Human rights and *Stronger Futures in the Northern Territory*

Submission to Joint Parliamentary Committee on Human Rights

Review of the *Stronger Futures in the Northern Territory Act* 2012 and related legislation

October 2014

'The existence of human rights standards is not the source of Indigenous disadvantage.

Human rights do not dispossess Indigenous peoples, they do not marginalise them, they do not cause their poverty, and they do not cause gaps in life expectancy and life outcomes.

It is the denial of rights that is a large contributor to these things. The value of human rights is not in their existence; it is in their implementation.'

- Mick Dodson[1]

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WHO WE ARE

The ALA is a national association of lawyers, academics and other professionals dedicated to protecting and promoting justice, freedom and the rights of the individual.

We estimate that our 1,500 members represent up to 200,000 people each year in Australia. We promote access to justice and equality before the law for all individuals regardless of their wealth, position, gender, age, race or religious belief.

The ALA started in 1994 as the Australian Plaintiff Lawyers Association, when a small group of personal injury lawyers decided to pool their knowledge and resources to secure better outcomes for their clients – victims of negligence.

The ALA is represented in every state and territory in Australia. More information about us is available on our website.[2]

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INTRODUCTION

The Australian Lawyers Alliance ('ALA') welcomes the opportunity to provide a submission to the Joint Parliamentary Committee on Human Rights in its inquiry into the *Stronger Futures in the Northern Territory Act* 2012 (Cth) and relevant legislation.

We welcome the announcement of the review into the legislation, noting that the Committee had recommended that the 44th Parliament initiate a review into the legislation in their 2013 report.

We particularly welcome the opportunity to provide a submission, given our previous and ongoing concerns about the legislation's impact upon human rights. These include concerns about the lack of 'free, prior and informed consent' obtained during consultations, and concern about the characterisation of special measures within the legislation. We also retain our concerns about the way in which the legislation met parliamentary process.

We attach to this submission our previous submissions regarding the legislation, and intend for them to be considered as part of this submission, given that our concerns about specific provisions and human rights remain outstanding.

Since the introduction of the *Stronger Futures* legislation, the High Court has considered 'special measures' in the case of *Maloney v The Queen* [2013] HCA 28.

Our previous submissions addressed the 'special measures' of the legislation in light of General Recommendation No. 32 and the case of *Gerhardy v Brown.*

We note that the decision in *Maloney v The Queen* limits the use of international sources in the interpretation of 'special measures' within the *Racial Discrimination Act* 1975. The recommendations of the Committee on the Elimination of Racial Discrimination, and the provisions of the UN Declaration on the Rights of Indigenous Peoples were not accepted to bear upon the meaning of 'special measures' under the *Racial Discrimination Act* 1975.

In *Maloney*, French CJ noted that 'the text of Art 1(4) of the [International Convention on the Elimination of Racial Discrimination], as imported by the RDA, did not bring with it consultation as a definitional element of a "special measure".'[3]

While this is a disappointing outcome, providing wide powers for the Parliament to determine what constitutes a 'special measure', and highlighting again the need for deeper entrenchment of international standards regarding discrimination into Australian law; we note that the findings of French CJ may also continue to be

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relevant to the Committee's inquiry.

In *Maloney,* French CJ also noted [at 25] that:

> 'That being said, **it should be accepted, as a matter of common sense, that prior consultation** with an affected community and its **substantial acceptance** of a proposed special **measure is likely to be essential to the practical implementation of that measure**. That is particularly so where, as in this case, the measure said to be a "special measure" involves the imposition on the affected community of a restriction on some aspect of the freedoms otherwise enjoyed by its members. **It can also be accepted**, as the appellant submitted, **that in the absence of genuine consultation with those to be affected** by a special measure, **it may be open to a court to conclude that the measure is not reasonably capable of being appropriate and adapted for the sole purpose it purports to serve**.'

We believe that there was an absence of genuine consultation with communities affected by the *Stronger Futures* laws.

We also believe that many of the amendments within the legislation may not properly be construed as for the 'sole purpose' that they purport to serve. This is especially the case in relation to 'food security', wherein penalties for violations of the Act are disproportionate and at odds with the limitation dates and penalties meted out nationwide for other offences. So too, the licensing of small businesses do not appear to constitute legislating for the 'sole purpose' of the advancement of Aboriginal people in the Northern Territory.

The limitations placed upon Aboriginal people in the Northern Territory in the form of these laws – in many ways, an extension of the *Northern Territory National Emergency Response Act* 2007 – impinge significantly upon human rights, in particular, the right to self-determination.

We welcome the committee's review of the legislation on a human rights basis.

OUR CONCERNS ABOUT CONSULTATION

'This is not a proper consultation. This consultation is nothing.'

– Yuendumu consultation[4]

We have previously raised our concerns about the lack of effective and genuine consultation with communities in the Northern Territory regarding the *Stronger Futures in the Northern Territory* legislation.

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Article 19 of the UN Declaration on the Rights of Indigenous Peoples provides that:

> 'States shall consult and cooperate **in good faith** with the Indigenous peoples concerned through their own representative institutions in order to **obtain their free, prior and informed consent before** adopting and implementing legislative or administrative measures that may affect them.'

We submit that it does not appear that the free, prior and informed consent of Indigenous peoples was secured prior to the adoption of the *Stronger Futures in the Northern Territory* legislation.

While the UN Declaration on the Rights of Indigenous Peoples was formally endorsed by the Australian government in 2009, we believe that further steps must be taken to enshrine the spirit of its provisions into law.

Mick Gooda, Aboriginal and Torres Strait Islander Commissioner, wrote:

> 'The adoption of the Declaration is one thing. Now we face the challenge of real implementation. By implementation, I mean making both the intent and spirit of the Declaration real to Aboriginal and Torres Strait Islander peoples…
>
> It was the governments of the world that affirmed that the rights in the Declaration are a road map towards a reconciled nation.'[5]

Given the decision in *Maloney,* which limited the interpretation of international instruments formally endorsed by Australia, there is a need for the rights specified within the Declaration to be formalised and made further enforceable by law.

The consultations

The Stronger Futures consultation meetings were held 'in around 100 communities and town camps across the Northern Territory' between June and August 2011.

The total number of participants is unknown. The range of attendance across the meetings ranged from one person, in Tier 1 meetings, to more than 100 people at the Alice Springs public meeting. The number of Tier 1 meetings held was 378. Most of these would have involved very small groups of people, or one-on-one sessions. The number of Tier 2 meetings held was 101. This is equivalent to a total of 479 meetings. Interpreters were booked for only 91 meetings.

The meetings were not transcribed by the government. Some were independently transcribed and utilised by UTS' Jumbunna Indigenous House of Learning in their subsequent report on the consultations, *Listening but not hearing*.[6]

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Jumbunna's report critiqued the consultations process as failing to comply with Australia's obligations to meaningfully consult with Aboriginal and Torres Strait Islander peoples. Among other failings, 'the process was deficient because it:

- Did not involve the affected Aboriginal people in the design or implementation of the process;
- Relied on materials that were dense, complex and were not translated into relevant Aboriginal languages;
- Was conducted in very general terms, without reference to specific proposals or potential initiatives, despite the fact that the proposed legislative measures must have been in draft;
- Was decidedly partisan and did not acknowledge previous criticisms of Intervention measures or acknowledge successful community led initiatives to address community aspirations;
- Covered so many themes and asked so many questions that in depth discussion was not possible;
- Did not provide any mechanisms for reaching agreement;
- Did not include a clear process for feedback to communities to verify records of meetings; and
- Gave insufficient time for considered appraisal of the complex proposed legislative measures, especially from remote Aboriginal communities.'[7]

The independent report

The independent report released by the Cultural and Indigenous Research Centre Australia Centre (CIRCA) also admitted that CIRCA only visited 12 consultations – ten Tier 2 consultations, and two public meetings, out of 479 meetings. This amounts to monitoring of approximately 2.5% of meetings. This is grossly inadequate to be able to provide an assessment of the consultations being 'free, fair and accountable'.

While the government purported that the consultations affirmed that Aboriginal people were consulted regarding the *Stronger Futures* laws, we question the timing of the legislative drafts. The three bills comprising the legislative package were complex and voluminous.

It is certainly questionable as to what impact, if any, the consultations had on either the development of government policy and/or draft legislation that would inevitably have been available to government at the time of consultations.

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OUR CONCERNS ABOUT PARLIAMENTARY PROCESS

Previously, we raised our concerns about the way in which the *Stronger Futures in the Northern Territory* legislation met with parliamentary process.

We provide a short summary below:

The House of Representatives

- The *Stronger Futures in the Northern Territory* legislation was introduced in one of the last sitting weeks for the year in November 2011. Jumbunna Indigenous House of Learning stated in its report, *Listening but not hearing,* that:

  > 'It is simply not credible to suggest that a considered evaluation of the consultations could have informed the legislation, given the brief period of time that elapsed between the conclusion of the consultation and the tabling of the legislation. Needless to say, the provisions of the Bills and the impact that they will have on affected communities has not been discussed with communities at all.'[8]

- The voluminous legislation was referred to the Senate Community Affairs Committee for inquiry and report by 29 February 2014: a period of time that was largely over the Christmas holiday break, meaning that it would be difficult for organisations to appropriately analyse the legislation. The Senate Community Affairs Committee, realizing the hefty task before them, sought a brief extension in order to provide its report on 13 March 2012.

- Regardless of the short period of time, 454 submissions were presented to the Senate Community Affairs Committee, indicating the strong community opposition to these proposed laws.[9] In months to come, independent campaign *Stand For Freedom* collected the signatures of over 42,000 Australians opposed to the legislation.[10]

- The *Stronger Futures in the Northern Territory* legislation was placed on the House of Representatives' Daily Program for Monday, 27 February 2012 in the last days of the prior week. The date was significant for a number of reasons:

  - This date was prior to the Senate Community Affairs Committee handing down its inquiry report, and two days prior to the initial deadline for the inquiry report.

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- This was the same day as one of the Rudd/Gillard leadership challenges, meaning that there would be no adequate media scrutiny of the legislation and ensuing discussion in the House.

- This was the same day on which we had arranged for a film screening and discussion panel of elders and community leaders to be held at Parliament House, Canberra, in order that they may raise their concerns about the legislation, with parliamentarians from both houses invited to attend.

- The *Stronger Futures in the Northern Territory* legislation passed in the House of Representatives at 6.01pm on 27 February 2012, one minute after our event had commenced.

Compatibility with human rights

- A number of human-rights based groups wrote to the Parliamentary Joint Committee on Human Rights in 2012, calling for the Attorney-General to seek that a statement of compatibility with human rights be tabled alongside the legislation. The Attorney-General did not deem this to be necessary.

- On 9 March 2012, the UN Special Rapporteur on Extreme Poverty and Human Rights, Ms Maria Magdalena Sepulveda Carmona, and the UN Special Rapporteur on the Rights of Indigenous Peoples, Mr James Anaya, wrote to the Australian government, outlining six questions regarding the proposed legislation, as well as concerns that 'a number of provisions within the Stronger Futures bills threaten the enjoyment of human rights by Australia's indigenous communities, in particular the principle of equality and non-discrimination'[11]. They sought a response within sixty days.

- While the *Stronger Futures in the Northern Territory* legislation did not require a statement of compatibility with human rights to be tabled, as it was introduced prior to the 1 January 2012 commencement of the *Human Rights (Parliamentary Scrutiny) Act* 2012 (Cth), the Hon. Jenny Macklin tabled a statement of compliance with human rights, just hours prior to the vote on the legislation in the Senate. This statement of compliance was not appropriately assessed and did not provide an effective human-rights based analysis of the Bills.

- The Australian Lawyers Alliance released our own statement of non-

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compliance with human rights within hours.

- The *Stronger Futures in the Northern Territory* legislation was passed by the Senate in the early hours of the morning of 28 June 2012.[12]

- The Australian Lawyers Alliance applied under freedom of information laws for the release of the Australian government's response to the UN Special Rapporteurs, which was released to us on 29 August 2012. This indicated that on 7 June 2012, agents of the Australian government responded to the correspondence, requesting an extension to respond by the end of June 2012.

  Over four months after original receipt of the UN Special Rapporteurs' correspondence, agents of the Australian government responded on 20 July 2012. The UN Special Rapporteurs were informed that the legislation had been passed, the policy intent and spending regarding the reforms was explained and the 'Assessment of Policy Objectives with Human Rights' was annexed to the correspondence. In short, the concerns of the UN Special Rapporteurs had been largely ignored.

OUR CONCERNS ABOUT 'SPECIAL MEASURES'

We have previously raised our concerns about the validity of legislative measures being characterised as 'special measures'. Failure for these legislative measures to adequately fulfil the internationally accepted tests of 'special measures' could have the effect that the relevant laws would be racially discriminatory.

Special measures were involved in Parts 2, 3, 4, of the *Stronger Futures in the Northern Territory Bill* 2011 (Cth) and legislative amendments in Schedules 3 and 4 of the *Stronger Futures in the Northern Territory (Consequential and Transitional Provisions) Bill* 2011 (Cth).

In particular, these provisions related to:

- 'Tackling alcohol abuse' (Part 2);
- 'Land reform' (Part 3);
- 'Food security' (Part 4);
- Schedule 3;
- Schedule 4.

Our commentary on specific clauses can be seen more extensively in our previous

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submission on the *Stronger Futures in the Northern Territory Bill* 2011 and related bills to the Senate Community Affairs Committee.

While we discussed the effect of *Maloney* earlier, we reiterate that the special measures within the *Stronger Futures* laws, we do not believe, could be properly construed as being for the 'sole purpose' of advancing the rights and freedoms of Indigenous people. Furthermore, as emphasised in our previous submission, the legislation appears to create the maintenance of separate rights for different racial groups, with no evidenced method by which achievement of the objectives may be measured.

Section 8 of the *Racial Discrimination Act* 1975 (Cth) provides that:

> 'this Part [Part II – Prohibition of Racial Discrimination] does not apply to, or in relation to the application of, special measures to which paragraph 4 of Article 1 of the Convention applies…'

This provides the most specific reference to 'special measures' in federal legislation.

The *International Convention on the Elimination of All Forms of Racial Discrimination* provides further guidance, in that:

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

While disregarded in *Maloney,* we again reiterate, for contrast, General Recommendation 32, issued by the UN Human Rights Committee in 2009, which provides additional guidance regarding the characterisation of special measures.

These include that the measures should be:

- For the sole purpose of ensuring equal enjoyment of human rights and fundamental freedoms;
- Appropriate and legitimate;
- Necessary in a democratic society;

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- Respect principles of fairness and responsibility;
- Temporary: not to be continued after the fulfilment of objectives – which are to be goal related;
- Should not lead to the maintenance of separate rights for different racial groups.

CONCLUSION

We look forward to the Committee's findings. We are happy to elaborate further upon the issues that we have raised.

OUR PREVIOUS WORK REGARDING STRONGER FUTURES

Prior to the Stronger Futures legislative package being passed into law, we were vocal in our opposition to the proposed legislation. We attach these to our current submission for consideration by the Committee.

These include:

- A 54 page submission addressing our specific concerns with the *Stronger Futures in the Northern Territory* legislative package to the Senate Community Affairs Committee (February 2012): *Stronger Futures? Disempowerment and denial of legal rights: The establishing of a separate set of rights and interests for Indigenous communities under the Stronger Futures legislation;*[13]
- A statement of non-compliance with human rights;
- Correspondence to the Joint Parliamentary Committee on Human Rights;
- Information released under the *Freedom of Information Act* 1982 (Cth).

Our work on the issue can be accessed at our website:
http://www.lawyersalliance.com.au/ourwork/stronger-futures-in-the-nt

Film screening at Parliament House

In February 2012, the Australian Lawyers Alliance partnered with the directors of critically acclaimed film, 'Our Generation' to host a film screening and discussion panel at Parliament House, Canberra, to raise awareness about the legislation.

Parliamentarians and media representatives were invited to attend the event. ALA President Greg Barns and Co-Chair of the National Congress of Australia's First

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Peoples, Les Malezer, opened the event.

Panellists spoke powerfully about the *Stronger Futures* legislation. Panellists included:

- The Hon. Alistair Nicholson AO QC, former Chief Justice of the Family Court of Australia
- Dhangal Gurriwiwi, Elcho Island community
- Barbara Shaw, community leader, Mt Nancy Town Camp, Alice Springs
- Prof. Jon Altman, Centre for Aboriginal Economic Policy and Research (ANU)

The event was sponsored by Amnesty International; the National Council of Churches' NATSIEC; NSW Aboriginal Land Council and ALPA.

The event was further endorsed by the Human Rights Law Centre; ANTAR; SNAICC; Jumbunna Indigenous House of Learning; JEM; Urban Neighbours of Hope; Civil Liberties Australia and Concerned Australians.

REFERENCES

[1] Australian Human Rights Commission, Community Guide to the UN Declaration on the Rights of Indigenous Peoples, (2013) at 8. Accessible at https://www.humanrights.gov.au/publications/community-guide-un-declaration-rights-indigenous-peoples
[2] Australian Lawyers Alliance (2012) <www.lawyersalliance.com.au>
[3] *Maloney v The Queen* [2013] HCA 28, French CJ at [24]
[4] Concerned Australians, 'NT Consultations Report 2011', at 17.
[5] Australian Human Rights Commission, Community Guide to the UN Declaration on the Rights of Indigenous Peoples, (2013) at 4. Accessible at https://www.humanrights.gov.au/publications/community-guide-un-declaration-rights-indigenous-peoples
[6] http://www.jumbunna.uts.edu.au/researchareas/listeningbutnothearing.html
[7] Jumbunna Indigenous of Learning, *Listening but not hearing,* at 9. http://www.jumbunna.uts.edu.au/researchareas/ListeningButNotHearing8March2012.pdf
[8] Jumbunna Indigenous House of Learning, *Listening but not hearing,* at 60.
[9] http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Community_Affairs/Completed_inquiries/2010-13/strongfuturent11/submissions
[10] Stand For Freedom, www.standforfreedom.org.au
[11] A copy of this letter was previously provided by the National Congress for Australia's First Peoples to the Joint Committee in August 2012 and can also accessed at http://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Committee_Inquiries/strongerfutures/additionalinfo/~/media/Committees/Senate/committee/humanrights_ctte/activity/stronger_futures/additional_info/addino_ncafp_090812.ashx

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[12] http://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bId=r4736

[13] Submission to the Senate Community Affairs Committee (3 February 2012). Accessible at http://www.lawyersalliance.com.au/ourwork/stronger-futures-in-the-nt

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