introducing the powers was the alleged prevalence of organised child sex abuse rings in remote communities; allegations which have been rejected by the ACC itself<sup>64</sup>. ANTaR calls on the Government to withdraw these powers.

**Recommendation: Special powers for the Australian Crime Commission and Australian Federal Police should be withdrawn. Failing that, a sunset period should be inserted.**

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<sup>61</sup> Southwood J in R v Wunungmurra [2009] NTSC 24, 9 June 2009 at [25].

<sup>62</sup> See, in particular, Recommendation 72, Northern Territory Board of Inquiry into the Protection of Aboriginal Children from Sexual Abuse, *Little Children are Sacred*, 15 June 2007 at 30.

<sup>63</sup> NAAJA, *Aboriginal Communities and the Police’s Taskforce Themis: Case studies in remote Aboriginal community policing in the Northern Territory*, October 2009 at 163.

<sup>64</sup> Nick McKenzie, ‘Pedophile ring claims unfounded’, *The Age*, 5 July 2009.

### 3. FOOD SECURITY

87. The *Stronger Futures* bill would introduce some changes to the current community store licensing program, including more severe penalties for licensing breaches. Access to fresh, healthy food for all communities is an important goal in tackling some of the health problems faced by Aboriginal peoples in the Northern Territory. However, it is foreseeable that restrictive licensing requirements may raise the price of food beyond what many people in targeted communities can afford. Recognising the impact that material deprivation has played on health problems in Aboriginal communities in the Northern Territory, it is essential that the licensing scheme does not contribute to price inflation. We are also concerned about the introduction of criminal penalties which seem to be unnecessarily coercive.
88. In this next stage of the Government's response, steps must be taken to improve affordability, noting the prohibitive cost of fresh food in remote communities. We therefore advocate for the creation of a fresh food tax and transport subsidy to reduce the cost of food for consumers in NT communities. We suggest that such a scheme could be modeled on a similar Canadian program, Nutrition North America (formerly the Food Mail Program), with the Canadian Government providing a transport subsidy to food providers in remote, isolated regions. Under the scheme, funding is based on the total weight of fresh food products shipped to eligible communities, who must then pass on the savings to consumers. The program receives \$60 million CA per year.

**Recommendation: Introduce fresh food tax and transport subsidies to improve access to affordable, healthy food for remote communities.**<sup>65</sup>

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For more information, see ANTaR's Pre-Budget Submission, Recommendation 13.

#### 4. HOUSING AND LAND REFORM

- Land Reform (Part 3) would enable the Executive to make regulations with respect to the use of land, dealings in land, planning, infrastructure or any matter prescribed by the regulations as they relate to Town Camps (s. 34(1)) or Community Living Areas (s. 35(1)).
- The Government has made a commitment that it will not be extending compulsory five-year leases of Aboriginal land acquired under the NTER.

89. ANTaR welcomes the Government's commitment not to renew compulsory five-year leases over Aboriginal land in the Northern Territory and to instead seek to negotiate voluntary leases.

90. We also welcome increased leasing flexibility as an opportunity for fruitful negotiations between land title holders, their representatives, the government, social service organisations and relevant commercial interests. However, we are concerned by the lack of transparency under Part 3 of the *Stronger Futures in the Northern Territory Bill 2011* which makes analysis of proposed changes to Town Camps and Community Living Areas difficult. ANTaR is very concerned by the over-reliance on disallowable instruments, including in this instance. In addition to a statement justifying the application of special measures in this case, it is essential for the transparency of the legislative process that the Government detail its plans for land reform in the primary legislation. In particular, what special measures does the Government envisage "to facilitate the granting of individual rights or interests"<sup>66</sup> or "promote economic development"<sup>67</sup> in town camps and community living areas? ANTaR recommends, that the Government add detail to *Land Reform* following dialogue with title holders.

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<sup>66</sup> Section 33(a), *Stronger Futures in the Northern Territory Bill 2011*.

<sup>67</sup> Section 33(b), *Stronger Futures in the Northern Territory Bill 2011*.

## Individual Property Rights

91. The lack of specificity in Part 3 of the *Stronger Futures in the Northern Territory Bill 2011* invites contemplation of retrograde policies that could be advanced in the name of the broader principles to promote individual rights and economic development. There are few safeguards in the bill to limit Executive discretion.
92. While ANTaR is not in-principle opposed to the development of private dwelling or subdivision of title, the market value of land in remote communities means that there is not necessarily capacity for capital gains to be realised from the sale of property as in other parts of the Australian property market. Attempts to use title to increase individual prosperity or deal with more complex and comprehensive social deprivation are therefore unlikely to be successful in many community living areas and town camps.

**Recommendation: Part 3 of the *Stronger Futures in the Northern Territory Bill 2011* should be amended to insert proposed changes to the uses of town camps and community living areas in the Northern Territory following negotiation and agreement with the Northern and Central Land Councils, and title holders.**

## Housing

93. ANTaR welcomes the Government's commitment to developing and improving the quality of housing for Aboriginal people in the Northern Territory. ANTaR notes the Stronger Futures' policy statement's commitment to ensure appropriate standards for the provision of social housing, irrespective of provider, and extend NT building protections to remote communities.
94. Most recently, we note the Minister's comments that "more than 350 new houses have been built and another 275 are underway. More than 1,800 rebuilds and refurbishments of houses are also complete."<sup>68</sup>
95. ANTaR's policy paper, *A Better Way*, at Appendix A provides tangible solutions to address acute housing need in the Northern Territory. In particular, we note that while Stronger Futures restates the Government's commitment to building and repairing housing as a 'top order priority', it also signals its intention to continue along its current reform trajectory.
96. Although some progress has been made towards addressing housing need through the National Partnership Agreement on Remote Indigenous Housing, only a limited number of communities are currently scheduled to receive new housing and homeland communities have been excluded from any further new housing. As APO NT highlighted in its recent response to Stronger Futures, current housing funding extends only to 2013 and targets a small number of locations through the 'priority communities' model.<sup>69</sup>

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<sup>68</sup> The Hon Jenny Macklin MP, Second Reading Speech, 23 November 2011.

<sup>69</sup> APO NT, 2011 at 37.

97. ANTaR seeks a bipartisan commitment to sustained investment in NT communities to meet housing needs, recognising that needs, if not met, will grow even more acute as the Aboriginal population grows. Such funding must extend to include homelands and outstations, currently subject to a moratorium on new housing funding. There is also a critical need for ongoing funding for the maintenance of existing housing stock. Without such funding, the deterioration in housing stock will present health and safety risks to residents and result in capital depreciation. ANTaR refers the Committee to housing recommendations 7 and 8 of our Pre-Budget Submission at Appendix B.

## 5. REVIEW AND SUNSET PROVISIONS

- The Stronger Futures Bill and the Transitional Provisions Bill include review provisions, which provide for review after up to seven years of operation and sunset 10 years after commencement.

98. Since the beginning of the 'Emergency Response', ANTaR has advocated for the creation of a long-term community development strategy for remote communities in the Northern Territory. In doing so, we echo the Department of Finance and Deregulation's *Strategic Review of Indigenous Expenditure*:

*'The deep-seated and complex nature of Indigenous disadvantage calls for policies and programs which are patient and supportive of enduring change (including in the attitudes, expectations and behaviours of Indigenous people themselves). A long-term investment approach is needed, accompanied by a sustained process of continuous engagement.'*<sup>70</sup>

99. We therefore welcome the Government's long-term focus and commitment to working with remote communities to improve safety, health and well-being. However, we are concerned that the provisions in the current bill do not have broad community support and continue to undermine rights and entitlements. We are also concerned that communities were not notified of the intended duration of the legislation during the consultation process. The 10-year term of the legislation, with a 7-year review period, provides little opportunity for further consultation or review. Moreover, while welcoming the inclusion of a review provision, we suggest that 7 years is too long to wait before assessing the effectiveness of policies which will have a direct and serious impact on communities. We recommend shorter sunset and review periods. Should the SEAM provisions not be withdrawn, we advocate for a sunset period of maximum 5 years.

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<sup>70</sup> Department of Finance and Deregulation, *Strategic Review of Indigenous Expenditure*, 2010 at 15.