A Stronger Future? Disempowerment and denial of legal rights:

The establishing of a separate set of rights and interests for Indigenous communities under the Stronger Futures legislation

Submission of the Australian Lawyers Alliance to the Senate Community Affairs Committee

3 February 2012

Who We Are

Background

The Australian Lawyers Alliance is a national association of lawyers, academics and other professionals dedicated to protecting and promoting justice, freedom and the rights of individuals. We estimate that our 1,500 members represent up to 200,000 people each year all over 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 Lawyers Alliance 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.

Our membership has since broadened to include barristers, lawyers, academics, students and other professionals, that represent clients across a range of areas of law.

Funding

We receive no government funding.

Our main source of funds is membership fees, with additional income generated by our events such as conferences and seminars, as well as through publications, sponsorship, advertising, donations, investments, and conference and seminar paper sales.

Law reform

We take an active role in contributing to the development of policy and legislation that will affect the rights of individuals and the fulfilment of human rights.

We also take an active role in informing the media of issue inhibiting individuals' access to justice, and call for legislative change in these areas.

Summary of our submission

The Australian Lawyers Alliance opposes the proposed Stronger Futures legislation package. We ask that the Senate Committee recommend the rejection of the proposed legislation to the House.

We submit that:

- This legislation will lead to the maintenance of separate rights for different racial groups, contrary to the provision in Article 1(4) of the *International Convention on the Elimination of All Forms of Racial Discrimination.*

This legislation:

- Undermines legal rights across a range of areas of law, including administrative law; constitutional law; consumer law; criminal law; discrimination law; privacy law; property law and welfare rights.

This policy:

- Reflects the assimilationist and paternalistic views of government towards Aboriginal people from the 1890s to 1960s. Furthermore, the legislation seeks to deal with complex social and economic disadvantage through government regulation and the undermining of individual freedom.
- Is a continuation of the policy of the NT Intervention under the National Emergency Response legislation, which has been openly rejected by communities and has increased stigma and poverty in communities.
- Is a marketing exercise, wherein the substance of the policy above has not changed, except in its PR profile.

The legal importance of consent

The High Court, in *Gerhardy v Brown* [1985] HCA 11; (1985) 159 CLR 70, dealt with the issue of 'special measures'. The court stated that 'the wishes of the beneficiaries are...perhaps essential in determining whether a measure is taken for the purpose of securing their advancement.'[1]

- The legislation has not been developed in genuine consultation with Indigenous communities.
- Indigenous communities have not provided 'free, fair and informed consent' to the measures.
- Indigenous communities openly oppose the measures.

The specific provisions

We believe the vast number of provisions providing discriminatory treatment to communities means that amendments to the legislation are not possible to rectify its character.

The impact of this legislation

This legislation will increase disempowerment, stigma and poverty in communities.
Many provisions may be extended beyond the sunset period of 10 years, via the regulation making power, thus making more concrete the future breaches of human rights.

We also wish to note, that our report has been produced under significant pressure of time and resources. ***The period of time provided for this inquiry has been vastly inadequate.*** *We have consulted with a range of other legal organisations that have been unable to provide submissions, due to the time period in which it was canvassed.*

[1] *Gerhardy v Brown* [1985] HCA 11; (1985) 159 CLR 70 at [135]

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Introduction

The Australian Lawyers Alliance welcomes the opportunity to provide a submission to the Senate Community Affairs Committee on the *Stronger Futures* legislation package, which includes the *Stronger Futures in the Northern Territory Bill 2011* (Cth); the *Stronger Futures in the Northern Territory (Consequential and Transitional Provisions) Bill 2011* (Cth) and the *Social Security Legislation Amendment Bill 2011* (Cth) ('the Stronger Futures legislation package').

Our submission will principally address the *Stronger Futures in the Northern Territory Bill 2011* (Cth) and the *Stronger Futures in the Northern Territory (Consequential and Transitional Provisions) Bill 2011* (Cth).

Principally, we are opposed to the current proposed legislative change formulated within the Bills, and at the circumstances in which it was introduced to Parliament. We believe that the Stronger Futures legislation package will prejudice Indigenous communities and also communities from a low socio-economic background in Australia.

After rigorous legal analysis, we submit that we are opposed to the above bills, as they combine to grossly undermine basic legal rights enshrined in many areas of Australian law, to which all Australians should have access, regardless of race or socio-economic background. These include protections within administrative law; constitutional law; consumer law; criminal law; discrimination law; privacy law; property law and welfare rights.

We believe that the undermining of such a range of areas of legal protection amounts to 'the maintenance of separate rights for different racial groups'[2], which would appear to breach the limitation of what may constitute a 'special measure' under international definitions.

We submit that many areas of the legislation may therefore be contentiously fought on the legal character of 'special measures' in the future.

The Australian Lawyers Alliance ('ALA') submits that the current approach of the Australian government in relation to development in Indigenous communities is outdated and not in keeping with basic or best practice in relation to community development or community empowerment, on either a domestic or international level.

We submit that it may not be possible to make adequate amendments to ensure the fulfilment of legal and human rights of Indigenous people under this legislation. This is due to the extremely vast number of specific provisions that specifically undermine the rights of communities.

We submit that the real problem lies within the heart of this legislation, within the policy on which it is premised. The policy underlying the proposed legislation is not only significantly outdated, it is proven not to work, and is in violation of international law.

We believe that there is no possibility that Aboriginal people asked for this legislation; nor was their consent sought in the introduction of this legislation. Such legislation would never be tolerated to be suggested, let alone passed, in regard to any other area of Australia.
We draw upon Article 2 of the *International Convention on the Elimination of All Forms of Racial Discrimination,* which provides that:

[2] General Recommendation No. 32, *Committee on the Elimination of Racial Discrimination, Seventy Fifth Session, August 2009,* paragraph 26.

*'(1) States Parties condemn racial discrimination and **undertake to pursue by all appropriate means and without delay a policy of eliminating racial discrimination in all its forms** and promoting understanding among all races, and, to this end:*

*(c) Each State Party shall take effective measures to review governmental, national and local policies, and to **amend, rescind or nullify any laws and regulations** which have the effect of **creating or perpetuating racial discrimination** wherever it exists....'*[3]

We therefore ask for the Senate Committee to openly dismiss the Stronger Futures legislation and recommend its rejection to the House of Representatives.

We recommend that a policy shift is required, and the manner in which the Committee, and the Parliament respond to this legislation, heralds a watershed moment in our nation's history.

An overview of the content of our submission

The Australian Lawyers Alliance will address the following areas within our submission:

- The policy of Stronger Futures
- The nature of consultations
- Alcohol management
- Food insecurity
- Land reform
- Censorship
- Sentencing
- Other matter – Part 5
- The future of the legislation.

In principle, our submission provides a legal analysis of the proposed legislation, and the vast scope of specific provisions that undermine Indigenous legal rights.

We believe that communities should participate, and be empowered to participate, in the development of viable and creative alternatives to the proposed legislation.

We highlight and emphasise the important role of the elders in communities and their views.[4]

We also highlight the role of non-government organisations that have advocated with and for Indigenous rights for decades.

We believe that elders, community representatives and many non-government organisations have viable and creative alternatives to the proposed legislation.[5]

Ultimately, it is our hope that the submission of the Australian Lawyers Alliance highlights the need for these alternatives to be addressed.

[3] *International Convention on the Elimination of All Forms of Racial Discrimination,* Article 2(1)
[4] See Statement by Northern Territory elders and community representatives: No more! Enough is enough!' (November 2011) Accessible at http://indymedia.org.au/2011/11/04/statement-by-northern-territory-elders-and-community-representatives-no-more-enough-is-en;
[5] For example, see 'Jumbunna Indigenous House of Learning, 'Rebuilding From the Ground Up: Alternatives to the Northern Territory Intervention' (2011) http://www.jumbunna.uts.edu.au/researchareas/alternatives.html

The Policy

The Stronger Futures policy approach

'*People in the Northern Territory want for their children what each of us, right across the country, want for our children.'*

- Hon. Jenny Macklin
Second reading speech, Stronger Futures, November 2011[6]

'There is nothing dignified about losing your human rights as a human being.'
- Yananymul Mununggurr
Elected councillor, East Arnhem Shire, 2009[7]

The Stronger Futures policy

The intention of stronger futures contrasts significantly with that of recent policy movements in relation to the Parliament's engagement with Indigenous Australia.

We submit that the policy of Stronger Futures is protectionist, inaccurate, and is based on selective evidence.

The policy is reminiscent of Aboriginal policy in the early to mid twentieth century, where the Aboriginal Protection Board regulated aspects of Indigenous communities' lives, including management of finances, alcohol management, health. Parliamentary debate about the role of government in 'protecting' Aboriginal communities regarding these issues backdates centuries.[8]

Many of the components of the current legislation address the same areas of public and private life, via government regulation. Many of the provisions within the legislation will incur practical consequences of assimilation and discrimination.

The Stronger Futures policy statement provides that:

> *'A partnership approach between the Australian Government, the Northern Territory Government and Aboriginal Territorians is driving reform and improving service delivery. The goal of stronger futures together is key to this approach.*
>
> *At the heart of this work will be the views of Aboriginal people in the Northern Territory.*
>
> *People made it clear that they do want changes. They want to work with government to make these changes''*[9].

However, while people have expressed the desire for change, this includes a change in the way that government perceives communities and the subsequent development of policy. Communities have called for increased decision making in their own lives, and for the rollback of the Northern Territory

[6] Hon Jenny Macklin, Second Reading Speech, *Stronger Futures in the Northern Territory Bill 2011* (Cth), 23/11/2011 http://www.jennymacklin.fahcsia.gov.au/speeches/2011/Pages/jm_s_strongerfutures_23november2011.aspx
[7] Concerned Australians, *This is What We Said – Australian Aboriginal People Give Their Views on the Northern Territory Intervention* (2010); at 60.
[8] For example, see NSW parliamentary debate in 1936, on the *Aboriginal Protection (Amendment) Bill 1936* (NSW). Accessible at http://www.caught-in-the-act.kathystavrou.net/chapter-8.html
[9] Australian Government, *Stronger Futures in the Northern Territory – Policy Statement,* November 2011, at 1.

Intervention. For example, the Statement of Northern Territory Elders and Community Representatives provides:

> *'The Stronger Futures report has created a lot of anger and frustration due to lack of process and the ignorant way in which the views of the people have been reported. We therefore reject this report.'*[10]

The Stronger Futures policy is not representative of the wishes of Indigenous communities, and we submit that the views of Aboriginal people in the Northern Territory have not been represented at the heart of the development of this policy.

The Stronger Futures legislation package is also a continuation of the policy approach employed under *Northern Territory National Emergency Response Act 2007* (Cth) ("NTER").

The continuation of the NTER 'inherently flawed' policy approach can be seen in:

- the continuation of top down approach of decision making, without consent from communities;
- the continuation of core legislative elements of the NTER;
- the continuation of lack of acknowledgement of the wishes of elders or communities;
- the continuation of lack of transparency and accountability in engaging with communities;
- the disregard given to comments made by communities, surrounding non-consent and direct opposition to proposed measures;
- the rushing of legislation through Parliament processes; and
- a textual comparison of the Second Reading Speech of Hon Mal Brough regarding NTER, and the Second Reading Speech of Hon Jenny Macklin regarding Stronger Futures.[11]

For example, the Second Reading speech for the NTER Bill highlights all key areas that are the foci of the Stronger Futures legislation:

- Alcohol restrictions;
- Land reform;
- Town camps;
- Pornography;
- Community stores; and
- Bail and sentencing.

We submit that all that has changed is the marketing and public relations profile surrounding the package.

Instead of a marketing image that argues the emergency required to stop child abuse, the current legislation package is being marketed as 'this is what Aboriginal people want to develop a stronger future.'

This is simply wrong.

There is strong opposition to the legislation package, manifest in submissions provided by elders [12] and reports[13] from non-government organisations (NGOs).

[10] Statement by Northern Territory elders and community representatives, above n 4.
[11] See Hon Mal Brough MP, Second Reading Speech, *Northern Territory National Emergency Response Bill 2007* (Cth) 7/8/2007 http://www.formerministers.fahcsia.gov.au/malbrough/speeches/Pages/nter_bill_7aug07.aspx and Hon Jenny Macklin, above n 6.
[12] See Statement by Northern Territory elders and community representatives, above n 4.

The NTER has been heavily criticised, including by the UN Special Rapporteur on the situation of human rights and fundamental freedoms of Indigenous people, Professor James Anaya who reported that:

> *'The **Northern Territory Emergency Response**, which by the Government's own account is an extraordinary measure...**overtly discriminates against aboriginal peoples, infringes their right to self determination and stigmatises already stigmatised communities**.'*
>
> *In my opinion, the Emergency Response is **incompatible with Australia's obligations under the Convention on the Elimination of All Forms of Racial Discrimination, and the International Covenant on Civil and Political Rights, treaties to which Australia is a party, as well as incompatible with the Declaration on the Rights of Indigenous People, to which Australia has affirmed its support**.*[14]

This was supported by the UN Special Rapporteur on the right to health, Mr Anand Grover who reported that:

> *The intervention... was inherently flawed, and some of the measures imposed were in direct breach of Australia's international human rights obligations.* [15]

The impact of NTER

'It is destroying our communities.
It has taken away our rights and it has failed to deliver proper services.

As a result of the Intervention, tremendous amount of trauma,
and of soul searching of Aboriginal people feeling that they had done something wrong,
but they couldn't put their finger on what it is that's wrong.

They've come to the conclusion what is wrong is that we were born black into a different culture.'

- Rosalie Kunoth-Monks OAM, Utopia 2011[16]

The Northern Territory Intervention presents a number of lessons that need to be learned by government before the development of any subsequent policy affecting Indigenous communities.

The NTER reaped a traumatic impact on communities that included:

- Significant increases in suicide attempts;
- Decreases in school attendance;
- Thousands of workers being put onto Centrelink as CDEP closes down;
- Growth in Indigenous incarceration rates by almost 30 per cent.[17]

A Health Impact Assessment of the Northern Territory Emergency Response noted the connection between policy implementation, trauma and health:

[13] For example, see Concerned Australians, 'Opinion: NTER Evaluation 2011' (November 2011); Jumbunna House of Indigenous Learning, 'Rebuilding from the Ground Up – An alternative to the Northern Territory Intervention' http://www.jumbunna.uts.edu.au/researchareas/newmedia/RebuildingGroundUp12_5_11.pdf
[14] Concerned Australians, above n 7, at 64.
[15] Ibid, 69.
[16] Ibid, 25, 27.
[17] Jumbunna House of Indigenous Learning, 'Rebuilding from the Ground Up – An Alternative to the Northern Territory Intervention' (2011) http://www.jumbunna.uts.edu.au/researchareas/newmedia/RebuildingGroundUp12_5_11.pdf

The ways in which the NTER was introduced and is being implemented are likely ***to contribute to the high burden of trauma and disease*** *already carried by Aboriginal people across generations.*

The HIA predicts that any improvements in physical health may be outweighed by negative impacts on the psychological health, spirituality and cultural integrity of almost all the Aboriginal population in prescribed communities (and arguably, in the NT).

The loss of trust in government will limit the ability of governments and communities to work together effectively in the future.

The NTER... has overlooked the centrality of human dignity to health.[18]

The policy approach proposed by NTER, and that proposed by Stronger Futures, stands in stark contrast to other recent developments in Australian law reform and policy.

Recent policy developments

Proposed Constitutional reform

The reforms proposed within the recently released report, *Recognising Aboriginal and Torres Strait Islander peoples in the* Constitution recommended acknowledgement of Indigenous peoples within the Constitution, as well as abolition of the 'race power' under section 51(xxix).[19]

The Panel also considered the possibility of future amendments such as constitutionally designated or reserved seats for Indigenous representatives in Parliament;[20] calls for greater powers of and independence of Indigenous governance structures;[21] Indigenous facilitation of empowerment; and calls for agreements between Indigenous communities and the Commonwealth as being contractually binding.[22]

The character of Stronger Futures, of top-down decision making and government regulation, appears to fly in the face of reforms calling for greater empowerment and recognition of Indigenous peoples.

House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs

The June 2011 report, *'Doing Time: Time for Doing - Indigenous Youth in the Criminal Justice System'*, released by the House of Representatives Standing Committee on Aboriginal and Torres Strait Islanders Affairs, made 40 holistic recommendations and submitted that:

'*To effect change in the area of Indigenous disadvantage and disproportionate incarceration rates, the following principles must be applied:*

- *engage and empower Indigenous communities in the development and implementation of policy and programs;*

[18] Australian Indigenous Doctors' Association and Centre for Health Equity Training, Research and Evaluation, UNSW. Health Impact Assessment of the Northern Territory Emergency Response. Canberra: Australian Indigenous Doctors' Association, 2010, at viii. http://www.aida.org.au/viewpublications.aspx?id=3
[19] Recognising Aboriginal and Torres Strait Islanders in the Constitution – Report of the Expert Panel' (2012)('Constitutional Reform Report') Accessed 1 February 2012 at http://www.youmeunity.org.au/uploads/assets/3446%20FaHCSIA%20ICR%20report_text_Bookmarked%20PDF%2012%20Jan%20v4.pdf
[20] Ibid, 177.
[21] Ibid, 182.
[22] Ibid 191.

- *address the needs of Indigenous families and communities as a whole;*
- *integrate and coordinate initiatives by government agencies, non-government agencies, and local individuals and groups;*
- *focus on early intervention and the wellbeing of Indigenous children rather than punitive responses; and*
- *engage Indigenous leaders and elders in positions of responsibility and respect.*

> *We need to ensure that Indigenous Australians, including Indigenous youth, are given every opportunity to contribute positively not just to their communities but to Australian society as a whole.'*[23]

The Committee's 40 recommendations spanned suggestions ranging from educational programs to recreational activities; health screening; culture training; school incentive programs; apprenticeships and employment as ways to decrease the involvement of youth in the criminal justice system.

The Committee's recommendations span a greater range of holistic measures that would in fact, lead to the greater empowerment and equality of Indigenous communities in the Northern Territory, if implemented, and infinitely more so than the measures proposed within the Stronger Futures legislation.

Reports from UN representatives

The reports of the UN on the NTER, and on the rights of Indigenous communities, have repeatedly called for alternative policies to be employed.

UN Special Rapporteur on the situation of human rights and fundamental freedoms of Indigenous people, Professor James Anaya, said in 2009 that:

> *'I would like to stress that any [affirmative] measure must be devised and carried out with due regard of the rights of Indigenous peoples to self-determination and to be free from racial discrimination and indignity.*
>
> *I am concerned that there is a need to incorporate into government programs a more holistic approach to addressing Indigenous disadvantage across the country...'*[24]

UN Special Rapporteur on the right to health, Mr Anand Grover also commented on the need for a policy shift in Australia

> *'Including the Indigenous population in policy and decision-making processes is necessary to build relationships which would ensure genuine protection of their interests, while securing their respective cultural identities and self-determination, and restoring respect and dignity.*
>
> *The Northern Territory Emergency Response has unfortunately undermined some progress in efforts towards reconciliation, as communities describe the NTER as paternalistic, disempowering and racially motivated.'*[25]

[23] House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs, *Doing Time: Time for Doing – Indigenous Youth in the Criminal Justice System,* (June 2011) Accessed 29 January at http://www.aph.gov.au/house/committee/atsia/sentencing/report/front.pdf
[24] Concerned Australians, above n 7, at 63.
[25] Ibid, at 67.

The international community is watching to see what will be the new approach of the Australian government.

International law

We submit that the Stronger Futures legislation is in breach of principles of international law, including the right to self determination and free, prior and informed consent.

Self determination

Article 1(1) of the *International Covenant on Civil and Political Rights* provides that:

> **All 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**.

We submit that the deep intervention of the Australian government into individual lives and communities represented within the proposed legislation is inhibiting Indigenous people's access to the right to self determination. These proposed changes also inhibit their ability to pursue their economic, social and cultural development freely.

Free, prior and informed consent

We believe this legislation is also in breach of Article 19 of the UN *Declaration on the Rights of Indigenous People*, which 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 communities in the Northern Territory did not provide their 'free, prior and informed consent' to these legislative measures.

Special measures

Section 8 of the *Racial Discrimination Act 1975* (Cth) provides for special measures. Special measures are outlined in Article 1(4) of the International Convention on the Elimination on All Forms of Racial Discrimination, which provides 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.*

The Australian Human Rights Commission acknowledged in their November 2011 report that:

> *The Commission has serious concerns about the inappropriate classification of State actions as 'special measures'. Particularly where they intentionally discriminate on the basis of race and are formulated without the participation and the acceptance of Indigenous peoples.*

> *In particular, the redesigned 2010 measures **will not meet the requirements** of a 'special measure' in international law.*[26]

Given that General Recommendation 32, on the meaning and scope of special measures, was passed in 2009, there is now also more legal clarity on an international level as to what constitutes '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;
- Respect principles of fairness and responsibility;
- Temporary: not to be continued after the fulfilment of objectives – which are to be goal-related; and
- Should not lead to the maintenance of separate rights for different racial groups.[27]

The measures must also be 'designed and implemented on the basis of need, grounded in a realistic appraisal of the current situation of the individuals and communities concerned.' Appraisals should be evidenced by accurate data, and the design and implementation of special measures should be based on prior consultation and active participation of, communities.

Special measures are 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).

We submit that these provisions may not be legally characterised as 'special measures', if they were challenged in a court.

Case law on 'special measures'

Justice Brennan commented on the 4 indicia of 'special measures' in the case of *Gerhardy v Brown,*[28] that:

> *'...a special measure (1) **confers a benefit** on some or all members of a class, (2) the membership of which is based on race, colour, descent or national or ethnic origin, (3) for the **sole purpose of securing adequate advancement of the** beneficiaries in order that they may enjoy and exercise equally with other human rights and fundamental freedoms, (4) in circumstances where the protection given to the beneficiaries by the special measure is **necessary in order that they may enjoy and exercise equally with other human rights and fundamental freedoms**.'*[29]

The 'advancement of beneficiaries', he defined, required consideration of the wishes of the beneficiaries. Advancement:

> ***'is not necessarily what the person who takes the measure regards as a benefit for the beneficiaries.** The purpose of securing advancement for a racial group is not established by showing that the branch of Government or the person who takes the measure does so for the*

[26] Australian Human Rights Commission, 'The Suspension and Reinstatement of the RDA and Special Measures in the NTER' (2 November 2011)
[27] General Recommendation No. 32, above n 2.
[28] [1985] HCA 11; (1985) 159 CLR 70
[29] *Gerhardy v Brown* [1985] HCA 11; (1985) 159 CLR 70 Brennan J at [133]

purpose of conferring what it or he regards as a benefit for the group if the group does not seek or wish to have the benefit.

The wishes of the beneficiaries for the measure are of great importance (perhaps essential) in determining whether a measure is taken for the purpose of securing their advancement. *The dignity of the beneficiaries is impaired and they are not advanced by having an unwanted material benefit foisted on them.*[30]

In addition, Brennan J outlined that a measure which satisfies the four indicia is not a special measure if the provisos in the latter part of Article 1(4) apply:

The measure must not "lead to the maintenance of separate rights for different racial groups" nor "be continued after the objectives for which (it was) taken to have been achieved". *These provisos are intended to ensure that formal discrimination is not suffered to continue when protective measures to achieve effective and genuine equality are no longer necessary.*[31]

We submit that the legislation package does not confer Indigenous communities with a benefit that is their wish; and that the legislation package leads to the maintenance of separate rights across a number of areas.

We submit that a significant number of provisions within the Stronger Futures package combine to undermine essential human rights itemised in Article 5 of the *International Convention on the Elimination of All Forms of Racial Discrimination,* which include:

- *The right to equal treatment before the tribunals and all other organs administering justice;*[32]
- *The right to security of person and protection by the State against violence or bodily harm, whether inflicted by government officials or by any individual group or institution;*[33]
- *Political rights, in particular the right to participate in elections-to vote and to stand for election-on the basis of universal and equal suffrage, to take part in the Government as well as in the conduct of public affairs at any level and to have equal access to public service;*[34]
- *The right to own property alone as well as in association with others;*[35]
- *The right to freedom of peaceful assembly and association;*[36]
- *The right to public health, medical care, social security and social services;*[37]
- *The right to education and training;*[38] and
- *The right to equal participation in cultural activities.* [39]

The consolidation of these separate rights across the Parts proposed in the legislation creates a separate set of rights for Indigenous people.

The present issue can also draw upon the decision in *Bruch v Commonwealth,*[40] wherein the legal definition of 'special measure' was determined by a matter of fact. This included the presence of 'clear evidence'[41] that AbStudy was going to increase the participation of Indigenous people in higher

[30] *Gerhardy v Brown* [1985] HCA 11; (1985) 159 CLR 70 Brennan J at [135]
[31] *Gerhardy v Brown* [1985] HCA 11; (1985) 159 CLR 70 Brennan J at [135]
[32] *International Convention on the Elimination of All Forms of Racial Discrimination,* Article 5(a)
[33] *International Convention on the Elimination of All Forms of Racial Discrimination,* Article 5(b)
[34] *International Convention on the Elimination of All Forms of Racial Discrimination,* Article 5(b)
[35] *International Convention on the Elimination of All Forms of Racial Discrimination,* Article 5(d)(v)
[36] *International Convention on the Elimination of All Forms of Racial Discrimination,* Article 5(d)(ix)
[37] *International Convention on the Elimination of All Forms of Racial Discrimination,* Article 5(e)(iv)
[38] *International Convention on the Elimination of All Forms of Racial Discrimination,* Article 5(e)(v)
[39] *International Convention on the Elimination of All Forms of Racial Discrimination,* Article 5(e)(vi)
[40] *Bruch v Commonwealth* [2002] FMCA 29 (13 March 2002)
[41] Ibid at [39]

education. Evidence of fact of how these proposed changes will 'advance' Indigenous communities in accordance with the above definition; and evidence of 'consent' is distinctly lacking.

The Stronger Futures consultations

'The consultations have been another important step in forging a real partnership between the Australian Government and Indigenous Territorians.'

- Hon. Jenny Macklin, October 2011[42]

'But we feel that Balanda are not listening. Government doesn't listen to [us] ... has no second thought. They hear, they ignore, forget, go back home, write what they think. Our messages are not going into their thinking.'

- Elders and community members, Ramingining, NE Arnhemland, January 2011[43]

The Australian Lawyers Alliance are concerned that consultations in communities were inadequate to justify the creation of this legislation.

We submit that the number of people canvassed and the areas which the consultations canvassed; the nature of the consultations; the lack of transparency and inadequacy of independent assessment, all consolidate to suggest that the consultations were inadequate.

We therefore believe that communities did not provide consent, let alone, 'free, prior and informed consent'.

We therefore submit that the consultations cannot be relied upon to justify this legislation. This will have implications also for the determination of the legal character of these 'special measures.'

The consultation meetings

The Stronger Futures consultation meetings were held 'in around 100 communities and town camps across the Northern Territory.'[44] It is not possible to be certain of the total number of participants.[45]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.[46]

The number of Tier 1 meetings held was 378.[47] 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.[48]

This is equivalent to a total of 479 meetings. Interpreters were booked for only 91 meetings.[49]

The consultations also did not canvas a range of areas directly impacted by this legislation.

[42] Australian Government, *Stronger Futures in the Northern Territory – Report on Consultations,* October 2011, at 5. Accessed at http://www.Indigenous.gov.au/stronger-futures-in-the-northern-territory-report-on-consultations/
[43] Submission No. 29, 'Re Stronger Futures in the Northern Territory Bills 2011', submission to Senate Community Affairs Committee inquiry into the Stronger Futures bills. Accessed 1 February 2012 at http://www.aph.gov.au/senate/committee/clac_ctte/strong_future_nt_11/submissions.htm
[44] Australian Government, above n 42, at 80.
[45] Ibid at 15.
[46] Ibid, at 5.
[47] Ibid at 82.
[48] Ibid at 82.
[49] Ibid, at 16.

Nature of the consultations

The inadequacy of government consultations with Indigenous communities has been the subject of extensive comment in the recently released report on constitutional reform and is not a new phenomenon, where the Expert Panel reported that:

> *At almost all consultations and in many submissions, Aboriginal and Torres Strait Islander Australians expressed anguish, hurt and anger at the extent of their economic and social disempowerment, and their current circumstances.*[50]

The duty of care to engage in simple basic ethical research requirements is exacerbated especially on consideration of the vulnerabilities faced in engaging in fieldwork with Indigenous communities. This includes the fact that communities have been previously subjected to traumatic government policies.

We raise our concerns regarding a number of factors at the consultations.

- Literacy - the challenges with Indigenous literacy in providing written submissions has been the subject of recent comment;[51]
- Comprehension and language barriers;
- Lack of ethics guidelines: that there is no research ethics guidelines process within the Department of FaHCSIA by which the preparations for consultations needed to be passed.[52] This is a basic requirement of social science research methodology.

In the absence of such a board or group, it is much more difficult for civil society to deconstruct the consultation process, after the event. To assist in the transparency, accountability and fulfilment of legal obligations of the Department in the future:

We recommend that an independent board of academics from Australia's leading universities, with specialisations in social science and a rights based approach to development; be commissioned to draft research ethics guidelines for the Department of FaHCSIA.

No transcripts

We are also concerned as the Stronger Futures consultations were also not transcribed by the Department.

While notes were taken by government staff that attended, these notes are piecemeal. This means that important information can be missed, and also that notes are liable to be censored. Such notes also do not indicate the identity of an individual. Furthermore, there is no way of knowing what authority and legitimacy the voice described had within the community, and what their specialty knowledge may have been.

The commissioning of field work without transcripts equates to, for example, if the Department of Immigration and Citizenship were to commission field work all over New South Wales, to determine people's views on asylum seekers. Without a transcript, it is impossible to separate the views of people who have authority to comment, their role in the community, and those who are simply going along with a majority view. There is also no way of knowing how questions were answered – a simple yes to a number of answers might indicate a lack of language comprehension.

[50] Constitutional Reform Report, above n 19, at 183
[51] Natalie Whiting & Cherie McDonald, ABC News, 'Fears basin plan to lose Indigenous input', January 25, 2012. Accessed January 25 2012 at http://www.abc.net.au/news/2012-01-25/fears-basin-plan-to-lose-Indigenous-input/3792374
[52] Parliament of Australia, Senate Community Affairs Committee, *Answers to Estimates Questions on Notice – Families, Housing, Community Services and Indigenous Affairs Portfolio, 2011-12 Supplementary Estimates Hearings,* Hansard Page: 21/10/2011 CA 23.

The government did not arrange for transcription of any of the consultations. Again, transcription would have assisted in fulfilment of the duty of care to engage in basic research ethical requirements.

We ask: why were the consultations not transcribed?

Other inquiries that are commissioned by government or government agencies are transcribed extensively.[53] It is difficult to refute the assertions of government of 'what Aboriginal people wanted' without a transparent and independent record by which to assess these claims.
That said, the Australian Lawyers Alliance have been in contact with independent organisations that did attend some consultations and arrange for their transcription. While we have not seen the transcripts, oral accounts of the transcripts paint a different picture of what communities asked for, and also their perception of government. These transcripts will be released in a report in early February.

Communities are seeking bilingual education, empowerment of their communities and many other suggestions that did not get recognised in the legislation drafted.

The transcripts also paint a picture that many of the areas proposed within the current legislation were not discussed with communities.

The inadequacy of 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'.

We submit that therefore, the government may not rely on CIRCA's assertion that the consultations were 'free, fair and accountable'.

A potential conflict of interest is also involved, as CIRCA was paid by the government to attend the consultations. CIRCA also, did not transcribe the consultations it attended.

Nevertheless, the CIRCA report did highlight some areas of challenge within the consultations, which we believe indicate larger issues in the consultations as they are scaled up to apply to a greater percentage of consultations.

The legislative drafts

We believe that it is possible that the Stronger Futures legislation was briefed to be drafted before the consultations with communities. This is indicated through its legal complexity and its cross-reference to many State and Commonwealth Acts. Many of its aims are also at odds with basic values inherent to Indigenous communities, such as community empowerment, and communal ownership of resources and land.

[53] For example, the House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs inquiry into the high level of Indigenous involvement in the criminal justice system. The Committee conducted 18 public hearings in Canberra, Sydney, Adelaide, Cairns, Darwin, Brisbane, Fitzroy Crossing, Perth and Melbourne. All of these public hearings were transcribed, and the transcripts made publicly accessible. *Doing Time: Time for Doing – Indigenous Youth in the Criminal Justice System,* (June 2011)*, at 3*; and the Productivity Commission's nation-wide inquiry into *Disability Care and Support,* in which all public hearings were transcribed. See Productivity Commission, *Disability Care and Support – Public hearings.* Last updated 8 June 2011. Accessed 25 January 2012 at http://www.pc.gov.au/projects/inquiry/disability-support/public-hearings

We have applied under freedom of information law, for the release of information from the Department of FaHCSIA regarding the legislative drafts, and intend to release this information to the Committee, if received prior to the Senate reporting date, and also to the media.

We believe that it is possible that the consultations were held to justify the passing of the Stronger Futures legislation that had already been briefed to be drafted. This amounts to misrepresentation to Indigenous communities.

The Senate Inquiry process

The 'Stronger Futures in the Northern Territory Policy Statement,' released in November 2011, provided that 'Aboriginal people and other affected people will be able to continue giving their feedback and input to government during the committee process.'[54]

We assert that the involvement of Indigenous communities, and of civil society more largely, in the Inquiry process, is likely to be limited. This is due to:

- Lack of information provided to communities surrounding the legislation;
- Lack of information provided to communities surrounding the inquiry.

We are aware of this, as we, and some of our partners, have informed some members of communities about the Senate inquiry. The challenges for Indigenous communities to provide written submissions have also been the topic of recent comment.[55]

In addition, high levels of participation are unlikely from civil society due to the submission dates being set over the Christmas holiday period, in conjunction with a range of other important human rights submission inquiry deadlines.

[54] Australian Government, *Stronger Futures in the Northern Territory: Discussion Paper,* November 2011, at 2.
[55] See Whiting & McDonald, above n 51.

The legislation

Alcohol management

'I mean, the government hasn't instigated any programs for alcohol you know, against alcohol and other drugs in this community, and surely that kind of funding would make more sense…it'd be more long standing than the Intervention…'

- Bagot Community resident[56]

The Australian Lawyers Alliance is concerned as the provisions relating to alcohol management are excessively interventionist, and provides large ministerial discretion to approve or modify alcohol management plans.

Object of the Part

The Object of Part 2 – Tackling alcohol abuse, provides that:

> *'The object of this Part is to enable special measures to be taken to reduce alcohol-related harm to Aboriginal people in the Northern Territory.'*[57]

The purpose of enabling special measures is said to be in order to reduce alcohol-related harm.

However, we submit that the proposed Part cannot fulfil its aim via the legislation proposed, as it is not employing a public health perspective.

The proposed measures fly in the face of even basic knowledge surrounding alcoholism and alcohol treatment[58], and certainly contravene the hundreds of studies, both domestically and internationally, that canvas effective ways to treat alcohol-related harm generally, and in an Indigenous context. [59] Challenges with alcohol consumption, or the consumption of any drug, are ultimately a health issue. This has been recognised by the internationally renowned Global Commission on Drugs.[60]

The measures proposed also run against recommendations made by the House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs in 2011, including Recommendation 8 – Alcohol and substance abuse, which provided that:

> *The Committee recommends that, in collaboration with state and territory governments, the Commonwealth Government increase funding for locally based alcohol, anti-smoking and substance abuse programs.*[61]

The Australian Lawyers Alliance submit that the restrictive legal measures and legal approach proposed in Part 2 therefore are highly unlikely to fulfil its object, and should not be passed into law.

[56] Concerned Australians, above n 7, at 39.
[57] *Stronger Futures in the Northern Territory Bill* (Cth) Clause 7
[58] See About.com, Buddy T, Treatment of alcoholism, Last updated January 2 2010. Accessed 29 January 2012 at http://alcoholism.about.com/od/about/a/treatment.htm
[59] See for example, Maggie Brady, *Indigenous Australia and alcohol policy: meeting difference with indifference* (UNSW Press: 2004) http://books.google.com.au/books?hl=en&lr=&id=AbHfZnrp_w0C&oi=fnd&pg=PA7&dq=Indigenous+alcohol+treatment+Australia&ots=4zqSWa6DFQ&sig=60nBn7yRuWkW2Qt9KgpFpchmt9w#v=onepage&q=Indigenous%20alcohol%20treatment%20Australia&f=false
[60] See Global Commission on Drugs, http://www.globalcommissionondrugs.org/
[61] House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs, above n 23, at 95.

We believe that a best practice assessment of health and alcohol should be conducted, and that this should form the basis for alcohol treatment in the Northern Territory.

The problems of overt government regulation

Decriminalisation of drug usage has been proven in a number of regions of the world to contribute to better public health outcomes.
Overt government regulation of alcohol consumption as represented within this Part, ultimately, may lead to:

- increased stigma and shame within communities;
- double standards for Indigenous and non-Indigenous communities;
- increased bureaucracy;
- increase in policy mistakes and determinations through excessive ministerial discretion;
- increased numbers of incarceration;
- disempowering of the work of non-government agencies working to redress alcoholism; and
- increase in decentralisation of decision-making from community control.

Ultimately, all of these factors combine to further community disempowerment and to contribute to increased feelings of oppression and discrimination, which sometimes attract self-medication through alcohol consumption.

We are concerned as the provisions enumerated within Part 2 – Tackling alcohol abuse are not empowering, and do not employ a health-based assessment of excessive alcohol consumption, or address the core issues lying behind it. We submit that Part 2 is unnecessary.

The nature of alcoholism

It has been recognised that:

> *regardless of how someone is diagnosed as alcohol dependent or how they came to realize they have a serious drinking problem, the first step to treatment is a sincere desire to get help.* ***Alcoholics who are pressured into treatment by social pressure or forced to quit by circumstances rarely succeed in the long run.***
>
> *Even most alcoholics who seek help on their own volition have at least one relapse before they obtain long-term sobriety.*[62]

We believe that more investment needs to be had into programs addressing alcoholism from a public health perspective.

Where are the prescribed areas?

> *'Plan, plan, but...what for? If this is a dry community, it is a dry community. No permits for white or black, nothing.* [It's always been a dry community]. *So why should we look at putting a plan in? You know, just getting confused.*
>
> - Community member, Ampilatwatja 2009[63]

The *Stronger Futures in the Northern Territory (Consequential and Transitional Provisions) Bill 2011* (Cth) outlines that any area that was a prescribed area under section 4 of the *Northern Territory*

[62] 'Treatment of Alcoholism'. Accessed 29 January 2012 at http://alcoholism.about.com/od/about/a/treatment.htm
[63] Concerned Australians, above n 7, at 42

National Emergency Response Act 2007 (Cth) will be characterised as an 'alcohol protected area' under the Stronger Futures legislation.[64] This may be varied by the rules.

This includes all Aboriginal land that is 'land held by a Land Trust for an estate in fee simple'[65]; 'any roads, rivers, streams, estuaries or other areas that were expressly excluded under Schedule 1 to the *Aboriginal Land Rights (Northern Territory) Act 1976*; and any other area that was declared by the Minister.[66] This applies to at least 73 communities.

This essentially extends the NTER's definition of prescribed areas, without a community being given option to opt out. This is especially relevant for those communities that are voluntarily 'dry'.

We raise concern as the rules will stipulate which areas in the Northern Territory are alcohol protected areas.[67] These rules, which can be made, varied or revoked at the Minister's initiative and discretion,[68] do not require the same legal processes as those required for the introduction of legislation, and are therefore less open and transparent.

This can particularly be seen in clause 27(6), which provides that the Minister must ensure that information is provided to a community surrounding the rule, has been available to the community to which it may apply; and that the people living there are given a reasonable opportunity to make submissions on the rule and its potential consequences.

However, a failure to comply with this clause does not affect the validity of a rule made.[69] There is therefore no real onus on the part of government to genuinely engage in community consultation. The grounds for assessment in making a rule are also well-distanced from reality. The Minister must have regard to the object of Part 2; the 'well-being of people living in the area'; whether there is a reason to believe that people living in the area have been the victims of alcohol-related harm; and other concerns.

Many of these considerations are paternalistic and provide no objective guidelines for assessment. Given the lack of onus to consult, it may also be questioned to what extent community views will genuinely be sought after. It is highly likely that in the interests of swift bureaucratic decision-making, and political posturing, that communities will find out that they have been subsumed into a prescribed area without adequate notice, or control over that decision.

The penalty imposed for consumption and supply of alcohol

The ALA is concerned regarding the high punishment imposed for possession, consumption, supply and intention to supply, of alcohol. We believe that the penalties imposed are excessive and will not lead to reduction in imprisonment, or a sustainable solution that addresses alcohol abuse.

Clause 75B provides a maximum penalty of 100 penalty units or imprisonment for 6 months for bringing liquor into an alcohol protected area, or consumption of liquor in an alcohol protected area. Clause 75C provides the same penalty in instances where a person supplies liquor, or transports or possesses liquor with the intent of supplying it, in an alcohol protected area.

Clause 75C(7) provides that where the quantity of alcohol is greater than 1.35L, the maximum penalty for the offence is 680 penalty units or imprisonment for 18 months.

These penalties, to put them in perspective, would lead to up to 18 months imprisonment for possession of alcohol that amounts to less than a standard bottle of milk.

[64] *Stronger Futures in the Northern Territory (Consequential and Transitional Provisions) Bill 2011* (Cth), s5(1),
[65] *Aboriginal Land Rights (Northern Territory) Act 1976,* s3(1)(a)
[66] *Northern Territory National Emergency Response Act 2007* (Cth), s4
[67] *Stronger Futures in the Northern Territory Bill 2011* (Cth), s27(1)
[68] See *Stronger Futures in the Northern Territory Bill 2011* (Cth), s27
[69] See *Stronger Futures in the Northern Territory Bill 2011* (Cth), s27(8)

Given that a standard bottle of wine is approximately 750 mL, possession of 2 bottles of wine could potentially lead to imprisonment for up to 18 months.

The Australian Lawyers Alliance submit that these penalties are excessive and unnecessary.

Overrepresentation of Indigenous people in prison

Given that these provisions will only apply in alcohol protected areas (and therefore, not apply to non-Indigenous communities), this will ultimately lead to more Indigenous people being incarcerated.

Already, the Indigenous rates of imprisonment are substantially higher than non-Indigenous communities. This was acknowledged as being 28 times higher for Indigenous youth than non-Indigenous youth, despite Indigenous peoples representing only 2.5% of the Australian population;[70] in the 2011 report *Doing Time: Time for Doing.* This was declared a 'national disgrace'[71]. The same report acknowledged that:

> *Many of the issues addressed in the report of this Committee reflect the core underlying factors that the Royal Commission identified as explaining the disproportionate number of Indigenous people in custody, including* ***poor relations with police, alcohol and substance abuse, poor education, unemployment, inadequate housing and entrenched poverty. The Committee finds it concerning that these same factors have been identified two decades later, and that the overrepresentation of Indigenous juveniles and young adults in the criminal justice system has increased.***[72]

These penalties also do not address alcohol consumption from a public health perspective.

Defences to offences under clause 75B and clause 75C

The legislation also stipulates extremely specific provisions regarding the defences available to the above offences. These defences include:

- If a person was in a boat on waters engaged in recreational activities or commercial fishing;[73] and the waters were in an area that the Minister had declared were available for such a defence to be applied.
- If a person was engaged in recreational activities, and this was connected with tourism, and the activities were consistent with the management plan of the national park and the defendant was behaving in a responsible manner.[74]
- The offence occurred in an emergency or was necessary to preserve life, prevent injury or protect property.

Essentially, these defences appear to set up different levels of rights, as tourists and officials of the postal service[75] are persons that will not be affected, even when operating within an alcohol protected area. This is discriminatory.

The elements required to be proved, for example 'the defendant was behaving in a responsible manner', are paternalistic and is language such as would be used to address a child. This is also a subjective test.

[70] House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs, above n 23, at (ix).
[71] Ibid, 2
[72] Ibid 2.
[73] *Stronger Futures in the Northern Territory Bill 2011* (Cth), clause 8, sub-clause 75B(2)(a)(b)
[74] *Stronger Futures in the Northern Territory Bill 2011* (Cth), clause 8, sub-clause 75B(4)
[75] Ibid, sub-clause 75A(3)

The ability of the defences to be applied, also rests entirely on ministerial discretion. Clause 74D provides that the Minister may make a determination as to whether the defence is or is not available.

Ministerial discretion

Part 2 of the *Stronger Futures in the Northern Territory Bill 2011* (Cth) imposes a large amount of ministerial discretion and increase in the functions of the role of the Commonwealth Minister. This minister will be the minister responsible for the administration of the *Stronger Futures in the Northern Territory Act 2011* (Cth). Please see the footnotes for a listing of all sections referring to the Commonwealth Minister, NT Minister and the Minister.[76]

The Australian Lawyers Alliance is concerned at the level of discretion and scope of power invested in and granted to ministers. The Minister will also be reliant on information that is secondary in nature, and will be making determinations without oversight from any Indigenous representative body, or elder from the community. The performance of these functions does also not mandatorily require consent with communities, elders or specialists in Indigenous culture.

There are also no guidelines about how consultation is to be screened as being adequate with communities, or how transparency will be facilitated.

The functions of the Minister include:

- Determine the rules that will prescribe areas defined as 'alcohol protected areas';[77]
- Determining that an area should be allowed to have a defence against an offence under cl 8, sub-clause 75B and sub-clause 75C;[78]
- Determine the variation of liquor licence conditions;[79]
- Vary liquor permit conditions;[80]
- Request the NT Minister to appoint an assessor to conduct an assessment in relation to premises,[81] where the Minister reasonably believes that 'sale or consumption of liquor… is causing substantial alcohol-related harm to Aboriginal people;'[82]
- Determine whether to approve, vary, refuse and/or revoke alcohol management plans;[83]
- Make rules prescribing alcohol protected areas;[84]
- Cause an independent review of other NT and Commonwealth laws relating to alcohol.[85]

Ultimately, the performance of these functions will depend on the individual appointed as Minister: their background; their knowledge of Indigenous culture; their on-the-ground knowledge of the NT; the efficacy of bureaucratic processes; the reliability of research provided to the Minister; the reliability of consultations held with communities; the reliability of notice and the form in which it is provided to communities; and the understanding amongst advisors of all of the above.

[76] See *Stronger Futures in the Northern Territory Bill 2011* (Cth): references to the Commonwealth Minister in cl 8, sub-cl75B(3); cl 8, sub-cl 75B(6); cl 8, sub-cl 75C(3); cl 8, sub-cl 75C(6); cl 8, sub-cl 75D(1)(2). Following these Clauses, no further references are made to the Commonwealth Minister, but are references to the Minister: in cl 12(4); cl 12(5); cl13(3); cl13(4); cl15(1)(a)(b);cl15(2); cl15(3);cl15(6); cl15(7); cl17(1); cl17(2); cl17(3); cl17(4); cl17(5); cl17(6); cl17(7); cl18(1);cl18(2);cl18(4); cl20(1) cl18(2);cl23(1); cl23(2); cl23(3); cl23(4); cl23(5); cl23(6); cl23(7); cl24(1); cl24(2); cl25(1); cl25(2); cl25(3); cl25(5); cl26; cl27(3); cl27(4); cl27(5); cl25(6); cl25(9); cl28(1); cl28(2); cl28(4); cl28(5); cl29. See references to the NT Minister in cl15(1)(b); cl15(2); cl15(3); cl15(4); cl15(5); cl15(6); cl28(1); cl28(2); cl28(4); cl28(6).
[77] *Stronger Futures in the Northern Territory Bill 2011* (Cth), cl 27
[78] *Stronger Futures in the Northern Territory Bill 2011* (Cth), cl 8, sub-cl 75D
[79] *Stronger Futures in the Northern Territory Bill 2011* (Cth), cl 12(4)(5)
[80] *Stronger Futures in the Northern Territory Bill 2011* (Cth), cl 13(3)(4)
[81] *Stronger Futures in the Northern Territory Bill 2011* (Cth), cl 15(2)
[82] *Stronger Futures in the Northern Territory Bill 2011* (Cth), cl 15(1)(a)
[83] *Stronger Futures in the Northern Territory Bill 2011* (Cth), cl 17(1), cl 23, cl 18 and cl 24
[84] *Stronger Futures in the Northern Territory Bill 2011* (Cth), cl 27(1)
[85] *Stronger Futures in the Northern Territory Bill 2011* (Cth), cl 28(1)

We believe that investing the extensive levels of discretion and performance of functions to a Minister is dangerous and unsustainable.

In particular, we are concerned with the powers to determine whether alcohol management plans are approved, varied, refused or revoked; the making of rules; the criteria upon which these determinations can be made; and the commissioning for independent review.

Alcohol management plans

Part 2 proposes the Minister be granted with powers to determine whether to approve, vary, refuse and/or revoke alcohol management plans.

In making a determination to approve an alcohol management plan, a Minister must have regard to the object of Part 2; any matter prescribed by the rules and any other matter that the Minister considers relevant.[86]

The centralisation of decision making regarding alcohol management plans with the Minister is grossly inappropriate.

Centralisation of this decision making process is also inappropriate, due to the importance of relationships in reducing alcohol harm, and the need for an individualised approach, combined with adequate social support, to assist individuals seeking treatment and rehabilitation of alcohol abuse. The approach to managing alcohol consumption proposed within the Stronger Futures legislation is grossly inadequate.

Duration of alcohol management plans

The cessation of an alcohol management plan is destined to be the date cited in the alcohol management plan, or when the *Stronger Futures* laws sunset – which could be a period of up to 10 years.[87] We believe that an alcohol management plan that lasts 10 years in duration is not in best practice for the needs of an individual addressing problems with alcohol. The needs of an individual and of a community struggling with alcohol consumption vary over time.

Some of the problems with legislating an alcohol plan include the difficulty in varying; there is a lack of medical and other professionals ongoing investment in it; and the decentralisation of community involvement in its ongoing updating.

Notices regarding 'alcohol protected areas'

The Australian Lawyers Alliance is also concerned with the continuation of notices to be imposed on communities.

Part 2 of the *Stronger Futures in the Northern Territory Bill 2011* (Cth) provides for notices to be imposed at various places, advertising communities as alcohol protected areas, or areas where a defence to an alcohol offence is not applicable.

Under the proposed legislation the NT Licensing Commission may determine that there be notices stating that it is an offence to bring alcohol into an alcohol protected area are to be posted at the place where most people would usually access the community, and also at airports from which aircraft depart that would fly into the area.[88] Where this has been determined by the NT Licensing Commission, the imposition of these signs is mandatory.[89]

[86] *Stronger Futures in the Northern Territory Bill 2011* (Cth), cl 17(2)
[87] *Stronger Futures in the Northern Territory Bill 2011* (Cth), cl 19
[88] See *Stronger Futures in the Northern Territory Bill 2011* (Cth), cl 14(1)
[89] *Stronger Futures in the Northern Territory Bill 2011* (Cth), cl 14(3)

While the legislation provides that the 'NT Licensing Commission must endure that the wording of the notice is respectful to Aboriginal people'[90], we submit that this is not possible. The signs, in and of themselves, are deeply offensive and stigmatising to Aboriginal people. The only comparative notices that exist are quarantine notices when crossing across states and territories in Australia. Ultimately, the ALA submit that the imposition of these notices contribute to a comparator that entering Aboriginal communities carries similar stigma to that of a contagion. This is highly discriminatory.

Despite the insulting nature of these signs, it is an offence to remove or damage them, and carries a maximum penalty of 5 penalty units.[91] This is proposed to be an infringement offence.[92]However, an official may remove the sign as part of their duties.[93]

Notices in newspapers

The legislation also provides that the NT Licensing Commission may cause a notice to be advertised in a newspaper about the area, and that it is an offence to bring liquor into the area.[94]

Notices that a defence is not available

Where a determination has been made that a defence for an alcohol offence under clause 75B or clause 75C is not available, clause 75E provides that a notice may be posted, and be kept posted, on entry to the area, and to be published in a newspaper circulating the district.

This is egregious and shames communities

A poor image of Australia to our international visitors

In addition, we wish to highlight that not only are all of these signs stigmatising to Aboriginal communities – it is also presents a poor public relations image of Australia. The Northern Territory attracts millions of tourists every year. The imposition of such signs stigmatises Aboriginal communities to our international visitors, and also stigmatises our Australian government as racist and interventionist.

AAT review of determinations

A number of determinations made under Part 2 of the *Stronger Futures in the Northern Territory Bill 2011* (Cth) will be available to appeal in the Administrative Appeals Tribunal (AAT).

However, in reality, the access of communities to the AAT to appeal these decisions is hampered by other restrictions such as lack of access to adequate legal services in remote areas, and other associated barriers.[95]

Furthermore, the regulations made under this Part and the processes by which they are made are not available for appeal in the AAT.

[90] *Stronger Futures in the Northern Territory Bill 2011* (Cth), cl 14(2)
[91] *Stronger Futures in the Northern Territory Bill 2011* (Cth), cl 8, sub-cl 75F
[92] *Stronger Futures in the Northern Territory Bill 2011* (Cth), cl 11
[93] *Stronger Futures in the Northern Territory Bill 2011* (Cth), cl 8, sub-cl 75F(2)
[94] *Stronger Futures in the Northern Territory Bill 2011* (Cth), cl 14(4)
[95] See, for an elaboration of these barriers: Melanie Schwartz and Chris Cunneen, "Working Cheaper, Working Harder: Inequity in Funding for Aboriginal and Torres Strait Islander Legal Services" (January 2011). *University of New South Wales Faculty of Law Research Series.University of New South Wales Faculty of Law Research Series 2011,* Working Paper, at 7. Accessed at http://law.bepress.com/unswwps/flrps11/art7

Future of these laws

Clause 28 provides that there should be an independent review of other Commonwealth and Northern Territory laws relating to alcohol, no less than 2 years following the introduction of this legislation, and that this review should examine the effectiveness of those laws in reducing alcohol related harm to Aboriginal people living in the Northern Territory.

This indicates that there is intention to widen the legal approach as a form of regulating alcohol harm. We find this troubling, as already the proposed amendments are expansive.

We submit that a legal approach to alcohol harm is inadequate to address and redress current social problems posed by alcohol consumption in the Northern Territory.

We also query how independent this review will be. The independent report produced by CIRCA evaluating the Stronger Futures consultations; and independent reports that have been commissioned to assess the NTER, have not accurately revealed the perception of communities and legal entities. We therefore are troubled by the proposal that an 'independent' review will be commissioned that will examine further expansions to these laws.

Our solution

The ALA submit that government regulation of alcohol management is grossly inappropriate.

We oppose

The Australian Lawyers Alliance are opposed to:

- Excessive penalties imposed creating criminal offences for possession and supply of alcohol;
- Excessive levels of ministerial discretion granted to ministers in areas of no expertise;
- Continuation of stigmatising signs and notices erected at entrances to communities;
- Legislating alcohol management plans.

The existence of alternatives

The Australian Lawyers Alliance provide that viable alternatives exist through:

Consultations with communities

- Communities, and community elders should be consulted regarding their solutions in how to reduce alcohol harm in their individual community.

Consultations with experts

- Experts in alcohol treatment and management should be consulted for best practice in alcohol management, treatment and rehabilitation, especially within Indigenous communities.

A change in policy approach

- There needs to be a shift towards the importance of relationships, accountability and community based solutions in the reduction of alcohol harm;
- There needs to be a shift towards decriminalising what is essentially a health and development issue, not a legal issue;
- There needs to be a policy shift in acknowledging that each individual community is different and requires a different solution.

Addressing the core underlying issues contributing to alcohol abuse

- The deeper reasons underlying alcohol abuse should be addressed: for example, the oppression felt by communities under the NTER response has contributed to desperation in communities and sometimes this may lead to self-medication via alcohol.
- We recommend increase mental health services and counselling options in rural and remote areas.
- We recommend that the Committee examine the recommendations proposed within the *Doing Time: Time for Doing* report to address other underlying issues on a holistic level.

Funding increases

- Increasing funding to non-government organisations with proven record in alcohol abuse reduction;
- Increasing funding to preventative education programs and initiatives run by Indigenous communities and non-government organisations;
- Increase funding to legal organisations that provide legal advice and assistance to Indigenous communities.

Food insecurity

'My experience of the Commonwealth suggests to me that the culture of the Commonwealth public service, regardless of the party in power, is one of micro regulation which manifests itself in a desire to control every detail of matters within Commonwealth power.'

Michael Stokes, submission to 'Recognising Aboriginal and Torres Strait Islanders in the Constitution'[96]

Application to stores

The proposed amendments regarding food security, will in reality, only apply to Aboriginal communities. This can be seen in a number of sections.

Firstly, the definition of the food security area lists the 'the whole area of the Northern Territory other than an area prescribed by the rules made for the purposes of Clause 74(1).'[97] There is therefore an assumption of inclusion in the food security area, unless exempted by the rules.

The Minister is to create the rules, and in making the rules, the Minister must regard:

- The Object of Part 4;
- The wellbeing of people living in the area;
- Any other matter that the Minister considers relevant.[98]

Given the Object's specific reference to 'Aboriginal communities', in practicality, the 'food security area' retracts to apply automatically to all Aboriginal communities in the Northern Territory, where exemption is to be determined by the Minister.

This can also be seen in clause 41, where, in the Secretary's determination of whether a community store requires a licence, the Secretary must have regard to, among other considerations, the Object of Part 4. Clause 41(5) also provides a mandatory term in:

[96] Michael Stokes, submission no 3096 in Constitutional Reform Report, above n 42, at 184.
[97] *Stronger Futures in the Northern Territory Bill 2011* (Cth), cl 38
[98] *Stronger Futures in the Northern Territory Bill 2011* (Cth), cl 74

> The Secretary **must not determine** that the owner is required to hold a community store licence **unless** ... the store is an important source of food, drink or grocery items **for an Aboriginal community.**

Essentially, this means that a store that does not provide for an Aboriginal community, will not be under the licensing regime.

Ultimately, these amendments are therefore setting up a separate system of business law for businesses that service Aboriginal communities.

Civil penalty

Clause 38 provides a mandatory provision that if an owner is required to hold a community store licence, and does not hold one, they **must not operate the store.** This amounts to a civil penalty offence of 50 penalty units.

A community store owner will be liable for the debts of the community store (cl 39(2))

Determination of licences and consent of communities

The Secretary is granted ultimate discretion as to whether a store is required to hold a licence.

In making this determination, there is no need to secure the consent of people being serviced by the community store.

While cl 41(2) provides that before making a determination the Secretary must consult people being serviced by the store, a failure to comply with this Clause does not affect the validity of any determination made.
There is therefore little incentive to consult communities.

Procedure regarding licences

We are also concerned regarding the procedure for licences to be granted.

Only 10 business days are granted for a store owner to provide written submissions:

- If and when a Secretary makes a determination that a licence is required;[99]
- If the Secretary proposes to refuse to grant a licence;[100]

An owner is then given 'at least 20 business days' to seek a licence after receiving notification that a licence is required.[101]

These are not long periods of time. Furthermore, the challenges for Indigenous communities to provide written submissions has been the topic of recent comment.[102]

Secretarial powers under Part 4

Wide powers are granted to the Secretary, including power to:

- Determine whether a licence is required;[103]
- Determine whether to grant a licence to an owner;[104]

[99] *Stronger Futures in the Northern Territory Bill 2011* (Cth), cl 42(3)
[100] *Stronger Futures in the Northern Territory Bill 2011* (Cth), cl 47(3)
[101] *Stronger Futures in the Northern Territory Bill 2011* (Cth), cl 43(3)
[102] See Whiting & McDonald, above n 51.
[103] *Stronger Futures in the Northern Territory Bill 2011* (Cth), cl 41(1)
[104] *Stronger Futures in the Northern Territory Bill 2011* (Cth), cl 45

- Impose conditions on a community store licence;[105]
- Vary a community store licence;[106]
- Revoke a community store licence;[107]
- Determine the owner of a store is required to be registered under the CATSI Act;[108]
- Require an authorised officer to assess a community store;[109]
- Appoint authorised officers[110] and issue them with identity cards;[111]
- Require owners to give compellable information to the Secretary;[112]
- Apply to a court for an order for payment of pecuniary penalty to the Commonwealth;[113]
- Give an infringement notice for contravention of an enforceable provision;[114]
- Accept and cancel undertakings[115]
- Apply to a court for an order regarding breach of undertakings;[116]
- Apply to the court to seek an injunction;[117]

The criteria by which a Secretary must determine whether to grant a licence is paternalistic and unreasonable. Clause 45 provides that the Secretary must have regard to:

- The Object of Part 4;
- The 'food security matters'
- Any assessment of the store under section 67
- The nature and circumstances of the store
- Any other matter the Secretary considers relevant.

The matters that constitute 'food security matters', would not normally be even deemed for consideration in the operation of stores in any other area in Australia. These include:

- an assessment of the range of produce;
- 'whether the store will take reasonable steps to promote good nutrition and healthy products'; and
- the character of persons involved in the store, including whether they have a criminal history.[118]

This contrasts to the licensing regime and operation of supermarkets and fast food outlets.

The consideration of the prior criminal history of persons involved in the store is also discriminatory.

Community store licence conditions

All licences are bound by conditions as set out in the rules. These rules are to be made by the Minister.[119]

[105] *Stronger Futures in the Northern Territory Bill 2011* (Cth), cl 52
[106] *Stronger Futures in the Northern Territory Bill 2011* (Cth), cl 58
[107] *Stronger Futures in the Northern Territory Bill 2011* (Cth), cl 59 and cl 65
[108] *Stronger Futures in the Northern Territory Bill 2011* (Cth), cl 62
[109] *Stronger Futures in the Northern Territory Bill 2011* (Cth), cl 67
[110] *Stronger Futures in the Northern Territory Bill 2011* (Cth), cl 69
[111] *Stronger Futures in the Northern Territory Bill 2011* (Cth), cl 70
[112] *Stronger Futures in the Northern Territory Bill 2011* (Cth), cl 73
[113] *Stronger Futures in the Northern Territory Bill 2011* (Cth), cl 75
[114] *Stronger Futures in the Northern Territory Bill 2011* (Cth), cl 90
[115] *Stronger Futures in the Northern Territory Bill 2011* (Cth), cl 96
[116] *Stronger Futures in the Northern Territory Bill 2011* (Cth), cl 97
[117] *Stronger Futures in the Northern Territory Bill 2011* (Cth), cl 98
[118] *Stronger Futures in the Northern Territory Bill 2011* (Cth), cl 46
[119] *Stronger Futures in the Northern Territory Bill 2011* (Cth), cl 74

The Secretary has power to impose extra conditions on a community store licence that are beyond those in the rules.[120] The criteria to be considered include 'food security matters' and a range of other measures that do not have any explicit reference to the sustainable functioning of the store.

Assessment of the store

An assessment of a store by an authorised officer can be required by the Secretary at any time, on their own initiative, regardless of whether a store has sought an application for a licence.[121]

An authorised officer is granted extensive powers under Part 4. An authorised officer is appointed by the Secretary,[122]

However we are concerned that such officers will not have the requisite knowledge of positive engagement with Indigenous communities.

The assessment of community stores is likely to be intimidating, and there are few protections on the rights of individuals to refuse such an assessment. The number of restrictive provisions appears to force compliance of individuals to any activity requested or performed by an authorised officer.

This can be seen in relation to entry of community stores.

Entry to community stores

An authorised officer may enter the premises of a community store for the purposes of assessment.[123] Entry is not authorised unless the occupier gives consent.[124]

However, the Secretary may also refuse to vary a community store licence is a person unreasonably withholds consent for an authorised officer to enter the premises.[125] This is extremely restrictive in that it does not allow individuals a genuine option to consent or to refuse consent.

Furthermore, the legislation provides that it is a condition of a licence that the owner **must allow** entry for an authorised officer to enter the premises for the purposes of auditing or monitoring compliance, and allow the officer to 'inspect things' and give an authorised officer documents under request.

This is also punitive, as breaching a condition of a community store licence carries a penalty of 20 penalty units.[126] This may also cause revocation of a community store licence, through breaching a condition or contravening a civil penalty.[127]

Revocation of the store's licence would take effect the day after notice was given.[128] It is a civil offence to operate the store if the owner does not hold a community store licence.[129]

Essentially, these laws surrounding entry force compliance, and hold legal threats of civil penalty units, refusal to vary conditions, or outright revocation of the licence, in the event that an owner does not comply. There are few rights available to an owner to resist this process.

[120] *Stronger Futures in the Northern Territory Bill 2011* (Cth), cl 52
[121] *Stronger Futures in the Northern Territory Bill 2011* (Cth), cl 67(4)
[122] See *Stronger Futures in the Northern Territory Bill 2011* (Cth), cl s69 for further criteria relating to authorised officers.
[123] *Stronger Futures in the Northern Territory Bill 2011* (Cth), cl 71(1)
[124] *Stronger Futures in the Northern Territory Bill 2011* (Cth), cl 71(2)
[125] *Stronger Futures in the Northern Territory Bill 2011* (Cth), cl 58(6)
[126] *Stronger Futures in the Northern Territory Bill 2011* (Cth), cl 56
[127] *Stronger Futures in the Northern Territory Bill 2011* (Cth), cl 59
[128] *Stronger Futures in the Northern Territory Bill 2011* (Cth), cl 59
[129] *Stronger Futures in the Northern Territory Bill 2011* (Cth), cl 38(1)

These restrictions can also be seen in access to documentation.

Access to documentation

It is a condition of a licence that the owner must allow an authorised officer to 'inspect things' at the premises, and if requested to, provide an authorised officer with documents relevant to auditing and monitoring compliance.[130]

If an authorised officer is assessing a community store, the owner, manager or occupier of the premises must, if requested, give an authorised officer or any other person assisting the authorised officer, 'such documents as are reasonably necessary for the authorised officer to make the assessment.'[131] Failure to do so attracts a criminal penalty of 60 penalty units.[132] Failure to provide the authorised officer 'with such assistance and facilities as are necessary and reasonable for making the assessment' [133]also attracts a criminal penalty, of 10 penalty units.

The Secretary may revoke a licence if a licence condition has been breached, or if a person involved in the store has committed an offence against the [Stronger Futures] Act.[134]

The Secretary may also refuse to vary a community store licence if a person unreasonably refuses to provide documents, material or assistance as required by clause 72.[135]

Essentially, this Part provides absolutely excessive powers ensuring that owners comply with providing documentation.

Failure to provide this documentation can lead to a licence being cancelled or revoked, a refusal for a licence to be varied, or substantiated as a criminal offence.

No comparable rights are granted to the individual to refuse to provide information.
The closest option an owner has to refusal is that they do not need to provide documents, if such documents may incriminate them. However, the owner bears the evidentiary burden in this regard.

Compellable information

Under clause 73, the Secretary may also require a person to give compellable information regarding the store, and in a specified form and manner.[136] Failure to comply creates a criminal penalty of 10 penalty units.[137]

A criminal penalty will not be sustained if a person has a reasonable excuse – however, reasonable excuses that are accepted in other jurisdictions are inaccessible under cl 73(4).This includes information that is subjection to an obligation of confidentiality arising from a commercial relationship, and information that is commercially sensitive. Failure to supply information of this kind does not attract reasonable excuse.[138]

We are concerned, as this clause applies despite any law of the Commonwealth, a State or Territory prohibiting disclosure of the information.[139] This undermines a vast sweep of individual legal rights and laws applying to small business under any and all other Australian laws.

[130] *Stronger Futures in the Northern Territory Bill 2011* (Cth), cl 54
[131] *Stronger Futures in the Northern Territory Bill 2011* (Cth), cl 72(2)
[132] *Stronger Futures in the Northern Territory Bill 2011* (Cth), cl 72(2)
[133] *Stronger Futures in the Northern Territory Bill 2011* (Cth), cl 72(3)
[134] *Stronger Futures in the Northern Territory Bill 2011* (Cth), cl 59(a)(b)
[135] *Stronger Futures in the Northern Territory Bill 2011* (Cth), cl 58(6)(a)(ii)
[136] *Stronger Futures in the Northern Territory Bill 2011* (Cth), cl 73(2)
[137] *Stronger Futures in the Northern Territory Bill 2011* (Cth), cl 73(3)
[138] *Stronger Futures in the Northern Territory Bill 2011* (Cth), cl 73(4)
[139] *Stronger Futures in the Northern Territory Bill 2011* (Cth), cl 73(6)

Requirement to register under CATSI Act

The restrictions under Part 4 are likely to be even more restrictive for some community stores. Under clause 62, the Secretary may determine if the owner of the community store is required to be registered under the *Corporations (Aboriginal and Torres Strait Islander Act) 2006*. However, this requirement can only be imposed on stores that hold a community store licence;[140] i.e. that are already subject to the rest of Part 4.

Requirements to register for CATSI are therefore on top of the already restrictive regime imposed by the rest of Part 4. Similar provisions relate to registration, such as:

- if the Secretary require registration, failure to do so will incur a penalty – 20 penalty units;[141]

Restrictions continue to apply in relation to time periods to provide comment:

- owners have 10 business days to submit written submissions to the Secretary on proposals to revoke licences [142] and on proposals that registration may be required;[143] and at least 20 business days to make submissions after determination that registration is required.

Failure to register may cause the Secretary to revoke the community store licence[144], and such revocation may prohibit the store from being opened.[145] Revocation would take effect one day following the owner's receipt of notice.[146]

Lodging an application does not necessarily need to be accepted by the Secretary.

Essentially, these rules operate on top of those already instituted by the rest of Part 4.

The practical implications of Part 4

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, it is highly likely that in the presence of such restrictions, community store owners will feel harassed, disempowered, intimidated and undermined in their ability to conduct their businesses.

It is highly likely, that stores will be forced to close, either temporarily or permanently, **in the presence of such a strict and invasive regulatory regime.**

In such instances, families will have to travel further distances to access community stores. In remote Australia, this is a different reality to the closure of stores in major urban cities. The closest store could be extremely far away for one community.

Ultimately, increasing regulation on these stores, and increasing pressure, is not going to drive prices downwards. Instead, the closure of stores will cause prices to rise, due to a lack of competition.

[140] *Stronger Futures in the Northern Territory Bill 2011* (Cth), cl 62(3)
[141] *Stronger Futures in the Northern Territory Bill 2011* (Cth), cl 61
[142] *Stronger Futures in the Northern Territory Bill 2011* (Cth), cl 66(3)
[143] *Stronger Futures in the Northern Territory Bill 2011* (Cth), cl 63(3)
[144] *Stronger Futures in the Northern Territory Bill 2011* (Cth), cl 64
[145] *Stronger Futures in the Northern Territory Bill 2011* (Cth), cl 64(2)(d)
[146] *Stronger Futures in the Northern Territory Bill 2011* (Cth), cl 65(4)

This will undermine the ability of communities to access food, at reasonable prices. This legislation will undermine, not promote, food security.

Enforcement of food security

The Australian Lawyers Alliance are concerned at the measures laid out in Division 8 of Part 4, and propose that the measures are not necessary, and amount to setting up a an enforcement procedure of separate rights and interests for Indigenous communities.

Ultimately, the use of penalties in relation to food security is totally inappropriate and punitive. Taking a hardline regulatory approach to food security will not result in achieving the aims that the Government says it wishes to achieve. Millions of dollars will be wasted fighting cases, which instead could have been distributed into the growth of sustainable food enterprise.

Limitation dates

Under Part 4, incredibly long limitation dates have been set in the exercise of the powers granted to the Secretary, that are not justifiable, especially when compared with limitation dates across other areas of law.

For example, the Secretary must make an application for an individual who has contravened a civil penalty provision (of which there are many under this Part) to pay a fine to the Commonwealth – within 6 years of the alleged contravention.[147]

This compares to other limitation dates in Australia:

- Complaint of disability discrimination (Federal) – 12 months;
- Legal claim for personal injury (in NSW) – 3 years;[148]
- Frustration of contract (in NSW) – 6 years;[149]
- Compensation to relatives for death – 3 years.[150]

Under the proposed legislation, an infringement notice must be issued within 12 months after the day the contravention is alleged to have taken place.[151] The amount in the notice is to be equal to one-fifth of the maximum penalty that the court could impose,[152] which is an unnecessarily high amount. This also relies on a Secretary's belief on 'reasonable grounds... that a person has contravened an enforceable provision'[153] and doesn't need to be proven in a court of law. This is an extraordinarily long period of time in which an infringement notice may be issued. This power may be utilised to harass, intimidate and force compliance within communities.

The issuing of infringement notices in such a long period of time also means it will be more difficult for an individual to appeal it and prove that the offence did not occur.

Penalty to be paid to the Commonwealth

Clause 75 provides that a person may be required to pay a pecuniary penalty to the Commonwealth for violation of a civil penalty provision.

[147] See *Stronger Futures in the Northern Territory Bill 2011* (Cth), cl 75(1)(3)
[148] See *Limitations Act 1969* (NSW), s18A(2)
[149] See *Limitations Act 1969* (NSW), s14A
[150] See *Limitations Act 1969* (NSW), s19
[151] *Stronger Futures in the Northern Territory Bill 2011* (Cth), cl 90(2)
[152] *Stronger Futures in the Northern Territory Bill 2011* (Cth), cl 91(2)
[153] *Stronger Futures in the Northern Territory Bill 2011* (Cth), cl 90(1)

The civil penalty provisions regarding store licensing as described above, are excessively restrictive. It will be extremely difficult for store owners to comply with these provisions. However, few defences are available to individuals.

Creating punitive penalties for communities that are already struggling financially, is reprehensible.

Ultimately, while this Part promotes 'food security' and 'reasonably priced food', this Part is also imposing fines on community store owners, that would put considerable pressure on stores to close.

This cost is likely to be borne by individual owners due to the business structure of community stores.

Aiding and abetting

Clause 86 provides an ancillary provision that a person cannot aid, abet, induce or be concerned in, contravention of a civil penalty provision.

Essentially, this section widens the net of people that these laws will affect.

Other matters in the enforcement of food security

We also wish to highlight our concern with the other provisions within Division 8, including:

- Clause 88;
- Clause 89;
- The provisions surrounding undertakings; and
- The provisions surrounding injunctions.

Protections on jurisdiction of the courts being undermined

We are also concerned that the legislation package undermines the jurisdiction of courts. Clause 103(3) provides that section 15C of the *Acts Interpretation Act 1901* (Cth) does not apply in relation to civil proceedings under Part 4.

Section 15C provides a foundational law regarding the jurisdiction of courts, and the operation of authorising proceedings. The non-application of this section appears to be attempting to undermine the application of the Constitution in terms of the court of a Territory.

Section 15C provides:

Where a provision of an Act, whether expressly or by implication, authorizes a civil or criminal proceeding to be instituted in a particular court in relation to a matter:

> *(a) that provision shall be deemed to vest that court with jurisdiction in that matter;*
>
> *(b) the jurisdiction so vested is not limited by any limits to which any other jurisdiction of the court may be subject; and*
>
> *(c)* ***in the case of a court of a Territory, that provision shall be construed as providing that the jurisdiction is vested so far only as the Constitution permits.***

Provision and disclosure of information

Clause 104 allows the Secretary to request individuals to provide written consent that the Secretary be permitted to check the individual's criminal records.

While the exception under Part VIIC of the *Crimes Act 1914* (Cth) is stated to still apply under section 104(2); the practical relevance of this is that, in rural and remote areas, where legal services are underfunded and require more support, the capacity for individuals to seek legal assistance on such basic matters may be difficult.

The enforcement provisions relating to information release in Part 4 also combine in practical effect with clause 104(2), to create a power imbalance and confusion about which information will attract a criminal penalty, civil penalty, or no consequence. This effect also operates in tandem with clause 105, which allows for the disclosure of information to the Secretary.

Clause 105 allows for the Secretary to broadly request of a department, agency, authority of Commonwealth, a State or Territory, or a person who holds an office or appointment under a law of the Commonwealth, a State or Territory, to give the Secretary information specified in the request that the Secretary considers is reasonably necessary.[154] No provision is made regarding the necessity for consent of the individual in the release of such information.

This allowance of the Secretary's discretion to be exercised may allow for the release of information from essentially any party. This goes above and beyond the intention of freedom of information laws, and undermines crucial rights to privacy on personal information.

Under the *Privacy Act 1988* (Cth), people must still usually provide their consent for information to be passed on concerning them.

The legislation provides that the disclosure of this personal information is 'taken to be a disclosure that is authorised by law for the purposes of the *Privacy Act 1988* (Cth).'[155] This is essentially nullifying relevant sections of the *Privacy Act* that would protect individuals.

Clause 106 also provides that the Secretary may disclose, or authorise the disclosure of, information obtained by the Secretary may be disclosed to any agency, authority or department of the Commonwealth, a State or a Territory; a person who holds an office or appointment under a law of the Commonwealth, a State or a Territory; the Australian Federal Police; or a police force of the Territory.

This amounts to a major breach of an individual's right to privacy. Information about an individual could be sought without their consent, from any agency, and then passed on to any other agency.

This facilitates and allows for the transfer of personal, and potentially, prejudicial information, without an individual's knowledge, to any government agency or police body nationally. This amounts to a huge expansion in powers.

In the absence of any constitutional rights or hierarchy of laws in regard to privacy, these laws will not be able to be struck out easily. They will lead to gross violations of power and also contribute to decreasing relationship between communities and government and police, through an undermining of trust.

These provisions are an explicit violation of the *Privacy Act 1988* (Cth). The expansion in such powers does not relate to food security at all, and appears to establish a separate set of rights and interests, which would definitely cause legal questions to be considered surrounding the characterisation of these provisions as 'special measures.'

Relevance to Australian consumer law

We are also opposed to the addition of cl 109 of Part 4 to be subsumed into the *Competition and Consumer Act 2010* (Cth).The Act is now the foundation of Australian consumer law.

[154] See *Stronger Futures in the Northern Territory Bill 2011* (Cth), cl 105(1)
[155] See *Stronger Futures in the Northern Territory Bill 2011* (Cth), cl 105(2)

This broadens the areas of law that are being infiltrated by the Stronger Futures policy approach.

This also may lead to permanence of the provisions under cl 109, as has been seen previously, in the continuation of amendments made by NTER to the *Classification (Publications, Films and Computer games) Act 1995* (Cth), which are being extended through the transitional provisions of the current proposed legislation.

Restriction on access to the AAT – transparency issue

Clause 110 of the proposed legislation also outlines the grounds on which an application may be made to the Administrative Appeals Tribunal for review of determinations made by the Secretary.

None of the determinations listed as being applicable for review are in relation to cl 104 (information about criminal history) or cl 105 (power to request information from public officials) or cl 106 (disclosure of information to public officials), or the making of any regulations.
These determinations are exempt from administrative review, as are a number of others within the proposed legislation.

This essentially strips an individual of rights that have been explicitly set out under Commonwealth legislation, and then denies access to review of decisions made.

Our solution

The Australian Lawyers Alliance are opposed to:

- Over-regulation of small business in areas affecting Aboriginal communities only;
- Excessive discretion granted to the Secretary;
- Enforcement provisions

The Australian Lawyers Alliance provide that viable alternatives exist through:

- Government subsidies on freight costs;
- Establishment of community market gardens;
- Working with specialist NGO partners in food security to create food sustainability programs.

A change in policy approach

- There needs to be a shift in acknowledging that food security will not improve via over-regulation of stores and associated reduction in competition.
- There needs to be a shift towards treating lack of access to good quality food as a development issue; not a legal issue.
- There needs to be a policy shift in acknowledging that each individual community is different and requires a different solution.

Funding increases

- There needs to be funding increases to organisations that are providing legal services to Indigenous communities. Especially, if such legislation were to be implemented, this will cause a rise in the already gaping need for increase in advocacy and legal assistance services.

Land reform

'We will not stop being Aboriginal people... through our rituals our responsibilities to the land, and furthermore, ***holding that land as the underpinning of everything we are.'***

- *Resident, Arlparra/Utopia, 2009*[156]

'We are the land holders in our communities. It is our land, it is our community and it is subject to our law. We will not be assimilated by these policies.'

- Elders and community members, Ramingining, NE Arnhemland[157]

The Australian Lawyers Alliance is concerned as the provisions relating to land reform undermine a number of rights and interests in current property law, and serve as a foundation for other laws in the future that may serve to remove further rights and interests of Indigenous communities.

This is especially significant, given the relationship of identity that Indigenous communities have to their land.

Object of the Part

The Object of Part 3 – Land reform, provides that:

> *'The object of this Part is to enable special measures to be taken to facilitate the granting of individual rights and interests in relation to land in town camps and community living areas; and to promote economic development in town camps and community living areas.'*[158]

The purpose of enabling special measures is cited to be in order to facilitate the granting of individual rights and interests; and to promote economic development.
This purpose is antithetical to the values held in many communities of communal ownership and mutual responsibility. It also reduces the level of rights accessible to communities under property law.

Special measures

The measures proposed **do not confer a benefit** to those involved, as these laws remove the certainty of communities' land entitlement and interest via the modifying power of regulations.
The measures **do not appear to have the sole purpose** of securing the advancement of Indigenous communities, as 'promoting economic development' could also lead, in the near future, to the displacement of Indigenous communities from their lands via large scale major infrastructure projects. This is not an unrealistic statement, given the already positive relationship with mining organisations, as seen by the signing of a Memorandum of Understanding between by Hon. Jenny Macklin and the Minerals Council of Australia, in May 2011.[159]

The measures are **not necessary** for Indigenous communities to achieve economic development. This can be achieved through other means on a local level. The granting of individual interests is also not necessary; as especially in some communities, communal ownership is upheld under traditional law. In these communities, it is necessary to maintain these ownership structures.
Furthermore, it is questionable as to what extent these laws will cease in the future. Already, there is a continuation of some of the aspects implemented under NTER. It is likely that some of the aspects of these land reforms will be foundational in the future for other unjust laws.

[156] Concerned Australians, above n 7, at 24.
[157] Submission No. 29, 'Re Stronger Futures in the Northern Territory Bills 2011. Accessed 1 February 2012 at http://www.aph.gov.au/senate/committee/clac_ctte/strong_future_nt_11/submissions.htm
[158] S33
[159] Memorandum of Understanding On Indigenous Employment and Enterprise Development (2011) http://www.minerals.org.au/resources/mou/index.html?/mou/index.html

Consultation in town camps and community living areas

The proposed legislation refers explicitly to town camps and community living areas.

However, consultations within these areas was grossly inadequate.

Of the 79 areas defined as 'community living areas' listed on the Department of FaHCSIA website[160], only 12 communities featured in the Stronger Futures consultations.[161] Of the 45 'town camps' listed on the Department of FaHCSIA website, [162] only 11 town camps featured in the Stronger Futures consultations.
This amounts to consultations occurring in approximately 15% of community living areas; and 24% of town camps.[163] This was not with all representatives of the community, and in some cases were with one person only.

Many community living areas speak Indigenous languages only.

While Hon. Jenny Macklin stated, in her second reading speech, that 'the measures reflect the many conversations we have had with Aboriginal people in the Northern Territory,'[164] it is highly unlikely that Indigenous communities, **despite any language barriers that may have also featured in consultations, would have ever asked for such specific legal changes, or for any removal of their control upon their own lands.**

It is also questionable as to whether land reform was even brought up as a topic of discussion in these communities, as no transcripts exist.

Regulations may modify NT laws

The Australian Lawyers Alliance is concerned with clauses 34 and 35 of the *Stronger Futures in the Northern Territory Bill 2011* (Cth), which provide that regulations may modify any law of the Northern Territory, in relation to town camps, and community living areas respectively, relating to:

- The use of land;
- Dealings in land;
- Planning;
- Infrastructure; or
- Any other matter prescribed by the regulations.

These regulations will take effect immediately on their commencement,[165] and will carry force as though they have been made by a law of the Northern Territory.[166]

[160] Commonwealth of Australia (2009) Department of FaHCSIA, 'Community living areas', Last modified 21/04/2009 4:34pm PMhttp://www.fahcsia.gov.au/sa/Indigenous/progserv/ntresponse/about_response/overview/communitiesprescribed/prescribed_areas/Pages/legis_pa_communities_living_areas.aspx
[161] These were Alpurrurulam; Atitjere; Engawala; Imangara; Imanpa; Jilkminggan; Laramba; Minyerri; Tara; Titjikala; Wilora and Wutunurrgurra. This can be seen through comparing Commonwealth of Australia, *Stronger Futures in the Northern Territory Report on Consultations,* October 2011, at 80 – 81and Commonwealth of Australia (2009) Department of FaHCSIA, 'Community living areas', Last modified 21/04/2009 4:34pm PMhttp://www.fahcsia.gov.au/sa/Indigenous/progserv/ntresponse/about_response/overview/communitiesprescribed/prescribed_areas/Pages/legis_pa_communities_living_areas.aspx.
[162] Commonwealth of Australia (2009) Department of FaHCSIA, 'Town camps and maps', Last modified 21/04/2009 4:36pm. PMhttp://www.fahcsia.gov.au/sa/Indigenous/progserv/ntresponse/about_response/overview/communitiesprescribed/prescribed_areas/Pages/legis_pa_towncamps.aspx
[163] These figures are approximations only and are dependent on the consistency of information in publications and documents produced by the Commonwealth of Australia.
[164] Hon. Jenny Macklin, Second Reading Speech, above n 6.
[165] *Stronger Futures in the Northern Territory Bill 2011* (Cth), cl 34(3), 35(3)

We are concerned as this means that any law of the Northern Territory can be changed easily, without need for close examination by future Committees or by the public. These laws thus also bypass any of the processes of assessment that they may have been subject to under the *Parliamentary Scrutiny (Human Rights) Act 2011.*

This is essentially setting up an alternative system of rights and interests. Certainty in ownership is the bedrock of Australian property law, to the extent that 'just terms' for property acquisition lies in the constitution. The variation of property laws via these sections undermine the certainty of Indigenous interests in land.

Consultation requirements

Clause 34(8) provides that before making regulations for a town camp, the Minister must consult with:

- The government of the Northern Territory;
- The lessee of the land that is the town camp;
- Any other person that the Minister considers appropriate to consult.

Clause 35(4) provides that before making regulations for a community living area, the Minister must consult with:

- The government of the Northern Territory;
- **If** the owner of the land that is the community living area requests to be consulted about the making of regulations – the owner; and
- The Land Council in whose area the community living area is located; and
- Any other person that the Minister considers appropriate to consult.

We are concerned regarding the negative onus to consult with owners of the land, especially given that the majority of community living areas (CLAs) speak Indigenous languages. The application of this section would require community legal education for owners of the land in CLAs in order to inform them of the need to indicate their desire. We do not believe that this is likely to happen in practice. However, regardless of these sections and their inadequacies, failure to comply with these sections does not affect the validity of the regulations made.[167]

Regulations open to abuse

The practical application of these laws is open to abuse, where other persons wishing to utilise the land that is held by either town camp or community living area, for an alternative purpose, such as mining, or large infrastructure projects, may be consulted by the Minister.
This is particularly troubling, given clause 34(6), which provides that 'the regulations may modify a lease… by modifying the purposes for which the land that is the subject of the lease may be used.'

Continuation of NTER

There has been a consistent voicing of opposition in Indigenous communities to the Northern Territory Intervention. [168]

Part 2 of the *Stronger Futures in the Northern Territory (Consequential and Transitional Provisions) Bill 2011* (Cth) provides for the saving of provisions from the NTNER Act.

[166] *Stronger Futures in the Northern Territory Bill 2011* (Cth), cl 34(5)(b)
[167] *Stronger Futures in the Northern Territory Bill 2011* (Cth), cl 34(9), 35 (5)
[168] For example, see Concerned Australians, *This is What We Said – Australian Aboriginal People Give Their Views on the Northern Territory Intervention* (2010); and Concerned Australians, *Walk With Us – Aboriginal Elders Call Out to Australian People to Walk with Them in their Quest for Justice,* (2011)

The following sections of the NTNER Act will be preserved:

In relation to compulsory five year leases granted under s31 of NTNER:

- Section 3 (definitions);
- Part 4;
- Part 8; and
- Schedule 1,

Will all be retained until the relevant time.

A number of sections will also remain in force in relation to rights, titles and interests in land that were vested in the Commonwealth under section 47 of NTER, or were preserved under section 48 of NTER.[169]

Sections 60 and 61 under NTER – which relate to compensation of acquisition of property – will also 'continue in force in relation to acquisitions of property that occurred before the relevant time.'[170]

Section 62 under NTER – which relates to payment of agreed amounts of rent – will continue in relation to: agreements made under that section before the relevant time; and the rent payable on leases under section 31 before the relevant time.

Essentially, this means that any property that has been acquired before the relevant time, will continue to be bound by the principles of compensation under NTER.

We also have concern with section 63, which allows for the continuation in force of amounts payable before, on or after the relevant time.

While we have not had the requisite time to examine these sections in great depth, we do acknowledge that the retaining of these sections indicates that there is something amiss in the property law regime as it applies to Indigenous communities.

Changes to *Aboriginal Land Rights (Northern Territory) Act 1976*

We also raise significant concern regarding changes to the Aboriginal land rights legislation.

Effect of land reform laws

Ultimately, these laws may in the future:

- Remove accountability;
- Remove transparency;
- Reduce community control and certainty regarding the nature of their property entitlements and interests.

Compensation for acquisition of property

The ALA is also concerned regarding the apparent circumnavigating of compensation on 'just terms' for acquisition of property, drawn from s51(xxxi) of the Constitution.

Clause 116 of the proposed legislation provides for a striking out of s50(2) of the *Northern Territory (Self-Government) Act 1978* (Cth), and of s128A of the *NT Liquor Act* in reference to 'any acquisition

[169] *Stronger Futures in the Northern Territory (Consequential and Transitional Provisions) Bill 2011,* Schedule 1, Item 3.
[170] *Stronger Futures in the Northern Territory (Consequential and Transitional Provisions) Bill 2011* (Cth), Part 2, clause 4(1)

of property referred to in those provisions that occurs as a result of the operation of this [Stronger Futures in the Northern Territory Bill 2011].'[171]

S50(2) of the *Northern Territory (Self-Government) Act 1978* (Cth), currently provides:

> *Subject to section 70, the acquisition of any property in the Territory which, if the property were in a State, would be an acquisition to which paragraph 51(xxxi) of the Constitution would apply,* ***shall not be made otherwise than on just terms****.*

S128A of the *NT Liquor Act* currently provides that:

> *Where the application of a provision of this Act or a regulation made under it would, but for this section,* ***result in an acquisition of property otherwise than on just terms****, the person from whom the property is acquired shall be entitled* ***to receive just compensation*** *for the acquisition, and a court of competent jurisdiction may determine the amount of the compensation or make such order as, in its opinion, is necessary to ensure that the acquisition is on just terms.*

We believe that the circumventing of these provisions, that specifically outline compensation must be on just terms, will have application in other parts of the Bill, to consolidate Commonwealth interests in property.

The ALA is concerned that this legislation will be used as a keystone for the making of other laws in the future, in transition to, and beyond, the sunset period.

Censorship

'we're not, we're not paedophiles, and we are saying it loud and clear. Now I want you to answer and tell these men, and these women and myself, why are we being punished by the Federal Government and by the Northern Territory Government?'

- Community member, Arlparra/Utopia, 2009[172]

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- 'I think you can go to Canberra and you can buy even worse books...'
- Community member, Ampilatwatja, 2009[173]

The *Stronger Futures in the Northern Territory (Consequential and Transitional Provisions) Bill 2011* (Cth) provides for amendments to the *Classification (Publications, Films and Computer Games) Act 1995* ("CPFCG Act").

Communities have previously expressed their discontent at the prohibitions on their communities, which they feel label their communities.

While the main object is 'to enable special measures to be taken to protect children living in Indigenous communities in the Northern Territory from being exposed to prohibited material', this is a textual continuation from amendments made under NTNER.

We believe that provisions relating to censorship also may fail the legal test of 'special measures'. In particular, these measures are not necessary. The *Little Children Are Sacred* report, which was used as a policy justification to activate the NT intervention, has since…. While special measures are meant to only to be in place until the objective is fulfilled, there has been no recognition of escalating levels of sexual abuse in communities.

[171] *Stronger Futures in the Northern Territory Bill 2011* (Cth), cl 116
[172] Concerned Australians, above n 7, at 47.
[173] Ibid, 45.

We also submit that the amendments to this Act also appear to not be temporary. Previous amendments to this Act were made under NTNER Act and have been retained. This means some of these laws will carry, in character, for a 15 year period, and may continue indefinitely beyond that as the foundation for new transitional provisions when the Stronger Futures legislation sunsets in the future.

Ministerial discretion

The Indigenous Affairs Minister is granted power to make, revoke or vary determinations that an area in the Northern Territory is a prohibited material area. The definition for 'prohibited material area' is entirely reliant on the Minister's determinations.[174] Any area that was a prescribed area under section 4 of NTNER will be assumed on commencement of the Stronger Futures legislation, to be a prohibited material area.

The criteria proscribed for the Minister to make a determination are paternalistic, and do not require factual evidence; objective tests or consultation with communities.

Criteria include:

- The Object of the Part;
- The 'wellbeing' of people living in the area;
- Extent to which people living in the area have expressed the view that their 'wellbeing' will be improved by such measures.

The object of the Part, as commented above, is unnecessary.

'Wellbeing' is an extremely vague subjective phrase, and no definition has been provided as to what constitutes a positive or negative assessment of 'wellbeing'.

Further criteria include:

- Whether there is **reason to believe** that people living in the area have been the victims of violence or sexual abuse;
- Whether there is **reason to believe** that children living in the area have been exposed to prohibited material;

'Reason to believe' does not provide any requirement for evidence; the production of reports; or statutory declarations. Under this framework, 'reason to believe' could include hearsay, which is usually inadmissible evidence in a court of law.

Also, the occurrences of violence, sexual abuse, or exposure to prohibited material, does not in and of itself mandate such strong restrictions on communities' civil liberties. The legislation also does not provide that any epidemic proportions are required of such instances.

- Extent to which people living in the area have expressed their concerns about being at risk of violence or sexual abuse;
- The views of the relevant law enforcement authorities;

'Concerns' may constitute opinions, or gossip. This provision does not provide for the authority of legitimacy of the 'people' to provide comment. 'Risk of violence' can also be defined extremely widely. Similarly, the 'views' of relevant law enforcement authorities may constitute opinions, hearsay, gossip, and racially discriminatory views. This may especially be the case in areas where there is poor police relationship with communities. 'Views' do not require evidence to be examined.

[174] See *Stronger Futures in the Northern Terittory (Consequential and Transitional Provisions) Bill 2011* (Cth), Schedule 3, clause 3.

- Any other relevant matters. [175]

This allows ministerial discretion to allow for anything to be considered that they desire. This process allows excessive discretion of an individual, usually based far away from a community, who may not have good knowledge of the area.
There is, furthermore, no criteria provided in this Part that opposition to the determination must be considered.
The process of decision making under this Part is opaque. It is also questionable as to what extent these determinations may be appealed in the Administrative Appeals Tribunal.

Consultation not required

In the determination of whether an area should be a 'prohibited material area', it is cited that the Minister must ensure information has been provided to communities, and a reasonable opportunity to give submissions.[176]

However, a failure to comply with this does not affect the validity of a determination.[177]
We are concerned, as the opposition of community to the stigma surrounding prohibiting material in a community, does not appear too carry weight in deciding ministerial discretion.

Continues offences

The legislation preserves the offences created under NTNER regarding possession or control of prohibited material. This preserves offences of:

- Possession or control of level 1 prohibited material – 50 penalty units;[178]
- Possession or control of level 2 prohibited material – 100 penalty units;[179]
- Supply for single items of prohibited material – 100 penalty units;[180]
- Supply of 5 or more items of prohibited material – 200 penalty units or imprisonment for 2 years.[181]

The punishments for these offences are excessive. The existence of these offences only for Indigenous communities is also highly discriminatory.

For supply of prohibited material, the defendant is taken to have committed the offence, and the burden of proof rests on the defendant to disprove allegations.[182] This is in breach of the presumption of innocence.

Independent review

Under section 114, an independent review is to be undertaken within 7 years of operation.
We do not believe that such a review will be adequate, or completely independent in character.

[175] *Stronger Futures in the Northern Territory (Consequential and Transitional Provisions) Bill 2011* (Cth), Schedule 3, cl 4, sub-cl 100A.
[176] See *Stronger Futures in the Northern Terittory (Consequential and Transitional Provisions) Bill 2011* (Cth), Schedule 3, cl 4, sub-cl100A(4)
[177] *Stronger Futures in the Northern Terittory (Consequential and Transitional Provisions) Bill 2011* (Cth), Schedule 3, sub-cl100A(5)
[178] *Stronger Futures in the Northern Territory Bill 2011* (Cth), cl 101
[179] *Stronger Futures in the Northern Territory Bill 2011* (Cth), cl 102
[180] *Stronger Futures in the Northern Territory Bill 2011* (Cth), cl 103(1)
[181] *Stronger Futures in the Northern Territory Bill 2011* (Cth), cl 103(2)
[182] *Stronger Futures in the Northern Territory Bill 2011* (Cth), cl S103(3)

Sentencing

'I call for a new approach that will bring real law and justice, and make Australia a leader among nations in relation to Indigenous people. This can only be done by recognising us as the First Australian People and our legal system as the First Australian legal system.'

- Reverend Dr. Reverend Djiniyini Gondarra OAM, Galiwin'ku, 2011[183]

We submit that there should be legislative change, wherein customary law and cultural practice should be taken into account in making an order or imposing sentences and applications for bail, for any offence all over Australia.

Failure to recognise Indigenous law amounts to assimilation of the Indigenous legal system and laws, which have operated for thousands of years.

Some changes have been made in the *Stronger Futures in the Northern Territory (Consequential and Transitional Provisions) Bill 2011* (Cth) that allows for consideration in instances of violation of cultural heritage.

However, this legislative change needs to be extended further.

Amendments to the *Crimes Act 1914* (Cth) in Schedule 4 of the *Stronger Futures in the Northern Territory (Consequential and Transitional Provisions) Bill 2011* (Cth), provide for alterations in judicial discretion in sentencing.

We are particularly opposed to Item 8, cl 16AA, which provides that:

*(1) In determining the sentence to be passed, or the order to be made, in relation to any person for an offence against a law of the Northern Territory**, a court must not take into account any form of customary law or cultural practice as a reason** for:*

(a) Excusing, justifying, authorising, requiring or lessening the seriousness of the criminal behaviour to which the offence relates; or

(b) Aggravating the seriousness of the criminal behaviour to which the offence relates.

We submit that customary law and cultural practice **should** be taken into account in making an order or imposing sentences for offences of the Northern Territory. Failure to recognise Indigenous law amounts to trampling the value of the Indigenous legal system.

It is the role of courts and of the judiciary to take into account the background of the individual in sentencing. A wide scope is applied in order to impose the most just sentence for the offence in that instance. Eliminating customary law and cultural practice from the offence removes one of the most crucial elements of an individual's background that the judge may consider.

Other essential matters – analysing Part 5

Delegation of power

The Australian Lawyers Alliance is concerned regarding the Minister's ability, and the Secretary's ability, to delegate powers. While the legislation appears to present a centralisation of decision making with the Minister, or with the Secretary, clause 112 provides that either individual may delegate any of their functions or powers to an SES employee.

[183] Concerned Australians (2011) *Walk With Us: Aboriginal Elders Call Out to Australian People to Walk with Them in their Quest for Justice,* at 33.

This is the same person who may be appointed as an authorised officer.

Ultimately, the practical reality of this Bill, if passed, will be a bureaucratic nightmare.

SES employees scattered all over the country, with usually, little understanding of Indigenous communities, will be granted power to make decisions that will have potential for huge detrimental impact.

The operation of this legislation in practice, could lead to a mass decentralisation of powers, that are vested anywhere in the country except in the hands of Indigenous people themselves.

All of the areas within this submission where we have highlighted excessive ministerial discretion as an issue, are relevant here, in that this discretion will be granted to SES employees.

There are also no guidelines in the legislation as to how decision making, or consultation is to ensure the consent of communities; to ensure the goal-orientated advancement of Indigenous rights; or how decision making should be made by reference to other government departments or principles of public health or international development.

More money will be spent on bureaucratic support than on advancing the rights of Indigenous people.

Trade and commerce not to be free

Clause 115 provides for the non-application of the *Northern Territory (Self-Government) Act 1978* in relation to this Act.

This provides

> *Trade, commerce and intercourse between the Territory and the States, whether by means of internal carriage or ocean navigation, shall be absolutely free.*

We question the policy behind this amendment.

Review of the Act

While section 117 provides that an 'independent review' must be undertaken of the Act, we believe that it is unlikely to be independent.

Income management

'What they didn't do is ask the people what they really wanted to be on, on basic card or stay on the money. But it was wrong to make everyone go on income management, and that was wrong what they done.'

-Bagot Community resident, 2009[184]

The income management, it's very extreme. It's a simple thing, like I said it's not rocket science, all you need is to have, is to instigate a program that within communities for all, that can help people budget their money. That's all you need, you don't need people to be, you know, to have income management forced upon them, to make them do the right thing.'

- Bagot community resident[185]

The Australian Lawyers Alliance submit that the *Social Security Legislation Amendment Bill 2011* (Cth) also is antithetical to an approach of community empowerment and effective engagement.

Communities were not provided with the option to opt out of compulsory income management before the passing of legislation in June 2010.

Elders have openly opposed income management measures, saying that 'attendances need to be rewarded, rather than children and families being punished for non-attendance.'[186]

Compulsory income management has historically been suggested as a policy measure under the Aboriginal Protection Board.

A crucial element in encouraging school attendance is bi-lingual education. This is currently being examined by a Senate Inquiry.

We also highlight that tying school attendance to income management, will have the most prejudicial impact on the most vulnerable communities and lowest socio-economic groups in Australian society.

Effect on families

It appears, from the wording of this legislation, that these 'deductions' do not amount to suspensions, and that the amount removed from families will not be replaced. This will be an outstanding issue for families with liabilities owing, such as car repayments; rent; health care costs and ongoing costs such as day to day liabilities: food; electricity and water bills; educational costs; transport costs and petrol.

The removal of welfare payments will cause heightened desperation in families that are already struggling to make ends meet, and who have determined basic financial management of how to meet their liabilities with the little means that they have.

This will have the greatest impact on families that have an illness or disability in their family unit – given higher implied costs in providing care to these individuals.

It will also have the greatest impact on families who live in a remote area, where transport costs are higher, and there is a greater lack of services to support people in need as a safety net.

Given that 4 million Australians are estimated to have a disability[187] , and the high prevalence of Indigenous people living with a disability, this burden is likely to borne hardest by those already straining under the weight of competing financial pressures.

[184] Concerned Australians, above n 7, at 36.
[185] Ibid 31
[186] Statement by Northern Territory Elders and Community Representatives, above n 4.

Disability discrimination

We submit that the linking of welfare payments to school management plans is likely to prejudice families of children with a behavioural disability, such as Asperger's Syndrome, Attention Deficit Disorder and autism.

The legislation provides for '5 absences of more' from school for 'reasons that are not satisfactory to a person responsible for the operation of the school.'[188]

This does not provide a description of what constitutes '5 absences', and whether this will constitute single days; consecutive days or a consecutive period; suspensions or expulsions.

Already, the existing education system, which is not tied to receipt of welfare, poses challenge for children with behavioural disability and their families. This can be seen in the large scale of disability discrimination complaints in the area of education brought to the Australian Human Rights Commission each year. The challenge for such families was also seen in the High Court case of *Purvis v New South Wales* [2003] HCA 62.

Ultimately, this provision connecting welfare support with school attendance, which is the section upon which the entire amendment relies, establishes a condition with which a child with behavioural disability cannot comply. This could therefore amount to direct and indirect disability discrimination under section 5 and 6 of the *Disability Discrimination Act 1992* (Cth).

The mandatory deduction of family welfare payments as a result, may also constitute discrimination against an associate under section 7.

The future of the legislation

'We have had enough! We need our independence to live our lives and plan our futures without the constant oppression and threats which have become central to the relationship between Government and Aboriginal communities in the Northern Territory.'

- Elders and community representatives of communities within the Northern Territory[189]

Much of our submission has provided a legal analysis of the provisions within the legislation.

However, we wish to highlight that this analysis must be viewed in light of the social context in which it will operate.

Not only are these laws excessively restrictive, not only do we believe that they would not be accepted in white Australia – but we believe that the negative impact that these laws will reap in Indigenous communities far outweighs these other considerations.
Operating against a context of historical dispossession, generational trauma, these laws, if passed, will operate alongside a passionate desire for self determination in amidst poverty that is in part caused by paternalistic government policy over a number of centuries.

As quoted by Reverend Djiniyini Gondarra OAM, in the film 'Our Generation':

'We were rich, when we were living alone.'

[187] Australian Bureau of Statistics, Survey of Disability, Ageing and Carers (2009) *Summary.* Accessed 2 February 2012 at http://www.abs.gov.au/ausstats/abs@.nsf/Latestproducts/4430.0Main%20Features22009?opendocument&tabname=Summary&prodno=4430.0&issue=2009&num=&view=
[188] *Social Security Legislation Amendment Bill 2011* (Cth), Part 2, cl 28.
[189] Statement of Elders and Community Representatives, above n 4.

Land, culture and law – essential elements to identity – are being affected by these laws. These laws target that which is core to Aboriginal people, and represents another assimilation policy that will undermine what has been achieved in the years since the Apology.
Ultimately, we believe that the introduction of this legislation will lead to:

- Increases in psychological health issues and trauma in communities;
- Increases in imprisonment rates;
- Micro-management of small business;
- Abuse of powers by officers authorised under this Act;
- Decreases in access to food;
- Increase in poverty;
- Disempowerment;
- Undermining of legal rights across a range of laws;
- Impeded access to justice;
- Dispossession of land;
- Promotion of racially discriminatory attitudes among Australians;
- Promotion of racially discriminatory attitudes among international visitors;
- Poor international standing for Australia in our human rights record;
- Consolidation of and ongoing increase of public health issues;
- Setting a foundation for future laws.

While it is said that a vacuum will occur in these communities at the extinguishment of the NTER if nothing is left to replace it, we submit that many of the provisions in the legislation are far more repressive than any vacuum would be.

While the Government has pledged to be committed to 'closing the gap', it is well renowned that health outcomes are also linked to human dignity, and the fulfilment of legal rights. It is not possible for the Government to close the gap while concurrently increasing that gap through implementing measures such as those proposed.

The sun will not set

We are deeply disturbed surrounding the future of this legislation.

While clause 118(1) provides that the Act will cease to have effect at the end of 10 years after commencement, clause 118(2) provides that regulations may be made that prescribe matters of a transitional nature, including prescribing any saving or application provisions in relation to the Act as a whole.

What this means is, that even when the provisions within the Stronger Futures legislation cease, that regulations can be made that extend, preserve and 'save' any particular provision at all, beyond the 10 year period.

This process does not require parliamentary scrutiny under the *Parliamentary Scrutiny (Human Rights) Act 2011* (Cth), and does not require the same level of accountability and transparency as any legislation being passed in the future. Not only is this in breach of a foundational principle of 'special measures', it allows for this legislation to be a building block and keystone in the establishment of future laws.

This supplies an indication that many of the core tenets of the Bill can and will, last more than the proposed ten year period.

This has already happened with the *Northern Territory National Emergency Response Act 2007* (Cth). Many of the provisions within NTER have continued and been strengthened upon, despite its 'rollback'.

The Australian Lawyers Alliance are deeply concerned by this provision. It allows for the continuation of these laws, many of which are based on arbitrary objectives, with no means of goal-orientated measure. It also does not provide Indigenous communities with options to opt out of the legislation.

Ultimately, the injustices caused by the trampling of legal rights across a range of areas of laws under the Stronger Futures will continue beyond the ten year period.

Conclusion

The Australian Lawyers Alliance are deeply troubled by the Stronger Futures package of legislation.

We believe that the legislation undermines a range of entitlements and rights across a wide scope of areas of law.

We believe that the ongoing impact of such undermining of rights will continue to have an oppressive impact on communities, who under international law, are entitled to the right to self determination.

We believe that these laws will increase imprisonment in communities; increase disempowerment; increase Indigenous poverty; increase racial discrimination; increase stigma; decrease access to food, and presents an absolute contrast to the recent movements in Australian policy suggesting the empowerment of Indigenous communities.

There is a need for a policy shift in the way that government engages with Indigenous people, that presents a historical shift away from government over-regulation, paternalism, and top-down decision making.

In 2008, history was made as Hon. Kevin Rudd announced the apology to Indigenous Australians. In 2012, constitutional reform was proposed to amend the constitution, acknowledging Indigenous communities and abolish the ‘race power’.

The response of the Parliament of Australia to the Stronger Futures legislation is the next defining moment in the Parliament’s ongoing history with Indigenous people.

Winston Churchill once quoted that ‘history is written by the victors.’ We believe that policy can be also.

We implore you, that the history of this policy be written in genuine partnership with Indigenous communities.

We therefore ask for the Senate Committee to openly dismiss the Stronger Futures legislation and recommend its rejection to the House of Representatives.

Reverend Djiniyini Gondarra OAM, traditional law man from Elcho Island, spoke with us surrounding the legislation.

He said, ‘Every person should be free to walk. Free to choose. Free to say, by the dignity that they are a human being.’

Now is that moment. Let them be free.

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