

Submission To: Parliamentary Joint Committee On Human Rights
Regarding: 12-month review of the *Stronger Futures in the Northern Territory Act 2012* and related legislation

Submission to the Parliamentary Joint Committee on Human Rights

This is the second submission that we are making to the Committee and at risk of being repetitive we wish to re-state that it is our belief that the Stronger Futures legislation deprives Aboriginal people in the Northern Territory of their right to self-determination as set out in international covenants to which Australia is a signatory:

*International Covenant on Economic, Social and Cultural Rights*¹
*International Covenant on Civil and Political Rights*²

It is also our belief that the laws are discriminatory and do not comply with Australia's commitment as set out in the international convention to which Australia is also a signatory:

*The Convention on the Elimination of All Forms of Racial Discrimination*³

Furthermore, we believe that the law does not take into account the commitments made when Australia gave public endorsement to the Declaration on the Rights of Indigenous Peoples in April 2009. Articles 3, 4 and 5 leave no doubt as to the breadth or intent of this commitment.⁴

Article 3

Indigenous peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

Article 4

Indigenous peoples, in exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions.

Article 5

Indigenous peoples have the right to maintain and strengthen their distinct political, legal, economic, social and cultural institutions, while retaining their rights to participate fully, if they so choose, in the political, economic, social and cultural life of the State.

Self-determination is achieved through empowerment. The Stronger Futures laws aim to disempower by restricting the possibility to freely pursue economic, social and cultural development. The Australians Human Rights Commission states,

*"The feelings of disempowerment affecting these communities are symptomatic of a lack of control over issues directly affecting groups."*⁵

¹(1966) <http://www2.ohchr.org/english/law/cescr.htm>

²(1966) <http://www2.ohchr.org/english/law/ccpr.htm>

³(1965) <http://www2.ohchr.org/english/law/cerd.htm>

⁴(2007) http://www.un.org/esa/socdev/unpfii/documents/DRIPS_en.pdf

⁵AHRC submission To The Senate Community Affairs Legislation Committee, (March 2012), para 82, p18. https://www.humanrights.gov.au/sites/default/files/content/legal/submissions/2012/20120206_stronger.pdf

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CONSULTATION

The PJCHR Report indicates that “the question of proper consultation with Indigenous groups and other affected communities is relevant for a number of human rights. It is of particular relevance to the enjoyment by Indigenous people of the right to self-determination guaranteed by articles 1 of the ICCPR and the ICESCR”.⁶

However, as the Report states there was much criticism of the processes of consultation used prior to the implementation of the Stronger Futures legislation. The process was considered inadequate at many levels. These are all issues that were considered at length in the first round of submissions. The Committee View resulted in its endorsement of the recommendation of the Senate Community Affairs Legislation Committee that the framework articulated by the Australian Human Rights Commission and the Aboriginal and Torres Strait Islander Social Justice Commissioner for meaningful and effective consultation with Indigenous communities should be adopted by government.⁷

These guidelines have, however, not been adopted by Government during consultations with Community Living Areas in 2013 and more recently with communities regarding 99-yr leases.

It is perhaps worth noting that one of the best descriptions of a consultation process provided by the United Nations comes from Convention 169 (ILO) and this is because it takes the trouble to also state what a consultation is not. It isn't an information meeting.

*Consultation should be undertaken in good faith, with the objective of achieving agreement. The parties involved should seek to establish a dialogue allowing them to find appropriate solutions in an atmosphere of mutual respect and full participation. Effective consultation is consultation in which those concerned have an opportunity to influence the decision taken. This means real and timely consultation. For example, a simple information meeting does not constitute real consultation, nor does a meeting that is conducted in a language that the indigenous peoples present do not understand.*⁸

From transcripts we see that community 'consultations' on both the NTER measures and the Stronger Futures measures have been attempts by Government at 'information provision' that have not in any way aligned with genuine consultation processes.

Recommendation:

The Committee should require of Government a clear definition of the process for consultations that will be used with Indigenous Peoples at all times.

The process should be in accordance with the recommendations of the Human Rights Commission. Transparency of the consultation process should be secured by video and transcript.

⁶ http://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Completed_inquiries/2013/2013/112013/~media/Committees/Senate/committee/humanrights_ctte/reports/2013/11_2013/pdf/report.ashx Para 1.117, p31

⁷ Ibid. Para 1.123, p34.

⁸ Convention No.169 – ILO, at http://www.un.org/esa/socdev/unpfi/documents/workshop_FPIC_ILO.doc Para 5, p 2.

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CONSENT

As discussed in submissions to the first report, the failure to hold genuine consultations has led to a failure to obtain the consent of Indigenous Peoples to the measures that were introduced in 2012 under the Stronger Futures legislation.

Consent for the measures was clearly not forthcoming and evidence to this effect was well documented in the Senate Inquiry Report, supported by the transcripts that accompanied all of the Hearings. It was made very clear from the Hermannsburg Hearing transcripts⁹, and commented on by the now Minister, Nigel Scullion, that the legislation was not understood¹⁰, nor was there support for its implementation.¹¹ The Maningrida Hearing transcript highlights the strong objection to the legislation by representatives of communities from West, Central and Eastern Arnhem Land.¹² Consent was neither asked for nor, it seems, required by government.

SPECIAL MEASURES

As stated in the Report:

The Committee is not persuaded by the material put before it by the government that Stronger Futures legislation can properly be characterised as 'special measures' under ICERD or other relevant human rights treaties.¹³

This decision by the Committee is accepted.

⁹ **Hermannsburg** transcript, 20/2/2012 Ntaria (Hermannsburg) (PDF) or at http://parlinfo.aph.gov.au/parlInfo/download/committees/commsen/a3d14c82-bef1-434e-843d-366547f63678/toc_pdf/Community%20Affairs%20Legislation%20Committee_2012_02_20_817_Official.pdf;fileType=application%2Fpdf

¹⁰ "Country Liberals Senator **Nigel Scullion** says the first public hearing [Ntaria/Hermannsburg] about federal legislation replacing the emergency intervention in Indigenous communities in the Northern Territory has been a complete waste of time.

...

Senator Scullion says the committee spent most of the day explaining the legislation to the community, because it had not been properly consulted by the Federal Government." <http://www.abc.net.au/news/2012-02-21/20120221-stronger-futures-bill-consultation-process/3842500?section=nt>

¹¹ See also **Darwin** Stronger Futures Senate Hearing consultations, 24/2/2012 p.4. **Nigel Scullion**: "There is a fundamental thread through most of the feedback we get when we talk about consultation. When we get to most communities any observer would say that Aboriginal people more generally hate the intervention. They do not like it, it invades their rights and they feel discriminated against". [Darwin \(PDF\)](http://parlinfo.aph.gov.au/parlInfo/download/committees/commsen/22e597e2-671f-405c-90b7-bcab321ceab1/toc_pdf/Community%20Affairs%20Legislation%20Committee_2012_02_24_842_Official.pdf;fileType=application/pdf) or http://parlinfo.aph.gov.au/parlInfo/download/committees/commsen/22e597e2-671f-405c-90b7-bcab321ceab1/toc_pdf/Community%20Affairs%20Legislation%20Committee_2012_02_24_842_Official.pdf;fileType=application/pdf

¹² **Maningrida** Community Member **Mr Gamarania** 22/2/12: "This has been a very limited chance of hearing the seven-point measures[about Stronger Futures legislation]... Would there be any way to have another consultation? ... This is the voice of Arnhem land. We do not like the seven-point measure that discriminates against our human rights that alters our self-determination..."

Maningrida (PDF) pp 36-37. Or at http://parlinfo.aph.gov.au/parlInfo/download/committees/commsen/686c4ca5-8149-4834-8780-47c190b11f5d/toc_pdf/Community%20Affairs%20Legislation%20Committee_2012_02_22_828_Official.pdf;fileType=application/pdf

¹³ Para 1.10, p28. at

http://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Completed_inquiries/2013/2013/112013/~media/Committees/Senate/committee/humanrights_ctte/reports/2013/11_2013/pdf/report.ashx

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THE REPORT

The first part of the PJCHR Report of 2013 has effectively addressed the failure of the government process to satisfy the requirements for genuine consultations with Aboriginal communities. The report makes no claim of Government having gained the consent of the Peoples to the Stronger Futures legislation. Finally, the Committee has not been persuaded that the measures legislated can be considered to be 'special measures'.¹⁴

These appear to us to be very significant findings and we believe they should have been the basis for immediate recommendations to Government. It was hoped that when it became clear that the process used for the introduction of discriminatory measures, reliant upon the genuine engagement with Aboriginal peoples, had not occurred that the legislation may have been suspended while new consultations were conducted in line with Human rights requirements. This did not happen.

The second half of the report turns its attention to 'A Framework for Analysis'. While the framework itself is a very valuable tool produced by the Attorney General's Department for public servants in drafting statements of compatibility across all seven treaties, its use here appears to us to be questionable. We do not believe that the Committee should be engaged in a process of justifying the restriction of a right. We believe the Committee should take responsibility for informing Government of failures to protect rights, and where possible, to offer recommendations to immediately rectify such failures.

With the Committee's scrutiny of this legislation it became clear that the process used for the introduction of such measures was grossly flawed. It is now a matter of changing that very flawed process rather than ignoring it and moving on to some secondary process which attempts to justify the restrictions of a right without any attempt to obtain input from the affected communities.

The process of genuine consultation is in line with our commitment to self-determination as set out in both the ICESCR and the ICCPR covenants, to which Australia is a signatory. In Article 4 of the ICCPR we are told quite clearly that only in times of *public emergency which threatens the life of a nation* may we take measures of derogating our obligations to the Covenant.¹⁵ We are further told that if we should do this then we must immediately inform the Secretary-General of the United Nations. Australia has given no such notification of derogation.

¹⁴ Ibid.

¹⁵ Article 4(3) at <http://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx>

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RACIAL DISCRIMINATION

The Stronger Futures legislation is racially discriminatory because the measures in the legislation target only Aboriginal people of the Northern Territory and without their consent. It would seem that Australia is in breach of the Racial Discrimination Act.

RECOMMENDATION

The Stronger Futures legislation should be repealed.

Michele Harris OAM
for
'concerned Australians'
8 October 2014