Chapter 3
Issues identified with legislative amendments

Overview

3.1 The committee received significant evidence regarding the proposals outlined in the Stronger Futures package of bills and six key areas received the majority of commentary. These areas are in all three bills and are as follows:

(a) Alcohol Management (Stronger Futures in the Northern Territory Bill 2011);
(b) Land Reform (Stronger Futures in the Northern Territory Bill 2011);
(c) Food Security (Stronger Futures in the Northern Territory Bill 2011);
(d) Customary law (Stronger Futures in the Northern Territory (Consequential and Transitional Provisions) Bill 2011);
(e) Income Management (Social Security Legislation Amendment Bill 2011); and
(f) School attendance (Social Security Legislation Amendment Bill 2011).

3.2 This chapter explores these key areas as ordered and draws on evidence to highlight issues that were raised by submitters to this inquiry. It also sets out the committee’s views and recommendations in each area.

Alcohol Management

3.3 Provisions relating to alcohol management are contained in Part 2 of the Stronger Futures in the Northern Territory Bill 2011 (hereafter referred to as the Stronger Futures bill). The measures set out in Part 2 of the bill (tackling alcohol abuse) propose various initiatives designed to tackle alcohol–related harm to Aboriginal people.

3.4 These initiatives include:

- a review of the relevant Commonwealth and Northern Territory alcohol and licensing laws, in relation to alcohol regulation aimed at reducing alcohol-related harm to Aboriginal people;
- enabling the Minister for Indigenous Affairs to request that Northern Territory licensing assessors assess premises that sell, or allow for the consumption of alcohol, where there is concern that they are contributing to alcohol-related harm to Aboriginal people;
- retaining current alcohol restrictions in Aboriginal communities including offences arising from those restrictions; and
strengthening alcohol management plans to help bring about local solutions for Aboriginal communities that are focused on harm minimisation.¹

3.5 The measures set out in the bill have been developed in response to general community support for ongoing alcohol restrictions that aim to reduce the incidence of alcohol related harm.²

3.6 Although there is support for some continued Commonwealth Government involvement, there is a clear consensus that how support is rolled out should involve consultation with those affected.

...Aboriginal people want to be directly engaged in the development of alcohol approaches impacting their communities. As most Aboriginal members of the Uniting Church live in Aboriginal communities, we call for the further development of local community and, as applicable, regional alcohol management plans. Funding for development of these plans should be increased and made more widely available so that Aboriginal people, on a community-by-community basis, may develop their own solutions in partnership with other relevant stakeholders.³

3.7 Although not broadly supportive of the Stronger Futures legislation, in relation to consultation, the Australian Hotels Association stated their support for government involvement:

The Northern Territory's per capita consumption of alcohol rate is about 1.5 times the National average. There is no doubt that the Northern Territory has a significant problem with alcohol misuse. The AHA (NT) is, and has always been, keen to be part of the solution in reducing alcohol related harm in the Territory and we will never be successful in doing so without all stakeholders sitting at the table.⁴

**Harsh penalties**

3.8 Division 2 of Part 2 of the Stronger Futures bill will amend the NT Liquor Act and the NT Liquor Regulations to amend the penalties for the possession and supply of liquor in alcohol protected areas. Throughout its inquiry many stakeholders raised concerns with the committee in respect of these matters given their very punitive nature.

We have concerns about a way of dealing with alcohol issues that plays the law-and-order card and being seen to introduce tougher penalties in response to the consumption of alcohol. Our concerns are that there are a number of initiatives from the Territory government and some of them this legislative framework that have the effect of increasing the likelihood that Aboriginal people will end up in jail and for longer periods of time. That is

¹ Stronger Futures in the Northern Territory Bill 2011, *Explanatory Memorandum*, p. 3.
³ Mr Peter Jones, Uniting Church Northern Synod, *Committee Hansard*, 23 February 2012, p.10
⁴ Australian Hotels Association (NT), *Submission 190*, p. 1.
an issue that we really should be backing away from. We should be trying to implement steps that reduce the rate of incarceration rather than ones that are likely to increase it.

...our underlying philosophy is that communities need to be given some responsibility for developing their own responses to alcohol management.5

3.9 When these matters were raised with government officials, information was provided detailing that the amendments set out in the bill merely act to bring consistency with existing laws.

**Senator SCULLION:** If it assists, Madam Chair: my understanding, following discussions with the minister, is that they had been requested by the Northern Territory government to make this legislation consistent with the existing Northern Territory regulation outside the prescribed areas.

**Mr Brodie:** I am responsible for the licensing regulation scheme in the Northern Territory. The provisions that are being mooted in the Stronger Futures bill essentially deactivate the penalty provisions in the existing Northern Territory Liquor Act and replace new sets of penalty provisions in respect of offences in what is now called a 'prescribed area' but under the new act will be called an 'alcohol protection zone'. Essentially, you get only one set of penalty provisions that are in force in those alcohol protection zones at any one point in time. Obviously, where there is a general restricted area under the Northern Territory legislation that is not concurrent with an alcohol protection zone in the normal provisions in the Northern Territory Liquor Act would take effect at that point in time.

...We were asked what the Northern Territory law looked like, but we found out what the proposal was without necessarily being consulted about what an appropriate structure would look like.

**Mr Henderson:** But in terms of the principles: I am not sure what happened at the departmental level, but in my discussions with Minister Macklin it was about having consistency of legislation and penalties across both pieces of legislation... The policy intent was to try to get alignment and consistency around penalties.6

3.10 The provisions that are of the greatest concern are those set out in subclause 75C(7) which specify that if a person supplies liquor to a third person in an alcohol protected area and the amount of liquor involved in greater than 1,350 millilitres, the maximum penalty for the offence is 680 penalty units or imprisonment for 18 months. Among submitters, there is concern that the use of such harsh penalties will result in greater levels of aboriginal incarceration.

3.11 Mr Hunyor, Principal Legal Officer of the Northern Australian Aboriginal Justice Agency explained:

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5 Central Australian Aboriginal Legal Aid Service, *Committee Hansard*, 21 February 2012, p. 10.

6 Mr Micheile Brodie, Northern Territory Licensing Commission, *Committee Hansard*, 24 February 2012, p. 17.
Where is the evidence that it is going to make any difference to increased penalties? I think one of the issues we need to look at every time an increase in penalty and an increase in imprisonment is imposed is: what is the opportunity cost if realistically that is going to mean sending more people to jail? Jail costs more than $100,000 per person per year, according to the Productivity Commission. Surely there are better ways to be spending that money on the sorts of things that Ms Rosas has touched on today that are lacking in our communities—that is, rehabilitation, culturally appropriate services and culturally relevant treatment. That is where we think we should be putting the energy and resources, not on increasing the potential for people to go to jail. It is unlikely to lead to a greater number of cases for our service, but it will mean we will need to put more work into a number of cases. If someone is facing a period of imprisonment, we will obviously be wanting to spend more time on that case and more time before the court. So it will be another work pressure on us.7

3.12 The Maningrida Progress Association voiced similar concerns:

During a recent board of committee meeting, our board members indicated that the proposed changes under the Stronger Futures bill, under the penalty for liquor offences, for under 1,350 ml to include six months imprisonment is very harsh. There are very few instances of grog running in Maningrida compared to other types of illicit drug running. Illicit drug running of cannabis or kava in remote communities is a very lucrative business.

... All we are concerned with is that, if the bill is passed, our jail will be overcrowded by people with grog offences and punishment for illicit drug runners will be much lighter due to insufficient prison space. I have got statistics here that indicate the number of offences during the last court hearing: for drug offences, including cannabis and kava, there were 14 cases; for drink driving there were four cases; for other motor vehicle offences there were 12 cases; for domestic violence there were six cases; there were 21 break-ins; and there were 22 cases of public disorderly behaviour.8

3.13 When responding to the concerns raised by submitters regarding the harsh and punitive nature of the penalty provisions, FaHCSIA explained:

Ms Edwards: The first point to make is that penalties for supply of an amount of alcohol under 1,350 mils was an offence with strong penalties prior to the NTER. When the new provisions came in and that was displaced, it was something that caused some concern. Some magistrates and so on had seen people many times with relatively small amounts of alcohol coming before the courts and no longer had the option of the stronger penalty. So that was one of the key factors directing the

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7 Mr Jonathon Hunyor, Northern Australian Aboriginal Justice Agency, Committee Hansard, 23 February 2012, p. 40.

8 Mr Jimmy Woon Tan, Maningrida Progress Association, Committee Hansard, 22 February 2012, pp 21–22.
government. We needed to make sure we gave a full range of options and, as has been in the public statements of the minister, were really tough on grog running.

The second point to make is that the penalty of so much of a fine or up to six months in prison is, of course, a maximum penalty for supply of, say, an amount of alcohol up to 1,350. The key thing to remember about 1,350 is that that equates to three cartons of full-strength beer or 6.25 flagons of wine. I think it is 4.something bottles of gin. So we are not talking about totally insubstantial amounts of alcohol here.

Senator SIEWERT: Yes, but it is also less than, so you could be talking about small amounts of alcohol.

Ms Edwards: You could be talking about someone committing the offence of supply of less than 1,350. That would be an offence which would be punishable by a penalty of up to the fine or amount of imprisonment. You would expect the court, as it would normally, to look at the range of penalty and the severity of the offence and apply a penalty within that range. So, for a first offence or one for a very small amount of alcohol, you would normally expect the court to apply at the lower end of that range. The provisions return to the courts who are looking at these offenders the full range of penalties. For supplying of over 1,350 there are more stringent penalties to recognise. It provides a range that in the ordinary discretion judicial officers apply. We have handed over to them to apply the penalty that fits the offence.9

3.14 There is a common view among submitters that more action is required to treat substance abuse and address rehabilitation; penalties alone will not achieve the desired outcomes. The Australian Human Rights Commission:

...reiterates its recommendation from the Social Justice Report 2007 for the Australian Government to ensure alcohol restrictions are supplemented by investment in infrastructure in the health and mental health sectors (including culturally appropriate detoxification facilities) and investment in culturally appropriate community education programs delivered by Indigenous staff [Recommendation no. 15].10

Committee view

3.15 The committee acknowledges the advice given by the Australian Government Departments to explain the proposed penalty provisions.

3.16 The committee shares the concern of witnesses, including the Commonwealth and NT Government officials who appeared before it, that penalties may lead to increased Aboriginal imprisonment. The committee acknowledges however the advice provided by the Commonwealth and NT Government Departments who clarified that

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9 Ms Caroline Edwards, Department of Families, Housing and Community Services and Indigenous Affairs, Committee Hansard, 1 March 2012, pp 39-40.

the penalty provisions are maximum amounts not default amounts and that it is the courts that will apply the penalty to fit the offence.

3.17 The committee agrees with witnesses such as the Central Australian Aboriginal Legal Aid Service that infringement notices are a useful tool. The committee also agrees that more needs to be done to facilitate effective rehabilitation, treatment and education programs that target prevention and that rehabilitation should be conducted in a culturally appropriate way.

Recommendation 1

3.18 The committee recommends that the Stronger Futures in the Northern Territory Bill 2011 be amended to allow infringement notices to be issued in relation to minor alcohol offences and to make it clear that infringement notices may be issued relating to the possession and supply of liquor.

Assessing licensed premises

3.19 Division 5 of the Stronger Futures bill provides the Minister with the authority to request that the relevant Northern Territory Government Minister appoint an assessor to conduct an assessment of a licensed premise if it is believed that the sale or consumption of liquor at or from a premise is causing substantial alcohol-related harm to Aboriginal people.11

3.20 The People's Alcohol Action Coalition (PAAC) presented evidence to the committee that suggested alcohol-related harm is not a racial issue in the Northern Territory and the operation of the bill could be enhanced through a minor change to Clause 15(1)(b) of Division 5 of Part 2 of the Stronger Futures Bill.12

3.21 PAAC suggested to the committee that this provision, which enables the Minister to assess licensed premises where it is reasonably believed that the sale or consumption of liquor at those premises is causing substantial alcohol related harm to 'Aboriginal people' (Clause 15(1)(b) of Division 5 of the bill) could be amended so that it refers to 'the community'.

...it would be preferable to remove the reference to Aboriginal people in the provision that gives the Commonwealth the powers to intervene and ask for an independent audit on particular alcohol outlets. It is not a racial issue. I think that could be amended to read that where any particular outlet is deemed to be causing excessive problems for 'the community', and not for 'Aboriginal people'. This is not a racial issue. In the Northern Territory, non-Aboriginal people drink at twice the level of other Australians and have much higher rates of alcohol related problems. Non-Aboriginal people who are addicted to alcohol are just as likely to gravitate towards the cheapest forms of alcohol as Aboriginal people are. There is nothing racially based about the message we are proposing and we do not think the

12 Dr John Boffa, PAAC, Committee Hansard, 21 April 2012, p. 34.
The committee considers that the evidence provided demonstrates that excessive alcohol consumption leading to alcohol-related harm is a serious matter in the Northern Territory.

**Alcohol Management Plans**

3.23 Division 6 of Part 2 of the Stronger Futures bill introduces an application process for the approval of alcohol management plans (AMPs).\(^{14}\) The changes being introduced will ensure that all AMPs are brought to the attention of the Commonwealth Minister for Indigenous Affairs who in approving a plan must consider all its elements to ensure it is aimed at minimising alcohol-related harm.\(^{15}\)

3.24 The committee received evidence that suggests there is general support for the continued use of AMPs, particularly as it enables communities to tailor plans to suit their individual circumstances.

**Mr Hoffman:** ...It is not a one-fits-all solution and all communities basically need to have sets of rules for their own needs.\(^{16}\)

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**Senator CROSSIN:** Do you think that having an alcohol management plan, camp by camp or community by community, is a good way to go?

**Miss Shaw:** Yes. It is no good my camp having an alcohol management plan for our camp and then using that in my grandfather's community; it should be his people in his community making up their own rules. But we residents have done our own.\(^{17}\)

CAAAPU supports and encourages alcohol management plans that are developed by the communities with professional support and input from our organisation. Alcohol management plans should be completed with professional assistance from persons qualified and experienced in the field of alcohol and substance abuse issues.\(^{18}\)

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13 Dr John Boffa, PAAC, *Committee Hansard*, 21 April 2012, p. 34.
16 Mr Rodney Hoffman, *Committee Hansard*, 23 February 2012, p. 60.
17 Miss Barbara Shaw, *Committee Hansard*, 21 February 2012, p. 21.
18 Ms Eileen Hoosan, Central Australian Aboriginal Alcohol Programs Unit, *Committee Hansard*, 21 February 2012, pp 44–45.
Although there is community support for the continued use of AMPs, there is some concern around the approval process; the concern being that AMPs will be 'hijacked' through the approval process given the 'layers' of bureaucracy involved leading to unnecessary delays in the process.

Ms Hoosan: ...but our concern is the delay of government. This plan has to go through before it gets to the minister.

... 

Miss Shaw: We do not want it hijacked by them saying, 'We are going to look at the Mount Nancy camp as a model.' It needs to work and it needs to be supported. We need a chance to make it work. If we announce it today or tomorrow, then somebody else might hijack it—an organisation or another community. We want to be able to use it as a model to allow it to get off the ground.\textsuperscript{19}

Committee view

The committee agrees with the view that the effectiveness of AMPs will be impeded if prolonged delays in the approval process are experienced. The committee notes that at present the bill does not prescribe a timeframe in which the Minister is required to make a decision concerning an AMP application. The committee considers that there must be urgency in any such approval process.

Recommendation 2

The committee recommends that processes be implemented to ensure that the Minister responds to alcohol management plan applications in a timely manner.

More needs to be done

The evidence presented to the committee suggests a level of community support for ongoing Commonwealth Government involvement in alcohol management matters, however, the committee consistently heard that stakeholders would like to see more done in addition to the measures set out in the bill.

Reducing supply

Several stakeholders suggest that reducing the supply of alcohol is required. We believe that, until the flow of alcohol in Central Australia is reduced, we are not going to see a long-term improvement in Indigenous health, school attendance or employment. Access to alcohol in Alice Springs must be reduced. Recent territory moves such as the buyout of two liquor shops, the introduction of ID scanners and the Banned Drinkers Register have helped a lot. But more needs to be done.\textsuperscript{20}

\textsuperscript{19} Ms Eileen Hoosan, Central Australian Aboriginal Alcohol Programs Unit, \textit{Committee Hansard}, 21 February 2012, p. 44.

\textsuperscript{20} Mr David Hewitt, \textit{Committee Hansard}, 21 February 2012, p. 59.
The association supports the retention of the current restrictions on the availability of alcohol imposed under the Northern Territory emergency response measures and considers that restrictions are an important element of overall alcohol management and for reducing harm in communities. The association also considers that more needs to be done to restrict the sale of takeaway alcohol given that it can lead to uncontrolled consumption and often contributes the greatest harm in communities. This would require focus on restricting current and future liquor licences.21

3.30 Similarly, PAAC advocate reducing supply through the introduction of a floor price. They believe that this would reduce supply, particularly of cheap wine which is causing substantial alcohol-related harm in the Northern Territory.

The Northern Territory has a much higher level of alcohol consumption and alcohol-related harm than any other jurisdiction in the country; higher than other countries that are going to implement a floor price, such as Scotland. It seems to me that we cannot afford to wait for deliberations which are clearly going to come up and say that the overwhelming weight of evidence is that a minimum price on alcohol is a key population measure which will reduce alcohol-related harm. We think there is a strong case to argue that this jurisdiction should have a minimum price—a floor price—on alcohol imposed on it by the Commonwealth government in the absence of this jurisdiction itself being able to do that.22

3.31 The Distilled Spirits Industry Council of Australia (DSICA) however suggests that the idea that introducing a floor price for alcohol will fix alcohol-related problems in any part of Australia is flawed and will not work.

DSICA acknowledges that there is a current policy and media focus on minimum floor pricing for alcohol products. In particular, the Australian National Preventative Health Agency (ANPHA) has been tasked with the development of a minimum floor price concept. It is understood that the potential introduction of a minimum floor price is a likely response to claims of misuse of cheap wine products, particularly in Indigenous communities.

DSICA strongly opposes the introduction of a minimum floor price on a number of grounds, including:

- The fact that there is a lack of economic evidence confirming the effectiveness of minimum floor pricing in reducing risky and high-risk drinking behaviours;

- A minimum floor price will negatively impact the population at large (particularly responsible consumers and those of lower socio-economic backgrounds), rather than targeting at-risk drinkers and those who are determined to misuse alcohol; and

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21 Mr David Jan, Local Government Association of the Northern Territory, Committee Hansard, 23 February 2012, p. 62.

22 Dr John Boffa, PAAC, Committee Hansard, 21 February 2012, p. 33.
International experience demonstrates the difficulties associated with implementing a minimum floor price which delivers desired health and social policy objectives.23

3.32 The committee raised these matters with the Commonwealth Department of Families and Community Services and Indigenous Affairs. In response, the Department commented that:

...The National Preventative Health Task Force is looking at the minimum price mechanisms, and the new Australian National Preventive Health Agency will develop the public interest case for a minimum price. They are expected to provide initial advice to their minister in 2012—this year.24

Education is lacking

3.33 The committee heard concerns that more education around responsible drinking and alcohol awareness is required as is support for treatment and rehabilitation.

3.34 The Local Government Association of the Northern Territory identified that there is a lack of education around responsible drinking in the Northern Territory.

...there does not seem to be much work done in the area of education. The Living with Alcohol program run by the Territory government some years ago was an excellent education program but unfortunately was not ongoing. The association would like to see more resources employed in the area of alcohol education.25

3.35 Ms Hoosan of the Central Australian Aboriginal Alcohol Programs Unit (CAAAPU) outlined that although CAAAPU support alcohol management initiatives, more needs to be done to support rehabilitation.

We would like to see the Australian government commit to increasing the support and funding for treatment and rehabilitation facilities for Aboriginal people, especially for residential treatment for families. Implementing a holistic preventative approach will reduce the demand for alcohol and problem drinking. It is critical to reduce the demand for alcohol through increasing employment opportunities, training, improving health services, early intervention at school, improving community stores, having better housing schemes and building community capacity and leadership. It is about good governance.

...
We recognise that there are some good decisions in the Stronger Futures NT plan, including the NT government's 'Enough is Enough' alcohol reform campaign. We refer to the substance misuse assessment and referral for treatment courts for alcohol related offences. The CAAAPU organisation are doing everything possible to support the Northern Territory government's campaign by providing culturally appropriate rehabilitation treatment services, delivered by highly qualified Aboriginal employees and elders.26

Committee view

3.36 The committee acknowledges the serious challenges facing the Northern Territory to reduce alcohol-related harm. The committee is of the view that the evidence it received indicates that alcohol is causing substantial harm in parts of the Northern Territory however, that increasingly, other drugs, such as marijuana and kava, are also causing problems. The committee considers that the measures in the Stronger Futures bill will go some way to supporting the Northern Territory as it seeks to address alcohol-related harm however the committee concedes that more does need to be done, particularly in the areas of alcohol education and rehabilitation.

3.37 The committee notes the importance of the independent review that is planned to occur three years after the commencement of the proposed provisions and takes the view that any policy changes recommended by the independent review should be acted upon.

Land Reform

3.38 Land reform provisions are outlined in Part 3 of the Stronger Futures bill. These provisions enable the Commonwealth to make regulations to amend Northern Territory legislation relating to town camps (Division 2) and community living areas (Division 3) to facilitate voluntary long-term leasing, including for the granting of individual rights or interest and the promotion of economic development.27

3.39 The broad objectives of the land reform measures outlined in Part 3 of the bill are designed to overcome Northern Territory (NT) legislative restrictions and impediments relating to residential and economic development in town camps and community living areas. Introduction of a regulation making power provides a practical way of being able to implement, appropriate, sustainable and community supported residential and economic models designed in consultation with, and supported by, relevant stakeholders, including the relevant interest holders in the land and the NT Government.28

26 Ms Eileen Hoosan, Central Australian Aboriginal Alcohol Programs Unit, Committee Hansard, 21 February 2012, pp 44–45.
27 Senate Standing Committee for the Scrutiny of Bills, Alert Digest No. of 2012, 8 February 2012, pp 48-49
3.40 Given the complex nature of the relevant NT legislation, restrictions and impediments in NT legislation must be identified through a thorough analysis of the relevant models developed in consultation with stakeholders. The proposed land reform regulation powers will allow implementation of models to commence once this analysis has been completed and also ensure that appropriate safeguards in relation to dealings in land can be maintained where necessary or relevantly modified under NT legislation.29

3.41 Related to the land reform amendments, Schedule 2, item 4 of the Consequential Amendments bill amends the *Aboriginal Land Rights (Northern Territory) Act 1976* (Land Rights Act) to ensure that its operation is consistent with the repeal of the NTNER Act.30 Schedule 2 also repeals Part IIB of the Land Rights Act and introduces an additional function for Land Councils to provide assistance to community living area landowners, in relation to dealings in their land.31 This Part also constitutes a special measure for the purposes of the RDA, affording ‘Aboriginal people opportunities for home ownership and economic development.’32

**Removal of section 23(1)(eb) of the Aboriginal Land Rights (Northern Territory) Act 1976 Act**

3.42 The inclusion of a provision, section 23 (1)(eb), into the Land Rights Act expressly provides that Land Councils have a statutory function to assist Aboriginal associations or corporations which own community living areas when requested to do so.33 While this was accepted as a role for Land Councils, an issue was raised by both the Central Land Council (CLC) and the Northern Land Council regarding the limited nature of this provision as making it explicit only Land Councils should meet these costs.

3.43 The CLC explained that funding for this role is a matter between the Government and the Land Councils and should not be made explicit in the legislation:

**Ms Newell:** We have been consistently urged to do more cost recovery, so it would be remiss of us not to mention that as an issue that is of concern to the land council. In terms of the new power for land councils to be inserted into the Land Rights Act, none of our powers are constrained by a clause at the end that says, 'at your own expense.' That just seems an unnecessary clause to have in there.

**Senator CROSSIN:** I am just trying to find the Northern Land Council's reference—

...
Senator CROSSIN: It is proposed section 23(1)(eb) should be removed, which is to delete the words 'at the land council's expense'.

Ms Newell: That is our submission as well. We have said that we do not support it in its current form and that that phrase should be removed. How we get funded by the government is to tally for the government and us to discuss. There should not be a clause there that says 'at our own expense' going on in perpetuity. It is just not appropriate.

Senator CROSSIN: So it is an anomaly in relation to what currently exists.

Ms Newell: That is it.34

The NLC reiterated this view in their submission and explained that:

...as presently drafted the proposed s 23(1)(eb) inappropriately includes a constraint. If assistance is provided regarding a community living area, this must and can only be “at the Land Council's expense”. This constraint - which appears inadvertent - is inappropriate, both in practical terms and also from the perspective of broader Commonwealth policy. Ordinarily Land Councils would meet the expense of providing assistance, however exceptions will appropriately arise especially where a proponent is able to contribute to those expenses. For example, a mining company which seeks tenure for a road across Aboriginal land would ordinarily contribute to expenses (eg the costs of meetings and sacred site surveys). There is no constraint in the statute to preclude such cost recovery; indeed s 33A contemplates that this will occur. Where a portion of that road also crosses a community living area, a mining company would likewise contribute to such expenses. As presently drafted, the proposed s 23(1)(eb) appears to preclude such contribution.

Since 2002 (pursuant to orders made by the Finance Minister), Commonwealth policy has required full recovery of costs by Commonwealth entities, including Land Councils, except “where it is not cost effective, where it is inconsistent with government policy objectives or where it would unduly stifle competition or industry innovation.” As presently drafted, the proposed s 23(1)(eb) is inconsistent with that policy. The drafting of the proposed s 23(1)(eb) appears to have inadvertently been adopted from the existing s 23(1)(f), which empowers a Land Council to provide legal assistance in relation to traditional land claims “at the expense of the Land Council”. That constraint has not caused difficulty in the context of land claim litigation, but is inappropriate where development is proposed on existing titles. The appropriate precedent is s 23(1)(e) which empowers a Land Council to negotiate leases regarding development on Aboriginal land. That provision does not include any cost recovery constraint. It is submitted that the cost recovery constraint in the proposed s 23(1)(eb) should be removed. This can be achieved by deleting the words “at the Land Council's expense”.35

34 Ms Virginia Newell, Central Land Council, Committee Hansard, 21 February 2012, pp 4–5.
35 Northern Land Council, Submission 361, p. 5.
The Commonwealth Department of Families, Housing, Community Services and Indigenous Affairs (FaHCSIA) explained the intent behind the drafting of this provision:

Ms Moyle: It was intended to make clear that the work the land councils would be able to do under the Aboriginal Land Rights Act would not be at the expense of the CLA association, which is unfunded. It was intended to make clear—

Senator CROSSIN: It does not do that, though, does it?

Ms Moyle: Our advice is that it does. It enables the land council to perform its functions in the usual way and to be funded in the usual way, and that is, as Mr Dillon said, through the ABA or by some cost recovery from lease proponents but not from the CLA association.36

However, as the NLC pointed out, the Land Councils also do not receive funding for this and there are issues with current policies regarding cost recovery:

The question for us is more or less the role of the NLC in providing assistance to these peoples. We do not get funding. It also clashes with Commonwealth policies with regard to how we extract cost recovery in representing these peoples. We are doing it merely because some of the people who are occupying this are actual traditional owners.37

The fact that Land Councils are not presently funded for this purpose was confirmed by FaHCSIA when the committee queried whether they were actually funded to represent the organisations on CLAs under the current funding they receive:

Senator CROSSIN: So why would they do that work if they are not funded to do it? How would they fund themselves to do it?

Ms Moyle: They absorb that cost at present. To the extent that they are doing work for CLA associations, it is absorbed by the land councils.

Senator CROSSIN: They do not like it, though, do they?

Ms Moyle: I am sure they would rather be funded for the work they do.38

The Australian Human Rights Commission (AHRC) also emphasised the need for adequate resourcing and stated:

...if this function is to rest with the Land Councils, the Government must ensure the Land Councils are adequately resourced to perform this task. This would be consistent with Article 39 of the Declaration which outlines the right of Indigenous peoples access to financial and technical assistance from the States, for the enjoyment of their rights.

36 Ms Sally Moyle, Department of Families, Housing and Community Services and Indigenous Affairs, Committee Hansard, 1 March 2012, p. 39.

37 Mr Kim Hill, Northern Land Council, Committee Hansard, 23 February 2012, p. 30.

38 Ms Sally Moyle, Department of Families, Housing and Community Services and Indigenous Affairs, Committee Hansard, 1 March 2012, p. 39.
Similarly, the Government should ensure town camp councils also have access to sufficient financial and technical assistance to enable them to utilise any new provisions affecting town camp leasing.\(^{39}\)

**Committee view**

3.49 The Committee agrees that section 23 (1)(eb) should be amended to remove "at the Land Councils expense". The Committee believes this drafting is appropriate only when the Land Councils are funded for this purpose.

**Recommendation 3**

3.50 The committee recommends that section 23 (1)(eb) of the *Aboriginal Land Rights (Northern Territory) Act 1976* be amended to remove the text "at the Land Councils expense".

**Support for five year leases being abolished under Stronger Futures and move toward voluntary leasing arrangements**

3.51 The Committee received evidence that the Commonwealth Government recognised that the compulsory nature of the five-year lease arrangements were 'counter-productive' and would expire on 17 August 2012.\(^{40}\)

3.52 There was broad support from submitters regarding these five-year lease arrangements\(^{41}\) not continuing under the Stronger Futures bill. The AHRC clearly expressed this view in their submission to the Committee:

> The Consequential and Transitional Provisions Bill repeals the NTNER Act, which contains the provisions relating to the acquisition of five-year leases. This Bill also repeals Part IIB of the *Aboriginal Land Rights (Northern Territory) Act 1976 (Cth)* (ALRA). The Commission strongly supports the repeal of these provisions, and is encouraged by the Australian Government's commitment to transition to voluntary leasing arrangements in the Northern Territory.\(^{42}\)

**Removal of Part 3 (Divisions 2 and 3) of the Stronger Futures Bill**

3.53 Although the Committee was provided with evidence supporting land reform as it brings attention to a 'genuine and pressing need for comprehensive reform',\(^{43}\)

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40 Department of Families, Housing, Community Services and Indigenous Affairs, *Submission 343*, p. 33.


43 Aboriginal Peak Organisations of the Northern Territory, *Submission 330*, p. 12.
many submitters outlined arguments for having Part 3 removed from the Stronger Futures bill.

3.54 The CLC explained to the committee that they would prefer a comprehensive legislative package that affects CLAs (Division 3) and title in order to overcome current constraints, through a process separate to the Stronger Futures bill:

CLAs—generally small excisions from pastoral properties—were granted by the Northern Territory government. Unlike the land rights act, there is a suite of Northern Territory legislation that constrains land dealings on CLAs. These include, among other things, the inability to grant leases and licences for all but a limited number of purchasers. Ten of these larger communities in the Central Land Council region are CLAs, including Lake Nash, Titjikala and Imanpa.

The Central Land Council would prefer the Australian government to devolve a comprehensive and detailed CLA reform agenda and introduce a bill that expressly sets out the reform for debate and comment.44

3.55 In relation to town camps (Division 2), the Tangentyere Council Inc. also stated this should be removed:

Senator CROSSIN: Mr Shaw, under part 3, division 2 as to town camps, there is a very similar treatment to the community living areas whereby this just specifies that for the Commonwealth government it provides for regulation-making powers. What are you saying about this actual division, that there is no need for it or that it needs to be changed or that if any regulation-making power were instigated you would want to be part of the consultations?

Mr Shaw: I think what we are saying is that the minister should explore all options for time ownership and the excision of land whether it be dealing with private home ownership or economic development as per the residents of the town camps without the loss of secure land tenure. This could be achievable with the community land trust model without the regulation-making powers under this legislative package. I think at this point in time Aboriginal people really want a commitment of negotiations with the current government and Aboriginal people are over consulted with the raft of social policies and we want to move towards proper negotiations to ensure that models suit the community, community expectations versus government policy and government legislation.

Senator CROSSIN: So you would like to see all of division 2 actually deleted? It is unnecessary and should be taken out; is that what you are saying?

Mr Shaw: Yes.45

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44 Mr David Ross, Central Land Council, Committee Hansard, 21 February 2012, p. 2
45 Mr Walter Shaw, Tangentyere Council Inc, Committee Hansard, 21 February 2012, p. 28.
**Broad Commonwealth regulation powers**

3.56 Division 3 allows for broad Commonwealth regulation making powers that will amend any NT legislation relating to land matters, should the Northern Territory Government not amend relevant legislation themselves. The committee received evidence outlining concerns regarding these broad powers. The AHRC stated they were:

...cautious that given the lack of detail provided concerning the proposed Regulations, we are unable to comment on whether the proposed Regulations, and therefore subsequent amendments to Northern Territory laws and leases, will be consistent with human rights obligations.  

3.57 FaHCSIA explained to the Committee that these regulation powers need to be broad in scope as:

...the precise form of home ownership and economic development models is a matter for consultation between the town camp landholders, residents and the Territory and Commonwealth governments, and because of the complex nature of the relevant Territory legislation.

3.58 Although broad in scope, the Commonwealth cannot make regulations to modify NT law until appropriate consultations with relevant stakeholders have been undertaken; these requirements are outlined in subclauses 34(9) and 35(5).

3.59 The Commonwealth regulation making power does not prevent the NT from concurrently using its legislative powers in relation to the same matters and should the NT Government implement reforms that meet the commitments outlined in the bill for more flexible land tenure, the Commonwealth regulation will not be required.

3.60 The CLC advised the committee that work was already being undertaken with the NT Government regarding amending the suite of NT legislation to accommodate changes:

...the Northern Territory has been considering amendments of its own, so it is possible that the Northern Territory may introduce amendments which could deal with this comprehensively. The alternative is—as we set out in our submission—that the Commonwealth could actually take the time, instead of just giving the broad regulation-making power to the executive, to sit down and map out what changes were necessary in order to provide certainty for CLAs for secure tenure and economic development.

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47 Mr Michael Dillon, Department of Families, Housing and Community Services and Indigenous Affairs, *Committee Hansard*, 1 March 2012, p. 28.


Senator SIEWERT: In your submission, you go into the various acts which need to be amended. If I understood correctly, it has been on the Northern Territory government's agenda for some time but has not happened. Is that correct?

Ms Newell: Certainly we have been pushing for it for a number of years and the intervention and the focus on formalisation of land tenure has helped it along. We have been in discussions with the Northern Territory government about reform measures for well over 12 months.

Ms Weepers: Senator, certainly the easiest option is for the Territory to move ahead quickly with a comprehensive reform package. That is the most straightforward solution to the problem.

Senator SIEWERT: In terms of taking out of this and then develop a comprehensive package—is that what you meant?

Ms Weepers: For the Northern Territory government to implement a comprehensive reform is the simplest solution.51

3.61 The NT Government advised the committee that they are well placed to progress the changes separate to the Stronger Futures bill and these changes would be subject to consultation with those affected:

Mr Henderson: We will do the amendments. Of course, when we are amending legislation that impacts on Aboriginal people, we need to consult. The consultation process has started with the NLC and, in particular, the CLC, about those amendments. We go to an election in August, and parliament will obviously be prorogued after the budget sittings, so it is a bit touch and go, but we have started those discussions. I do not want to ram legislation into the house that would affect community living areas without the support of the land councils to say that the legislation is appropriate.

Senator SIEWERT: I apologise, but I really want to understand this bit: do you support the position of the CLC and the NLC that that should come out of the Stronger Futures legislation and be dealt with by the NT? I hope I am not verballing them, but that is my take on their position.

Mr Henderson: I would agree. I think those provisions are redundant, given the Territory's commitment to actually doing that. That is a commitment we have made. The legislation is not in the house yet because we are still trying to get agreement, in the same way that, if the Commonwealth were going to legislate, I would hope that the Commonwealth minister would consult with the land councils about appropriate amendments before, once again, legislating for the Northern Territory and affecting Aboriginal people.52

51 Ms Virginia Newell and Ms Jayne Weepers, Central Land Council, Committee Hansard, 21 February 2012, p. 3.

52 The Hon Paul Henderson MP, Chief Minister and Mr Ken Davies, Northern Territory Government, Committee Hansard, 24 February 2012, p. 13.
3.62 The CLC supported the view of the NT Government being better placed to progress necessary legislative amendments in regard to land reform, but understood the rationale for the Commonwealth having regulation making powers. Ms Newell from the CLC stated:

Ideally, comprehensive reform would be led by the Northern Territory government. In the absence of such proactive leadership by the Northern Territory government, the approach being taken by the Australian government in the Stronger Futures in the Northern Territory Bill 2011 and the Stronger Futures in the Northern Territory (Consequential and Transitional Provisions) Bill 2011 is understandable but is not ideal. The regulation-making power proposed in relation to CLAs is very broad and we do not support it in its current form. The delegation of such extensive power over an important reform agenda to the executive creates difficulties because it requires the Aboriginal land owners and the land councils to unreservedly trust the executive to devise an appropriate reform agenda at an unspecified point in time over the next 10 years.53

3.63 The committee inquired about precedent with the Commonwealth and a jurisdiction having dual abilities to amend legislation and whether this will cause confusion:

Senator BOYCE: ...Are you aware of any other legal areas where this is happening, where the Northern Territory and the Commonwealth can jointly or dually change the same provisions?

Ms Newell: No, I am not aware of a similar provision. I am aware of essentially similar regulation making powers in entirely different fields. In relation to the Northern Territory, I am not aware of a similar one.

Senator BOYCE: Do you share the concern about 'interesting results'?

Ms Newell: I am not sure what that refers to. I do not know that critique.

Senator BOYCE: I think the concern is about opposing provisions.

Ms Newell: That is implicit in our preference that the land measures be undertaken by the Northern Territory government, who has responsibility for land reform, has the departments and is across the detail of land administration in the Northern Territory. That is implicit in that we said we would prefer it to be done at the Northern Territory level. However, the overriding concern of the land council is that we do get reform in this area. Therefore, if the Commonwealth is able to do that we would be supportive.54

3.64 When questioned about whether the Commonwealth regulation powers were required at all given this work between the NT Government and Land Councils, the

53 Ms Virginia Newell, Central Land Council, Committee Hansard, 21 February 2012, p. 2.
54 Ms Virginia Newell, Central Land Council, Committee Hansard, 21 February 2012, p. 7.
CLC response was that it may 'simply serve to incline the Northern Territory government to make those changes.'

**Committee view**

3.65 The committee agrees that land reform is needed in the NT and that the move toward voluntary leasing arrangements as outlined in Part 3 of the bill is positive. The committee notes that these amendments must be undertaken with close cooperation between the NT and Commonwealth governments.

3.66 The committee acknowledges the regulation making power for the Commonwealth as outlined in clause 34 and 35 of the bill is broad, however based on the evidence provided, considers these powers will only be drawn on should the Northern Territory Government not progress amendments. Based on advice provided by the Northern Territory Government, the committee understands they will continue to progress the necessary amendments.

**Food Security**

3.67 Part 4 of the Bill deals with food security measures. The NTER measures of 2007 created the legislative framework for stores in prescribed communities to be licensed. The Stronger Futures bill provides for a community store licensing scheme to operate for a ten-year period to provide food security for Aboriginal communities.

3.68 The Revised Explanatory Memorandum to the Bill states that the measure "...is intended to enhance the contribution currently made by the community stores licensing system to continue to improve access to fresh, healthy food." This was shown in the independent evaluation of the community stores licensing program, which also showed that there are areas "...where the scheme could be strengthened, including addressing problems of non-compliant traders and greater community understanding of store business." The Northern Territory Government agrees that there have been improvements in store governance, and the availability and affordability of fresh fruit and vegetables.

Prior to the intervention, community stores were a world away in terms of their governance, in terms of fresh fruit and in terms of appropriate pricing given freight costs and what have you. Food security is very important and has been a big gain.

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The proposed provisions set out licensing procedures, the conditions under which licences are granted, business registration requirements, and arrangements for the stores to be assessed, and introduces a penalty scheme for breaches of licenses including fines and injunctions, and the withdrawal of a license in some circumstances.

All stores in 'designated food security areas' will be required to be licensed. The Revised Explanatory Memorandum explains:

The Bill recognises that community stores differ greatly and that the regulation of the store should be tailored to its individual circumstances. Community stores licensing will only apply to stores that are an important source of food, drink or grocery items for an Aboriginal community. Community stores licensing will not apply in areas that are major centres of the Northern Territory where there is adequate competition and choice in the supply of food, drink and grocery items.

Existing licences will be transitioned and communities will be consulted before a decision is made as to whether any further stores should be required to hold a licence. In order for a community store to be required to hold a license it must fulfil the criterion of being an ‘important source of food, drink or grocery items for an Aboriginal community’.

The Financial Impact Statement in the Revised Explanatory Memorandum states that the cost of implementing the food security measure will be $40.9 million.

The Commonwealth government considers the food security measure to be a special measure for the purposes of the Racial Discrimination Act, in that it will improve the health and wellbeing of Aboriginal people in the Northern Territory:

It advances the enjoyment by Aboriginal people of human rights, such as the right to an adequate standard of living, including adequate food, and the right to the highest attainable standard of physical and mental health. The licensing of community stores helps to achieve this outcome, resulting in an improved supply of food, drink and grocery items for Aboriginal people living outside of major centres.

While the committee appreciates the importance of ensuring that there is adequate, affordable and accessible healthy food for communities, it also notes the

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60 A 'designated food security area' is the whole of the Northern Territory other than an area that is prescribed by the rules as outlined in see section 74 of the Bill.

61 Stronger Futures in the Northern Territory Bill 2011, Revised Explanatory Memorandum, pp 2–3.

62 Stronger Futures in the Northern Territory Bill 2011, Revised Explanatory Memorandum, p. 28.

63 Stronger Futures in the Northern Territory Bill 2011, Revised Explanatory Memorandum, p. 3.

64 Stronger Futures in the Northern Territory Bill 2011, Revised Explanatory Memorandum, p. 29.
concerns raised during the inquiry that it is setting up a separate set of business rules for this type of enterprise.\textsuperscript{65}

3.75 Evidence was also provided to the committee concerning the need for direct action to immediately reduce healthy food prices and make sure people have easy access to this healthy food:

At no point in Part 4, is there any provision relating to the cost of food, or ensuring that a store will be available and open within 20km of a community for a community to access food, despite licensing regulation and conditions.

The omission of any such provisions, appears to point out how far removed Part 4 is from its promoted object to promote food security.

Ultimately, increasing regulation on these stores, and increasing pressure, is not going to drive prices downwards.\textsuperscript{66}

3.76 The Northern Territory Coordinator General of Remote Services, Ms Havnen suggested that the Commonwealth government should expand its food security activities to ensure there is more monitoring of stock to ensure it is of good quality, and to consider food supplement programs to increase nutrition in communities:

…whilst the licensing of community stores has probably been a useful exercise, things could actually go a little further, and I would include a recommendation around the systematic monitoring and assessment of store turnover, particularly of healthy foods. Simply licensing a store as a one-off licence and assuming that store managers and so on will ensure that adequate food supply is available at affordable prices and of a good quality, I think, is an assumption that ought not to be left untested.

There needs to be further consideration given to governments looking at other food supplementation programs,—like those in the United States such as the Women, Infants, and Children program—particularly in remote areas where you have such high levels of failure to thrive and nutrition related illness. By way of noting, that particular program in the US has continued to be funded and supported by the federal government and has been expanded over last 10 to 20 years.\textsuperscript{67}

3.77 Mr Morrish, the Chief Executive Officer of Bawinanga Aboriginal Corporation which operates a store in Maningrida, suggested that subsidies or other forms of assistance to reduce the cost of food would be more helpful than the licensing system:

…the bottom line is that we are saying we do not agree with that piece of legislation because we do not need to be licensed. We have run our store for a long time. We have run it properly and there have been no questions

\textsuperscript{65} Australian Lawyers Alliance, \textit{Submission 319}, p. 31.
\textsuperscript{66} Australian Lawyers Alliance, \textit{Submission 319}, p. 35.
\textsuperscript{67} Ms Olga Havnen, Northern Territory Coordinator General for Remote Services, \textit{Committee Hansard}, 23 February 2012, p. 22.
raised about how we have run it. What we are saying is: government, work with us on the issues that affect us. Freight is a killer.  

...our stores do not make money on fruit and vegetables because we cannot afford to pass on the freight costs. To do that to the consumer makes it unaffordable. We would price out people's ability to buy fresh food, so we hold those costs down on those particular items so that the affordability and the food security are there. I can say, about the amount of money spent on legislating and monitoring from a store licence point of view, that, if we invested that in a freight subsidy to this community or other communities, it would go a long way to ensuring the food security, as opposed to store licensing.

3.78 Mr Tan, from the Maningrida Progress Association that also operates a store in Maningrida, provided the committee with more information on this issue:

Generally, fresh fruits and healthy foods in remote communities cost significantly more than in urban town centres because of the freight component. The freight costs for bringing freezer goods from Brisbane to Darwin are 80c per kilo and then 91c from Darwin to Maningrida by barge. For example, if we were to buy a kilo of apples from a Brisbane supplier at $3.50 per kilo, by the time it reaches Maningrida—if we include the freight costs—that kilo of apples costs $5.21. With our mark-up of only 10 per cent, we have to sell that kilo of apples for $5.73 compared to the original cost of $3.50. In view of the high freight costs of bringing healthy fruit into the community, we are seeking subsidy for freight from the government. This would definitely help to bring down the price of healthy foods to sell in the supermarket. With better affordability, this will encourage locals to spend more on healthy food.

Committee Comment

3.79 The committee acknowledges that more needs to be done in the area of guaranteeing food security in remote communities. In particular, the committee agrees that there is a need for ongoing work with the communities regarding the issues identified in relation to the freight and delivery costs associated with getting healthy food into communities. Ensuring healthy food is available in communities at an affordable cost is essential and should remain on the agenda for future action.

Customary law

Bill) contains the proposed amendments that will ensure that customary law and cultural practices cannot be considered in bail or sentencing decisions for offences under Commonwealth or Northern Territory law except for situations when considering bail or sentencing decisions for offences against such laws that protect cultural heritage, including sacred sites or cultural heritage objects.\(^{71}\)

3.81 The existing provisions which prevent the consideration of customary law and cultural practices are contained within the intervention legislation and although they were introduced to prevent customary law and cultural practice being used to mitigate the seriousness of any offence involving violence against women and children, their application has had unintended adverse consequences for offences against cultural heritage, including cultural heritage objects and sacred sites.\(^{72}\)

3.82 The current prohibition on considering customary law in bail and sentencing decision will continue to apply for offences against Commonwealth and Northern Territory laws including those that relate to violence against women and children.\(^{73}\)

**Calls for broader reform**

3.83 Evidence received by the committee throughout its inquiry was supportive of the changes set out in the bill given that their application has resulted in unintended adverse consequences. However many submitters gave evidence to the committee suggesting that the amendments should go further and that there is a need to ensure that these practices are in fact considered in all sentencing and bail applications.

3.84 The Central Australian Aboriginal Legal Aid Service (CAALAS) have recommended that Clauses 3 and 8 of Schedule 4 to the Consequential and Transitional Provisions Bill be removed. CAALAS 'strongly oppose the exclusion of cultural practice and customary law from bail and sentencing considerations' as they are of the view that:

...this puts Aboriginal people into a different position for sentencing and bail purposes than any other member of the population when they come before the courts. It is a discriminatory practice that needs to be abolished. The argument that this gives better protection to Aboriginal women and children is a fallacious argument and in some instances people will be worse off because of this particular provision.\(^{74}\)

Basically the legislation means that for an Aboriginal person coming before the court charged with an offence the court is not able to look at the reasons

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\(^{74}\) Mr Mark O'Reilly, Central Australian Aboriginal Legal Aid Service, Committee Hansard, 21 February 2012, p. 8.
for committing the offence which may have been influenced by cultural
practice or some aspect of Aboriginal culture.\textsuperscript{75}

3.85 The Northern Australian Aboriginal Justice Agency is of the same view as
CAALAS. When appearing before the committee, NAAJA provided compelling
evidence of how the exclusion of customary law and cultural practice results in unjust
outcomes for Aboriginal people.

Possibly a good example would be a situation involving a non-Aboriginal
person who was being prosecuted for having received too much by way of
Centrelink and not having declared their true income. Let us say that person
had received overpayments in the period leading up to Christmas and they
came to court and, by way of mitigation, said to the court, 'Yes, I agree; I
knew I was getting paid too much, but Christmas was coming around and I
wanted to buy presents for the kids.' You can expect that the court might
say, 'Well, you've still done the wrong thing, but I take that into account.
That's relevant. It was not a situation of greed; it was something that you
did for that reason.' That relates to a cultural practice: the cultural practice
of giving presents at Christmas time. This provision either applies to that—
in which case I think most Australians would think that that is ludicrous—
or it does not or is not intended to apply to that, in which case it is clearly
discriminatory, because we are trying to target one set of cultural practices
and not another.\textsuperscript{76}

3.86 NAAJA also explained that prior to the introduction of the provisions in the
original intervention legislation, the courts were well able to apply the laws
appropriately without mitigating the seriousness of offences:

The position of the law before these provisions was simply that those sorts
of considerations for non-Aboriginal people or for Aboriginal people could
be taken into account. Frequently in cases where cultural law was raised—
in the difficult and sensitive cases involving, for example, sex with girls
under 16—the courts made it very clear that it was a factor they took into
account, for example, to distinguish the person from a sexual predator, so it
was relevant to try to figure out where in the scale of things this offending
came, but that factor was outweighed by the need to protect women and
children.

... The point that I would really seek to draw out of them is that the court has
never placed those considerations of customary law and culture above the
interests of protecting women and children. So I think it is a
misconception—if it exists—that really should be laid to rest.\textsuperscript{77}

\textsuperscript{75} Mr Mark O'Reilly, Central Australian Aboriginal Legal Aid Service, Committee Hansard,
21 February 2012, p. 11.

\textsuperscript{76} Mr Jonathon Hunyor, NAAJA, \textit{Committee Hansard}, 23 February 2012, pp 40–41.

\textsuperscript{77} Mr Jonathon Hunyor, NAAJA, \textit{Committee Hansard}, 23 February 2012, p. 44.
While supporting reform, not all submitters suggested that it go as far as suggested by CAALAS and NAAJA. The Human Rights Commission in its submission recommended that the changes concerning the consideration of cultural law and customary practice in the Consequential and Transitional Provisions bill could go further but suggested that they continue to be excluded from situations involving violence or sexual abuse:

The Commission considers that the continued exclusion of customary law and cultural practice from bail and sentencing decisions is too broad. Sections 15AB(1)(b) and 16(A) of the Crimes Act 1914 (Cth) should instead be amended to prevent authorities from considering customary law or cultural practices only when considering offences that involve violence or sexual abuse.78

Asked about witnesses' concerns about customary law provisions, representatives of the Attorney General's Department commented:

**Senator CROSSIN**: Supreme Court Justice Riley...has some grave concerns about the impact of the fact that the courts can no longer take into account the custom and practice in relation to bail and sentencing, and he makes some very strong comments...about the impact that it has on Indigenous people...It is pretty unusual, I think, for magistrates to be saying, 'Please have another look at section 91.' Why do you believe that could not be seriously re-examined?

**Ms Chidgey**: We have seen Chief Justice Riley's comments. I have them in front of me. Our view would be different. He made a comment about Aboriginal offenders not having the same rights as offenders from other sections of the community. We would maintain that that is not correct.

**Senator CROSSIN**: Why do you think it is not correct?

**Ms Chidgey**: Because the provisions apply to not being able to take into account any cultural practice to mitigate the seriousness of the conduct of an offender, and that would apply to cultural practices regardless of whether they were Indigenous or from other cultures.79

In 2009, the Attorney General's Department expressed the view that there was no evidence that the limiting of consideration of customary law and cultural practice in bail and sentencing decisions was having any unintended adverse consequences.80 It also noted the case of *The Queen v Wunungmurra*,81 which addressed the laws in question. It concluded that:

If this interpretation is taken up as a precedent, it appears likely that the provision will only preclude consideration of customary law and cultural practice in sentencing decisions to the limited extent intended.

79 Ms Sarah Chidgey, Attorney-General's Department, *Committee Hansard*, 1 March 2012, p. 43.
3.90 And:

According to Southwood J’s remarks, the affidavit [of Ms Laymba Laymba, a senior member of three Aboriginal clan groups who is knowledgeable about the customary laws and cultural practices of the Yolngu people] contained information on circumstances in which an Aboriginal man from a particular clan group who is also a Dalkaramirri (said to have a similar role to judicial officer) may inflict severe corporal punishment on his wife with the use of a weapon. His remarks indicate that Ms Laymba Laymba states that the defendant was acting in accordance with his duty as a Dalkarra man. This contradicts the argument put by stakeholders and commentators who have argued that Aboriginal customary law does not condone violence. While it may be the case that Aboriginal customary law does not condone domestic violence or sexual abuse, it appears that in some cases it may permit or require physical punishment.82

3.91 Attorney General's Department representatives also made a point that was important to the committee's consideration of the issue:

They are forbidden to consider cultural practice as a factor that would mitigate the seriousness of the offence, but there are other factors that they can consider such as the nature and circumstance of the offence, and there has been at least one case where, for example, they did not consider it in terms of cultural practice to mitigate the seriousness but did consider the fact that the families involved were supportive of the actions. So there are some lines to be drawn, but there is some ability, still, to take factors into account in other ways.83

Committee view

3.92 The committee acknowledges the opposition expressed to it regarding continued restrictions on consideration of customary law and cultural practice in bail and sentencing decisions. It recognises the importance of customary law and cultural practice in Aboriginal and Torres Strait Islander communities, and understands that people want to ensure that those laws and practices are kept strong in communities, through ensuring their continuing relevance. At the same time, it believes that nothing in customary law should be allowed to in any way condone violence or sexual abuse.

3.93 The committee believes that the 2009 case The Queen v Wunungmurra has demonstrated that the current provisions provide a framework within which customary law and cultural practice can play an appropriate role in cases involving Aboriginal and Torres Strait Islander Australians. The amendments in the current bill will ensure that there will be no unintended consequences regarding cultural heritage, including sacred sites and cultural heritage objects.

83 Ms Sarah Chidgey, Attorney-General's Department, Committee Hansard, 1 March 2012, pp 43–44.
Recommendation 4

3.94 The committee recommends that the Commonwealth include in its engagement program with remote NT communities going forward a specific component designed to build understanding of customary law provisions and support for this measure and in particular to clear up misunderstandings that have arisen.

Recommendation 5

3.95 The committee also recommends that the measure and its level of understanding in communities be reviewed in 5 years time as part of the review and evaluation of the proposed National Partnership agreement.

Income Management


3.97 Part 3B of the Social Security (Administration) Act 1999, provides for an income management regime, the purpose of which is outlined in the Act as being to reduce immediate hardship and deprivation by ensuring that the whole or part of certain income support payments is directed to meeting priority needs, reduce expenditure on certain goods, and encourage socially responsible behaviour.

3.98 Under the existing regime, the following criteria must be met before a person can be made subject to involuntary income management.

(a) a child protection officer of a State or Territory requires the person to be subject to the income management regime; or
(b) the Secretary has determined that the person is a vulnerable welfare payment recipient; or
(c) the person meets the criteria relating to disengaged youth; or
(d) the person meets the criteria relating to long-term welfare payment recipients; or
(e) the person, or the person’s partner, has a child who does not meet school enrolment requirements; or

84 For a person to be assessed as a vulnerable welfare payment recipient, a delegate, in this case a Centrelink social worker, must make a written determination that the person is a vulnerable welfare payment recipient. In making such a determination, the delegate must consider: whether the person is experiencing an indicator of vulnerability (11.4.2.20), whether the person is failing to meet their priority needs or the priority needs of their partner, children or other dependants, as a result of experiencing the indicator of vulnerability, and whether the person's total circumstances could be assisted by income management, having regard to other services and mechanisms available. Source: [http://www.fahcsia.gov.au/guides Acts/ssg/ssguide-11/ssguide-11.4/ssguide-11.4.2/ssguide-11.4.2.10.html](http://www.fahcsia.gov.au/guides_acts/ssg/ssguide-11/ssguide-11.4/ssguide-11.4.2/ssguide-11.4.2.10.html), (accessed 7 March 2012).

(f) the person, or the person’s partner, has a child who has unsatisfactory school attendance; or

(g) the Queensland Commission requires the person to be subject to the income management regime; or

(h) the person voluntarily agrees to be subject to the income management regime.\(^8\)

3.99 In circumstances where a person becomes subject to income management, the person will have an income management account. Amounts will be deducted from the person’s welfare payments and credited to the person’s income management account. However, amounts will be debited from the person’s income management account for the purposes of enabling the Secretary to take action directed towards meeting the priority needs of: the person; and the person’s children (if any); and the person’s partner (if any); and any other dependants of the person.\(^8\)

3.100 Part 3B also provides for a person to voluntarily elect to participate in income management.\(^8\)

3.101 Although the focus is often on the Northern Territory, the committee notes that income management applies more broadly. The Government has identified five trial sites throughout Australia where income management will commence on 1 July 2012\(^9\) – Playford (South Australia), Bankstown (New South Wales) Shepparton (Victoria), Rockhampton (Queensland) and Logan (Queensland).\(^9\)

3.102 The provisions set out in Part 1 of Schedule 1 will amend Part 3B of the Social Security Administration Act 1999, to enable income management referrals from a range of State and Territory authorities. It will do this through the changes proposed by Clause 123UFAA. New Clause 123UFAA will enable referrals for income management to be made by an officer or an employee of a recognised State or Territory authority.\(^9\)

3.103 The 'recognised State or Territory authority' referred to in Clause 123UFAA will be specified by legislative instrument.\(^9\) Under the existing provisions of Part 3B, the authority to refer a person to income management resides with a child protection officer.

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\(^9\) Clause 123UFAA, Social Security Legislation Amendment Bill 2011, lines 23–30, p. 4, lines 1–18, p. 5.

Income management – a difficult policy

3.104 Throughout its inquiry the committee heard conflicting views on income management. Some stakeholders are supportive of income management:

The phrase 'women's counsellor', as it attaches to case management, is our way of providing proper support. Proper support, in terms of case management, is working closely with the client but also with their family.

...That is another reason why the women are also supportive of income management, because it is the cash economy. It is those that are not engaged in the community, particularly young people, who are using what they do receive to access cannabis.\(^{93}\)

Without exception, women whom we know in remote communities have supported income management. Last year a friend from a South Australian community who was visiting Alice Springs told us that, when she got back to her community, she was going to get a BasicsCard because she had seen the benefits of having part of her pension quarantined. We had to tell her that, for now, she could not use a BasicsCard in South Australia. I think this illustrates the support that women in the remote communities have given to the BasicsCard.\(^{94}\)

3.105 Others however view the measures as discriminatory and 'dehumanising'.

My objection to the compulsory nature of the BasicsCard is summarised in the following quote from the letter written to the minister for Indigenous affairs, Jenny Macklin, in August last year. I said very clearly to her:

Madayin Traditional laws do not allow the control of an individual's personal possessions or property by another person.

For us molu rrupiya, tax money taken through official processes, become the individual's personal possession when they receive it. Therefore in the light of Madayin traditional law compulsory quarantining of Centrelink payments breaks the right of an individual to control their own life.'

...

The solution the Yolngu people seek is for the Australian government to remove compulsory quarantining of Centrelink payments, and instead respond to the needs of our children with education and assisting their parents with budgeting. It would also be beneficial to have a voluntary quarantining service. Yolngu people are completely capable of providing for their children without being dehumanised and humiliated by having to use the BasicsCard.\(^{95}\)

\(^{93}\) Ms Andrea Mason, Ngaanyatjarra Pitjantjatjara Yankunytjatjara (NPY) Women's Council, Committee Hansard, 21 February 2012, p. 15.

\(^{94}\) Mr David Hewitt, Committee Hansard, 21 February 2012, p. 59.

\(^{95}\) Dr Djiniyini Gondarra OAM, Dhurili Clan Nation, Committee Hansard, 22 February 2012, pp. 29–30.
3.106 National welfare organisations expressed their strong opposition to income management, and what is regarded by many organisations as the implementation of policy without sufficient evidence to indicate that it works.\textsuperscript{96}

3.107 Dr Cassandra Goldie of the Australian Council of Social Services expressed it in this way:

\begin{quote}
We want to emphasise just how deeply concerned national groups, local groups and regional groups—who have deep expertise in how to provide the right supports to people who are living on low incomes and who are struggling in a particular way—are with the way in which government should be working with those communities. We really want to emphasise that this set of bills takes us off further entrenching what we see as being fundamentally contrary to basic human rights, to what is practical and is working. To the best of our knowledge, there is nothing like this in comparative countries, so we really want to highlight how deeply concerned our groups are with the direction that this legislation will set us off in...\textsuperscript{97}
\end{quote}

3.108 Dr Falzon of the St Vincent de Paul Society says:

\begin{quote}
The Society has consistently opposed compulsory income management and punitive welfare policy that pathologises people in poverty and fails to take into account the complexity of their lives. Topdown imposition of measures such as compulsory income management and SEAM are not only fundamentally antithetical to our mission and vision, but also antithetical to the Australian Governments’ commitment to “resetting the relationship” with First Nations People.\textsuperscript{98} The committee heard concerning evidence from submitters that they are encountering discrimination when using their BasicsCard:

That does not read right to me, because this is racist this intervention—call it money management, the BasicsCard. It is an intervention. The government should not have brought this in at all...

They want to put in the BasicsCard in Bankstown. You have to use Woolworths, Coles, Kmart and Target. I do not want to go into Woolworths with my BasicsCard. If I want some cat food for my cat or some ice-cream to give myself a little treat, the girl will get on the intercom at Woolworths and say: ‘Item 25, Peters ice-cream. Is that allowed on the BasicsCard?’ How humiliating. Woolworths have certain checkouts that you can use because not every one of the checkouts will take this BasicsCard. As then
\end{quote}

\begin{flushright}

\textsuperscript{97} Dr Cassandra Goldie, \textit{Committee Hansard}, 6 March 2012, p. 32.

\textsuperscript{98} St Vincent de Paul Society, \textit{Submission 24}, p. 1.
\end{flushright}
Minister Tanya Plibersek said at the closed forum, 'It looks like a credit card.' It does not look like a credit card.\textsuperscript{99}

3.109 The Northern Territory Discrimination Commissioner Mr Eddie Cubillo advised the committee that there had been instances where Aboriginal people subject to income management had been treated poorly when using their BasicsCard:

We have had complaints from the urban centres with regard to how they are treated with their cards at shops in various places. We have had to pull a big shopping centre and provide training for them on how they treat Indigenous people with those welfare quarantine cards.

...It was in a major centre in the Territory. The big shopping centre was making people line up in a separate queue even though they lined up previously. They were saying it was a process for them, but people were—

...This was in Alice Springs.\textsuperscript{100}

3.110 In addition to the evidence received that may demonstrate instances of discrimination, the committee heard that the limited range of vendors involved in the income management scheme is also causing stress among families:

\textbf{Mr Oliver}:...Income management does not really teach people to budget; it just takes half their money away. So you have anxiety issues over that—having enough money to feed your kids, to pay your rent or to have a power card. Even though power cards are $20, for us people who are working it is nothing but for people who are on income management it is actually something.

\textbf{CHAIR}: Thanks, Mr Oliver. Can you buy your power card with your BasicsCard?

\textbf{Mr Oliver}: I believe so, yes.

\textbf{CHAIR}: And you can buy food with your BasicsCard?

\textbf{Mr Oliver}: Yes, that is what it is for, but Centrelink always had that capacity; they called it Centrepay.

\textbf{CHAIR}: Sure, but I am just trying to clarify from your previous statement that people have not been refused power cards for electricity because of the BasicsCard.

\textbf{Mr Oliver}: No, there has been no refusal of that, but when people go into Darwin there are only a certain number of shops that actually accept BasicsCards.\textsuperscript{101}

3.111 The committee also heard evidence that suggests communities, particularly those where income management is being trialled, do not understand how it works:

\textsuperscript{99} Miss Carol Carter, Deputy Chairperson, Bankstown Aboriginal and Torres Strait Islander Advisory Committee, \textit{Committee Hansard}, 6 March 2012, p. 10.

\textsuperscript{100} Mr Eddie Cubillo, Northern Territory Discrimination Commissioner, \textit{Committee Hansard}, 24 February 2012, p. 3.

\textsuperscript{101} Mr Cyril Oliver, Malabam Health Board, \textit{Committee Hansard}, 22 February 2012, p. 8.
**Mr Thomas:** We have been involved in meeting community organisations in Logan just recently. We are finding that there is not a lot of awareness in Logan at the moment about income management, so we have been assisting in explaining the possible changes out there. We have been doing the same thing out at Bankstown as well and have travelled to Shepparton. We are located here in Sydney, in Surry Hills, but we do not have the resources to have a casework service out there or to do some outreach. Certainly we have talked to community groups. We have been talking with Legal Aid and the Aboriginal Legal Service. We still have a legal working party looking at this issue at the moment, and it is our hope that we would be able to provide some outreach in these areas. We have had similar discussions with people at Shepparton about the need for community legal education. We are finding that there is a lot of not misinformation but just distortions, and people are really unclear about the model of income management that is going to be put in place in these locations. So people are needlessly anxious, and that is really unfortunate. Add to that the fact that people tell us that the engagement of the Department of Human Services or Centrelink has been, to quote someone who emailed me yesterday, 'ordinary' in these areas. So there needs to be more engagement there on the ground, and also with people who like income management and people who do not like it as well.

There is also the fact that the focus is on income management. There is confusion about the role of income management and all of the other place-based initiatives, which some groups have been very supportive of in these areas. So we think that is one of the reasons why it is important not just to get the information about people's social security rights but to get clear information about how the other proposals are working in the area as well. We have put this to government in our federal budget submission this year about this particular issue and mentioned it in relation to welfare rights funding overall, because we see a particular growth in the need to address this issue immediately.102

3.112 The committee notes that the purpose of income management is to ensure better protection of vulnerable Australians and ensure that priority needs are met and expenditure on certain goods is reduced. The Northern Territory Children's Commissioner, however, identified that in situations of domestic violence, although income management may be helpful in ensuring that expenditure on alcohol or drugs is reduced, the quarantining of money may in fact prevent the person suffering abuse from leaving the domestic violence situation.

**Dr Bath:** I can say this, that I have come across many examples where women and children, in particular, are extremely stuck in terms of knowing what to do when they are exposed to domestic violence. I am sure most of us have personal experience of having to assist people in that situation who are living in Darwin and Alice Springs. So, in a broad sense, I think it is certainly true that many of the victims of domestic violence have very few resources, very few options and very few places to turn. That goes

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102 Mr Gerard Thomas, Policy and Media Officer, National Welfare Rights Centre, *Committee Hansard*, 6 March 2012, p. 28.
absolutely without saying. My ears did pric up when I heard that mentioned because I think the issue is that if someone truly needs to have their income managed it is probably because kids are at risk in that situation. I am talking about if they truly do need to have their income managed. I do not know whether making some sort of blanket statement that the money should be returned is necessarily a good thing. Maybe if it were assessed by a professional I would be more comfortable about it rather than making a blanket statement. But if the issue is that it is being managed because kids have been neglected in the past, I do not think that is a valid contention.103

3.113 Submitters are strongly opposed to compulsory income management and would prefer that it remain voluntary.

CAALAS continues to oppose the current regime of compulsory income management in the Northern Territory but in particular the proposed expansion under the social security bill. We are highly concerned about the continuation of income management and its expansion in the absence of independent evidence that income management is working to protect women and children or to encourage socially responsible behaviour.104

... We are not opposed to income management. We are opposed to compulsory income management. If someone genuinely and voluntarily elects to be income managed, we support that decision. We do not support compulsory income management in the way that it currently exists in the Northern Territory—there is a difference there.105

3.114 The Public Health Association of Australia (PHAA) explained why compulsory income management should include clear entry and exist points and be a measure of last resort:

The PHAA acknowledges that there may be a case, in some limited instances, for compulsory income management for targeted individuals, where transparent, priority criteria have been established, such as child abuse or neglect, or alcohol-related violence. If compulsion is to be applied, there should be legal and ethical criteria to govern the process, including transparent methods of decision making, defined criteria to determine 'entry' and enable 'exit' from the scheme, and the right to appeal and review. Compulsory income management should only be implemented as a last resort and as part of a case management program, implemented by a properly consisted non-government organisation, with safeguards against arbitrary decision making.106

103 Dr Howard Bath, Northern Territory Children's Commissioner, Committee Hansard, 23 February 2012, p. 51.
104 Ms Katie Robertson, Central Australian Aboriginal Legal Aid Service, Committee Hansard, 21 February 2012, p. 8
105 Ms Katie Robertson, Central Australian Aboriginal Legal Aid Service, Committee Hansard, 21 February 2012, p. 13.
106 Public Health Association of Australia, Submission 159, p. 6.
Committee view

3.115 The committee takes the view that public opinion on the effectiveness and public benefit of income management remains divided. The committee is generally supportive of initiatives that aim to empower and protect vulnerable Australians but would be concerned if the measures prevent those in circumstances of distress from improving their situation. The committee is however concerned by the apparent lack of understanding in the place-based communities where income management is being trialled.

3.116 The committee is gravely concerned by the anecdotal evidence it received which suggested people using the BasicsCard are encountering discrimination. The committee views such practices as completely inappropriate and considers cases of discrimination should be addressed.

3.117 Ongoing work is needed with the community, Centrelink, elders and vendors, to ensure an understanding of the BasicsCard, including education for vendors that will ensure there is never discriminatory or stigmatising treatment.

Broadening of the referral powers

3.118 Throughout its inquiry, the proposed broadening of the referral power contained in Clause 123UFAA of the Social Security Legislation Amendment Bill 2011 was strongly criticised and raised as a concern by many stakeholders, particularly legal representatives. The Central Australian Aboriginal Legal Aid Service (CAALAS) raised concerns with this proposal given that it broadens the referral power to State and Territory authorities which will result in multiple agencies, without relevant knowledge and training of how income management works, making decisions of a significant magnitude.

The main concern that I will talk about today is the referral by a state or territory authority of a recipient on income management. We strongly oppose the ability for staff of a recognised state or territory authority to be able to make a decision regarding whether a welfare recipient should be subject to income management. We recommend that this provision be removed from the social security legislation amendment bill or, should it provide, we strongly recommend that an additional section be inserted into this legislation whereby the secretary has the final discretion as to whether a referral is implemented or actioned.

We have grave concerns about the government seeking to extend income management referral decision-making powers to other Northern Territory government departments based on our experience to with child protection income management. Our greatest anxiety relates to the insufficient understanding among many NT authorities of how income management works, what it involves and whether it will assist a welfare recipient.107

107 Ms Katie Robertson, Central Australian Aboriginal Legal Aid Service, Committee Hansard, 21 February 2012, pp. 8–9.
Similarly the Northern Australian Aboriginal Justice Agency (NAAJA) were of the view that “[d]ecisions about social security and administration should be done by Centrelink, and I think that is what people expect.”

CAALAS explained that their concern with the broadening of the referral provisions is twofold. Not only are they concerned that there is a lack of knowledge of income management in state and territory authorities who may be recipients of this delegated legislative power but that in some cases, such as the Northern Territory, such a delegation will create access to justice problems given the absence of an administrative appeals review process.

We are of the opinion that Centrelink income management staff are best placed to determine a recipient's eligibility for income management, given that it is a highly complex regime. Giving Centrelink final discretion will also afford recipients subject to a decision access to Centrelink review mechanisms, such as the authorised review officer, the Social Security Appeals Tribunal and the Administrative Appeals Tribunal.

Committee view

The committee shares the concerns of submitters about the delegation of the referral power to authorised state and territory authorities given the potential impact of decisions concerning income management can have on families.

The committee also notes that it would be an undesirable outcome if the proposed provisions could affect access to justice for vulnerable Australians, and considers that all decisions about whether a person is made subject to income management must allow for appropriate review of administrative power and accord natural justice.

The committee notes the argument made in a number of submissions, including the Australian Human Rights Commission and Aboriginal Peak Organisations NT, that the usual Social Security appeal mechanisms should be available to Centrelink recipients who are referred for income management by a proposed State/Territory body.

The committee notes that all decisions made by Centrelink in relation to income management are appealable through the usual Social Security appeal mechanisms. This proposal would bring into the Social Security appeals process decisions that are not made by Centrelink. In this sense it would be a new use of these appeals mechanisms and the committee has been advised by FAHCSIA that it is not practicable. In particular, decision making powers on income management will be provided to state/territory bodies where they have particular expertise e.g. in child

108  Mr Alexander Clunies-Ross, Northern Australian Aboriginal Justice Agency, Committee Hansard, 23 February 2012, p. 44.

109  Ms Katie Robertson, Central Australian Aboriginal Legal Aid Service, Committee Hansard, 21 February 2012, p. 9.
protection or substance abuse – and where Centrelink does not have such expertise. It is not practicable that Centrelink would review decisions of a body where they do not hold the expertise.

3.125 It is unclear to the committee how Centrelink would review a decision that may be based upon many years of case files from authorities working closely with families and individuals, without having full access to these case files. It is also questionable whether it is appropriate for Centrelink to be examining case files which will contain intensely personal information about individuals and their children, and may contain a range of unsubstantiated allegations.

3.126 To allow for the usual Social Security appeal mechanisms would essentially require the duplication of expertise that is already held by particularly state or territory bodies.

3.127 However, the committee certainly agrees that there should be opportunities for people to seek review of decisions about income management. Therefore, it would be appropriate for the amended bill to require that the Minister only approve authorities which have an appropriate review process. This would apply specifically to decisions made by the authority to give a notice to place a person on this measure of income management, and would enable people referred under the measure to have that decision reviewed. An appropriate review process would be one where there is review by a person not involved in the original decisions; the review is easily accessible and is provided in a timely fashion, and available at no cost.

Recommendation 6

3.128 The committee recommends that the government amend the Social Security Legislation Amendment Bill to require that only agencies that have in place appropriate internal and external review and appeal processes be approved by the Minister to make income management referrals.

School Attendance

3.129 Schedule 2 of the Social Security Legislation Amendment Bill 2011 amends the provisions in the social security law that underpin the Government’s Improving School Enrolment and Attendance through Welfare Reform Measure (known as SEAM). It enables some local tailoring of this measure so the operation of SEAM can be integrated with the Northern Territory Government’s Every Child, Every Day initiative, to support greater improvement of school attendance. Under the amended arrangements, a parent may be required to attend a compulsory conference to discuss their child’s school attendance, to enter into a school attendance plan, and to comply with the plan. Failure to meet the compliance arrangements provided by the Bill would lead to suspension of a parent’s income support payment, unless certain circumstances apply.\footnote{Social Security Legislation Amendment Bill, \textit{Explanatory Memorandum}, p. 12.}
3.130 Under the current provisions, failure to comply with Part 3C of the Social Security Legislation results in similar penalties for school non-attendance, such as the temporary suspension of some income support payments. The changes set out in the Bill will introduce additional steps in the process before this suspension occurs, such as conferencing and development of school attendance plans. These additional steps are set out in a new Division 3A of Part 3C of the Bill.

3.131 The financial impact of this Bill in implementing the school attendance measure is $28.2 million over four years from 1 July 2011, with the measures in this Bill commencing from 1 July 2012.

The proposed amendments – new SEAM model

3.132 Division 3A will be inserted into Part 3C of the Social Security Administration Act, which relates to SEAM and sets out provisions for school attendance plans. Division 3A enables the Secretary or a person responsible for the operation of a school to:

- require a person to attend a conference to discuss the school attendance of their child, to enter into a school attendance plan at the conference, and to comply with the plan; and

- to give compliance notices where a person fails to attend a conference, fails to enter a plan, or fails to comply with a plan. The compliance notice would require the person to attend a conference, enter a plan, or comply with a plan, depending on circumstances surrounding the giving of the notice.

3.133 Failure to comply with a compliance notice under these amendments will then result in payments being suspended. This suspension of income support remains a last resort measure under the amendments and a suspension is subject to the following exceptions:

- suspension of payments could not occur if the Secretary were satisfied that there were ‘special circumstances’ to justify the failure to comply with the compliance notice; and

- a determination can be made, having regard to all the circumstances, that, if a person has been fined under a State or Territory law regarding a failure of the person’s child to attend school, payments may not be suspended despite

111 Social Security Administration Act 1991, Part 3C, section 124M.
112 Social Security Legislation Amendment Bill, Explanatory Memorandum, p. 0.
115 Department Families, Housing, Community Services and Indigenous Affairs, Submission 343, p. 22.
non-compliance with the compliance notice, even if no special circumstances exist.\textsuperscript{116}

3.134 A new section 124NC provides for school attendance plans to be part of SEAM rather than just issuing compliance notices. Under this amendment, the Secretary or the person responsible for the operation of the school may require a parent or carer enter into a school attendance plan which would set out requirements to meet in order to improve attendance for the child/ren that the plan covers.\textsuperscript{117}

\textbf{SEAM trials and extension to additional NT locations}

3.135 In 2009, SEAM was trialled in six locations across the Northern Territory and six locations in Queensland. The trials in the Northern Territory have involved a total of 14 schools (including nine government schools). The Australian Government announced in 2011 that SEAM will be extended to an additional 16 sites in the Northern Territory.\textsuperscript{118} The locations where SEAM is being implemented in the Northern Territory is set out in Appendix 5.

\textbf{Importance of school attendance to lift educational outcomes}

3.136 The committee heard broad support from submitters regarding the benefits of education leading to better life outcomes, and the need to lift educational outcomes through school attendance. This was highlighted in the bill's second reading speech:

School attendance in the parts of the Northern Territory is unacceptably low – as low as 40\% in some schools. With such a level of absence, a child cannot build a sufficient foundation in literacy and numeracy to enable them to succeed in later schooling and in the modern world.\textsuperscript{119}

... This work must continue, but it is clear that for these improvements in schools to translate into improvements in educational outcomes for students, regular school attendance is essential.

Improving attendance can never be done by governments and schools alone. For all the funding that governments invest and all the skills that teachers bring to their schools, we still ultimately rely on the parents to get their children ready and to the school gate each morning.\textsuperscript{120}

\begin{itemize}
  \item \textsuperscript{116} Social Security Legislation Amendment Bill, \textit{Explanatory Memorandum}, p. 12.
  \item \textsuperscript{117} Social Security Legislation Amendment Bill, \textit{Explanatory Memorandum}, p. 15.
  \item \textsuperscript{119} Minister Garrett, Social Security Legislation Amendment Bill 2011, Second Reading Speech, \textit{House of Representatives Hansard}, 23 November 2011, p. 13559.
  \item \textsuperscript{120} Minister Garrett, Social Security Legislation Amendment Bill 2011, Second Reading Speech, \textit{House of Representatives Hansard}, 23 November 2011, p. 13559.
\end{itemize}
Despite receiving evidence supporting school attendance, the committee received little evidence from stakeholders that supported current measures to address school non-attendance. A number of issues were raised by submitters regarding the approach taken in the Stronger Futures bills, particularly SEAM. These key issues often were not directly related to the proposed legislative amendments but spoke to broader issues relating to the policies being implemented under these arrangements. Issues identified included:

- policy confusion between Commonwealth policies and jurisdiction based policies to improve school attendance;
- lack of evidence supporting SEAM as an effective measure to address school non-attendance; and
- punitive measures are ineffective in addressing school non-attendance and intensive case management approaches are required.

**Policy confusion between Commonwealth policies and jurisdiction based policies to improve school attendance**

The Bill’s Explanatory Memorandum explains that amendments enables 'local tailoring' so the operation of SEAM can be integrated with the Northern Territory (NT) Government's Every Child, Every Day initiative to support school attendance. This integration is not made explicit in the legislative amendments so the new Division 3A can potentially apply outside the Northern Territory.

Given SEAM will be extended in the Northern Territory to specific locations, and the Territory Government has recently implemented the Every Child, Every Day initiative which can include fining parents when children do not attend school, it is unclear to the community how these two policies will interact and what policy will take precedence.

The Australian Department of Families, Housing, Community Services and Indigenous Affairs (FaHCSIA) explained SEAM will support the NT Government's approach and sought to provide clarity to the committee regarding its integration with the NT Every Child, Every Day initiative and stated that SEAM:

...is supported by the Northern Territory government, recognising that it will complement its own every child, every day policy and operate in the context of a range of other measures encouraging improved levels of school attendance. In other words, SEAM is not the only lever being used in this area.

There have been a range of comments about SEAM that it is punitive and that there is a lack of evidence that it works. I would like to respond to those. First, SEAM is a strong measure, but it is not the only measure. SEAM is another strategy to complement others aimed at improving school attendance.

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attendance. It is not seen as a panacea. The new SEAM model provides positive support to parents and families. It builds on the Territory government's attendance conference process. That process gets families and schools together to try and resolve the barriers to attendance before a suspension of income support occurs. Social work and other support services will be provided to assist the family throughout the SEAM process. Where required, however, the new SEAM enables a tougher approach to be applied. Suspension of income support is the lever at the end of the process for the small number of parents who refuse to engage and in so doing, deprive their children of the opportunities that schooling provides, the opportunities for a life with much greater potential.122

3.141 The Northern Territory Government also stated that SEAM is just one aspect of an approach to improving attendance in the Territory, and this measure is part of a broader strategy:

The NTG considers that the SEAM provides a mechanism to enhance school attendance, through its integration with the NTG's Every Child, Every Day school attendance strategy and its Strong Start, Bright Futures comprehensive service delivery model in Territory Growth Towns. However the SEAM alone cannot deliver the educational outcomes being sought, it must be complemented by effective engagement with families, further enhancing teacher quality and numbers, including growing a strong Indigenous education workforce, teacher housing, and student reengagement strategies.

Investments in the area of re-engaging disengaged students are needed to ensure the desirable impacts of the SEAM legislative reform do not have unintended consequences of disrupting the learning of students who have been more consistently engaged with schooling, as is coordinated support for families of disengaged students! This investment would importantly build on the early encouraging signs of improved outcomes from the collective NT and Commonwealth government investment in remote Indigenous schools and communities.123

3.142 These clarification points however do not appear to have filtered out to all the communities which it affects. The committee heard from many submitters that there was still confusion around how the two policies operated together. The Aboriginal Peak Organisations of the NT stated:

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

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122 Mr Michael Dillon, Deputy Secretary of Families, Housing, Community Services and Indigenous Affairs, Committee Hansard, 1 March 2012, p. 27.
attendance at school, the possibility of varied consequences is unnecessarily confusing.\textsuperscript{124}

3.143 Some community schools, however, did indicate to the committee how SEAM relates to the \textit{Every Child, Every Day} initiative and how this may operate on the ground. When asked what both the Commonwealth and Territory governments provide to address school non-attendance issues, the Principal of Maningrida school stated:

> It is very similar to our current NT policy around Every Child, Every Day. It is really coming back even before the fines or any of that are rolled out. It comes back to the communication with parents. So, if Trish Crossin has not come to school for 10 days, we would need to then go around to the family and say, 'What is happening with Trish? What is the story here?' and then, 'How can we help Trish to come to school?' We then work it out with the parents or the family and say, 'Okay, what is the background here?' Our attendance officers will then come to the school and say, 'We need these types of support for this type of child,' and that is different support for different children that are not attending. We can then work with that child and really engage them into the school. But we keep that conversation happening all the time. Even when Trish does come back into the school, we need to have that conversation the week after as well to make sure the parents engage and know what is happening in the class for that student, so the parents can support the students in the classroom, because they know what is happening in each class.\textsuperscript{125}

3.144 The need for further education in the community about what these two measures entail, how they will interact and what implications there may be for parents, and communities affected remain. This need was made clear in the Aboriginal Peak Organisations of the Northern Territory submission that stated significant 'community education is needed to ensure Aboriginal People fully understand the new SEAM measure'.\textsuperscript{126}

\textit{Committee view}

3.145 Based on feedback received in the Northern Territory, the committee believes the distinction between the NT Government's \textit{Every Child, Every Day} initiative and the SEAM measure remains unclear within the community.

\textbf{Recommendation 7}

3.146 The committee recommends that the Commonwealth and NT governments provide greater clarity regarding SEAM and the \textit{Every Child, Every Day} measures, how they interact and will operate in parallel together. Further education needs to be provided to communities where these policy changes will

\begin{itemize}
\item \textsuperscript{124} Aboriginal Peak Organisations of the Northern Territory, Submission 330, p. 8.
\item \textsuperscript{125} Mr Stuart Dwyer, Maningrida School Principal, Committee Hansard, 22 February 2012, p. 26.
\item \textsuperscript{126} Aboriginal Peak Organisation of the Northern Territory, Submission 330, p. 8.
\end{itemize}
apply in the Northern Territory as of 1 July 2012 and advice provided by both
governments must be clear as to what policy applies in different areas
throughout the Northern Territory.

Lack of evidence supporting SEAM as an effective measure to address school non-
attendance

3.147 The committee heard from many stakeholders concerned with SEAM being extended under the legislative amendments despite the apparent lack of evidence that supports it as an effective measure to address non-attendance. The National Congress of Australia's First Peoples stated:

...there is insufficient evidence to support improved attendance and educational outcomes through an expansion and extension of SEAM and that these resources would be better directed at alternatives such as changing the school environment and supporting community-driven initiatives. We note that the Department of Education, Employment and Workplace Relations released an evaluation report on SEAM for 2010 at the concluding stages of the consultation period of this review. Due to the late timing of the release, there has been insufficient time to analyse the evaluation report and its implications. Accordingly, we reserve our position on the evaluation report.127

3.148 The Central Australian Women’s Legal Service (CAWLS) Inc. expressed shared this concern through their submission and requested the extension of SEAM be put on hold until more evidence is gathered.

CAWLS is concerned at the expansion of SEAM despite a lack of evidence that it has worked to positively impact school attendance in the trial communities. The evaluation of the 2009 model states that “SEAM did not demonstrably improve the rate of attendance of SEAM children overall, nor was any effect apparent at any stage of the attendance process in 2009”. CAWLS asks the Committee to recommend that the expansion of SEAM be put on hold until substantive evidence is available to show that the serious step of suspending and/or cancelling parental income support payments works to significantly improve school attendance.128

3.149 The committee received advice from FaHCSIA and the Australian Department of Education, Employment and Workplace Relations however that evaluations of SEAM in 2009 and 2010 have found positive outcomes, and that nother evaluation is being conducted in late 2012. FaHCSIA advised that:

...an early 2009 evaluation report relating to SEAM's operation in the Northern Territory was released in mid-December 2011. A subsequent 2010 evaluation report has also been released and a copy has been provided to the committee. The 2010 report showed that SEAM is having a positive effect

127 National Congress of Australia's First People, Submission 224, p. 23.
on both enrolment and attendance. From 2009 to 2010, students who were involved in the SEAM trial improved their attendance rates more than other children attending the same schools. We understand that this improvement was mostly a result of a decrease in unauthorised absences, those directly targeted by SEAM. Social worker contact provided by Centrelink was also shown to be vital in helping to improve the absence rates of referred students during the compliance period. This is particularly the case for students with higher absence rates, where assistance was provided to address attendance issues, helping to limit a relapse in absence rates.

These evaluations also outlined a number of areas in which SEAM could be improved. The government has acted on these recommendations. Accordingly, the new model of SEAM proposes as part of the Stronger Futures package has key differences from the existing SEAM model.\textsuperscript{129}

3.150 The Australian Government also advised that a final evaluation of the SEAM trial will be conducted in 2012 and further evaluations are being planned to monitor the effectiveness of improving and integrating SEAM with the Northern Territory’s Every Child, Every Day strategy.\textsuperscript{130}

Committee view

3.151 The committee notes the intention for an evaluation of SEAM in 2012 and believes this evaluation, and any others conducted in relation to Every Child, Every Day, should be made available as soon as possible and inform future amendments in this policy area.

Recommendation 8

3.152 The committee recommends that the SEAM 2012 evaluation, and any other material monitoring the effectiveness of SEAM and the Every Child, Every Day initiative, be made publicly available as soon as possible following its completion. Timing of the evaluation's release is particularly important given the inappropriate delay in releasing the 2010 evaluation of SEAM.

Punitive measures are ineffective in addressing school non-attendance and intensive case management approaches are required

3.153 Suspension of income support payments under amended SEAM arrangements remain a last resort. This information however was often not evident in the understanding expressed by organisations and individuals who presented evidence to the committee. In their submission, the Australian Council of Social Services asserted that SEAM in the Northern Territory:

\begin{flushright}
\textsuperscript{129} Mr Michael Dillon, Department of Families, Housing, Community Services and Indigenous Affairs, Committee Hansard, 1 March 2012, p. 27.
\textsuperscript{130} Families, Housing, Community Services and Indigenous Affairs, Submission 343, p. 20.
\end{flushright}
...started at the punitive and simplistic end of the range of potential solutions to a set of complex problems. It started with the imposition of a penalty, and then, in its various iterations, worked backwards to identify the causes of individual non-attendance through the use of social workers, and as proposed now (in conjunction with the Every Child Every Day initiative), via case conferencing and attendance plans. While these measures will help identify the underlying causes of non-attendance, they are unlikely to resolve them. That requires a combination of intensive case management and action to deal directly with the underlying problems including changes in school environments and their relationship to communities.  

3.154 The view of SEAM as simply a punitive measure was also shared in the NT Indigenous community of Ntaria who told the committee that:

...We have to praise our school because they work really hard for our children. The only thing most of the people are afraid of now is that, if their children do not attend school, they will be fined and they will be punished for that.  

3.155 The National Congress of Australia's First Peoples also stated that the implementation of SEAM under the bill 'does not address the underlying issues' and continues a punitive approach to address non-attendance.  

3.156 In addressing issues that lead to school non-attendance, the need to adopt a holistic approach was a common theme among submitters to the inquiry. The Aboriginal Peak Organisations in the Northern Territory (APO NT) welcomed the 'addition of conferencing and school attendance plans in addition to the more punitive aspects of SEAM' in the amendments, however emphasised this support needs to be:

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

3.157 The Central Australian Aboriginal Legal Aid Service (CAALAS) shared this view, and stated that they:

...advocate for a culturally relevant, strength based, intensive case management approach, with officers working with school age children and their families to address the reasons behind poor school enrolment and poor

131 Australian Council of Social Services, Submission 1, p. 4.
132 Ms Williams, Committee Hansard, 20 February 2012, p. 10.
133 National Congress of Australia’s First Peoples, Submission 224, p. 23.
134 Aboriginal Peak Organisations of the Northern Territory, Submission 330, p. 4.
135 Aboriginal Peak Organisation of the Northern Territory, Submission 330, p. 7.
attendance. The suspension of schooling requirement payments should only be one component of that kind of approach.  

3.158 The committee heard broad support for intensive case management and the need to provide appropriate resources for these support services. The National Congress of Australia’s First Peoples commented that the:

...level of support they will need to stay there and to achieve is significant, and I think there are real issues about the capacity and workforce to meet those needs. That is not to say it should not happen at all. If you want children to attend school they are going to have to be supported, ultimately, to do that.

...The SEAM evaluation said some different things but it said that social worker contacts had more impact than the SEAM. On page 47 it said ‘...tailored social worker support was considered to be the most critical factor in addressing issues underlying poor school attendance’.  

3.159 FaHCSIA also identified social work support is vital to addressing issues underlying school non-attendance and identified this as a key difference in the legislative amendments:

...up front social work support for all families under SEAM will ensure that parents facing multiple complex barriers, thwarting their attempts to get children to school, are supported with tailored case management.  

3.160 The committee heard from the Australian Human Rights Commission that also advocated that a holistic approach be taken to this address issues as:

...that SEAM is the type of measure that could only be appropriate as a matter of last resort. It is certainly not a substitute for the provision of adequate educational facilities and also supporting communities.  

3.161 The Australian Government Departments explained to the Committee that the additional steps in the proposed amendments, such as the school attendance plans, provide for a more comprehensive, tailored response to addressing issues.

136 Miss Shanna Satya, Central Australian Aboriginal Legal Aid Service, Committee Hansard, 21 February 2012, p. 9.
137 Ms Jody Broun, National Congress of Australia’s First Peoples, Committee Hansard, 1 March 2012, pp 13–14.
138 Mr Michael Dillon, Families, Housing, Community Services and Indigenous Affairs, Committee Hansard, 1 March 2012, p. 27.
139 Mr Mike Gooda, Australian Human Rights Commission, Committee Hansard, 1 March 2012, p. 3.
140 Mr Michael Dillon, Families, Housing, Community Services and Indigenous Affairs, Committee Hansard, 1 March 2012, p. 27.
Committee view and comment

3.162 The committee is supportive of the additional steps outlined in the legislative amendments which provide for engagement of families prior to consideration being given to income support suspension, particularly the development of school attendance plans in section 124NC.

3.163 The committee notes the advice from the Commonwealth Government regarding additional support service resources being provided to the Northern Territory to facilitate these provisions, however suggests consideration be given to extending these resources to SEAM trial sites outside the Northern Territory.

Criteria for designating persons responsible for the operation of a school for the purposes of the amendments

3.164 The addition of subsection 124A(2) in the amendments provides that the Minister may, by legislative instrument, specify a class of persons for the purposes of defining the persons responsible for the operation of a school. The committee heard from submitters that this amendment provides scope for a range of people being able to provide notices for the new Division 3A of Part 3C of the Social Security Administration Act and this should be made explicit in the legislation, not by legislative instrument.

3.165 Central Australia Aboriginal Legal Aid Service suggested school councils in Aboriginal communities should be identified as designated persons under the legislation as this would provide cultural considerations be included in decision making. CAALAS told the committee that:

...decisions made by persons responsible for the operation of the school that could result in suspensions of payment or even cancellations will be subject to social security appeal mechanisms. But we think that the legislation should specifically stipulate that people have access to that route of people. We also submit that school councils in Aboriginal communities should be designated as persons responsible for the operation of the school in conjunction with the employees of the department of education in the Northern Territory. This would allow school councils to contribute to decisions around compliance with school attendance plans and conference notices. It means that cultural considerations will be given their due weight in those decisions.

3.166 The NT Department of Education also explained to the committee that there are currently two types attendance officers in the Territory school system, home liaison officers (remote communities) and Aboriginal and Islander education workers


142 Miss Shanna Satya, Central Australia Aboriginal Legal Aid Service, *Committee Hansard*, 20 February 2012, p. 9.
These officers may be well placed to be part of decisions regarding school attendance and appropriate responses to address underlying issues.

Committee view

3.167 The committee believes criteria should be considered by the Minister regarding defining persons responsible for the operation of a school prior to setting these out in a legislative instrument. Criteria should be culturally relevant when referring to remote indigenous schools, such as specifying Aboriginal Liaison officers in the NT as persons responsible for operation of a school.