



Inquiry into the *Stronger Futures in the Northern Territory Bill 2011*

Submission to the Senate Community Affairs Legislation Committee

February 2012

www.hrlc.org.au

Freedom. Respect. Equality. Dignity. **Action.**

Contact

Ben Schokman
Human Rights Law Centre Ltd
Level 17, 461 Bourke Street
Melbourne VIC 3000

W: www.hrlc.org.au

About the Human Rights Law Centre

The Human Rights Law Centre is an independent, non-profit, non-government organisation which protects and promotes human rights.

We contribute to the protection of human dignity, the alleviation of disadvantage, and the attainment of equality through a strategic combination of research, advocacy, litigation and education.

The HRLC is a registered charity and has been endorsed by the Australian Taxation Office as a public benefit institution. All donations are tax deductible.

Follow us at <http://twitter.com/rightsagenda>.

Join us at www.facebook.com/pages/HumanRightsLawResourceCentre.

Contents

1.	Overview	1
2.	Australia's Human Rights Obligations	2
2.1	UN Declaration on the Rights of Indigenous Peoples	3
3.	Relevant Human Rights Principles	3
3.1	The Stronger Futures Measures Must Adopt a Human Rights Based Approach	3
3.2	The Stronger Futures Measures Must Ensure Participation in Decision-Making	4
3.3	Limitations on Human Rights Must be Necessary and Proportionate	7
3.4	The Stronger Futures Measures Must Not be Discriminatory	7
3.5	Special Measures	8
4.	Ensuring Compatibility with the Declaration	8
4.1	Mainstreaming the Rights of Aboriginal and Torres Strait Islander Peoples	8
4.2	Monitoring and Evaluation	9

1. Overview

1. The Human Rights Law Centre (**HRLC**) welcomes the opportunity to make this submission to the Senate Community Affairs Legislation Committee.¹ This submission relates predominantly to the Stronger Futures in the Northern Territory Bill 2011 and the Stronger Futures in the Northern Territory (Consequential and Transitional Provisions) Bill 2011 (together, the **Stronger Futures measures**), however much of the discussion is also relevant to the Social Security Legislation Amendment Bill 2011 being considered by the Committee.
2. The HRLC welcomes the government's commitment to protect children, ensure community safety and build a better future for Aboriginal and Torres Strait Islander communities. However, the HRLC has general concerns relating to the process of development of the Stronger Futures measures, as well as the nature of the measures themselves.
3. This submission does not address the specific aspects of the proposed Stronger Futures measures in detail but rather seeks to outline the importance of ensuring that the measures comply with Australia's international human rights obligations and, importantly, respect the principles and standards contained in the UN Declaration on the Rights of Indigenous Peoples.
4. The HRLC is particularly concerned about:
 - (a) the lack of meaningful engagement with and participation of Aboriginal and Torres Strait Islander communities and individuals who are affected by the current Northern Territory Emergency Response measures and who will be subject to the proposed Stronger Futures measures;
 - (b) failures of the proposed Stronger Futures measures to comply with human rights obligations and principles, particularly given the lack of clear and cogent evidence to support the continuation of many of the measures; and
 - (c) ultimately, the high likelihood that the proposed Stronger Futures measures will not be successful in fulfilling their intended purpose to address the disadvantage faced by many Aboriginal and Torres Strait Islander communities and individuals.

¹ Information about the Senate Committee's Inquiry is available at http://www.aph.gov.au/senate/committee/clac_ctte/strong_future_nt_11/index.htm.

2. Australia's Human Rights Obligations

5. The measures introduced by the Northern Territory Emergency Response in 2007 raised many issues regarding Australia's international human rights obligations. A number of highly respected, independent United Nations human rights bodies and experts have previously identified the need for Australia to take urgent action to ensure that the Emergency Response measures comply with international human rights standards, including:
 - (a) the Committee on the Elimination of Racial Discrimination;²
 - (b) the Human Rights Committee;³
 - (c) the Committee on Economic, Social and Cultural Rights;⁴ and
 - (d) the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people following his country visit to Australia in 2009.⁵
6. Despite some steps being taken by the government, including the reinstatement of the operation of the *Racial Discrimination Act 1975* and an enhanced effort to engage with affected Aboriginal and Torres Strait Islander communities, the process of development of the Stronger Futures measures, as well as the nature of the measures themselves, continue to raise serious concerns with Australia's international human rights obligations. Indeed, many of the measures introduced by the Northern Territory Emergency Response will continue to operate largely unamended under the proposed Stronger Futures legislation.
7. The Stronger Futures measures must comply with human rights standards and principles in order to ensure that:
 - (a) Australia gives effect to its international legal obligations and acts consistently with its commitment to international human rights leadership;

² UN Committee on the Elimination of All Forms of Racial Discrimination, Urgent Action Letter to the Australian Government dated 13 March 2009 in relation to the Northern Territory Emergency Response, available at <http://www.hrlrc.org.au/files/cerd-letter-to-australia130309.pdf>.

³ UN Human Rights Committee, *Concluding Observations of the Human Rights Committee: Australia* (March 2009) UN Doc CCPR/C/AUS/CO/5, available at <http://www2.ohchr.org/english/bodies/hrc/docs/co/CCPR-C-AUS-CO-5.doc>.

⁴ UN Committee on Economic, Social and Cultural Rights, *Concluding Observations of the Committee on Economic, Social and Cultural Rights: Australia* (May 2009) UN Doc E/C.12/AUS/CO/4, available at <http://www2.ohchr.org/english/bodies/cescr/docs/AdvanceVersions/E-C12-AUS-CO-4.doc>.

⁵ Statement of the UN Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, James Anaya (27 August 2009), available at <http://www.un.org.au/files/files/Press%20Release%20-%20Australia%20JA%20final.pdf>.

- (b) measures that are designed and implemented to address serious Aboriginal and Torres Strait Islander disadvantage are effective; and
 - (c) the relationship between Australian governments and Aboriginal and Torres Strait Islander peoples is one of mutual respect and trust, and that Aboriginal and Torres Strait Islander communities are empowered and supported.
8. As stated above, the HRLC supports measures that are intended to protect the human rights of Aboriginal and Torres Strait Islander peoples, particularly children and women who may be vulnerable to family violence and sexual abuse issues. However, such measures must be consistent with and promote the furtherance of Australia's human rights obligations.

2.1 UN Declaration on the Rights of Indigenous Peoples

9. The Australian Government has endorsed the UN Declaration on the Rights of Indigenous Peoples.⁶ While the Declaration is not a binding treaty, it is a significant instrument that elaborates many human rights that already exist in international law and their specific application to Indigenous peoples. In this respect, the Declaration has “significant moral force”⁷ and represents an important standard for the treatment of Indigenous peoples. The standards and principles contained in the UN Declaration on the Rights of Indigenous Peoples should inform the concrete interpretation and application of binding international legal norms, such as those under the ICCPR, ICESCR and CERD, to Indigenous peoples.⁸

3. Relevant Human Rights Principles

10. In conducting its inquiry into the Bills, the HRLC recommends that the Senate Committee have regard to the following human rights principles when assessing the proposed Stronger Futures measures.

3.1 The Stronger Futures Measures Must Adopt a Human Rights Based Approach

11. A human rights based approach to the development and implementation of the Stronger Futures measures would:

⁶ UN GAOR, 61st session, GA Res 61/295, UN Doc A/RES/47/1 (2007).

⁷ M Davis, *The United Nations Declaration on the Rights of Indigenous Peoples* (2007) 11(3) AILR 55, 55.

⁸ See, eg, *Commonwealth v Tasmania* (1983) 158 CLR 1, 174-7; *Vance v State Rail Authority* [2004] FMCA 240.

- (a) ensure that Australia complies with its international human rights obligations and the standards and principles contained in the UN Declaration on the Rights of Indigenous Peoples; and
 - (b) promote the participation and empowerment of Aboriginal and Torres Strait Islander communities and ultimately enhance policy making and increase the likelihood of the effectiveness and success of the measures.
12. The HRLC is concerned that the development of the proposed Stronger Futures measures has failed to adopt a human rights based approach. In particular, as explained further below:
- (a) there has not been appropriate and effective participation of affected Aboriginal and Torres Strait Islander communities in the development of the Stronger Futures measures;
 - (b) there remain ongoing concerns about the disproportionate and discriminatory impact that the proposed Stronger Futures measures will have on Aboriginal and Torres Strait Islander communities; and
 - (c) there is insufficient credible and compelling evidence that has been presented by the government to justify the limitations that the proposed Stronger Futures measures will have on relevant human rights, including the right of self-determination, the right to equality and non-discrimination, the right to social security and the right to an adequate standard of living.⁹

3.2 The Stronger Futures Measures Must Ensure Participation in Decision-Making

13. The Stronger Futures measures must respect the right of self-determination and the duty of the government to consult with affected communities, particularly disadvantaged and vulnerable communities.
14. The right of self-determination is protected in Article 1 of both the *International Covenant on Civil and Political Rights* and the *International Covenant on Economic, Social and Cultural Rights*, both treaties to which Australia is a party. The right of self-determination is also enshrined in various articles of the UN Declaration on the Rights of Indigenous Peoples, including Articles 3, 4, 18, 19, 23 and 32.

⁹ For further information about the impact of the Northern Territory Emergency Response measures on these specific human rights, see the HRLC's previous submission to the Senate Committee's Inquiry into the Reinstatement of Racial Discrimination Act Bills, available at <http://www.hrlc.org.au/content/topics/equality/indigenous-rights-proposed-amendments-to-the-northern-territory-intervention/>.

15. The duty to consult with Indigenous peoples on decisions affecting them is a fundamental obligation that is firmly entrenched in international human rights law.¹⁰ The duty is recognised in various articles of the UN Declaration on the Rights of Indigenous Peoples and is affirmed as an overarching principle in Article 19:

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.

16. The principle of free, prior and informed consent reflects the importance of effective participation. Effective participation is a fundamental element to empowering vulnerable and disadvantaged communities and critical to establishing a relationship of mutual respect.
17. The HRLC considers that the issues with the government's consultation processes throughout the history of the Northern Territory Emergency Response – and which continue into the development of the Stronger Futures measures – raise particular concerns in relation to adherence with the standards and principles contained in the UN Declaration on the Rights of Indigenous Peoples, particularly regarding rights of participation and the duty to consult. The lack of consultation and undermining of self-determination is not only exemplified through the means by which the Northern Territory Emergency Response was implemented, but is also reflected in aspects of the measures themselves, which removes governance and decision making control from Aboriginal and Torres Strait Islander organisations.
18. The HRLC is concerned that:
- (a) when introduced in 2007, the Northern Territory Emergency Response legislation was passed without any consultation with Aboriginal and Torres Strait Islander representatives or affected communities;
 - (b) the unprecedented haste with which the Northern Territory Intervention was enacted precluded the crafting of an appropriate community based response;
 - (c) major concerns were expressed in relation to the "Redesign Consultations" undertaken by the Department of Families, Housing, Community Services and Indigenous Affairs in 2009;¹¹
 - (d) additional concerns have also been raised about the most recent consultations conducted in the lead up to the introduction of the Stronger Futures measures;¹² and

¹⁰ James Anaya, *Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people*, UN Doc A/HRC/12/34 (2009), [38].

¹¹ See the HRLC's previous submission to the Senate Committee's Inquiry into the Reinstatement of Racial Discrimination Act Bills, above n 9.

- (e) throughout the history of the Northern Territory Emergency Response, there has consistently been manifestly inadequate timeframes for community consultation. This is particularly concerning given the significance of the public policy issues involved with the measures and the widespread nature of their application and impact.
19. The result of the lack of meaningful involvement of affected Aboriginal and Torres Strait Islander communities in the design and implementation of the Northern Territory Emergency Response is that many of the measures do not have the support of the affected communities. This is highly likely to continue under the Stronger Futures measures. As the UN Special Rapporteur on Indigenous Rights has observed, without the buy-in of Indigenous peoples at the earliest stages of the development of government initiatives, the effectiveness of such initiatives is significantly compromised and diminished.¹³
20. Crucially, such lack of consultation has undermined the rights of self-determination and participation of Aboriginal and Torres Strait Islander peoples. Indeed, reflecting the importance of the right of self-determination for Aboriginal and Torres Strait Islander peoples, the lack of consultation is one of the aspects of the Northern Territory Emergency Response that has most profoundly disempowered Aboriginal and Torres Strait Islander peoples and their communities and led to a strongly articulated sense of helplessness.
21. At all times, it is imperative that any measures directly affecting Aboriginal and Torres Strait Islander peoples be made only after adequate consultation with and participation of affected Aboriginal and Torres Strait Islander communities. Continuing to fail to meaningfully engage communities in this process continues to fail to promote the realisation of the right of self-determination for Australia's Aboriginal and Torres Strait Islander peoples and deny their rights to culture and identity. This failure in turn has the potential to have a significant impact on the realisation of a number of other fundamental human rights.
22. The HRLC notes that certain aspects of the proposed Stronger Futures measures require that consultation take place with communities (such as when the Minister proposes to declare a particular area to be subject to alcohol restrictions). It is vital that these provisions contained in the Stronger Futures measures respect rights of participation. Participation in decision-making is vital to ensure the protection and promotion of the rights of Aboriginal and Torres Strait Islander peoples and the empowerment and development of individuals and communities.

¹² These concerns have been expressed by organisations including Aboriginal Peak Organisations Northern Territory, the Australian Council of Social Service, Jumbunna Indigenous House of Learning, and concerned Australians, among others.

¹³ James Anaya, above n 10, [36].

3.3 Limitations on Human Rights Must be Necessary and Proportionate

23. Limitations on human rights are only permissible in circumstances where such limitations can be demonstrably justified as being reasonable, necessary and proportionate. In this regard:
- (a) any limitation on human rights must fulfil a legitimate and pressing purpose;
 - (b) any limitation on human rights must be targeted, proportionate and interfere with rights to the minimal extent possible; and
 - (c) limitations on rights must be demonstrably justified and evidence-based.
24. The HRLC is concerned that the government has not provided sufficient credible, cogent and compelling evidence that the limitations on relevant human rights imposed by the Stronger Futures measures are necessary and proportionate. Any limitation of a human right requires a “very high degree of probability” and evidence to support the justification for the limitation as being permissible.¹⁴ This imposes a “stringent standard of justification”.¹⁵ The evidence should be “cogent and persuasive and make clear the consequences of imposing or not imposing the limit.”¹⁶
25. There is a clear lack of evidence to demonstrably justify the effectiveness, and thus the necessity, of many of the proposed Stronger Futures measures, particularly compulsory income quarantining and its purported link with improving school enrolment and attendance.
26. As discussed above, major concerns have previously been expressed about the adequacy of and the extent to which the government is able to demonstrably justify the limitations on human rights that have been imposed by the Northern Territory Emergency Response measures. Given that many of the Stronger Futures measures are continuations or extensions of the Northern Territory Emergency Response measures, these concerns about the government’s justification for the measures still exist.

3.4 The Stronger Futures Measures Must Not be Discriminatory

27. The Stronger Futures measures must respect the right to equality and non-discrimination. The right to equality and non-discrimination is a fundamental tenet of human rights law. The particular meaning and content of the right to equality and non-discrimination as it relates to Indigenous peoples is enshrined in article 15(2) of the UN Declaration on the Rights of Indigenous Peoples:

¹⁴ See, eg, *R v Oakes* [1986] 1 SCR 103, 105, 136-7; *Minister of Transport v Noort* [1992] 3 NZLR 260, 283; *Moise v Transitional Land Council of Greater Germiston* 2001 (4) SA 491 (CC), [19]. See also P Hogg, *Constitutional Law of Canada* (2004) 795-6.

¹⁵ *R v Oakes* [1986] 1 SCR 103, [67].

¹⁶ *Re an application under the Major Crime (Investigative Powers) Act 2004* [2009] VSC 381, [147] (Warren CJ).

States shall take effective measures, in consultation and cooperation with the indigenous peoples concerned, to combat prejudice and eliminate discrimination and to promote tolerance, understanding and good relations among indigenous peoples and all other segments of society.

28. Despite the reintroduction of the operation of the *Racial Discrimination Act 1975*, many of the Northern Territory Emergency measures have continued to impact specifically on Aboriginal and Torres Strait Islander peoples. In the absence of clear evidence to demonstrate their necessity and benefit, these measures continue to raise serious concerns in relation to the right of non-discrimination.

3.5 Special Measures

29. The HRLC also continues to be concerned about the categorisation of certain measures as “special measures”. The purpose of special positive measures is to ensure substantive equality. Such measures must reflect the aspirations of the peoples concerned and involve their free, prior and informed consent. As such, effective participation of affected communities is essential to protect, maintain and develop their cultures and identities, customs, traditions and institutions. As discussed further below, the consultation that has taken place with affected communities is not sufficient to meet the standard required to fulfil the criteria of being a “special measure”.

4. Ensuring Compatibility with the Declaration

4.1 Mainstreaming the Rights of Aboriginal and Torres Strait Islander Peoples

30. Working with Aboriginal and Torres Strait Islander peoples requires appropriate strategies that ensure their effective participation in decision making processes for all matters that affect them. The UN Declaration on the Rights of Indigenous Peoples provides a framework for adopting a human rights-based and culturally suitable approach to addressing the specific situation of Indigenous peoples.
31. In particular, the principles and standards contained in the Declaration regarding the participation of Indigenous people must be fully respected in order for government policies and initiatives to be effective. Mainstreaming and integrating Indigenous peoples’ issues in development requires such principles be integrated in all development policies and programs. The effective participation of Indigenous peoples and their representatives is essential to ensuring that the human rights of Indigenous people are respected, promoted and strengthened.
32. Ensuring the compatibility of government policies and practices with the human rights standards contained in the Declaration should involve:

- (a) ensuring the full participation and inclusion of Aboriginal and Torres Strait Islander peoples, which requires going further than mere consultation;
- (b) recognising the inter-dependence and inter-relatedness of all human rights, and that the fulfilment of one right cannot be achieved by compromising or violating another right;
- (c) recognising that discrimination against Indigenous peoples is often a structural problem that requires specific attention to overcome inequalities and exclusion; and
- (d) ensuring accountability, through the rule of law, for the protection and promotion of the individual and collective human rights of indigenous peoples.

4.2 Monitoring and Evaluation

33. Monitoring and evaluation of the Northern Territory Emergency Response measures and the proposed Stronger Futures measures is essential to ensure the progressive realisation of the human rights of Aboriginal and Torres Strait Islander peoples. Such analysis should:
- (a) assess how the measures are affecting Aboriginal peoples, even those which are not specifically targeting at them;
 - (b) assess the effectiveness of the measures, including ensuring that evaluation is participatory and adapted to the particular needs of Aboriginal peoples; and
 - (c) use effective indicators to ensure that it is possible to monitor and evaluate the measures with respect to Aboriginal peoples.