

**AMNESTY
INTERNATIONAL**



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

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Submitted by

Amnesty International Australia

About Amnesty International

Amnesty International is a worldwide movement to promote and defend all human rights enshrined in the *Universal Declaration of Human Rights (UDHR)* and other international instruments. Amnesty International undertakes research focused on preventing and ending abuses of these rights. Amnesty International is the world's largest independent human rights organisation, comprising of more than 3 million supporters in more than 160 countries and has over 140,000 supporters in Australia. Amnesty International is impartial and independent of any government, political persuasion or religious belief. It does not receive funding from governments or political parties. In August 2011 Amnesty International released *The Land Holds Us* report, which catalogues how Aboriginal Peoples' right to their traditional lands is being eroded in the Northern Territory. Amnesty International is committed to ensuring the *Declaration on the Rights of Indigenous Peoples* is implemented locally and nationally through legislation, policies and programs.

Introduction

Since the rollout of the Northern Territory Emergency Response (NTER) in 2007, there has been much criticism that the measures are punitive, discriminatory and were introduced without consent of the Aboriginal communities affected.¹ The evidence of the measures' effectiveness has been described as ambiguous at best.² The negative impact of the NTER on Aboriginal communities has been well documented³

After the Australian Government's own critical review of the NTER in 2009⁴, it committed to resetting the relationship with Aboriginal and Torres Strait Islander Peoples. The investment in the Northern Territory is welcome as is the positive focus on education, job creation and the recognition that consultation is fundamental to a program's success. However, the Stronger Futures legislation and policies do not represent a change in either design or approach. They do not meet the minimum standards under international law and there is only marginal evidence that the measures will work.

Amnesty International response to Stronger Futures Bills Social Security Amendment Act

Free, Prior and Informed Consent

Amnesty International believes there is a substantial gap between the approach the Australian Government has publicly committed to undertaking in regards to resetting the relationship and community engagement and the actual policies being introduced.

Stronger Futures was developed without genuine community engagement or partnership with Aboriginal communities. The consultations that did occur do not meet international standards for free, prior and informed consent.

Indigenous Peoples have strong rights to consent and participation in international law. The *UN Committee on Economic, Social and Cultural Rights* has provided a clear articulation of the rights of effective participation and informed consent and considers it as a fundamental aspect of non-discrimination. This is set out in the Committee's General Recommendation

XXIII, which requires States to “ensure that Indigenous Peoples have rights in respect of effective participation in public life and that no decisions relating to their rights and interests are taken without their informed consent”.⁵

Article 19 of UNDRIP declares that “States shall consult and cooperate with the Indigenous Peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them”.

In all matters affecting Aboriginal Peoples’ lands, communities and housing, there needs to be a robust process of consultation that recognises the specific traditions and circumstances of those affected. According to the UN Special Rapporteur on the Rights of Indigenous Peoples, “without the buy-in of Indigenous Peoples, through consultation, at the earliest stages of the development of government initiatives, the effectiveness of government programmes, even those that are intended to specifically benefit Indigenous Peoples, can be crippled at the outset”.⁶

A 2005 UN workshop on Free Prior and Informed Consent methodologies translated the principle into guidelines for its application. It established that:

Free should imply no coercion, intimidation or manipulation

Prior should imply that consent has been sought sufficiently in advance of any authorisation or commencement of activities and that respect is shown for time requirements of Indigenous consultation/consensus process.

Informed should imply that information is provided that covers aspects such as the nature, size, pace, reversibility and scope of the proposed activity; the reason(s) for or purposes(s); duration; the locality affected; and a preliminary assessment of the likely economic, social, cultural and environmental impact.⁷

In respect of consent, the workshop concluded:

Consultation and participation are crucial components of a consent process.

Consultation should be undertaken in good faith.

The parties should establish a *dialogue* allowing them to find appropriate solutions in an atmosphere of mutual respect in good faith, and full and equitable participation.

Further clarification about the duty to consult is outlined by the Special Rapporteur, James Anaya: “In all cases which Indigenous Peoples’ particular interests are affected by a proposed measure, obtaining their consent should, in some degree, be an objective of the consultations. As stated this requirement does not provide Indigenous Peoples with a ‘veto power’ but rather establishes the need to frame consultation procedures in order to make every effort to build consensus on the part of all concerned.”⁸

In 2010, the Productivity Commission identified the following success factors for overcoming Indigenous disadvantage and cautioned that the lack of any of these factors could result in program failure:

- Cooperative approaches between Indigenous people and government – often with the non-profit and private sectors as well
- Community involvement in program design and decision-making - a ‘bottom-up’ rather than ‘top-down’ approach
- Good governance – at organisation, community and government levels

- Ongoing government support – including human, financial and physical resources⁹.

Amnesty International has heard first-hand and through other organisations based in the Northern Territory the huge levels of disappointment at the nature of the Stronger Futures legislation. The measures within the Bills were introduced to Federal Parliament without proper feedback from communities. It was relayed to Amnesty International that at many of the consultations, government representatives committed to going back to communities before specific legislation and policies would be considered by Parliament.

Amnesty International welcomes provisions in the Stronger Futures Bill that require the Minister to consult with affected Indigenous communities before making decisions on matters such as alcohol management plans, regulations relating to town camps and community living areas, and community store licences. These are a positive step towards upholding the right of Indigenous Peoples to participate in decision-making on matters which would impact on their rights. However, Amnesty International stresses that if these sections of the Stronger Futures Bill are to be effective, the Australian Government must ensure that the consultation process in each case is of the highest standard.

Amnesty International is seriously concerned, that the Stronger Futures Bills do not impose any consequences for a failure to consult with Indigenous Peoples affected. The legislation repeatedly provides an ‘escape clause’ to a decision-maker who does not consult with the Indigenous Peoples. It states: “a failure to comply with [consultation requirements] does not affect the validity of the regulations.”¹⁰ Amnesty International believes that any such ‘escape mechanism’ reflects poorly on the Australian Government’s commitment to its human rights obligations and fails to ensure that meaningful consultation with Indigenous Peoples will actually occur.

Lack of evidence

Education is a fundamental building block for development and Amnesty International does not dispute the need to strengthen education outcomes for Indigenous Peoples. However, Amnesty International is gravely concerned that measures including the expansion of the School Enrolment and Attendance Measure (SEAM) and targeted place-based income management are being introduced without evidence that they are effective or improve the lives of those affected.

The Committee on the Convention of the Rights of the Child (CCRC) recognises that education of Indigenous children contributes both to their individual and community development as well as to their participation in the wider society.¹¹ Further, it sees quality education as an essential means of achieving individual empowerment and self-determination of Indigenous Peoples.¹²

The school attendance scheme was introduced as a trial as part of the NTER. The outcomes and full review of the school attendance scheme has yet to be completed. It is concerning that the Australian Government is intending on expanding SEAM prior to an evaluation of the trial being made. There is no evidence indicating whether the threat of withdrawal of income support works to create behaviour change in relation to children’s school attendance or in improved learning outcomes.

As outlined in a joint statement of Aboriginal peak bodies, community members as part of the Stronger Futures consultations recommended the introduction of culture into the curriculum, involving elders and parents more in school activities, developing mentoring programs for parents, and doing more to attract and retain good teachers. “This fits with what the research shows works. Aboriginal communities and peak organisations have also been calling for the reinstatement of bilingual learning for the same reason, because it works”.¹³

Amnesty International also warns that suspending welfare payments constitutes a violation of the right to social security as that right encompasses a prohibition on the taking of retrogressive measures.¹⁴ A retrogressive measure is one that reduces existing levels of social security benefits or denies benefits to persons or groups previously entitled to them.¹⁵ A retrogressive measure may only be introduced if it can be justified by reference to the totality of rights guaranteed by the *International Covenant on Economic, Social and Cultural Rights*.¹⁶ It is not clear that the measures are justified by the right to education, as there would likely be other ways to work towards realising the right to education that do not involve breaching the right to social security.

Amnesty International is also perplexed at the rationale for expanding income management to Playford (SA), Bankstown (NSW), Shepparton (Vic) and Rockhampton and Logan (Qld)¹⁷ considering the Australian Government's own evaluations of the existing program.

The Australian Government's own NTER Evaluation Report released in November last year states: *blanket imposition of Income Management -in combination with other changes, such as local government reform, shire amalgamation and loss of local councils; changes to the Community Development Employment Projects (CDEP) program; the loss of the permit system; and changes in land tenure, contributed to people's feeling of a loss of freedom, empowerment and community control.*¹⁸

The report went onto to say: *"There is some evidence suggesting that welfare reform had some positive effects, although the limitations of the evaluations and consultations conducted to date mean that further research is necessary to confirm those findings"*¹⁹.

Amnesty International also notes the findings of the report to Cabinet on Indigenous expenditure released under Freedom of Information in 2010. The review undertaken by the Department of Finance and Deregulation states: *"despite some anecdotal and evidence based indications of success with income management amongst Indigenous communities in the Northern Territory, it is still too early to confidently argue that the income management program is helping to strengthen Indigenous families by ensuring that welfare is spent 'on the essentials of life and in the interests of children' rather than being spent on dysfunction activities"*²⁰. The Review recommends the need to *"ensure that comprehensive and authoritative data are available to inform the planned evaluation of the Income Management program that is required by 2013"*.²¹

This Review also advised that the estimated cost of delivering the Income Management program is between \$5,000 and \$5,500 per person per annum. Considering the significant cost this proposed expansion represents, it is hard to fathom how the Australian Government can consider initiating such major expenditure on policy for which there is no evidence to affirm its effectiveness or benefit to people's lives.

Homelands

Articles 3 and 4 of UNDRIP state that Indigenous Peoples have a right to self determination, and by virtue of this right they must be able to freely determine their political status, and freely pursue their economic, social and cultural development. Further, in exercising their right to self determination, Indigenous Peoples have the right to autonomy in matters relating to their internal and local affairs as well as ways and means for financing their autonomous functions. Part of this relates to the fundamental human right which all Indigenous Peoples have to their traditional lands. This right enables Indigenous Peoples to fully enjoy their economic, social and cultural human rights. For Aboriginal Peoples in the Northern Territory

this connection to traditional lands or 'country' is of central importance to Aboriginal identity and culture.

Homelands support approximately 35 percent of Aboriginal Peoples in the Northern Territory.²² Evidence shows that homelands have important social and health benefits for Aboriginal Peoples in the Northern Territory. As such, a plan for Stronger Futures in the Northern Territory should include concrete support for people who choose to live on their traditional lands. The many benefits of homelands are clear. The United Nations Special Rapporteur on the Rights of Indigenous Peoples noted the social and health benefits of living on homelands:

Homelands are widely understood to have lower levels of social problems, such as domestic violence and substance abuse, than more populated communities. According to reports, the health of Indigenous people living on homelands is significantly better than of those living in larger communities. Homelands are also used effectively as part of substance abuse and other programmes for at-risk Aboriginal youth living in more populated or urban centres.²³

Homeland residents have participated in various health research projects over the last 20 years. These studies point strongly to significant improvements in health outcomes for Aboriginal Peoples in remote areas if they live in homeland communities, compared with Aboriginal Peoples who live in major towns.²⁴ Homelands are seen as places of respite. Many play a role in rehabilitation of addicts and offenders.²⁵

Raising families on homelands means that people maintain their spiritual and economic connections to their land and waters or 'country'. It means they can raise their children within their own cultural context, away from the marginalisation and discrimination that confronts Indigenous Peoples in larger towns and settlements. This gives Aboriginal People cultural security. One of the benefits of homelands is that Aboriginal Peoples have some measure of community control and agency and there are many examples of strong governance models and community-based decision making.²⁶

However, despite the benefits of homelands, there has been no serious coordinated and comprehensive commitment to the long-term health and sustainability of Aboriginal Peoples' homelands.²⁷ A 2008 Senate Select Committee report on regional and remote Indigenous communities concluded that it is the "ambiguity and even absence of policy ... that is having a large impact on the wellbeing of these communities". Stronger Futures provides the Australian Government with an opportunity to develop this strategy.

The Australian Government must incorporate into its Stronger Futures policy a commitment to implement, in consultation with homeland communities, an overarching plan to ensure the long-term sustainability of homelands.

Recommendations

- Amnesty International urges the Australian Government, as a signatory to the UN *Declaration on the Rights of Indigenous Peoples* (UNDRIP), to adhere to the principles enshrined within it. Amnesty International believes that this would lay the foundations for a true partnership between the Australian Government and Aboriginal communities in the Northern Territory.
- When scrutinising the Stronger Futures Bills it is important for members of the Senate Community Affairs Committee to consider the implications of the proposed measures and how they will directly affect Aboriginal Peoples as well as ensure that they meet the minimum standards set in international law.

- Amnesty International calls on the Stronger Futures and related Bills to be assessed by the newly established Parliamentary Joint Committee on Human Rights. Given that the NTER has been shown to violate the rights of Aboriginal Peoples, policies that come into effect when the NTER legislation expires must be afforded the highest level of parliamentary scrutiny.
- The Australian Government must incorporate into its Stronger Futures policy a commitment to implement, in consultation with homeland communities, an overarching plan to ensure the long-term sustainability of homelands.

- ¹ See: Special Rapporteur, *Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People* UN Doc A/HRC/1234 (15 July 2009) (J Anaya, Situation of Indigenous peoples in Australia); Aboriginal and Torres Strait Islander Social Justice Commissioner, *The Social Justice report*, Australian Human Rights Commission, 2007, Sydney (ATSI Commissioner, Social Justice Report 2007); Northern Territory Emergency Response Report of the NTER Review Board October 2008 Available at: http://www.terreview.gov.au/docs/report_ter_review/docs/Report_NTER_Review_October08.pdf
- ² J Anaya, Situation of Indigenous peoples in Australia p 32, para 27
- ³ United Nations High Commissioner for Human Rights, Navi Pillay, Canberra, 25 May 2011 <http://www.un.org.au/News.aspx?category=1&element=47&PKID=399>, Concerned Australians, *A further conversation with Elders Melbourne*, www.concernedaustralians.com.au/media/Elders-statement-7-2-11.pdf; University Law School, 7 February 2011; J Anaya, Situation of Indigenous peoples in Australia
- ⁴ Northern Territory Emergency Response Report of the NTER Review Board October 2008 Available at: http://www.terreview.gov.au/docs/report_ter_review/docs/Report_NTER_Review_October08.pdf
- ⁵ CERD Committee, *General Recommendation XXIII: Indigenous Peoples*, 51st sess 1997, annexV [4(d)], UN Doc A/52/18.
- ⁶ J Anaya, Situation of Indigenous peoples in Australia p 12, para 36.
- ⁷ Permanent Forum on Indigenous Issues Fourth Session, Report of the International Workshop on Methodologies regarding Free Prior and Informed Consent of Indigenous Peoples, <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N05/243/26/PDF/N0524326.pdf?OpenElement> accessed 3 March 2011.
- ⁸ J Anaya, Situation of Indigenous peoples in Australia P 17 para 48.
- ⁹ SCRGSP (Steering Committee for the Review of Government Service Provision) 2011, *Overcoming Indigenous Disadvantage: Key Indicators 2011*, Productivity Commission, Canberra, page 9. Available at: http://www.pc.gov.au/__data/assets/pdf_file/0010/111610/key-indicators-2011-overview-booklet.pdf
- ¹⁰ See sections 27(8), 34(9), 35(5) and 41(3)
- ¹¹ Committee Rights of the Child General Comment No. 11 Indigenous children and their rights under the Convention, UN Doc CRC/C/GC/11 (2009) p13, para 57. Indigenous children and their rights under the Convention (Committee CRC, Indigenous children and their rights under the Convention).
- ¹² Committee CRC, Indigenous children and their rights under the Convention p13, para 57.
- ¹³ Joint media statement "Cooperation not intervention: a call for a new direction in policies affecting Indigenous Australians in the Northern Territory", 23 November 2011. Available at <http://www.ntcoss.org.au/sites/www.ntcoss.org.au/files/NT%20Intervention%20Media%20Statement%20-%20November%2023%202011.pdf>
- ¹⁴ Ibid
- ¹⁵ Australian Government Attorney General's Department (2011) *Human Rights Guidance Sheet: Right to social security*, available http://www.ag.gov.au/www/agd/agd.nsf/Page/Humanrightsandanti-discrimination_Humanrightsandthepublicsector_Humanrightsguidancesheets_Righttosocialsecurity
- ¹⁶ Committee on Economic, Social and Cultural Rights (2008) *General Comment NO. 19: The Right to Social Security*, available <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G08/403/97/PDF/G0840397.pdf?OpenElement>
- ¹⁷ Social Security Amendment Bill 2011 Explanatory Memorandum p 2.
- ¹⁸ Northern Territory Emergency Response Evaluation Report 2011, p333 Available at: http://www.fahcsia.gov.au/sa/indigenous/pubs/nter_reports/Documents/nter_evaluation_report_2011.PDF (Northern Territory Emergency Response Evaluation Report 2011)
- ¹⁹ Northern Territory Emergency Response Evaluation Report 2011, p 362
- ²⁰ Strategic Review of Indigenous Expenditure Report to the Australian Government, February 2010, p 236. Available at: http://www.finance.gov.au/foi/disclosure-log/2011/docs/foi_10-27_Strategic_review_indigenous_expenditure.pdf (Strategic Review of Indigenous Expenditure Report to the Australian, 2010)
- ²¹ Strategic Review of Indigenous Expenditure Report to the Australian, 2010.
- ²² At the time of the census in 2006, these figures were an approximate representation of the population of these regions but they are elastic due to high levels of mobility between growth towns, large centres like Alice Springs and Darwin and homelands communities.
- ²³ J Anaya, Situation of Indigenous peoples in Australia.
- ²⁴ CP Burgess, FH Johnston, DMJS Bowman, PJ Whitehead, 'Healthy Country: Healthy People? Exploring the Health Benefits of Indigenous Natural Resource Management', *Australian and New Zealand Journal of Public*

Health, 2005, Apr; 29(2): p 117–22.

²⁵ Aboriginal and Torres Strait Islander Social Justice Commissioner *The Social Justice report* Australian Human Rights Commission, 2009, p 127. www.hreoc.gov.au/social_justice/sj_report/sireport09/pdf/sjr_ch4.pdf.

²⁶ S Kerins, 'The Future of Homelands/Outstations' *Dialogue*, 2010: 29(1) p 52–60. For more information see caepr.anu.edu.au/poc/index.php (S Kerins, The Future of Homelands/Outstations).

²⁷ Senate Select Committee on Regional and Remote Indigenous Communities, *Select Committee report on regional and remote Indigenous communities First Report*, September 2008 p 33. www.aph.gov.au/senate/committee/indig_ctte/reports/2008/report1/report.pdf.