



Australian
Human Rights
Commission

Stronger Futures in the Northern Territory Bill 2011 and two related Bills

**AUSTRALIAN HUMAN RIGHTS COMMISSION – SUBMISSION TO
THE SENATE COMMUNITY AFFAIRS LEGISLATION COMMITTEE**

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1 Introduction

1. On 23 November 2011, the Stronger Futures in the Northern Territory Bill 2011 (Cth) (Stronger Futures Bill), the Stronger Futures in the Northern Territory (Consequential and Transitional Provisions) Bill 2011 (Cth) (Consequential and Transitional Provisions Bill) and the Social Security Legislation Amendment Bill 2011 (Cth) (Social Security Bill) (collectively referred to in this submission as the Stronger Futures Bills) were introduced into Parliament.
2. The Stronger Futures Bills set the parameters for the operation and modification of measures originally introduced in the *Northern Territory National Emergency Response Act 2007* (Cth) (NTNER Act). Many of these measures are due to sunset in August 2012,¹ with budget measures currently continuing until 30 June 2012.²
3. On 25 November 2011, the Senate jointly referred the Stronger Futures Bills to the Senate Community Affairs Legislation Committee for inquiry and report.
4. The Australian Human Rights Commission makes this submission to the Committee for its Inquiry. The submission assesses how the measures in the Stronger Futures Bills comply with Australia's human rights obligations.
5. In summary, the Stronger Futures Bills contain the following provisions:
 - The Stronger Futures Bill:
 - i. introduces alcohol management plans in prescribed Northern Territory communities and amends laws relating to alcohol abuse measures
 - ii. introduces measures to allow the Commonwealth to amend Northern Territory legislation relating to leasing in Community Living Areas and Town Camps in the Northern Territory
 - iii. amends the licensing regime for community stores.
 - The Consequential and Transitional Provisions Bill:
 - i. repeals the NTNER Act
 - ii. contains certain savings provisions and transitional provisions relating to leasing, alcohol management, permit system and community stores
 - iii. contains consequential amendments relating to the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) (ALRA)
 - iv. amends the *Classification (Publications, Films and Computer Games) Act 1995* (Cth) (Classification Act)
 - v. amends the *Crimes Act 1914* (Cth) (Crimes Act) to introduce exceptions to the rule preventing consideration of customary law

or cultural practice in bail and sentencing for certain offences (cultural heritage).

- The Social Security Bill:
 - i. amends the operation of the income management scheme
 - ii. amends sections of social security legislation which enable the suspension of welfare payments in cases of school non-attendance.
6. A chronology of the Northern Territory Emergency Response (NTER) and Stronger Futures Bills is contained at Appendix 1 of this submission. This provides a more detailed history of the measures and the context within which they were introduced.
7. In order to assess the compliance of the proposed Stronger Futures measures with human rights standards, the Commission has given particular consideration to the following of Australia's binding human rights obligations:
- *The International Covenant on Civil and Political Rights (ICCPR)*
 - *The International Covenant on Economic, Social and Cultural Rights (ICESCR)*
 - *The International Convention on the Elimination of all forms of Racial Discrimination (ICERD)*
 - *The Convention on the Elimination of all forms of Discrimination Against Women (CEDAW)*
 - *The Convention on the Rights of the Child (CRC)*
 - *The Convention on the Rights of Persons with Disabilities (CRPD)*
 - *The Convention Against Torture and other Cruel, Inhuman or Degrading Treatment and Punishment (CAT).*
8. The Commission has also considered the extent to which the measures are consistent with the *Declaration on the Rights of Indigenous Peoples* (the Declaration). While of itself not a binding instrument, the Declaration sets out how the human rights principles in the above listed treaties apply to Indigenous peoples. Accordingly, it provides a comprehensive elaboration of relevant human rights standards against which to analyse the Stronger Futures Bills. These principles include:
- self-determination
 - participation in decision-making and free, prior and informed consent
 - non-discrimination and equality
 - respect for and protection of culture.³

9. To be consistent with these principles, the Commission submits that laws and policies should promote Aboriginal and Torres Strait Islander peoples' choice, participation and control. Aboriginal and Torres Strait Islander peoples should be actively involved in the making of policy and legislative decisions, and actively engaged in the implementation and delivery of the mechanisms that arise from the legislative changes. Policies and legislation should be non-discriminatory. Where disadvantage exists, laws and policies should be targeted at alleviating that disadvantage and promoting substantive equality. Substantive equality allows different groups to be treated differently so that they can, in the end, enjoy their human rights equally. Access to financial and technical assistance for Aboriginal and Torres Strait Islander communities from governments should also be available to facilitate the exercise and enjoyment of the rights contained in the Declaration.⁴ Finally, laws and policies should reflect, promote and value the cultures of Aboriginal and Torres Strait Islander peoples.
10. This approach not only reflects Australia's human rights obligations as they apply to Aboriginal and Torres Strait Islander peoples but is also consistent with the evidence base on what works to overcome Indigenous disadvantage.⁵

2 Summary and recommendations

11. The Commission welcomes the intent of the Australian Government to address the critical situation facing Aboriginal peoples in the Northern Territory and supports the Government's objective to improve the quality of life for Aboriginal peoples living in the Northern Territory.
12. In order to achieve Aboriginal people's social, cultural and economic goals, it is the Commission's view that the proposed Stronger Futures legislation requires the ongoing engagement of the people affected by these measures to ensure that they are able to address the challenges they face and own the solutions. This requires their engagement at all stages of design, development, implementation, monitoring and review of policy, legislation and programs.
13. While the Commission supports the intent of the Stronger Futures Bills, the Commission is of the view that the measures contained within the Stronger Futures Bills are intrusive and limiting of individual freedoms and human rights. Where it is deemed appropriate to design interventions which infringe on individuals' human rights, then that intervention must be the least restrictive on the rights of individuals whilst trying to meet the purpose of the intervention.
14. As such, the Commission's support for the passage of the Stronger Futures Bills is contingent upon the adoption of the recommendations outlined below at section 2.1.
15. This submission assesses the implications of the measures outlined in the Stronger Futures Bills in terms of their compliance with Australia's human rights obligations and makes suggestions about further developing the Bills to ensure their compliance and effectiveness.
16. In this submission, the Commission makes the following key points:

- The Stronger Futures Bills must be implemented in accordance with human rights standards. This includes ensuring that the Stronger Futures Bills are consistent with the *Racial Discrimination Act 1975* (Cth).
 - The Government is strongly encouraged to adopt the Commission’s approach to effective consultation and engagement with Aboriginal peoples in relation to further developing and implementing the Stronger Futures Bills, and to commit to working with Aboriginal communities in the Northern Territory to develop appropriate responses that meet the identified needs of individual communities.
 - A key priority for the Government should be to resource the development of community governance structures to enable Aboriginal peoples to engage with and control decision-making about their own development goals, particularly those pertaining to the Stronger Futures priority areas.
 - The Government should review and reform its internal structures and workforce to ensure cultural competency, cultural safety and cultural security.
17. The Commission is concerned that without these crucial amendments to the Stronger Futures Bills, the Government’s intention to improve the life outcomes for Aboriginal peoples in the Northern Territory will not be realised.

2.1 Recommendations

(a) Consultation and Engagement

18. The Commission recommends that the proposed s 4 of the Stronger Futures in the Northern Territory Bill 2011 (Cth) be amended so that the object of the Act is also to ensure the effective participation and engagement of Aboriginal and Torres Strait Islander peoples in matters affecting them
[Recommendation no. 1].
19. The Commission recommends that the Stronger Futures Bills are amended so that the definition of ‘consultation’ adopts the Commission’s criteria for meaningful and effective consultation set out at paragraph 63 and appendix 2
[Recommendation no. 2].

(b) Community Governance

20. The Commission recommends the Australian and Northern Territory Governments commit to:
- appropriately resource (including financial and technical assistance), and prioritise programs that facilitate the development of community governance structures which enable and empower Aboriginal communities to engage with and control decision-making about their cultural, political, economic and social development goals
 - develop and implement a holistic and coordinated approach to address the eight priority areas identified in the *Stronger Futures in the Northern*

Territory Discussion Paper and Consultations Report [**Recommendation no. 3**].

(c) *Cultural Competency*

21. The Commission recommends that the Australian and Northern Territory Governments implement the Stronger Futures measures in a culturally safe and competent manner. This requires the Government to ensure:
- the mandatory use of Identified Positions/Criteria for all positions in the public service that have any involvement with the Stronger Futures measures, and the requirement for relevant officers to have the appropriate skills and cultural competency to work with Aboriginal and Torres Strait Islander peoples and communities
 - the development of targeted education and training programs with accredited training providers to facilitate the development of appropriate skills and cultural competency
 - increasing the capacity of Government Business Managers and Indigenous Engagement Officers to work with communities and build community engagement processes with a view to improving community engagement on the key issues facing communities [**Recommendation no. 4**].
22. Given the potential of some measures to raise human rights concerns as they are developed, the Commission recommends that the Senate Community Affairs Legislation Committee conduct a follow up inquiry in three years' time into progress in improving Indigenous governance arrangements, cultural security, and progress in developing community led initiatives such as alcohol management plans [**Recommendation no. 5**].

(d) *Compliance with the Racial Discrimination Act*

23. The Commission recommends that the Stronger Futures Bills be amended to include 'notwithstanding' clauses that specify that in the event of ambiguity, the provisions of the RDA are intended to prevail over the provisions of the Stronger Futures legislation and that the Stronger Futures legislation does not authorise conduct that is inconsistent with the provisions of the RDA [**Recommendation no. 6**].

(e) *Income Management*

24. The Commission recommends that the Social Security Legislation Amendment Bill 2011 (Cth) be amended to require the Minister to consult with and take into account the views of the affected community prior to determining an area to be a 'specified area' [**Recommendation no. 7**].
25. The Commission recommends that the Social Security Legislation Amendment Bill 2011 (Cth) provide for criteria in the *Social Security (Administration) Act 1999* (Cth) which must be considered by the Minister when determining the type of agency which can, or whether a particular agency will, be authorised to give notices requiring individuals to be subject to income management. Such

criteria should require agencies to have a relevant connection to promoting the welfare and wellbeing of children. **[Recommendation no. 8].**

26. The Commission recommends that the power of an agency to make external referrals, and the factors that can be considered when making the decision to refer, should be clearly stated and defined in the primary legislation **[Recommendation no. 9].**
 27. The Commission recommends that Schedule 1 of the Social Security Legislation Amendment Bill 2011 (Cth) be amended so that proposed external referral mechanism allows Centrelink to make its own determination of whether to place a referred individual onto an income management program after considering the merits of a particular referral **[Recommendation no. 10].**
- (f) *School Enrolment and Attendance through Welfare Reform Measure*
28. The Commission recommends that the Government address the issue of school attendance through a rights-based and non-discriminatory approach which should include:
 - increasing the provision of education infrastructure and resources, particularly for Aboriginal and Torres Strait Islander communities in rural and remote areas
 - increasing engagement with all parents and communities
 - improving the quality of education, placing an emphasis on providing children with incentives to learn and developing methods of teaching that resonate with Aboriginal and Torres Strait Islander students
 - supporting education programs that have proven to increase school attendance **[Recommendation no. 11].**
 29. The Commission recommends that Government Business Managers work with the Northern Territory Department of Education to conduct an audit of and publicly report on schooling facilities in Aboriginal communities in the Northern Territory to ensure that there are adequate learning facilities for all Aboriginal children **[Recommendation no. 12].**
 30. The Commission recommends that if the SEAM program is to be extended, it be altered to ensure the full participation of Aboriginal communities in its implementation. This should include provisions that require the Government to establish community advisory mechanisms for the implementation of the scheme, and to provide options for communities to voluntarily 'opt-in' to the scheme **[Recommendation no. 13].**
 31. If the Government retains the welfare consequence of SEAM, the Commission recommends that it only be employed as a last resort. Further, the Commission recommends that the Social Security Legislation Amendment Bill 2011 (Cth) be amended:
 - to remove proposed s 124A(2)

- to remove proposed ss 124ND(1)(a) and (b)
 - so that ss 124NE and 124NF afford a discretionary power to suspend or cancel a ‘schooling requirement payment’. In particular, these provisions should provide that on non-compliance with a compliance notice the school *may* refer the matter to the Secretary for assessment by the Secretary as to whether to suspend or cancel a ‘schooling requirement payment’ in accordance with specified criteria
 - to provide that the Secretary, in making an assessment as to whether to suspend or cancel a ‘schooling requirement payment’, must give consideration to certain criteria, for example:
 - whether non-compliance is only of a trivial or technical nature
 - the number of school attendance plans that have previously been entered into
 - whether case-management and Government assistance has been provided to the person to assist in addressing barriers to attendance
 - the extent to which the suspension or cancellation will have a detrimental impact on the person and/or their family
 - whether suspension or cancellation is likely to impact on the school attendance of the person’s child
 - to require the Secretary to ‘reconsider’ his or her decision regarding suspension or cancellation of a ‘schooling requirement payment’ within 7 days of receiving an application for review under s 129 of the *Social Security (Administration) Act 1999* (Cth)
 - to require the arrears of a suspended ‘schooling requirement payment’ to be paid to the ‘schooling requirement person’ (under proposed s 124NG *Social Security (Administration) Act 1999* (Cth)) within as short a time as is practicable, but no more than 14 days, following the Secretary’s decision under s 129 of the *Social Security (Administration) Act 1999* (Cth)
- [Recommendation no. 14].**

(g) *Tackling Alcohol Abuse*

32. The Commission reiterates its recommendation from the *Social Justice Report 2007* for the Australian Government to ensure alcohol restrictions are supplemented by investment in infrastructure in the health and mental health sectors (including culturally appropriate detoxification facilities) and investment in culturally appropriate community education programs delivered by Indigenous staff **[Recommendation no. 15]**.
33. The Commission recommends that the blanket alcohol bans proposed be limited to a further three year period to enable the transition to community developed alcohol management plans **[Recommendation no. 16]**.

34. The Commission recommends that Division 6 of the Stronger Futures in the Northern Territory Bill 2011 (Cth) be amended to explicitly include consultation requirements for the development of rules that prescribe the minimum standards in relation to alcohol management plans **[Recommendation no. 17]**.
35. The Commission recommends that proposed ss 17 and 23 of the Stronger Futures in the Northern Territory Bill 2011 (Cth) be amended to ensure that the Minister is required to take into account the outcomes of consultations with affected communities about the introduction of alcohol management plans **[Recommendation no. 18]**.
36. The Commission recommends that s 23(2) of the Stronger Futures in the Northern Territory Bill 2011 (Cth) be amended to include that the Minister must have regard to the circumstances and views of the people living in the area when making a decision to approve a variation to an alcohol management plan **[Recommendation no. 19]**.
37. The Commission recommends that financial, technical and other assistance be provided to communities to facilitate the development of alcohol management plans that are tailored to the needs of their communities and contain the least restrictive measures **[Recommendation no. 20]**.
38. The Commission recommends that s 15(5) of the Stronger Futures in the Northern Territory Bill 2011 (Cth) be amended so that:
 - ‘undue financial burden’ is replaced with ‘excessive financial burden’
 - ‘would otherwise be inappropriate’ be removed or replaced with more targeted language detailing the kind of circumstances or situations where it would be reasonable to refuse such a request **[Recommendation no. 21]**.
39. The Commission recommends that the Australian Government ensure sufficient financial resources are made available to the Northern Territory Government to be able to effectively carry out requests to assess licenced premises **[Recommendation no. 22]**.
40. The Commission recommends that a definition of ‘alcohol’ be inserted into the dictionary in proposed s 75A(1) of the *Liquor Act* (Northern Territory) which clarifies that ‘alcohol’ in proposed s 75(C)(7) means pure alcohol or ‘Ethyl Alcohol with no other additives or denaturants’ **[Recommendation no. 23]**.
41. The Commission recommends that the Stronger Futures in the Northern Territory Bill 2011 (Cth) insert into Division 1AA into the *Liquor Act* (Northern Territory) a note setting out that these alternatives are the preferable way to manage possession and consumption of alcohol in alcohol protected areas **[Recommendation no. 24]**.
42. The Commission recommends that the Stronger Futures Bills be amended to include a mandated floor price for alcohol across the Northern Territory **[Recommendation no. 25]**.

(h) *Land Reform Measures*

43. The Commission recommends that the provisions of the Stronger Futures in the Northern Territory (Consequential and Transitional Provisions) Bill 2011 repealing the sections dealing with the compulsory acquisition of five-year leases, and repealing Part IIB of the *Aboriginal Land Rights Act (Northern Territory) 1976* (Cth), be passed **[Recommendation no. 26]**.
44. The Commission recommends that the Australian Government ensure Northern Territory Land Councils are adequately resourced to provide support to the owners of community living area land in relation to any dealings on the land as envisaged by proposed s 23(1)(ea) of the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth). In addition, the Australian Government should ensure town camp councils also have access to sufficient financial and technical assistance to enable them to utilise any new provisions affecting town camp leasing for their benefit **[Recommendation no. 27]**.
45. The Commission recommends that the Australian Government include the amendments to Northern Territory laws and/or leases, as envisaged by Part 3 of the Stronger Futures in the Northern Territory Bill 2011 (Cth), in the Bill to enable analysis and debate prior to the passage of the Bill. Alternatively, that the Government provide an exposure draft of the proposed Regulations in conjunction with the Stronger Futures in the Northern Territory Bill 2011 (Cth) for comment prior to the passage of the Bill **[Recommendation no. 28]**.
46. The Commission recommends that sections 34(1)(e) and 35(1)(e) of the Stronger Futures in the Northern Territory Bill 2011 (Cth) be amended to read that Regulations may modify any law of the Northern Territory relating to 'any matter which enables the objects of this Part' **[Recommendation no. 29]**.
47. The Commission recommends that any Regulations developed under proposed ss 34 or 35 of the Stronger Futures in the Northern Territory Bill 2011 be developed in partnership with affected Aboriginal communities. **[Recommendation no. 30]**.

(i) *Community Safety*

48. The Commission recommends that the Stronger Futures in the Northern Territory (Consequential and Transitional Provisions) Bill 2011 (Cth) be amended so that proposed s 100A(6) and s 115(5) of the *Classification (Publications, Films and Computer Games) Act 1995* (Cth) include as an additional factor the views and concerns raised during consultation **[Recommendation no. 31]**.
49. The Commission recommends that the Stronger Futures in the Northern Territory (Consequential and Transitional Provisions) Bill 2011 (Cth) be amended to remove Item 15 of Schedule 3 which automatically transitions pre-existing prescribed areas to prohibited materials areas **[Recommendation no. 32]**.
50. The Commission recommends that the Stronger Futures in the Northern Territory (Consequential and Transitional Provisions) Bill 2011 (Cth) be amended so that it amends the *Crimes Act 1914* (Cth) so that customary law

or cultural practices are only excluded from consideration in bail and sentencing decisions for offences that involve violence or sexual abuse [Recommendation no. 33].

3 Context – over-arching issues relating to the Stronger Futures Bills

51. Before discussing the specific measures contained in the Stronger Futures Bills, the Commission notes the following over-arching issues about the context within which the Bills will apply:

- consultation and engagement with Aboriginal and Torres Strait Islander peoples in the formulation of the Bills and implementation of NTER measures
- governance arrangements in Aboriginal communities in the Northern Territory
- government capacity and cultural competency to implement the Stronger Futures measures.

3.1 The Stronger Futures consultation process

52. On 22 June 2011, the Australian Government released the *Stronger Futures in the Northern Territory Discussion Paper* (the *Stronger Futures Discussion Paper*) and outlined its intended consultation process to discuss the future of the NTER.⁶ There was a six week period for consultations.

53. The Commission has previously brought these concerns to the attention of the government in relation to the inadequacy of the consultation process as outlined below:

- the timeframe for consultations was inadequate given the scope and depth of the issues raised in the *Stronger Futures Discussion Paper*
- significant measures such as income management were not listed for discussion during the Stronger Futures consultation process
- despite the Australian Government's efforts to work with the Aboriginal Interpreter Service (AIS), there was neither sufficient time to translate the paper into the languages of Northern Territory communities nor to provide the *Stronger Futures Discussion Paper* to the interpreters sufficiently in advance of the consultations.

54. These concerns were consistently raised with the Commission during visits to Aboriginal communities in the Northern Territory in late 2011.

55. The Commission also highlights consistent feedback provided during visits to Aboriginal communities in late 2011 that a 'one size fits all' approach to implementing Stronger Futures will not work.

56. In order to ensure the success of the intended outcome of the Stronger Futures Bills, there must be established avenues for communication, consultation and feedback between governments and communities. Further, the Commission views the issues of governance that are addressed in the following section as critical to deal with the different experiences, needs and processes of Aboriginal communities depending on whether they are town camps, traditional owners and/or homeland communities.
57. The Commission emphasises that while the review of the Stronger Futures Bills through the Senate Committee process can be considered appropriate for organisations and professional stakeholders, it is not considered an appropriate means of consultation for Aboriginal peoples. For the Government to obtain an accurate reflection of how Aboriginal communities feel they will be affected by the proposed Stronger Futures Bills, face-to-face consultations with Aboriginal communities must be undertaken with the intent to secure information for the purpose of drafting legislation that responds to the needs identified by communities. Such a process will also provide the different community perspectives to be highlighted, in order to ensure a legislative framework which is clear in its intent, but which accommodates the need for localised implementation strategies and processes.
58. The need for meaningful and effective consultation with Aboriginal peoples is particularly important given the length of time these measures will be in place: the Stronger Futures Bills are proposed to expire in ten years with a review to be undertaken seven years after the legislation commences.
59. In order to derive the evidence of how to improve consultative practices in the future, the Commission also notes that the Australian Government contracted the Cultural and Indigenous Research Centre Australia (CIRCA) to ‘review the consultation and communication strategy for the Stronger Futures consultations’⁷ and assess ‘the extent to which the consultations took place in accordance with the consultation and communication strategy’ and the ‘conduct of the consultations, training, use of interpreters, communication products and reporting’.⁸
60. The Commission’s view is that the assessment of the consultation process by CIRCA was inadequate because:
 - CIRCA only monitored ten ‘Tier 2’ whole-of-community meetings, two public meetings and no ‘Tier 1’ small community group meetings. This cannot be considered a representative sample given the Government claims that the Stronger Futures Bills have been informed by 371 ‘Tier 1’ meetings and 101 ‘Tier 2’ meetings.⁹
 - CIRCA only assessed these twelve meetings in accordance with the limited terms of reference outlined above in paragraph 59 and did not evaluate the Stronger Futures consultation process against ‘best practice’ consultation processes.
61. The Commission refers the Committee to the *Social Justice Report 2011* for further comments on the Stronger Futures consultation process.¹⁰

62. The Commission encourages the Government to ensure that Aboriginal and Torres Strait Islander peoples can meaningfully participate in all stages of policy and legislation development by providing complete and accurate information to communities in an accessible, culturally appropriate and timely manner.
63. Based on international ‘best practice’ standards, the Aboriginal and Torres Strait Islander Social Justice Commissioner has developed the following criteria for a meaningful and effective consultation process:
- The objective of consultations should be to obtain the consent or agreement of the Aboriginal and Torres Strait Islander peoples affected by a proposed measure, not simply to outline what is proposed. Consultation is a two way process, which includes listening to community’s views and using this feedback to influence and develop proposals from government.
 - Consultation processes should be products of consensus.
 - Consultations should be in the nature of negotiations.
 - Consultations need to begin early and should, where necessary, be ongoing.
 - Aboriginal and Torres Strait Islander peoples must have access to financial, technical and other assistance.
 - Aboriginal and Torres Strait Islander peoples must not be pressured into making a decision.
 - Adequate timeframes should be built into consultation processes.
 - Consultation processes should be coordinated across government departments.
 - Consultation processes need to reach the affected communities.
 - Consultation processes need to respect representative and decision-making structures.
 - Governments must provide all relevant information and do so in an accessible way.¹¹

Appendix 2 provides further details about each of these criterion.

64. The Commission recommends that the proposed s 4 of the Stronger Futures in the Northern Territory Bill 2011 (Cth) be amended so that the object of the Act is also to ensure the effective participation and engagement of Aboriginal and Torres Strait Islander peoples in matters affecting them
[Recommendation no. 1].
65. The Commission recommends that the Stronger Futures Bills are amended so that the definition of ‘consultation’ adopts the Commission’s criteria for

meaningful and effective consultation set out at paragraph 63 and appendix 2.
[Recommendation no. 2].

3.2 Aboriginal community governance in the Northern Territory

66. Governance is described as the:

processes, structures and institutions (formal and informal) through which a group, community or society makes decisions, distributes and exercises authority and power, determines strategic goals, organises corporate, group and individual behaviour, develops rules and assigns responsibility.¹²

67. The Commission agrees with and supports the extensive body of research and evidence that shows Aboriginal community governance is a key factor for the sustainable development of Aboriginal communities.¹³ The *NTER Review Board Report* stated in 2008:

The robust evidence over four years from the Indigenous Community Governance Project indicates that practical, capable, culturally legitimate governance is needed to ensure that communities achieve and sustain their cultural, political, economic and social development goals.¹⁴

68. This is supported by research from the Harvard Project on American Indian Economic Development, which demonstrates that when Indigenous communities:

make their own decisions about what development approaches to take, they consistently out-perform external decision makers on matters as diverse as governmental form, natural resource management, economic development, health care, and social service provision.¹⁵

69. The Declaration¹⁶ and the Expert Mechanism of the Rights of Indigenous Peoples¹⁷ also affirms that participation in decision-making determines Aboriginal peoples' enjoyment of other human rights.

70. The Commission is concerned that the NTER and related policies and legislation have caused an erosion of community governance and the disempowerment of Aboriginal communities in the Northern Territory.¹⁸

71. Issues that are particularly contributing to this disempowerment of Aboriginal communities include:

- the abolition of Aboriginal Community Councils and the subsequent roles of the amalgamated Regional Shire Councils and their ongoing interaction with local Aboriginal communities
- the manner in which Federal, Territory and Local government services and programs engage with Aboriginal communities
- the current 'top down' implementation of the NTER measures.

(a) *Regional Shire Councils*

72. In 2008, local government reforms in the Northern Territory disbanded 61 local government bodies, which included 54 Aboriginal Community Councils, and established eight Regional Shire Councils to predominantly service remote Aboriginal communities.¹⁹

73. Although these reforms occurred separately to the NTER, they were implemented at a similar time. The Commission agrees with the observation by Australians for Native Title and Reconciliation (ANTaR) that the effect of and interrelationship between parallel reforms to housing, the Community Development Employment Projects (CDEP), remote service delivery, homelands and local government has ‘reduced control at the community level and increased centralisation of decision-making’.²⁰

74. The Commission also supports the following observations by the Aboriginal Peak Organisations Northern Territory (APO NT):

The cumulative impacts of recent policies of the NT and Commonwealth Governments have denied opportunities for community leaders to govern their own communities. There are, currently, few clear processes for community decision making about planning for the future. Community members are being left out of decisions made about their community and ‘consulted’ at the end of the process at a time where there is little scope to influence decisions. ...

Community members are hurt and disappointed by the top-down approach by the government which determines ‘how, when and on what the community’ is consulted and lament the loss of their community councils.²¹

75. *The Northern Territory Emergency Response Evaluation Report (NTER Evaluation Report)* released by the Australian Government in November 2011 acknowledges that the abolition of responsive and representative Aboriginal Community Councils as part of the 2008 local government reforms has left ‘a gap in local governance arrangements’.²²

76. These observations align with feedback consistently provided to the Commission during visits to Aboriginal communities in the Northern Territory in late 2011.

77. It is the Commission’s view that the centralisation and control of Regional Shire Councils over local Aboriginal communities has contributed to deteriorating Aboriginal community governance, and has paralysed the ability of many Aboriginal peoples and communities to make decisions about their futures and to deal with local issues as they arise, rather than allowing them to escalate.²³

(b) *Government services and programs*

78. *The Stronger Futures Consultations Report*²⁴ and *NTER Evaluation Report*²⁵ identify problems with the way in which Federal, Territory and Local governments coordinate their services and programs and engage with Aboriginal communities in the Northern Territory.

79. The Commission welcomes the Australian Government's statement that it is 'considering options to develop stronger engagement processes with communities ... [and] to better support communities to address entrenched social issues'.²⁶
80. However, the Commission is concerned that these options will solely focus on employing more Government Business Managers (GBMs) and Indigenous Engagement Officers (IEOs) in communities, rather than facilitating community controlled and directed development. There have been mixed outcomes in different Aboriginal communities since 2007. Doubts remain as to whether GBMs provide an effective liaison and consultation point between governments and communities.²⁷ The Commission particularly notes its comments about cultural competency in the next section of this submission as being of particular importance in relation to GBMs and IEOs.
81. Almost five years after their introduction, GBMs have yet to be proven as an effective way to involve communities in decision-making and assist in service delivery.
82. It is acknowledged that it takes time to develop strong and constructive relationships with communities. The Commission believes that there remains a worrying shortfall in community governance in remote communities. The feelings of disempowerment affecting these communities are symptomatic of a lack of control over issues directly affecting groups. The Commission is concerned that after almost five years of the GBM program there is still a significant need for further efforts to facilitate community governance and foster partnerships between communities and government.
83. The Commission acknowledges that the National Partnership Agreement on Remote Service Delivery is working to change both the ways in which governments work together and the ways that governments and communities work with each other.²⁸
84. However, the Commission considers that the Australian and Northern Territory Governments need to take more significant steps to address the extreme levels of disempowerment currently being experienced by Aboriginal peoples in the Northern Territory. Local governance processes and infrastructure which meet the principles of self-determination for Aboriginal peoples must be revisited. This includes the development of a culturally competent workforce and an environment that is culturally safe and secure where Aboriginal peoples and communities can be empowered to take control of their destinies. This is explored in more depth at section 3.3 below.

3.3 *Government capacity and cultural competency to implement the Stronger Futures measures*

85. The Commission is concerned that despite five years of effort under the NTER, both the Northern Territory and Australian Governments continue to lack the capacity and cultural competency to effectively implement the measures in the NTER (as redesigned through the proposed Stronger Futures Bills).

86. The Commission notes that the original NTER was intended to go through various stages, from an initial ‘crisis’ management approach to a more sustainable ‘normalisation’ approach. As noted above, there has not been an appreciable improvement in the community governance arrangements in affected communities that would contribute to sustainable outcomes into the long term.
87. The Commission is also concerned that the Stronger Futures Bills do not provide a comprehensive framework for advancing the well-being of communities. It is not sufficiently holistic or appropriately resourced.
88. As an indication of the narrowness of the approach currently being implemented, the Commission notes that the *Stronger Futures Discussion Paper* and *Consultations Report* outlined the following eight key priority areas for action:
- school attendance and educational achievement
 - economic development and employment
 - tackling alcohol abuse
 - community safety and protection of children
 - health
 - food security
 - housing
 - governance.²⁹
89. Despite this, the Stronger Futures Bills do not include measures that address the identified priority areas of employment, housing, health or governance. The Commission is encouraged by the Australian Government’s announcement about providing job opportunities for Aboriginal people in the Northern Territory³⁰ and looks forward to working with the Government to develop a holistic approach to progressing all of these key priority areas.
90. The Social Justice Commissioner has also previously raised concerns about the cultural competency of the bureaucracy in the *Social Justice Report 2010* and *Social Justice Report 2011*.³¹
91. The Stronger Futures engagement mechanisms and consultation processes will be ineffective unless they are supported by a skilled and culturally competent government workforce. The NTER Review Board found that new attitudes must be developed to redefine the relationship between the bureaucracy and Aboriginal and Torres Strait Islander peoples including a greater understanding of Indigenous cultures and world views.³²
92. The capacity of government officials working with Aboriginal and Torres Strait Islander peoples must be developed to ensure engagement with local communities is effective. Therefore, it is suggested that government officials

working with Aboriginal and Torres Strait Islander peoples must be supported with professional development training from nationally accredited training providers.³³

93. Evidence indicates that Aboriginal and Torres Strait Islander peoples are best placed to address the issues confronting their own communities.³⁴ In implementing Stronger Futures measures, the Government should target the maximum possible employment of local Aboriginal and Torres Strait Islander peoples to manage and work on local programs and services for each community.
 94. In addition, the Commission is of the view that the Government should identify cultural competency as an essential skill required from its workforce. One way of doing this is by ensuring that identified criteria are used for all positions. This usually requires applicants for positions to establish that they meet the following two skills criteria:
 - an understanding of the issues affecting Aboriginal and/or Torres Strait Islander peoples
 - an ability to communicate sensitively with Aboriginal and/or Torres Strait Islander peoples.
 95. Currently, departments and agencies are only encouraged to use Identified Positions/Criteria. The Commission believes that these criteria must be mandatory and used by all levels of the public service that are involved in the Stronger Futures measures to improve the quality of engagement and skills of the public service in implementing sensitive measures in the distinct environments of Aboriginal communities.
- (a) *Cultural safety and security*
96. The *Social Justice Report 2011* examines how the strength and vitality of Aboriginal and Torres Strait Islander communities are being undermined by lateral violence.³⁵ The Report considers the role of governments in creating conditions of lateral violence in Aboriginal and Torres Strait Islander communities. The Report also identifies cultural safety and security as essential to building strong communities with strong governance.
 97. Cultural safety has been defined by Muriel Bamblett, CEO of the Victorian Aboriginal Child Care Agency as:

a place where you feel safe to identify, to be yourself, to say you are Aboriginal. It's about seeing the positives in Aboriginal people. It's about hearing the positives about your people, rather than being portrayed constantly as negative.³⁶
 98. It is a place or a process that enables a community to debate, to grapple and ultimately to resolve issues and challenges without fear or coercion.³⁷
 99. To achieve cultural safety and security, the *Social Justice Report 2011* emphasises the need to create:

- environments of cultural resilience within Aboriginal and Torres Strait Islander communities
 - cultural competency by those who engage with Aboriginal and Torres Strait Islander communities.³⁸
100. The Commission suggests that the implementation of the Stronger Futures measures should foster strong communities, where community members feel safe and draw strength in their identity, culture and community.
101. Similar to other communities, Aboriginal and Torres Strait Islander communities will always be shaped and informed by external influences. These influences can either empower and support communities to develop safe environments or undermine such efforts.
102. Consequently, the cultural competency of those who are implementing the Stronger Futures measures will play an important role in facilitating and enabling affected communities to take control of their challenges and develop safe environments.
103. Cultural competency is what is required of those that work with Aboriginal and Torres Strait Islander peoples, to ensure that their engagement helps build and develop cultural safety within Aboriginal and Torres Strait Islander communities. External processes should build cohesion within communities and strengthen community decision-making processes.
104. To engage effectively with Aboriginal and Torres Strait Islander communities, external stakeholders have responsibilities to:
- remove the road blocks that inhibit Aboriginal and Torres Strait Islander peoples from taking control
 - refrain from actions and processes that divide Aboriginal and Torres Strait Islander peoples
 - create environments where Aboriginal and Torres Strait Islander peoples' cultural difference is respected and nurtured
 - remove the structural impediments to healthy relationships in Aboriginal and Torres Strait Islander communities.
105. To meet these responsibilities external stakeholders must be sufficiently culturally competent. This requires more than an awareness of cultural differences and incorporates systems level change so that an organisation:
- values diversity
 - has the capacity for cultural self-assessment
 - is conscious of the dynamics that occur when cultures interact
 - institutionalises cultural knowledge

- adapts service delivery so that it reflects an understanding of the diversity between and within cultures.³⁹
106. The Commission notes that cultural competency is not something that is achieved formulaically. The approach, though tailored, must be considered and deliberate, allowing for capacity building over time in partnership with communities.
107. The *Social Justice Report 2011* thoroughly investigates important principles and methods required to address issues of cultural competency.⁴⁰ The concept of brokerage is discussed, and protocols are identified to facilitate cultural competency.⁴¹ Brokerage stresses the crucial nature of engagement with communities and the importance of developing relationships, and involving communities in decision-making. Protocols assist to guide this brokerage, to formalise consultation in service delivery as well as institutionalising culturally informed practices.
108. The Commission strongly believes that a culturally competent implementation of the Stronger Futures policy agenda is required for it to be consistent with human rights standards detailed above at paragraph 7. This is particularly important for policies and programs to build respect for and protect Aboriginal and Torres Strait Islander peoples' culture.
109. The Commission invites the Committee and the Australian Government to engage with the Aboriginal and Torres Strait Islander Social Justice Commissioner and the Race Discrimination Commissioner to ensure Stronger Futures processes, policy and legislation are culturally competent.

(b) *Recommendations*

110. The Commission recommends the Australian and Northern Territory Governments commit to:
- appropriately resource (including financial and technical assistance), and prioritise programs that facilitate the development of community governance structures which enable and empower those Aboriginal communities to engage with and control decision-making about their cultural, political, economic and social development goals
 - develop and implement a holistic and coordinated approach to address the eight priority areas identified in the *Stronger Futures in the Northern Territory Discussion Paper and Consultations Report* [**Recommendation no. 3**].
111. The Commission recommends that the Australian and Northern Territory Governments implement the Stronger Futures measures in a culturally safe and competent manner. This requires the Government to ensure:
- the mandatory use of Identified Positions/Criteria for all positions in the public service that have any involvement with the Stronger Futures measures, and the requirement for relevant officers to have the appropriate skills and cultural competency to work with Aboriginal and Torres Strait Islander peoples and communities

- the development of targeted education and training programs with accredited training providers to facilitate the development of appropriate skills and cultural competency
 - increasing the capacity of Government Business Managers and Indigenous Engagement Officers to work with communities and build community engagement processes with a view to improving community engagement on the key issues facing communities [**Recommendation no. 4**].
112. Given the potential of some measures to raise human rights concerns as they are developed, the Commission recommends that the Committee conduct a follow up inquiry in three years' time into progress in improving Indigenous governance arrangements, cultural security, and progress in developing community led initiatives such as alcohol management plans [**Recommendation no. 5**].

4 Human rights implications of the Stronger Futures Bills

4.1 Compliance with the Racial Discrimination Act 1975

113. A persistent criticism that has been made since the introduction of the original NTER measures is the compliance of these measures with the *Racial Discrimination Act 1975* (Cth) (RDA) and Australia's international obligations under the *International Convention on the Elimination of All Forms of Racial Discrimination* (ICERD).
114. The RDA was Australia's first law to protect human rights and remains a cornerstone of human rights protection in Australia. Upholding the values of the RDA and ICERD is vital to ensure community respect for government action and to maintain Australia's reputation as a nation committed to equality.
- (a) *What does the RDA protect?*
115. Sections 9(1) and 9(1A) of the RDA proscribe racial discrimination. The right to equality before the law is also protected in section 10.
116. Section 9 is relevant to an allegation that an act or conduct of a person is discriminatory. The making of laws by the Commonwealth and State and Territory legislatures or delegated lawmakers cannot be challenged as an act under s 9. Instead, the resulting law or delegated legislation can only be challenged under s 10.
117. Section 10 is relevant to an allegation that a law is discriminatory in its terms or its practical effect. To make a successful claim under s 10 of the RDA, the complainant must be able to show that the discrimination complained of arises by reason of a statutory provision and that:
- (1) persons of a particular race, colour or national or ethnic origin do not enjoy a right that is enjoyed by persons of another race; or
 - (2) persons of a particular race, colour or national or ethnic origin enjoy a right to a more limited extent than persons of another race.

118. Section 8(1) of the RDA provides that actions that can be described as ‘special measures’ do not amount to discrimination under the RDA.⁴²
119. The term ‘special measures’ is generally understood to apply to positive measures taken to redress the disadvantage, and secure the ‘full and equal enjoyment of human rights and fundamental freedoms’, of a particular racial group.⁴³
120. The ICERD⁴⁴ recognises that different treatment designed to ensure the equal enjoyment of rights is not discriminatory. Special measures undertaken for this purpose are essential to achieving substantive equality, advancing human dignity and eliminating racial discrimination.⁴⁵
121. According to the High Court, to meet the requirements of a ‘special measure’, a measure must comply with the following criteria:
- the measure must confer a benefit on some or all members of a class of people
 - the membership of this class must be based on race, colour, descent, or national or ethnic origin
 - the sole purpose of the measure must be to secure adequate advancement of the beneficiaries so they may equally enjoy and exercise their human rights and fundamental freedoms
 - the protection given to the beneficiaries by the measure must be necessary for them to enjoy and exercise their human rights equally with others
 - the measure must not have already achieved its objectives.⁴⁶
122. This view of the requirements of a special measure is supported by the Committee on the Elimination of Racial Discrimination (CERD). In its General Recommendation 23, the CERD explains that:
- Special measures should be appropriate to the situation to be remedied, be legitimate, necessary in a democratic society, respect the principles of fairness and proportionality, and be temporary. The measures should be designed and implemented on the basis of need, grounded in a realistic appraisal of the current situation of the individuals and communities concerned.⁴⁷
- (b) *Background and current measures*
- (i) *Original NTER measures*
123. The original NTER legislation was developed with limited consultation and without the free, prior and informed consent of the Aboriginal peoples affected.⁴⁸
124. In relation to the operation of the RDA, the original NTER legislation deemed all NTER measures, and any actions taken under or for the purposes of those measures, to be ‘special measures’ for the purposes of s 8 of the RDA⁴⁹ – in

other words, they were ‘deemed’ to be consistent with the RDA. Deeming that the measures are special measures in practical terms amounted to nothing more than the Government expressing the view that the measures were non-discriminatory. It is possible that such deeming would be of no legal effect.

125. Accordingly, the original NTER legislation also suspended the operation of Part II of the RDA (prohibition on racial discrimination) in relation to the provisions of the NTER legislation and in relation to any actions done under or for the purposes of the provisions in that legislation.⁵⁰ This removed any opportunity to challenge the validity of the measures and to determine whether, in fact, they were racially discriminatory or not.
126. This had the practical effect of authorising racially discriminatory practices through the NTER measures. It also had a very significant symbolic impact on the dignity of Aboriginal people in the Northern Territory.
127. At the time, the Commission urged the Government and Parliament to adopt an approach that was consistent with Australia’s international human rights obligations and particularly with the RDA.⁵¹
128. The Commission did not support the NTER measures being exempt from the RDA.⁵² The Commission stated that the NTER measures:

clearly have a number of significant actual and potential negative impacts upon the rights of Indigenous people which are discriminatory. The laws generally must therefore be justifiable as a ‘special measure’ taken for the advancement of Indigenous people to be consistent with human rights principles. If the NTER measures are not ‘special measures’, they should not be enacted.⁵³

129. The Social Justice Commissioner considered the implications of the suspension of the RDA in the *Social Justice Report 2007*.⁵⁴

(ii) 2010 NTER redesign measures

130. As part of the 2010 redesign measures, the *Social Security and Other Legislation Amendment (Welfare Reform and Reinstatement of Racial Discrimination Act) Act 2010* (Cth) (NTNER Amendment Act) repealed those provisions which had suspended the operation of the RDA with respect to the NTER legislation, and actions under it, with effect from 31 December 2010.
131. The NTNER Amendment Act also provided for the removal of those provisions that deemed the legislation and actions done under it to be special measures.⁵⁵ In their place, the NTNER Amendment Act inserted objects clauses in relation to four Parts of the NTER legislation, stating that the object of the Part was ‘to enable special measures to be taken’ for particular purposes.⁵⁶
132. The Commission welcomed these amendments. However, it also noted that the provisions were not fully effective in reinstating the protections of the RDA as the legislation also authorised the continuation of some measures that had a discriminatory and negative impact upon the rights of Aboriginal and Torres Strait Islander peoples.

133. To overcome this, and ensure the unequivocal and effective reinstatement of the RDA, the Commission recommended the inclusion of a clause that expressly states that in the event of any conflict between the NTER legislation and the RDA, the RDA would prevail. This would practically place a limit on the NTER measures so that they would not be valid measures if they were applied in a racially discriminatory manner.
134. The Commission refers the Committee to the following paper that it released in December 2011, *The Suspension and Reinstatement of the RDA and Special Measures in the NTER*,⁵⁷ which considers the impact of the NTER legislation, and subsequent redesign, on the suspension and re-instatement of the RDA and on the characterisation of the intervention Acts as special measures.
- (iii) Proposed measures – Stronger Futures Bills
135. The Government has stated that it considers that the measures contained in the Stronger Futures Bills comply with the RDA. The Minister outlined in the Second Reading Speech to the Stronger Futures in the Northern Territory Bill 2011 (Cth) (Stronger Futures Bill) that:
- All of the measures in this bill have been designed to comply with the Racial Discrimination Act 1975.⁵⁸
136. Further, the Government has indicated that it considers that the three measures in the Stronger Futures Bill – the tackling alcohol abuse, land reform and food security measures – and amendments relating to pornography restrictions in the Consequential and Transitional Provisions Bill are special measures within the meaning of s 8(1) of the RDA.⁵⁹
137. The Commission commends the Government for ensuring that the RDA applies to the implementation of the Stronger Futures measures. This means that sections 9 and 9A of the RDA can be utilised to challenge the discretionary actions of government officials in implementing the measures.
138. However, the Commission notes that a similar concern remains in relation to the current Bills as to the 2010 NTER redesign measures. Namely, in the absence of a ‘notwithstanding’ clause in the current bills, any provision in the Stronger Futures Bills that has a discriminatory impact will continue to be valid.
139. A legislative provision that makes it unequivocal that all measures in the Stronger Futures Bills must be implemented in a non-discriminatory manner would greatly contribute to the acceptance and workability of the legislation. This is particularly so in light of the level of distrust that has existed throughout the life of the NTER due to the initial suspension of the protections of the RDA and given also that it is the clearly stated intention of the Government that no measures will be racially discriminatory.
140. Whether individual measures contained in the Stronger Futures Bills are appropriately characterised as special measures is discussed further below.

(c) *Recommendations*

141. The Commission recommends that the Stronger Futures Bills be amended to include 'notwithstanding' clauses that specify that in the event of ambiguity the provisions of the RDA are intended to prevail over the provisions of the Stronger Futures legislation and that the Stronger Futures legislation does not authorise conduct that is inconsistent with the provisions of the RDA **[Recommendation no. 6]**.

5 Income management

142. Income management involves directing a portion of a person's welfare payments for the purchase of priority items including food, clothing and rent.
143. The Commission notes that there has been significant debate about whether income management is an effective policy tool for supporting the welfare of disadvantaged individuals and families, and in particular, Aboriginal and Torres Strait Islander peoples.
144. The Commission has previously expressed concern about the NTER measures for income management as they are too broadly applied, and have not been sufficiently targeted according to need. The Commission has stated that its preferred features of an income management measure are:
- an approach that enables participants to voluntarily opt-in, rather than an automatic quarantining model (which then relies upon individual applications for exemptions)
 - an approach that utilises income management as a 'last resort' for targeted risk areas such as child protection (that is supported by case management and support services), similar to the Family Responsibilities Commission model in Queensland
 - measures that are applied for a defined period and in a manner proportionate to the context.⁶⁰
145. An income management measure with these features can be justified as consistent with international human rights standards.
146. The *International Covenant on Economic, Social and Cultural Rights* (ICESCR) provides for a right to social security. This right has been interpreted as placing on governments an obligation to guarantee that the right to social security is enjoyed without discrimination, and equally between men and women.⁶¹ The ICESCR prohibits any discrimination on the grounds of race or other grounds which has the intention or effect of nullifying or impairing the equal enjoyment or exercise of the right to social security.
147. Further, the right to social security has been interpreted as requiring that eligibility conditions for unemployment benefits are reasonable and proportionate and the benefit is not provided in a form that is onerous or undignified. The withdrawal, reduction or suspension of benefits should be circumscribed, must be based on grounds that are reasonable and proportionate, and be provided for in national law.⁶²

(a) *Background and current measures*

(i) Original 2007 NTER measures

148. Under the original 2007 NTER measures income management applied to most welfare payment recipients in ‘prescribed areas’ (that is, prescribed Aboriginal lands and communities) in the Northern Territory.⁶³

149. The Commission expressed concern that these income management measures were racially discriminatory, breached the right to social security and denied procedural fairness to those to whom the measures applied.⁶⁴

(ii) 2010 NTER redesign measures

150. Instead of the blanket approach based on race, the 2010 redesigned income management measures applied more generally and were targeted towards the following three groups:

- disengaged youth
- long-term welfare payment recipients
- persons assessed as vulnerable.⁶⁵

151. Individuals falling outside these categories are able to voluntarily opt-in to the income management program.⁶⁶

152. The Commission welcomed the redesign of income management measures so that they no longer raised issues of direct racial discrimination. However, the Commission remained concerned that the scheme may raise issues of indirect discrimination due to the combination of the broad reach of some categories of the redesigned income management measures (which may not be reasonable or proportionate) and their application predominately to Aboriginal peoples (with a resultant disproportionate racial impact).

153. The Commission outlined a range of other issues and recommendations in its submission regarding the 2010 NTER redesign measures which continue to have relevance to the current measures.⁶⁷

(b) *Proposed measures – Stronger Futures Bills*

154. The Social Security Bill retains the 2010 NTER redesigned income management measures and also proposes to amend the *Social Security (Administration) Act 1999* (Cth) (SSA Act) to:

- create a new external referral process from recognised state/territory authorities⁶⁸
- enable the roll out of income management into new regions.⁶⁹

155. The Bill also decouples the vulnerable income management measures, allowing declarations regarding income management areas to be made under

either the category of vulnerable, long-term welfare payment recipients or disengaged youth.⁷⁰ Therefore, making a declaration on one ground no longer automatically includes the other ground. The Bill also proposes to allow income management to continue despite change of residence.⁷¹

156. The Commission notes with concern that these further changes to income management through the Bill were not identified as issues for consideration during the Stronger Futures consultation process.
- (i) Roll out to five new communities
157. The Social Security Bill enables the roll-out of income management to five new regions – namely Playford (South Australia), Bankstown (New South Wales), Shepparton (Victoria), Rockhampton and Logan (Queensland) – by empowering the Minister by legislative instrument to specify any State, Territory or area to be a ‘specified area’ for the purposes of income management.⁷²
158. The Commission is concerned by the breadth of the Minister’s discretion, which allows income management to be introduced across the country without consultation with the affected communities.⁷³ Indeed, there is no evidence that the communities in the five targeted areas were consulted prior to the Budget announcement or the introduction of the Social Security Bill.⁷⁴
159. The Commission highlights the importance of ensuring the participation of affected people in all aspects of the design, delivery and monitoring of the income management measures. A process of consultation would enable the Government to respond to the specific circumstances of individual people and communities. It would also allow for individuals and communities to decide on the most appropriate measures to meet their particular needs.
- (ii) External referral
160. The Social Security Bill includes provisions that will enable the Minister to authorise state and territory authorities to refer individuals to the Commonwealth to consider including them within the income management scheme.
161. The Minister may, by legislative instrument, determine the following to be a recognised state/territory authority for the purposes of income management referral:
- a specified department; or a specified part of a department, of a state or territory
 - a specified body of a state or territory
 - a specified agency of a state or territory.⁷⁵
162. The Explanatory Memorandum indicates that the provisions are intended to empower the Northern Territory Alcohol and Other Drug Tribunal to make

referrals.⁷⁶ However, the Commission is concerned that the potential scope of agencies that can be authorised to make referrals is too broad.

163. For example, it is not clear whether a referral could be made by an agent of a state department, such as a consultant, job network provider or child care provider. Such agents may not be sufficiently equipped, culturally competent, or adequately accountable for such decision making. Similarly, agencies such as a roads and transport agency could feasibly be made a referral agency under the scheme as proposed, and may have an interest in seeking to refer individuals who have issues relating to traffic offences. The legislation provides no safeguards against an extension of the use of the external referral procedures outside the purposes of the program.

164. The Commission is of the view that the referral powers should be limited to agencies and departments that have a relevant connection to promoting the welfare and wellbeing of children – which is a primary purpose of the income management scheme.

(iii) Triggers under the external referral mechanism

165. Proposed s 123UFAA of the SSA Act sets out the actions that may trigger mandated income management under the new external referral mechanism. A key trigger is whether an officer or employee of a recognised state/territory authority gives the Secretary written notice requiring that the person be subject to income management. The notice may be given ‘under a law in a State or Territory or in the exercise of the executive power of a State or Territory’.

166. Neither the proposed amendments nor the Explanatory Memorandum explain the criteria for writing a notice, where this is not contained in a state or territory law. The Commission considers that this could allow for broad discretion if exercised under the executive power of the state or territory. Further, there is no explanation of what state or territory laws already contain these triggers or will be amended to include such triggers. In the Commission’s view, the decision to make a referral for income management should be guided by a defined, legislated process.

(iv) Availability of avenues of review and appeal

167. The Commission submits that the decision-making powers of the external referring agency are too broad. Once the agency makes a ‘referral’, Centrelink does not have the discretion or the authority to consider its merits. Individuals are therefore not afforded the established review and appeal process built into the administration of the social security law.

168. Further, the normal avenues of review and appeal of Centrelink decisions will not be available in externally referred cases. Consequently, any externally referred individual would need to seek review through the agency from which the external referral has been made. This may place the individual at a disadvantage as they are required to operate within the internal review mechanisms that exist at the external referring agency.

169. The Commission is concerned that some external referral agencies may not have review processes, and that individuals placed on income management through external referral will be denied access to the well-established and accessible Centrelink review and appeal processes.
170. The Commission contends that all decisions affecting individuals should be subject to merits review to ensure natural justice, due process, and effective administrative decision-making.

(c) *Possible implications under the Racial Discrimination Act*

171. Due to its general application, the income management measure is not expressed to be intended to operate as a special measure under the RDA and does not raise issues of direct discrimination. In order to be consistent with the RDA, it only remains to identify whether it raises concerns of indirect discrimination.
172. The income management scheme has a disproportionate effect on Aboriginal peoples in the Northern Territory. According to the Government's own statistics, 94.2% of people on income management in the Northern Territory are 'Indigenous',⁷⁷ as compared with Indigenous peoples making up to 30% of the Northern Territory population.⁷⁸
173. The Commission also notes with concern that the five disadvantaged communities, which will be subject to the income management scheme from 1 July 2012, have high culturally and linguistically diverse communities. According to 2006 Census data, people born overseas accounted for 23.8% of the total population of Playford (South Australia).⁷⁹ In Bankstown (NSW), 38.7% of the total population were born overseas and 53.7% of the population spoke a language other than English at home.⁸⁰ The Commission further understands that the communities of Shepparton and Logan have experienced very high migrant settlement in recent years, particularly humanitarian settlement.
174. The overrepresentation of Aboriginal and Torres Strait Islander peoples and culturally and linguistically diverse communities in the trialling of income management is of significant concern to the Commission. Measures that disproportionately impact upon the ability of a particular racial group to enjoy their rights (such as the right to social security) may raise issues of indirect discrimination, particularly where the scheme is applied too broadly.

(d) *Recommendations*

175. The Commission recommends that the Social Security Legislation Amendment Bill 2011 (Cth) be amended to require the Minister to consult with and take into account the views of the affected community prior to determining an area to be a 'specified area' [**Recommendation no. 7**].
176. The Commission recommends that the Social Security Legislation Amendment Bill 2011 (Cth) provide for criteria in the *Social Security (Administration) Act 1999* (Cth) which must be considered by the Minister when determining the type of agency which can, or whether a particular agency will, be authorised to

give notices requiring individuals to be subject to income management. Such criteria should require agencies to have a relevant connection to promoting the welfare and wellbeing of children **[Recommendation no. 8]**.

177. The Commission recommends that the power of an agency to make external referrals, and the factors that can be considered when making the decision to refer, should be clearly stated and defined in the primary legislation **[Recommendation no. 9]**.
178. The Commission recommends that Schedule 1 of the Social Security Legislation Amendment Bill 2011 (Cth) be amended so that the proposed external referral mechanism allows Centrelink to make its own determination of whether to place a referred individual onto an income management program after considering the merits of a particular referral **[Recommendation no. 10]**.

6 School Enrolment and Attendance through Welfare Reform Measure (SEAM)

179. School Enrolment and Attendance through Welfare Reform Measure (SEAM) was implemented by the *Social Security and Veterans' Entitlement Legislation Amendment (Schooling Requirements) Act 2008* (Cth) (Schooling Requirements Act). The Schooling Requirements Act amended the *Social Security (Administration) Act 1999* (Cth) (SSA Act)⁸¹ to provide for the suspension or cancellation of certain welfare payments where a person in receipt of these payments does not comply with a notice relating to the school enrolment or attendance of their child.⁸² These provisions are outlined in Division 3 of the SSA Act.
180. The Social Security Bill inserts a new Division 3A into the SSA Act. This sets out an alternative process for dealing with unsatisfactory non-attendance at school.⁸³
181. After the person responsible for the operation of a school notifies the Secretary⁸⁴ of unsatisfactory non-attendance, the Secretary or Principal may issue a 'conference notice' which requires the attendance of the parent at a conference to discuss a compulsory school attendance plan.⁸⁵
182. A 'compliance notice' may be issued where a person fails to attend a conference; fails to enter into or agree to amend a school attendance plan; or fails to comply with a school attendance plan entered into after the conference.⁸⁶ If a person fails to comply with the 'compliance notice', then a 'schooling requirement payment' is not payable unless certain conditions exist.⁸⁷
183. A 'schooling requirement payment' includes a social security benefit, pension, or a payment under the *Veterans' Entitlement Act 1986* (Cth).⁸⁸
184. The Secretary must then determine to suspend or cancel a 'schooling requirement payment' that becomes non-payable under these provisions.⁸⁹ However, the Secretary may 'reconsider' a decision to suspend payment either on application or on his or her own initiative such as in cases where the person is complying with the attendance plan. After reconsideration, the

Secretary may determine that the ‘schooling requirement payment’ is payable and that any arrears are to be paid.⁹⁰

(a) *Evidence-based approaches to school attendance*

185. The Commission has long expressed concerns about low school attendance rates nationally among Aboriginal and Torres Strait Islander children.⁹¹
186. The *NTER Evaluation Report* reported that there has been no observable improvement in school attendance rates between 2006 and 2010. Further, there was a decline in attendance rates in 2010.⁹²
187. There is a need to prioritise measures to improve outcomes for Aboriginal children in education, particularly if we are to meet proposed targets to close the gap within the next generation. The Commission notes that the Australian Government has introduced a range of measures in recent years to increase Indigenous attendance and participation in schooling.
188. For some time, though, concern has been expressed that infrastructure to deliver education in Aboriginal communities has been seriously inadequate and that the Northern Territory government has not directed sufficient funding into this purpose (despite the receipt of additional funding through special purpose payments and the formulas applied by the Commonwealth Grants Commission that provide a greater funding weight for addressing Indigenous disadvantage and remoteness). As was noted in the *Social Justice Report 2008*, information about the level of services and facilities of schools in remote Aboriginal communities in the Northern Territory is notoriously lacking.⁹³ This mitigates against appropriate planning which would ensure that adequate resources are allocated for schooling facilities.
189. It is known that issues that contribute to improved attendance include:
- Cultural appropriateness of the school setting – including through the involvement of Aboriginal teaching personnel, parents and community members in all aspects of the schooling process from initial planning to implementation and delivery of programs; recognising the importance of Indigenous discourse.⁹⁴
 - Supportive ‘culture’ in the school that actively addresses bullying and harassment of Indigenous students.⁹⁵
 - Sport and motivational techniques - for example, the Clontarf program in Alice Springs has increased attendance rates up to 92% by using sport and motivational techniques to motivate students to stay at school. Other success stories include Cherbourg in Queensland, as well as Yirrkala, Yipirinya and Barunga in the Northern Territory.⁹⁶
 - High quality teachers who create a stimulating learning environment in the classroom.⁹⁷
190. Research has also stressed the importance of taking a holistic, long term approach to attendance, addressing issues at all levels including at school, at home and within the community. It is critical that such measures continue to

be the primary focus of government effort if we are to see lasting improvements in schooling outcomes.

(b) *The Commission's view on SEAM*

191. The Commission is concerned that there has not yet been sufficient evidence to suggest that SEAM in its current form is an effective approach to addressing issues of low school attendance, or that it is an appropriately targeted way of meeting the obligations of the government to ensure that all children receive a minimum level of education.

192. Notably, the recently released evaluation of the SEAM trial for 2007–2009 found that ‘there was no demonstrable effect of SEAM on improving the attendance rates of SEAM children in 2009 and no changes in unauthorised absenteeism behaviour among SEAM children during 2007–2009’.⁹⁸ This is consistent with the trial in one school in Halls Creek, Western Australia, which found that linking payments to attendance found no increase in attendance as a result of the trial.⁹⁹

193. The *SEAM Evaluation Report* also found that:

School attendance was seen to be affected by many factors and barriers ... Some of these were cultural obligations and issues, clan conflict and violence, transport issues, health problems and schooling languages. Tailored case management was considered to be the most critical factor in addressing issues behind school absenteeism.¹⁰⁰

194. In the final stages of drafting the Government released a further evaluation report of SEAM for 2010.¹⁰¹ While this report has suggested ‘SEAM is starting to have a positive impact on SEAM student attendance in both the NT and QLD...these results are tempered somewhat by evidence suggesting that a relapse after the compliance period is common, with an associated increase in unauthorised absences’.¹⁰² Given the variations in reports on SEAM’s effectiveness, the program should continue to be subject to regular review and revision to establish its efficacy as an approach over several years. At present there is still insufficient evidence to suggest the welfare consequences in SEAM are an effective approach to improving school attendance.

195. The Commission outlines the following concerns about how the SEAM process is set out in the Stronger Futures Bills.

(i) Suspension or cancellation of welfare payments

196. The *International Covenant on Economic, Social and Cultural Rights* (ICESCR) recognises that everyone has the right to education and that primary education shall be compulsory.¹⁰³ The *Convention on the Rights of the Child* (CRC) also requires State Parties to ‘take measures to encourage regular attendance at schools and the reduction of drop-out rates’.¹⁰⁴

197. The Commission agrees that measures must be implemented to improve attendance rates in order to realise the right to education. The question remains whether SEAM is an appropriate measure or whether it unduly

diminishes related rights of children and their families, such as a child's right to benefit from social security under Article 26 of the CRC.¹⁰⁵

198. In situations where welfare payments are suspended or cancelled, there is likely to be no income available for the period of the suspension, or in the case of the cancellation, for the period until a new application is completed. This will likely have a severe impact on the well-being of children.
199. During this period children and families may not have the means to access necessary food, clothing, housing, and medical care. Denying the means to access these goods and services does not promote the best interests of the child nor protect the rights of the child, necessary for their development.¹⁰⁶ This can also further entrench problems of poverty, ill health and overcrowded housing in the family, which research shows are factors that contribute to school absence.¹⁰⁷
200. This approach may also have the unintended consequence of having a disproportionately negative impact on women. This may arise in the context of women still predominantly fulfilling the role of carer in many Australian families.
201. In addition, the current trial sites illustrates that SEAM's initial application substantially affects Aboriginal and Torres Strait Islander children and families. Of the six identified trial sites in the Northern Territory, five of them are discrete Indigenous communities. In the sixth site, Katherine, 23% of the population is Indigenous, of which 44% are under the age of 18 years.¹⁰⁸
202. Contravention of the 'rights to equality before the law' provision in s 10(1) of the RDA does not require that the relevant law, or an act authorised by that law, make a distinction based on race. Section 10(1) is directed at the 'practical operation and effect' of the impugned legislation and is 'concerned not merely with matters of form but with matters of substance. Further, as noted above, s 9(1A) of the RDA prohibits indirect discrimination in the exercise of statutory discretion.
203. The Commission notes that the operation of SEAM is likely to have a substantial impact upon Aboriginal and Torres Strait Islander peoples as school attendance and enrolment is a more significant issue for Aboriginal and Torres Strait Islander peoples in these communities.¹⁰⁹ Aboriginal and Torres Strait Islander peoples may be more likely to be subject to SEAM and have their right to social security limited as a result.¹¹⁰
204. The Commission therefore encourages ongoing monitoring and review of the practical operation and effect of SEAM to ensure that it does not apply in a racial discriminatory way.
205. The ICESCR has identified the following relevant factors in setting out key features of the right to social security. Where retrogressive measures are taken in relation to the right to social security (such as suspension or cancellation of welfare payments), the Government has the burden of proving that they have been introduced after the most careful consideration of all alternatives and that they are duly justified by reference to the totality of the rights provided for the ICESCR in the context of the full use of the State party's

maximum available resources. Factors for consideration in establishing this include whether:

- alternatives were comprehensively examined
- there was genuine participation of affected groups in examining proposed measures and alternatives that threaten their existing human right to social security protections
- the measures were directly or indirectly discriminatory
- the measures will have a sustained impact on the realisation of the right to social security
- the individual is deprived of access to the minimum essential level of social security unless all maximum available resources have been used
- review procedures at the national level have examined the reforms.¹¹¹

(ii) Community consultation

206. The Commission is not satisfied that there was meaningful participation of affected communities on the continuation of SEAM or in exploring alternative options.
207. In particular the Commission queries whether complete information about SEAM and ‘linking school attendance to parents’ welfare payments’ was provided in an accessible way to communities. Both the detailed *Stronger Futures Discussion Paper* and the shorter version provided at community consultations fail to refer to the suspension or cancellation of welfare payments under SEAM as a consequence.
208. Further the *Stronger Futures Discussion Paper* outlined that ‘initial advice shows that [SEAM] is having a positive impact on parents ensuring their children are enrolled and regularly attending school’.¹¹² This information is inconsistent with the evaluation of SEAM recently released by the Government which suggests that SEAM has had no demonstrable effect on attendance rates.¹¹³
209. The *Stronger Futures Consultation Report* does not demonstrate overwhelming support for the SEAM program. The Government has suggested that during the consultations ‘[r]espondents commented relatively frequently that parents should have part of their welfare or Centrelink payments withheld or their payments reduced if they did not send their children to school’¹¹⁴ and reports that there were a smaller number of comments expressing concern with this approach.¹¹⁵ A Concerned Australians’ report suggests that there was not a sense that participants wanted school absenteeism solved by welfare cuts and fines.¹¹⁶
210. The Government also commented that a range of factors were suggested in consultations as key factors in children not attending school. These included parental encouragement, housing, no high school in the community, length of stay of teachers, bullying and transport.¹¹⁷

211. Community members also made suggestions which highlighted the need to create a more culturally safe environment for Aboriginal children to attend school. These included incorporating Indigenous culture in the school curriculum¹¹⁸ and the need for teachers to have cultural awareness training.¹¹⁹ The Commission suggests that bilingual education in schools could be another option for nurturing this culturally supportive environment.¹²⁰
- (c) *Ongoing engagement and participation of Aboriginal people in the SEAM program's implementation*
212. Perhaps more significantly, the Commission is concerned that there is not sufficient involvement of Indigenous communities in the implementation of the SEAM process. Similar to the reasoning above in relation to income management, it is feasible that SEAM measures could be implemented through processes that are driven at the community level and with the consent of Aboriginal and Torres Strait Islander peoples.
213. Modification of the scheme to ensure that the community is fully engaged in its implementation would go a long way to addressing concerns about its appropriateness from a human rights perspective. Such engagement should be required in the legislation. It could take a number of forms, such as a Family Responsibility Commission style approach as adopted in relation to welfare reforms in the Cape York region.
214. The Commission does not have a preferred model and considers that should the SEAM program be extended, further consultation should be undertaken to explore community led options for its implementation, which will reflect the local priorities and challenges of individual communities.
215. The Commission notes that the proposed amendments to require parents to enter into a school attendance plan may also provide an opportunity for better engagement between schools, parents and communities to help identify and address obstacles to school attendance.
216. Parents who are required to attend a school attendance conference may have previously had limited, or no, engagement with the school system. This interaction could present a potential power imbalance if not addressed. The school should consider options such as encouraging a support person from the community to be in attendance and interpreters should be provided where necessary and/or beneficial.
217. School attendance plans should be developed in full consultation with the parents and child. This means a platform should be provided for the school and parents to identify the obstacles to school attendance and both the school and parents are aware of their responsibilities under the proposed plan. The plan should identify where the school and/or the Department can address specific issues to encourage the child's attendance, not just the responsibilities of the parents.
218. The school should provide information in an accessible way, including the consequences for failing to adhere to the plan. Aboriginal and Torres Strait Islander peoples must not be pressured into making a decision and adequate

timeframes should be built into the process. This may mean multiple conferences are necessary for the parents to make a fully informed decision.

(d) *Drafting issues*

219. The Commission also provides the following proposals to further improve the drafting of the proposed SEAM provisions.
220. Proposed subsection 124A(2) of the SSA Act provides that the Commonwealth Minister for Indigenous Affairs (the Minister) may, by legislative instrument, specify a class of persons for the purpose of issuing conference and compliance notices. The Government anticipates that this person could be a school's truancy officer 'so that there is no need to involve other people responsible for the operation of a school in the giving of notices'.¹²¹
221. As discussed above, failing to comply with a 'compliance notice' results in the suspension of a 'schooling requirement payment'. Proposed s 124NE(1) of the SSA Act provides that a 'schooling requirement payment is not payable to a schooling requirement person if the person fails to comply with a compliance notice'. Section 124F(2) says that if s 124NE(1) applies then the Secretary *must* determine that the payment is suspended or cancelled. The limited discretion available to the Secretary to determine that s 124NE(1) does not apply is only in the case where special circumstances apply.¹²²
222. Effectively, in combination with s 124A(2), this gives decision-making power to a truancy officer regarding whether a welfare payment should be suspended as once he/she issues a compliance notice, suspension of payment automatically follows from non-compliance. This significant delegation of power is of concern given the importance of the ramifications for the parent and family as a result of non-compliance. It is also concerning that the assessment to issue a compliance notice, which in turn may result in suspension, is not made by a Centrelink employee who possesses the necessary expertise and whose decisions are subject to review under the SSA Act.
223. The Commission is further concerned that linking the suspension of a welfare payment to non-compliance with a compliance notice could penalise parents for simply failing to attend a conference or entering into a plan. The Commission notes that this suspension automatically follows a trivial act. The Commission is concerned that it is not specified in the Bills or accompanying documents that the suspension or cancellation of welfare payments is applied strictly as a 'last resort'.
224. Finally, the Secretary may 'reconsider' a decision to suspend payment either on application or on his or her own initiative such as in cases where the person is complying with the plan.¹²³ A person may make such an application under s 129 of the SSA Act. The Commission notes that there are no specified timeframes in which the Secretary must 'reconsider' a decision on application, or timeframes within which any arrears are to be paid to the person. Given a family could be without support funds during this period, prompt response times are essential.

(e) Recommendations

225. The Commission recommends that the Government address the issue of school attendance through a rights-based and non-discriminatory approach which should include:
- increasing the provision of education infrastructure and resources, particularly for Aboriginal and Torres Strait Islander communities in rural and remote areas
 - increasing engagement with parents and communities
 - improving the quality of education, placing an emphasis on providing children with incentives to learn and developing methods of teaching that resonate with Aboriginal and Torres Strait Islander students
 - supporting education programs that have proven to increase school attendance [**Recommendation no. 11**].
226. The Commission recommends that Government Business Managers work with the Northern Territory Department of Education to conduct an audit of and report on schooling facilities in Aboriginal communities in the Northern Territory to ensure that there are adequate learning facilities for all Aboriginal children [**Recommendation no. 12**].
227. The Commission recommends that if the SEAM program is to be extended, it must be altered to ensure the full participation of Aboriginal communities in its implementation. This should include provisions that require the Government to establish community advisory mechanisms for the implementation of the scheme, and to provide options for communities to voluntarily 'opt-in' to the scheme [**Recommendation no. 13**].
228. If the Government retains the welfare consequence of SEAM, the Commission recommends that it should only be employed as a last resort. Further, the Commission recommends that the Social Security Legislation Amendment Bill 2011 (Cth) be amended:
- to remove proposed s 124A(2)
 - to remove proposed ss 124ND(1)(a) and (b)
 - so that ss 124NE and 124NF afford a discretionary power to suspend or cancel a 'schooling requirement payment'. In particular, these provisions should provide that on non-compliance with a compliance notice the school *may* refer the matter to the Secretary for assessment by the Secretary as to whether to suspend or cancel a 'schooling requirement payment' in accordance with specified criteria
 - to provide that the Secretary, in making an assessment as to whether to suspend or cancel a 'schooling requirement payment', must give consideration to certain criteria, for example:
 - whether non-compliance is only of a trivial or technical nature

- the number of school attendance plans that have previously been entered into
 - whether case-management and Government assistance has been provided to the person to assist in addressing barriers to attendance
 - the extent to which the suspension or cancellation will have a detrimental impact on the person and/or their family
 - whether suspension or cancellation is likely to impact on the school attendance of the person's child
- to require the Secretary to 'reconsider' his or her decision regarding suspension or cancellation of a 'schooling requirement payment' within 7 days of receiving an application for review under s 129 of the *Social Security (Administration) Act 1999* (Cth)
 - to require the arrears of a suspended 'schooling requirement payment' to be paid to the 'schooling requirement person' (under proposed s 124NG *Social Security (Administration) Act 1999* (Cth)) within as short a time as is practicable, but no more than 14 days, following the Secretary's decision under s 129 of the *Social Security (Administration) Act 1999* (Cth)
- [Recommendation no. 14].**

7 Tackling alcohol abuse

229. The Commission supports the Government's aim of reducing alcohol-related harm in the Northern Territory. The Commission strongly urges the Government to adopt a holistic approach to addressing alcohol abuse as it is a complex multi-causal phenomenon that requires a comprehensive approach, including addressing the underlying social determinants.
230. The Commission notes that community control, adequate resourcing and comprehensive interventions are all key factors that facilitate effective alcohol abuse services and harm reduction strategies.¹²⁴ Evidence indicates that interventions imposed without community control or culturally appropriate adaptation and which stigmatise alcohol users do not work and can be counter-productive.¹²⁵
231. Protecting individuals from alcohol-fuelled violence is a legitimate goal and is consistent with the right to security of person and protection by the State against bodily harm' under Article 5(b) of the *International Convention on the Elimination of all forms of Racial Discrimination* (ICERD).
232. Further article 22(1) of the Declaration states that:
- Particular attention shall be paid to the rights and special needs of indigenous elders, women, youth, children and persons with disabilities in the implementation of this Declaration.
233. Importantly, however, article 22(2) of the Declaration states that such measures are to be taken *in conjunction with* Indigenous peoples. The measures to tackle alcohol abuse introduced by the 2007 NTER measures

and continued by the Stronger Futures Bill restrict the possession and consumption of alcohol in communities overwhelmingly inhabited by Aboriginals.

234. A recent Queensland Court of Appeal decision has found that similar legislative provisions in Queensland do not contravene s 10 of the RDA on the basis that no 'right' within the ambit of s 10 of the RDA was restricted by the impugned provisions. In the Commission's view, the reasoning of the majority on the construction of s 10 and the identification of the relevant right is susceptible to challenge. The Commission prefers the view of McMurdo P in holding that the provisions restrict the 'right to equal protection against discrimination from the practical effect of substantive law'.¹²⁶
235. Further, in the Commission's view legislative prohibitions on the possession and consumption of alcohol, that apply only in communities overwhelmingly inhabited by Aboriginals are inconsistent with the 'guarantee of the right of everyone, without distinction as to race, to equality before the law' protected by Article 5 of the ICERD.
236. The Commission also notes that where an action is intended to qualify as a 'special measure' under s 8 of the RDA, the wishes of the beneficiaries for the measure are of great importance (perhaps essential) in determining whether a measure is taken for the sole purpose of securing their advancement'.¹²⁷
237. In the Commission's view, the consent of the affected group, or at least the beneficiaries, is of paramount concern where punitive special measures operate by limiting certain rights of some, or all, of the affected group.¹²⁸ As Brennan J considered in *Gerhardy v Brown*, 'the dignity of the beneficiaries is impaired and they are not advanced by having an unwanted material benefit foisted on them'.¹²⁹
238. Further, CERD Committee has interpreted 'special measures' under article 1(4) of the ICERD as requiring that they be designed and implemented on the basis of 'prior consultation' with affected communities and the 'active participation' of such communities.
239. The Commission notes further that Article 19 of the Declaration states 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.
240. Consequently, the Commission supports the introduction of alcohol restrictions to address the impact of alcohol abuse within communities where such restrictions have community support.¹³⁰
241. The Commission is not convinced that the alcohol restrictions introduced as part of the 2007 NTER measures enjoyed a sufficient level of support within all of the communities affected. As stated above, the Commission is also concerned by the inadequacy of the consultations that occurred prior to introducing the Stronger Futures Bills into Parliament regarding the continuation of these measures.

242. The Commission has previously argued that the evidence indicates that blanket alcohol bans such as those imposed through the 'prescribed area' regime are not effective except when driven by communities.¹³¹ Unintended consequences of blanket alcohol bans include:
- displacement from communities into larger towns where alcohol is available
 - increased drinking in unsafe environments
 - criminalising behaviour that is not subject to criminalisation in non-prescribed areas.¹³²
243. The Commission also highlights the comparative success of community-based alcohol management plans over blanket alcohol bans.¹³³
244. Evidence indicates that effective 'interventions' to address alcohol abuse are:
- supported and controlled by affected communities
 - designed and tailored to the specific needs of particular communities and subgroups within them
 - culturally sensitive and appropriate
 - adequately resourced and supported, including to cater for clients with complex needs
 - provide a mix of broad-based and substance specific services
 - planned and integrated as a suite of interventions.¹³⁴
- (a) *Background and current measures*
245. The original 2007 NTER measures issued a ban on drinking, possessing, supplying or transporting liquor in prescribed areas, but allowed for the continued operation of licensed premises and individual permits issued under the *Liquor Act* (NT) (Liquor Act) and for some recreational, tourism and commercial fishing activities.¹³⁵ The measures also established mechanisms to monitor takeaway sales across the whole of the Northern Territory.¹³⁶ Under the original NTER measures, road signs were erected in prescribed areas notifying the restrictions on alcohol and prohibited materials. Police were also provided with powers to enter private residences in prescribed areas as if they were public places. At the time, the Commission expressed concern that these measures would be ineffective because they undermined community control in addressing alcohol-related harm.¹³⁷
246. The 2010 NTER redesign measures made a number of amendments to the operation of the alcohol measures.¹³⁸ The Commission welcomed aspects of the redesigned measures including:
- the provision of greater discretion in placing appropriate signage and publishing notices

- a more consultative scheme regarding entry by police into private residences¹³⁹
 - provisions that enable communities to introduce voluntary alcohol management arrangements and apply to be exempted from blanket alcohol bans.¹⁴⁰
247. However, the Commission also expressed concerns regarding features of the alcohol measures as part of the 2010 NTER redesign.¹⁴¹ The Commission particularly considered that the measures were not developed with adequate community consultation.¹⁴²
248. The current NTER alcohol restrictions in prescribed areas in the Northern Territory are due to sunset in August 2012.¹⁴³
249. The proposed measures relating to tackling alcohol abuse are contained in Part 2 of the Stronger Futures Bill. They preserve the area-based alcohol restrictions currently in place under the NTNER Act as redesigned in 2010.
250. The object of the proposed Part 2 is to ‘enable special measures to be taken to reduce alcohol-related harm to Aboriginal people in the Northern Territory’.¹⁴⁴ The primary measures in the Stronger Futures Bill:
- Continue alcohol restrictions already in place including offences through alcohol protected areas.
 - Create a process for the Commonwealth Minister for Indigenous Affairs (the Minister) to approve alcohol management plans in consultation with communities.
 - Appoint licensing assessors to assess premises that sell, or allow for the consumption of, alcohol where there is concern that they are contributing to alcohol-related harm to Aboriginal people.
 - Provide for an independent review within two years of commencement of the Bill.
251. Proposed s 27 of the Stronger Futures Bill allows the Minister to prescribe in the rules that a new area in the Northern Territory is to be an ‘alcohol protected area’. It is an offence to bring into, possess, control, consume, supply and transport liquor in alcohol protected areas.¹⁴⁵
252. The Commission commends both the requirement for community consultation¹⁴⁶ to precede the Minister making, revoking¹⁴⁷ or varying a rule prescribing an area to be an ‘alcohol protected area’ and the requirement for the Minister to have regard to submissions received during consultations prior to making such a determination.¹⁴⁸
253. However, the Commission is concerned that the Consequential and Transitional Provisions Bill automatically transitions prescribed areas under the 2007 NTER into ‘alcohol protected areas’. Existing licences and permits are also transitioned.¹⁴⁹ Accordingly, the Consequential and Transitional Provisions Bill will continue to impose alcohol restrictions on communities

previously determined to be ‘prescribed areas’ without the need for the proposed consultation processes to be complied with.

254. It is noted that rules prescribing an area as an ‘alcohol protected area’ may be revoked if the area becomes subject to an alcohol management plan. Practically, where alcohol management plans are negotiated with communities, the blanket ban over prescribed areas will not be applicable.
- (b) *Inadequate focus in the Stronger Futures Bills on transitioning to community led alcohol management plans*
255. The Commission welcomes the Australian Government’s intention that the Stronger Futures Bill be drafted to strengthen the ability of communities to take control of alcohol abuse and ‘forge their own path’ in developing responses to alcohol related harm.¹⁵⁰
256. The Commission commends the following features of the proposed measures tackling alcohol abuse:
- The repeal of the police power to enter private residences within prescribed areas as if they were a public place.¹⁵¹
 - Modifying the seizure of vehicle provisions under the Northern Territory Liquor Act to provide that in deciding whether to seize a vehicle, an inspector must have regard to (a) whether the main use of the vehicle is for the benefit of a community as a whole; and (b) the hardship that might be caused to the community if the vehicle were seized.¹⁵² The Explanatory Memorandum states that the types of vehicles covered by this measure include night patrol vehicles and community buses.¹⁵³
257. The Commission also welcomes:
- The community consultation processes required to be undertaken before the Minister can make, vary or revoke a rule to prescribe an area an alcohol protected area.
 - The process for the Minister to approve alcohol management plans in consultation with communities.
 - That signage informing residents and visitors of alcohol rules that apply in alcohol protected areas will be respectful to Aboriginal people and requires consultation with people living in the area prior to being erected.
 - That the Minister will be able to request the Northern Territory Minister¹⁵⁴ to conduct an assessment of licenced premises.
258. However, the Commission is of the view that a substantial focus of the Government should be on transitioning communities to locally developed alcohol management plans.
259. The ability to create local alcohol management plans has been a feature of the NTER legislation since the amendments in 2010.

260. Despite this, there are still no registered locally developed alcohol management plans that have displaced the blanket alcohol bans in prescribed communities.
261. The Commission is very concerned by this. It amounts to inadequate progress in the early stages of the intervention in developing community specific, tailored approaches to addressing alcohol abuse.
262. Once the Stronger Future measures are passed, the existing blanket bans on alcohol will continue for a further 10 years, to be reviewed after 7 years¹⁵⁵ – effectively meaning that communities will ultimately face the situation that there are blanket bans in their communities for a 15 year period in total with the option of review after having them in place for 12 years.
263. The ability for the blanket provisions to continue to apply, without review or any *requirement* to modify them to better meet the needs of the relevant communities, is likely to act as a disincentive for Government to consider more tailored, community driven responses.
264. The Commission notes that to meet the criteria of a special measure, an action must be regularly reviewed and monitored and the action should cease once its objective has been met. It is difficult to see how blanket measures can be justified for a period of up to 12 years, without steps being taken to develop locally tailored solutions.
265. Accordingly, the Commission does not support the continuation of blanket bans on alcohol for the duration proposed in the Stronger Futures Bills. Instead, the Commission recommends that the blanket alcohol bans proposed be limited to a further 3 year period to enable the transition to community developed alcohol management plans.
266. The Commission further recommends that adequate support, including financial, be provided to communities to develop alcohol management plans tailored to their circumstances.
267. The Commission believes alcohol management plans have significant potential to address alcohol related harm in the Northern Territory by facilitating community control of alcohol regulation and harm reduction strategies. This is both consistent with human rights standards and the evidence base.
268. The Commission reiterates that strong community governance structures are important for the success of the Stronger Futures measures. This is particularly important for the development of community owned alcohol management plans. Communities must have effective structures and protocols to enable them to make decisions regarding the difficult and sensitive issues to be addressed for effective alcohol management.
269. In this regard, the Commission notes the role of Community Justice Groups¹⁵⁶ in Queensland. In addition to carrying out local strategies to address criminal justice issues, Community Justice Groups operate as the mechanism for government consultation regarding the declaration of alcohol restrictions in a community.¹⁵⁷ An evaluation of Community Justice Groups conducted by

KPMG in 2010 indicated support for Community Justice Groups to ‘continue to have a “voice” about alcohol management in communities’.¹⁵⁸

270. The *Little Children are Sacred* Report also recommended the adoption of a community justice group approach and the development of alcohol management plans to address issues such as alcohol abuse in Northern Territory communities.¹⁵⁹

(c) *Technical matters about alcohol related measures in the Stronger Futures Bills*

(i) Rules governing applications for an alcohol management plan

271. A person or entity may apply for the approval of an alcohol management plan.¹⁶⁰ Rules will guide the form of the application and the design of the alcohol management plan.¹⁶¹ Further, the Minister must not approve a plan unless it meets the requirements prescribed by the rules.¹⁶²

272. The Explanatory Memorandum states that one of the purposes of the rules is to enable the Minister to establish minimum standards or criteria for alcohol management plans.¹⁶³ It also states that in deciding whether to approve an alcohol management plan, the Minister must review and consider all elements of an alcohol management plan, such as rehabilitation, service provision and education. This is designed to ensure that the Minister and communities can be assured that alcohol management plans are directed at minimising alcohol related harm and protecting vulnerable women and children.¹⁶⁴

273. If alcohol management plans are to be guided and assessed by rules that establish minimum standards then these rules should be created with the input of affected communities. Without such input the effectiveness of alcohol management plans will be undermined, and it contravenes the Government’s intention to engage in more community driven processes.

274. The Commission recommends that Division 6 of the Stronger Futures in the Northern Territory Bill 2011 (Cth) be amended to explicitly include consultation requirements for the development of rules that prescribe the minimum standards in relation to alcohol management plans.

(ii) Ministerial decisions regarding alcohol management plans

275. As noted above, the Bill enables the Minister to make a range of decisions regarding the approval, refusal to approve, variation or revocation of alcohol management plans.

276. The Commission welcomes the provisions enabling the Minister to not approve an alcohol management plan if there has been insufficient consultation or the majority of the community do not support the plan.¹⁶⁵ However, the Commission is concerned that the Minister may still exercise his or her discretion to approve a plan, notwithstanding the absence of either or both of these factors.¹⁶⁶

277. The Commission also notes with concern that other Ministerial decisions in relation to alcohol management plans (that is, to vary or revoke a plan) do not specify that the Minister can decide not to take action if satisfied that there has been insufficient consultation or a majority of community members do not support the action.
278. This omission may undermine the potential for alcohol management plans to facilitate community control over the regulation of alcohol and the reduction of alcohol-related harm.
279. The Commission contends that in making a decision relating to alcohol management plans, the Minister must ensure that there has been sufficient consultation with the affected community and take the outcomes of this consultation into account. The Commission reiterates that the features of meaningful consultation detailed at paragraph 63 and appendix 2 should be used to guide the Government as to whether there has been sufficient consultation.
280. The Commission notes that the outcomes of community consultations should identify where there are differences of view within the community. This would assist in being able to appropriately weigh the views of people in the community who have suffered harm as a result of alcohol abuse in the community.
281. The Commission also notes that when deciding to approve a variation to an alcohol management plan, the Minister is required to consider:
- the objects of the Part
 - any matter prescribed by rules
 - any other relevant matter.¹⁶⁷
282. To ensure that variations to alcohol management plans retain community ownership it is essential that the Minister is required to consider the circumstances and views of the people living in the area.
- (iii) Support for communities developing alcohol management plans
283. If alcohol management plans are to fulfil their potential to enable communities to control alcohol management, communities must be adequately supported and resourced to develop these plans.¹⁶⁸ The importance of access to financial, technical and other assistance in developing meaningful consultation processes is highlighted above at paragraph 63 and appendix 2.¹⁶⁹
- (iv) Notices
284. Under the 2007 NTER measures, road signs were erected in prescribed areas notifying the restrictions on alcohol and prohibited materials. The Stronger Futures Bill proposes that this power be retained by the Northern Territory Licencing Commission.¹⁷⁰

285. The erection of road signs under the NTER caused great hurt and humiliation to many people living in the affected prescribed areas, who felt that it ‘had the effect of shaming and labelling Aboriginal people as alcoholics and paedophiles’ and was ineffective at stopping drinking.¹⁷¹
286. Therefore, the Commission strongly welcomes that the Stronger Futures Bill’s proposal requires the Northern Territory Licencing Commission to ensure that the wording of notices are respectful to Aboriginal people.¹⁷²
287. The Commission also welcomes the Bill’s proposal to require the Northern Territory Licensing Commission to consult with people living in the area about a proposal to erect a notice and the content and wording of the notice.¹⁷³ Previously, under the 2010 NTER redesign measures, consultation was at the discretion of the Licensing Commission and was limited to the content of the notice.¹⁷⁴
288. The Commission understands that the Government has taken steps to ensure existing signs are rectified to meet the requirements of the Bill. The Commission commends the Government for beginning this process.

(d) *Assessments of licenced premises*

289. The Commission welcomes the proposed power to enable the Minister to request the Northern Territory Minister to appoint an assessor to conduct an assessment of licenced premises if the Minister reasonably believes that the sale or consumption of liquor at or from the premises is causing substantial alcohol-related harm to Aboriginal people.¹⁷⁵ Efforts to ensure that licenced premises do not contribute to alcohol-related harm are integral to a holistic approach to addressing alcohol harm.
290. The Northern Territory Minister must comply with the request unless he or she reasonably believes that compliance with the request would place an undue financial burden on the Northern Territory, including the Northern Territory Licensing Commission; or would otherwise be inappropriate.¹⁷⁶ There is no guidance in the Explanatory Memorandum about the circumstances under which the Northern Territory Minister could invoke these exclusions.
291. The Commission considers that the discretion of the Northern Territory Minister to refuse a request to assess licensed premises is too broad. It is not difficult to envisage a request to conduct an assessment could be perceived as placing ‘undue’ financial pressure on the Northern Territory Licensing Commission’s already heavy workload.
292. To ensure the practical effectiveness of the provision is not circumvented, the Commission believes that the Northern Territory Government should only be able to refuse a request if the financial burden is ‘excessive’. Further, the Australian Government should assist the Northern Territory Government to meet increased fiscal costs caused by conducting assessments.
293. Further the Commission notes that the term ‘inappropriate’ is defined by the Oxford Dictionary to mean: ‘not suitable or proper in the circumstances’. The Commission suggests therefore that the discretion to refuse to conduct an assessment is too broad.

294. The Commission notes that there is no statutory procedure to review the merits of government decisions in the Northern Territory.¹⁷⁷ This provides further justification for narrowing the Northern Territory Minister's discretion to refuse to undertake an assessment.
- (e) *Criminal justice issues*
295. Proposed s 8 of the Stronger Futures Bill inserts a new Division 1AA into the Liquor Act. This proposal will continue the offences to bring, possess, control, consume, supply, or transport liquor in 'alcohol protected areas' that were in place in prescribed areas under the NTER.
296. The maximum penalties for the offences of supply, transport, or possession with the intention of supply of more than 1 350 ml of alcohol, under the NTER Act were 680 penalty units or 18 months imprisonment.¹⁷⁸ This is retained in the Stronger Futures Bill.¹⁷⁹ The Explanatory Memorandum states that the serious penalties in relation to larger scale offences aim to reduce the flow of liquor into Aboriginal communities and target those profiting from unlawful transportation of the sale of liquor in Aboriginal communities.¹⁸⁰
297. Proposed section 75B(1) increases the maximum penalties for offences involving bringing into, possessing or controlling, or consuming less than 1 350 ml of liquor in an 'alcohol protected area' to 100 penalty units or six months' imprisonment. Proposed s 75C(1) does the same for offences involving supplying or transporting with the intent to supply liquor to a person in an 'alcohol protected area'. The Explanatory Memorandum states that 'the intention is that having alcohol within an alcohol protected area is to be treated as a significant offence'.¹⁸¹
298. The Commission commends the Government's intention to address alcohol related harm but does not support the criminalising of behaviour that is not subject to criminalisation outside of alcohol protected areas.¹⁸²
299. The *NTER Evaluation Report* indicated there was a clear increase in alcohol-related offences, including offences that were created by the NTER measures.¹⁸³ The Commission therefore reiterates its standing concerns that the alcohol offences under the NTER continued by the Stronger Futures Bill may result in increased imprisonment of Aboriginal and Torres Strait Islander peoples.¹⁸⁴
300. The Commission also highlights the likelihood that Aboriginal and Torres Strait Islander peoples will not be able to pay the fines imposed for violating the alcohol bans. This is especially the case where the person is also subject to income management and may not be in a position to pay the fines. The proposed provisions that increase the maximum penalties for offences involving less than 1 350 ml of alcohol are particularly concerning because such an offence now carries a term of imprisonment.
301. The Commission is also concerned about possible confusion caused by the terminology adopted in these proposed provisions. Offences under proposed 75B and 75C(1) refer to 'liquor', whereas proposed s 75C(7) refers to offences involving more than 1 350 ml of 'alcohol'. 'Liquor' is defined in the *Liquor Act* (Northern Territory) to mean 'a beverage that contains more than 1.15% by

volume of ethyl alcohol'. Alcohol is not defined. The Commission contends to avoid uncertainty a definition of 'alcohol' for the purposes of these offences should be inserted into the proposed dictionary in clause 75A(1).

302. The Australian Government has indicated that increasing the penalty for offences involving liquor under 1 350 ml of alcohol is in response to 'Aboriginal people's widespread concern about alcohol-related harm'.¹⁸⁵ The Commission does not consider that the Stronger Futures consultations clearly support this assertion.

303. While the *Stronger Futures Consultation Report* does state that the 'most frequent response to reducing alcohol harm was that more police, stronger policing and stronger penalties were needed',¹⁸⁶ the Report also indicates that the consultations elicited a wide variety of other less punitive responses to addressing alcohol harm.¹⁸⁷

304. The Commission notes that proposed s 9 of the Stronger Bill provides that the

The NT Liquor Act (other than section 75 of that Act) applies, while this Act is in effect, as if each alcohol protected area were a general restricted area under that Act.

305. The Explanatory Memorandum to the Bill also notes the option to refer an offender to the Substance Misuse Assessment and Referral for Treatment Court (SMART Court). The SMART Court is a court that deals with offenders where 'serious alcohol or drug misuse' contributed to the offending.

306. The SMART Court is able to make orders to assist the offender to address substance misuse and issues relating to rehabilitation. The Commission supports the use of SMART Courts to deal with alcohol related offences but notes that this option is only available where the offender has a history of serious substance misuse. However, it is possible that not all persons charged with possessing or consuming less than 1350ml of alcohol will fall into this category.

307. Under the *Liquor Act* (Northern Territory), there are alternative enforcement processes available for minor offences, such as the issue of penalty infringement notices. In the Commission's view these alternative enforcement processes should be the primary way to manage the possession and consumption of alcohol in alcohol protected areas.

(f) *Floor price*

308. The Commission supports the position of APO NT that a minimum floor price on alcohol across the Northern Territory is required to reduce the supply of alcohol.¹⁸⁸ National and international evidence is clear that increasing the price of alcohol is the most effective means to reduce consumption.¹⁸⁹

(g) *Recommendations*

309. The Commission reiterates its recommendation from the *Social Justice Report 2007* for the Australian Government to ensure alcohol restrictions are supplemented by investment in infrastructure in the health and mental health

sectors (including culturally appropriate detoxification facilities) and investment in culturally appropriate community education programs delivered by Indigenous staff [**Recommendation no. 15**].

310. The Commission recommends that the blanket alcohol bans proposed be limited to a further three year period to enable the transition to community developed alcohol management plans [**Recommendation no. 16**].
311. The Commission recommends that Division 6 of the Stronger Futures in the Northern Territory Bill 2011 (Cth) be amended to explicitly include consultation requirements for the development of rules that prescribe the minimum standards in relation to alcohol management plans [**Recommendation no. 17**].
312. The Commission recommends that proposed ss 17 and 23 of the Stronger Futures in the Northern Territory Bill 2011 (Cth) be amended to ensure that the Minister is required to take into account the outcomes of consultations with affected communities about the introduction of alcohol management plans [**Recommendation no. 18**].
313. The Commission recommends that s 23(2) of the Stronger Futures in the Northern Territory Bill 2011 (Cth) be amended to include that the Minister must have regard to the circumstances and views of the people living in the area when making a decision to approve a variation to an alcohol management plan [**Recommendation no. 19**].
314. The Commission recommends that financial, technical and other assistance be provided to communities to facilitate the development of alcohol management plans that are tailored to the needs of their communities and contain the least restrictive measures [**Recommendation no. 20**].
315. The Commission recommends that s 15(5) of the Stronger Futures in the Northern Territory Bill 2011 (Cth) be amended so that:
 - ‘undue financial burden’ is replaced with ‘excessive financial burden’
 - ‘would otherwise be inappropriate’ be removed or replaced with more targeted language detailing the kind of circumstances or situations where it would be reasonable to refuse such a request [**Recommendation no. 21**].
316. The Commission recommends that the Australian Government ensure sufficient financial resources are made available to the Northern Territory Government to be able to effectively carry out requests to assess licenced premises [**Recommendation no. 22**].
317. The Commission recommends that a definition of ‘alcohol’ be inserted into the dictionary in proposed s 75A(1) of the *Liquor Act* (Northern Territory) which clarifies that ‘alcohol’ in proposed s 75(C)(7) means pure alcohol or ‘Ethyl Alcohol with no other additives or denaturants’ [**Recommendation no. 23**].
318. The Commission recommends that the Stronger Futures in the Northern Territory Bill 2011 (Cth) insert into Division 1AA into the *Liquor Act* (Northern Territory) a note setting out that these alternatives are the preferable way to

manage possession and consumption of alcohol in alcohol protected areas
[Recommendation no. 24].

319. The Commission recommends that the Stronger Futures Bills be amended to include a mandated floor price for alcohol across the Northern Territory
[Recommendation no. 25].

8 Land reform measures

320. As part of the original NTER in 2007, the then Government introduced a number of measures that affected the rights of Aboriginal peoples to their lands, territories and resources, including the compulsory acquisition of leases for a term of five years over prescribed areas,¹⁹⁰ empowering the Australian Government to compulsorily acquire rights, titles and interests relating to town camps¹⁹¹ and providing for the acquisition (by the Australian or Northern Territory Governments or their authorities) of extensive statutory rights in relation to areas of Aboriginal land designated as construction areas (statutory rights provisions).¹⁹²

321. In 2010 the *Social Security and Other Legislation Amendment (Welfare Reform and Reinstatement of Racial Discrimination Act) Act 2010* (Cth) (2010 Welfare Reform Act) made only minor changes to the provisions of the NTNER Act concerning the compulsory acquisition of five-year leases.

322. The Commission has previously expressed concern about the lack of consultation that preceded the introduction of the land measures under the NTER, and highlighted the discriminatory impact of some of the measures on Aboriginal people.¹⁹³

323. The Consequential and Transitional Provisions Bill and the Stronger Futures Bill outline proposals to amend leasing arrangements in the Northern Territory on certain land.

(a) Repeal of five-year leases and statutory powers

324. The Consequential and Transitional Provisions Bill repeals the NTNER Act, which contains the provisions relating to the acquisition of five-year leases.¹⁹⁴ This Bill also repeals Part IIB of the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) (ALRA).¹⁹⁵ The Commission strongly supports the repeal of these provisions¹⁹⁶, and is encouraged by the Australian Government's commitment to transition to voluntary leasing arrangements in the Northern Territory.¹⁹⁷

(i) Leasing arrangements in town camps and community living areas

325. The Stronger Futures Bill will insert a new regulation-making power which allows the Australian Government to make regulations relating to leasing on town camp and community living area land in the Northern Territory.¹⁹⁸ The Stronger Futures Bill does not, in and of itself, make amendments to existing land laws in the Northern Territory.

326. The Government states that this will enable the removal of barriers to leasing on this land and enable Aboriginal landholders to make use of their land for a broader range of purposes including for economic development and private home ownership.¹⁹⁹ The Government intends this to be a ‘special measure’. Proposed s 33 of the Stronger Futures Bill provides that the object of the part is to enable ‘special measures’ to be taken to:
- facilitate the granting of individual rights or interests in relation to land in town camps and community living areas and
 - promote economic development in town camps and community living areas.
327. Proposed section 34 is a ‘regulation-making power which allows Northern Territory laws to be modified to the extent that the law applies to a town camp’. The regulation-making power allows for the ‘overcoming of restrictions and impediments relating to dealings, planning and infrastructure on town camp land for the benefit of Aboriginal people’.²⁰⁰
328. The regulations may also modify the *Crown Lands Act 1992* (NT) (Crown Lands Act) or the *Special Purposes Leases Act 1953* (NT) (Special Purposes Leases Act) (or both) to provide that a lease granted under the Special Purposes Leases Act is taken to have been granted under the Crown Lands Act.²⁰¹ In addition, the regulations may modify a lease granted under the Crown Lands Act or Special Purposes Leases Act by modifying the purposes for which the land that is the subject of the lease may be used.²⁰²
329. The provisions outline certain consultation requirements which must be met before the Minister makes any regulations. However the provisions also allow the regulations to be valid if the consultation requirements are not met.²⁰³
330. Proposed s 35(1) is a regulation-making power with respect to modifying Northern Territory laws in relation to community living areas. Regulations may modify any law of the Northern Territory relating to the use of or dealings in land, planning or infrastructure (or other) to the extent that the law applies to a community living area. These provisions include the same consultation requirements as the regulations relating to town camps.
331. The Consequential and Transitional Provisions Bill requires Land Councils to provide assistance to owners of community living areas regarding negotiating dealings in the relevant land – such as negotiating new leases.²⁰⁴
332. The Commission supports owners of community living areas having access to assistance in negotiating dealings on their land. However if this function is to rest with the Land Councils, the Government must ensure the Land Councils are adequately resourced to perform this task. This would be consistent with Article 39 of the Declaration which outlines the right of Indigenous peoples’ access to financial and technical assistance from the States, for the enjoyment of their rights.
333. Similarly, the Government should ensure town camp councils also have access to sufficient financial and technical assistance to enable them to utilise any new provisions affecting town camp leasing.

(b) *The Commission's view on land reform measures*

334. The Commission welcomes the Government's intention to promote economic development in town camps and community living areas by facilitating the removal of barriers which inhibit long term leasing and economic development.²⁰⁵
335. Under Article 32(1) of the *Declaration on the Rights of Indigenous Peoples* (the Declaration), Aboriginal and Torres Strait Islander peoples 'have the right to determine and develop priorities and strategies for the development or use of their lands or territories and other resources'. If enacted with the proposed effect, the changes could assist to facilitate Indigenous landowners and residents determining and developing priorities and strategies for the development of their land.
336. However the Commission cautions that given the lack of detail provided concerning the proposed Regulations, we are unable to comment on whether the proposed Regulations, and therefore subsequent amendments to Northern Territory laws and leases, will be consistent with human rights obligations and the RDA.
337. The Commission agrees with the Special Rapporteur on the rights of indigenous peoples, that 'increasing indigenous peoples' control over their lands and resources, self-determination and self-government is an essential component of advancing economic development'.²⁰⁶ The Government should ensure that in developing any Regulations, any proposed amendments should afford Aboriginal communities with options, and control over their land rather than imposed changes which lack community support. To do this, the measures must be developed and implemented in partnership with affected Aboriginal and Torres Strait Islander peoples.
338. The proposed land measures are part of the Australian Government's move towards voluntary leasing in the Northern Territory. While the Commission is supportive of the Australian Government's commitment to transition to voluntary leases, we have broader concerns about the Government's prioritisation of obtaining 'secure tenure'. As APO NT has noted:
- Problems arise, however, from seeking to address entrenched economic and social disadvantage experienced in remote communities simply as a matter of securing leases. No evidence exists that economic development or even home ownership will necessarily flow from secure leasing alone. Community cohesion, capacity to engage in wider society, issues of community control and decision-making have to be addressed in conjunction with a leasing policy.²⁰⁷
339. The Commission considers issues such as remoteness, education, health, job readiness, poor infrastructure and the failure of governments to respect and recognise Aboriginal and Torres Strait Islander forms of ownership are substantially more important and have a greater impact on the economic development of communities than lack of secure tenure.²⁰⁸ The Government should ensure prioritisation of funding to address these factors in addition to formalising tenure arrangements. This will help facilitate Aboriginal and Torres

Strait Islander peoples' ability to develop and determine their own priorities and strategies for development.

(c) *Drafting issues*

(i) Ensuring transparency and accountability

340. The Commission is unable to provide substantial comment on the proposals given the absence of any discussion about the proposed content of the Regulations. Given this, it would be preferable for the amendments to the relevant Northern Territory laws and/or leases to be included in the Stronger Futures Bill rather than left to Regulations. This would allow the appropriate level of transparency, analysis and debate to occur.

341. In the alternative, at a minimum the Government should provide an exposure draft of the proposed Regulations in conjunction with the Stronger Futures Bill.

(ii) Confining the regulation-making power

342. In addition, it is important to ensure that the regulation-making power is appropriately defined and limited to achieve its objective.

343. Proposed ss 34(1)(e) and 35(1)(e) state that regulations may modify any law of the Northern Territory relating to 'any matter prescribed by the regulations' to the extent they apply to community living areas and town camps in the Northern Territory. The Commission notes that this potentially broad regulation-making power will be confined by the stated objects of the Part to facilitate individual rights or interests and promote economic development.

344. However, for clarity, the Commission recommends that these sections be amended to read that Regulations may modify any law of the Northern Territory relating to 'any matter which facilitates the granting of individual rights or interests in relation to land in town camps and community living areas or promotes economic development in town camps and community living areas.

(iii) Meaningful and effective consultation

345. Given the importance of consultation and consent under the Declaration and the Government's commitment to transition to voluntary leasing, it is essential that the requirement to consult is mandatory and robust.

346. Proposed sections 34(8) and 35(4) of the Stronger Futures Bill provide that before making regulations relating to a town camp or a community living area, the Minister must consult with relevant parties, such as the lessee of the town camp. Proposed sections 34(9) and 35(5) provide that a failure to comply with this requirement does not affect the validity of the regulations.

347. The Commission understands that ss 34(9) and 35(5) are drafted to offer stability to parties who may have property interests affected by Regulations. However the Commission is concerned that these provisions could be used to undermine the duty to consult with affected parties.²⁰⁹

348. One way to address this is to include a set of minimum criteria which must be met as part of the consultation process. As noted at paragraph 63, the criteria developed by Aboriginal and Torres Strait Islander Social Justice Commissioner based on stakeholder research and international law, could be used as the basis for designing minimum consultation requirements.

(d) *Recommendations*

349. The Commission recommends that the provisions of the Stronger Futures in the Northern Territory (Consequential and Transitional Provisions) Bill 2011 repealing the sections dealing with the compulsory acquisition of five-year leases, and repealing Part IIB of the *Aboriginal Land Rights Act (Northern Territory) 1976* (Cth), be passed [**Recommendation no. 26**].
350. The Commission recommends that the Australian Government ensure Northern Territory Land Councils are adequately resourced to provide support to the owners of community living area land in relation to any dealings on the land as envisaged by proposed s 23(1)(ea) of the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth). In addition, the Australian Government should ensure town camp councils also have access to sufficient financial and technical assistance to enable them to utilise any new provisions affecting town camp leasing for their benefit [**Recommendation no. 27**].
351. The Commission recommends that the Australian Government include the amendments to Northern Territory laws and/or leases, as envisaged by Part 3 of the Stronger Futures in the Northern Territory Bill 2011 (Cth), in the Bill to enable analysis and debate prior to the passage of the Bill. Alternatively, that the Government provide an exposure draft of the proposed Regulations in conjunction with the Stronger Futures in the Northern Territory Bill 2011 (Cth) for comment prior to the passage of the Bill [**Recommendation no. 28**].
352. The Commission recommends that sections 34(1)(e) and 35(1)(e) of the Stronger Futures in the Northern Territory Bill 2011 (Cth) be amended to read that Regulations may modify any law of the Northern Territory relating to ‘any matter which enables the objects of this Part’ [**Recommendation no. 29**].
353. The Commission recommends that any Regulations developed under proposed ss 34 or 35 of the Stronger Futures in the Northern Territory Bill 2011 be developed in partnership with affected Aboriginal communities [**Recommendation no. 30**].

9 Community stores and food security

(a) *The Commission’s view on community stores and food security*

354. The right to adequate food is a human right recognised under international law.²¹⁰ Under the *International Covenant on Economic, Social and Cultural Rights* the right to adequate food involves the state’s obligation to respect, protect and to fulfil this right.²¹¹
355. The Commission also notes the right for Indigenous peoples to be actively involved in developing and determining economic and social programmes

affecting them.²¹² As such, this should be included in the planning and development of initiatives for food security in the Northern Territory.

(b) *Background and current measures*

356. The original 2007 NTER measures set up a licensing scheme for stores operating in prescribed areas. The licensing scheme required stores to participate in income management. Store licencing was originally introduced to address concerns about the operation of community stores in remote Indigenous communities. The licensing scheme also required stores to participate in income management to ensure the proper delivery of the income management arrangements established under Part 3B of the *Social Security (Administration) Act 1999* (Cth) (*Social Security Administration Act*).²¹³

357. The 2010 NTER redesign introduced greater transparency in the licensing procedures for community stores. Community stores could be assessed to determine whether they would be granted a community store license.²¹⁴ The basis of assessment was:

Reasonable quality, quantity and range of groceries and consumer items available and promoted at the store, including healthy food and drinks; capacity to participate in the requirements of the income management arrangements under the social security law; and have sound financial structures, retail and governance practices.²¹⁵

358. The Commission viewed the terms and conditions of store licensing under the 2010 NTER redesign measures as reasonable measures to promote food security. However, the Commission did raise concerns about the application of the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (Cth) (*CATSI Act*), the need for additional support and avoiding over-regulation under the store licensing scheme.²¹⁶

(c) *The Commission's view of the proposed measures – Stronger Futures Bills*

359. The Stronger Futures in the Northern Territory Bill 2011 (Cth) (*Stronger Futures Bill*) provides for a community store licensing scheme to operate for a 10-year period to address food security issues for Aboriginal communities in the Northern Territory. If the Stronger Futures Bill is passed licensing requirements will no longer be confined to stores accepting income managed funds. Assessment guidelines for licensing community stores will be broadened to include:

Satisfactory range of healthy and good quality food, drink or grocery items; promoting good nutrition and health products; and satisfactorily address aspects which may impact food security including, retail management and financial practices, business structure and environment of stores premises.²¹⁷

360. The Stronger Futures Bill also introduces greater assessment of store practices and more robust enforcement of these measures through civil penalty provisions, infringement notices, enforceable undertakings and injunctions.

361. The Commission continues to support the Bill's proposed community stores and food security measures.
362. It is the Commission's view that, overall, the terms and conditions of the licensing regime are reasonable, able to be complied with and do not have a negative impact upon the equal enjoyment of rights in public life by people of a particular race – and are therefore not racially discriminatory.
363. However, the Commission is concerned that proposed s 109 expressly states that Part 4 'has effect despite any other law of the Commonwealth'. This includes the *Racial Discrimination Act 1975* (Cth) (RDA), *Disability Discrimination Act 1992* (Cth) and the *Privacy Act 1988* (Cth).
364. The Commission is also concerned that the provisions regarding entry, access to records and compulsion to provide information may unnecessarily interfere with community store owners and manager's right to privacy.
365. The new enforcement mechanisms will mean that revocation of a community store licence is not the only remedy for non-compliance with licencing requirements.²¹⁸ Alternative remedies may assist in ensuring food security in remote Aboriginal communities. However the Commission notes that the new enforcement arrangements carry civil and criminal penalties²¹⁹ which may not always be a necessary or proportionate response to non-compliance.
366. The Explanatory Memorandum notes that the normal initial response to a breach of conditions will be to seek resolution without recourse to the new enforcement provisions.²²⁰ While this is a welcome assurance, the Government should closely monitor the use of the enforcement provisions to ensure they are being applied proportionately.
- (i) Meaningful and effective consultation
367. The Government contends that 'community consultation will continue to be an important aspect of the operation of the scheme'.²²¹ For example, proposed s 41(2) of the Stronger Futures Bill requires the Secretary to 'consult people being serviced by the community store about the proposal to make a determination' about whether a community store licence is required.²²² However proposed s 41(3) states that a failure to meet this requirement does not affect the validity of the determination.
368. The Commission has referred to other provisions in the Stronger Futures Bills which are drafted in the same way. To ensure that these provisions are not used to undermine the duty to consult with affected parties, the Commission reiterates the recommendation at paragraph 19 that the Government consult with affected Aboriginal and Torres Strait Islander peoples consistent with the criteria set out above in paragraph 63 and appendix 2.
- (ii) Pricing and nutrition
369. There are significant concerns about the high cost of food in remote community stores.²²³

370. The availability and affordability of healthy choices to meet nutrition requirements in community stores is a complex issue. Research suggests the community stores are improving the promotion of healthy choices through layout, displays, and purchasing options.²²⁴
371. While improving store management and governance is part of the solution to increasing access to affordable healthy choices, it is undermined by poor food supply in the Northern Territory. There are a number of factors contributing to poor food supply including freighting goods over long distances, breaking the cold chain, seasonal disruptions and lack of community input into stock orders.²²⁵ The Commission considers that support is needed to allow both stores and suppliers to develop holistic structures to improve the supply chain of food to community stores.
372. The Commission refers to the recommendations from the Inquiry into community stores in remote Aboriginal and Torres Strait Islander communities. In particular, the Commission supports the recommendations included in the Inquiry Report that the Australian Government consider:
- establishing a national remote Indigenous food supply chain coordination office²²⁶
 - supporting the development of flexible regional or group purchasing models to reduce cost without risking freight monopolisation.²²⁷
373. The Commission notes that the Australian Government is also in the process of developing the first National Food Plan.²²⁸ The Food Security measures of Stronger Futures legislation should be developed to ensure that the Stronger Futures measures regarding food security are consistent with the National Food Plan.

10 Community safety

(a) The Commission's view on community safety

374. Every individual has the right to live in a safe and secure community. The Commission reaffirms that communities must be safe places that are free of emotional, physical and sexual violence. The obligation to ensure the safety of communities arises out of several well established human rights instruments.²²⁹
375. Community safety encompasses a range of policy and program responses. The Commission supports a holistic approach to addressing community safety. Community empowerment is the key to addressing these issues in a constructive and sustainable manner. Any approach to community safety needs to allow communities to develop their own solutions, working in partnership with police and other stakeholders.

(b) Background and current measures

376. The original 2007 NTER measures placed a ban on pornography and required internet filters on all publicly funded computers in prescribed areas.²³⁰ The

measures also removed customary law as a factor for consideration in sentencing and bail determinations.

377. The NTER increased the police presence in remote Aboriginal communities. As a result of the NTER, 18 communities gained a resident police presence for the first time.²³¹ The *NTER Evaluation Report* stated that police numbers rose by 62 since the NTER was introduced in 2007.²³²
378. The 2010 NTER redesign amended the operation of the pornography measures. The Commission welcomed this redesign as it provided for greater discretion in placing appropriate signage and publishing notices.
379. Broadly speaking, evaluation research indicates some improvements in perceptions of community safety since the NTER commenced, and this is welcomed. The Community Safety and Wellbeing Research Study (CSWRS) interviewed around 1,300 individuals and found 72.6% of respondents felt community safety had improved since the NTER.²³³ The Community Safety Service Provider Survey (CSSPS) interviewed 699 individuals and found that 41% of respondents felt that their community was safer since the NTER.²³⁴
380. However, the NTER Evaluation Report found that only a very small number of offences related to pornography were documented: between 1 July 2007 and 31 December 2010 only 44 incidents were recorded.²³⁵
381. It is difficult to draw firm conclusions about the effectiveness of the prohibited material measures without data from comparable communities without the restrictions.²³⁶ However, it would appear that the number of recorded offences indicates that there is either a low level of illegal use and/or distribution of pornography, or police are limited in the type of incidents they can deal with.

(c) *Proposed measures – Stronger Futures Bills*

382. The Consequential and Transitional Provisions Bill will amend:
- the *Classification (Publications, Films and Computer Games) Act 1995* (Cth) (Classification Act) relating to the prohibition of pornography
 - the *Crimes Act 1914* (Cth) (Crimes Act) allowing for the consideration of cultural significance in the protection of cultural heritage.
383. The Commission welcomes the repeal of the requirement for internet filters on publicly funded computers in prescribed communities.²³⁷ The Commission supports the alternative proposal that all Commonwealth funding agreements include a requirement that funded organisations take steps to reduce the inappropriate use of publicly funded computers.
384. The Commission notes the Australian Crime Commission (ACC) powers granted as part of the NTER, relating to violence and child abuse against Aboriginal and Torres Strait Islanders, are not subject to the sunset provisions and will continue. The Commission considers it appropriate that these powers are reviewed to assess their necessity and whether they are being used appropriately.²³⁸ This is particularly important in light of the extensive nature of the ACC powers.

(d) *Prohibition of pornography*

(i) Prohibited material area

385. Schedule 3 of the Consequential and Transitional Provisions Bill retains and amends the provisions in Part 10 of the Classification Act which enable the Minister to determine that an area in the Northern Territory is a 'prohibited material' area. This creates a new process for the restriction of prohibited material in the Northern Territory.
386. Item 4 of Schedule 3 proposes to repeal s 100A and s 100B and inserts a new s 100A. The Commission welcomes the move towards a process that enables the Minister, to determine, on a case by case basis, that bans should apply to particular communities, after consultation has occurred. This process replaces the previous arrangement under which bans were imposed on communities with the onus on the community to apply to have the ban lifted.
387. The Commission commends the requirement in the Consequential and Transitional Provisions Bill in proposed s 100A(4) that community consultation be undertaken before the Minister makes a determination on whether bans should apply to particular communities, and that in making such a decision the Minister must have regard to submissions received during consultation.²³⁹
388. Proposed s 100A(6) and s 115(5) set out a number of matters which the Minister must have regard to when making a determination that either an area is a prohibited material area (and therefore subject to a pornography ban) or that the provisions cease to have effect. However, the Commission notes that the Minister is not required in either case to consider and accommodate the views and concerns raised during consultation.
- (ii) Treatment of prescribed areas
389. The Consequential and Transitional Provisions Bill automatically transitions prescribed areas under the NTER into prohibited material areas.²⁴⁰ The Commission is concerned that communities which were in prescribed areas under the previous regime will not benefit from the proposed consultation provisions.
390. The impact of the specific pornography prohibitions has been marginal and has attached an unwarranted and damaging stigma to communities. This has the effect of reinforcing negative stereotypes and ultimately undermining the good intentions of the measures. The carryover of previous prescribed areas means that the change to a more consultative process will have no effect in these communities. The communities will have to take public steps to exempt themselves from pornographic restrictions, which will compound the stigma associated with pornography bans.
391. The Commission believes determinations under the NTNER Act should be repealed and new determinations should be made on a case by case basis with the same discretionary considerations and consultation mechanisms as is proposed to apply into the future.

(e) *Customary law and cultural practice*

392. The Consequential and Transitional Provisions Bill seeks to amend the Crimes Act to continue measures in place under the NTER that prevent consideration of customary law or cultural practice in bail and sentencing decisions.
393. The Bill seeks to remove the unintended adverse consequences for offences that protect cultural heritage, including sacred sites and cultural heritage objects.²⁴¹
394. Australia has a rich and unique cultural heritage and has international obligations to ensure that culture may be enjoyed and significant heritage preserved.²⁴² The Commission welcomes the amendments that enable customary law and cultural practice to be considered in bail and sentencing decisions for offences against Commonwealth and Northern Territory laws that protect cultural heritage, including sacred sites or cultural heritage objects.
395. The Explanatory Memorandum states that the continued exclusion is to ensure that customary law and cultural practices are not used to mitigate the seriousness of any offence that involves violence or sexual abuse against women and children.²⁴³
396. The Commission supports the Government's intention to protect the rights of women and children with regards to violence and sexual abuse. However, the Commission notes the breadth and diversity of customary law and cultural practices, including alternative dispute resolution processes, which can complement the way the Australian legal system works. In relation to customary law and practice, there should be recognition of some of the existing and traditional community structures that guide dispute resolutions. These have the potential to provide culturally secure sanctions that accord to both cultural and broader community standards.²⁴⁴ Customary law practices can assist with the development of justice reinvestment models as well as other community justice initiatives.
397. The Commission considers that the continued exclusion of customary law and cultural practice from bail and sentencing decisions is too broad. Sections 15AB(1)(b) and 16(A) of the *Crimes Act 1914* (Cth) should instead be amended to prevent authorities from considering customary law or cultural practices only when considering offences that involve violence or sexual abuse.

(f) *Increased contact with the criminal justice system*

398. While many community members have welcomed the increased police presence, it has resulted in increased numbers of Aboriginal and Torres Strait Islander peoples coming into contact with the criminal justice system. Aboriginal and Torres Strait Islander peoples currently constitute 81% of the Northern Territory adult prison population.²⁴⁵
399. There has been a 62% increase in the recorded traffic and vehicle regulatory offences which is of particular concern.²⁴⁶ According to analysis, the majority of these offences do not involve alcohol or lead to harm.²⁴⁷ Instead, they are regulatory offences such as not having a driver's license, driving unregistered

or driving in an unroadworthy vehicle.²⁴⁸ When these offences occur and are prosecuted together, as they often are, there is a strong possibility of a custodial sentence.²⁴⁹

400. The lack of public transport, access to suitable vehicles and licensing services in remote communities influences driving behaviours and disproportionately disadvantages Aboriginal and Torres Strait Islander peoples in the Northern Territory. Whilst enforcement of traffic offences has a role to play in increasing community safety, the increase in incarceration for regulatory offences is a concerning trend.
401. Public order offences, including breaches of alcohol restrictions have increased by 43%.²⁵⁰ As outlined above at paragraph 299, the Commission is concerned that the enforcement of stricter alcohol restrictions will further increase these offences and in turn lead to more involvement with the criminal justice system.
402. It is the Commission's view that there should be greater use of community based, culturally secure diversions and treatment programs to prevent the further criminalisation of Aboriginal and Torres Strait Islander peoples in the Northern Territory, particularly around the relatively minor traffic, justice and public order offences.
403. Remote communities currently have poor access to treatment and diversion programs, leaving Magistrates with a limited number of available sentencing options. Similarly, fines can also be problematic given that many of the recipients are on income management and have a limited capacity to pay.
404. The inability to pay fines can often lead to imprisonment adding to the high numbers of Aboriginal and Torres Strait Islander peoples in prison. The establishment of a payment system for fines, whereby the court acknowledged potential barriers to prompt payment could allow for fines to be paid in a series of small payments could help reduce unnecessary incarceration. This system could be linked to Centrelink payments allowing individuals to consent to having a portion of their fortnightly payments being channelled directly to cover the fine.
405. The Commission has been advocating for justice reinvestment approaches to deal with Aboriginal and Torres Strait Islander over-representation in the criminal justice system.²⁵¹ This involves diverting funding from imprisonment for less serious offenders, and placing it in community level crime prevention, diversion and treatment programs. This should be targeted at communities where there is a high concentration of offenders and victims and be part of community engagement strategies which lead to local community safety plans. This sort of justice reinvestment approach could be accommodated within Stronger Futures and would in fact increase the effectiveness of existing community safety initiatives, offer an alternative to prison and contribute to reducing the number of Aboriginal people in the Northern Territory being sent to jail.

(g) *Recommendations*

406. The Commission recommends that the Stronger Futures in the Northern Territory (Consequential and Transitional Provisions) Bill 2011 (Cth) be amended so that proposed s 100A(6) and s 115(5) of the *Classification (Publications, Films and Computer Games) Act 1995* (Cth) include as an additional factor the views and concerns raised during consultation
[Recommendation no. 31].
407. The Commission recommends that the Stronger Futures in the Northern Territory (Consequential and Transitional Provisions) Bill 2011 (Cth) be amended to remove Item 15 of Schedule 3 which automatically transitions pre-existing prescribed areas to prohibited materials areas **[Recommendation no. 32].**
408. The Commission recommends that the Stronger Futures in the Northern Territory (Consequential and Transitional Provisions) Bill 2011 (Cth) be amended so that it amends the *Crimes Act 1914* (Cth) so that customary law or cultural practices are only excluded from consideration in bail and sentencing decisions for offences that involve violence or sexual abuse
[Recommendation no. 33].

4 Appendix 1: Chronology of the Northern Territory Emergency Response and the Stronger Futures Bills

See attached.

5 Appendix 2: Features of a meaningful and effective consultation process

See attached.

6 Appendix 3: Creating cultural competency

See attached.

¹ Northern Territory National Emergency Response Act 2007 (Cth), s 6.

² Australian Government, *Stronger Futures in the Northern Territory Discussion Paper* (2011), p 4. At <http://www.indigenous.gov.au/no-category/stronger-futures-in-the-northern-territory-discussion-paper/> (viewed 20 January 2012).

³ See M Gooda, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice Report 2011*, Australian Human Rights Commission (2011), ch 1 and 3. At http://www.humanrights.gov.au/social_justice/sj_report/sjreport11/index.html (viewed 10 January 2012).

⁴ *United Nations Declaration on the Rights of Indigenous Peoples*, GA Resolution 61/295 (Annex), UN Doc A/RES/61/295 (2007), art 39. At <http://www.un.org/esa/socdev/unpfii/en/drip.html> (viewed 10 January 2012).

⁵ See Closing the Gap Clearinghouse, *What works to overcome Indigenous disadvantage: key learnings and gaps in the evidence* (2011), p 2. At http://www.aihw.gov.au/closingthegap/documents/annual_papers/what_works_to_overcome_disadvantage.rtf (viewed 10 January 2011).

⁶ Prime Minister, Minister for Indigenous Affairs, Minister for Indigenous Health, Senator Crossin, 'Deliver a better future for Indigenous people in the Northern Territory', (Media Release, 22 June 2011). At <http://www.pm.gov.au/press-office/delivering-better-future-indigenous-people-northern-territory> (viewed 10 January 2012).

⁷ Cultural & Indigenous Research Centre Australia, *The Department of Families, Housing, Community Services and Indigenous Affairs, Report on Stronger Futures Consultation 2011 Final Report* (2011), p 3.

⁸ Cultural & Indigenous Research Centre Australia, *The Department of Families, Housing, Community Services and Indigenous Affairs, Report on Stronger Futures Consultation 2011 Final Report* (2011), p 5.

⁹ Australian Government, *Stronger Futures in the Northern Territory Report on Consultations* (2011), pp 80-82. At <http://www.indigenous.gov.au/stronger-futures-in-the-northern-territory-report-on-consultations/> (viewed 20 January 2012).

¹⁰ M Gooda, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice Report 2011*, Australian Human Rights Commission (2011), pp 27-28. At http://www.hreoc.gov.au/social_justice/sj_report/sjreport11/index.html (viewed 11 January 2012).

¹¹ M Gooda, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2010*, Australian Human Rights Commission (2011), app 4. At http://www.hreoc.gov.au/social_justice/nt_report/ntreport10/index.html (viewed 8 December 2011).

¹² M Dodson and D Smith, *Governance for Sustainable Development: strategic issues and principles for Indigenous Australian communities*, Discussion Paper No 251. Centre for Aboriginal Economic Policy Research (2003), p 1. At https://digitalcollections.anu.edu.au/bitstream/1885/41862/3/2003_DP250.pdf (viewed 21 November 2011).

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- ¹³ M Dodson and D Smith, *Governance for Sustainable Development: strategic issues and principles for Indigenous Australian communities*, Discussion Paper No 251. Centre for Aboriginal Economic Policy Research (2003), pp 3-4. At https://digitalcollections.anu.edu.au/bitstream/1885/41862/3/2003_DP250.pdf (viewed 21 November 2011); Australian Government, *Northern Territory Emergency Response Evaluation Report* (2011), p 4. At http://www.fahcsia.gov.au/sa/indigenous/pubs/nter_reports/Pages/nter_evaluation_rpt_2011.aspx (viewed 21 November 2011).
- ¹⁴ Australian Government, *Northern Territory Emergency Response: Report of the NTER Review Board* (2008), p 54. At <http://www.nterreview.gov.au/report.htm> (viewed 29 November 2011).
- ¹⁵ The Harvard Project on American Indian Economic Development, 'Overview: what works, where and why?' (2011). At: <http://hpaied.org/about-hpaied/overview> (viewed 12 January 2012).
- ¹⁶ Office of the High Commissioner for Human Rights, *Expert Mechanism Advice No. 2 (2011): Indigenous peoples and the right to participate in decision-making* (2011), para 3. At http://www.ohchr.org/Documents/Issues/IPeoples/EMRIP/Advice2_Oct2011.pdf (viewed 28 November 2011).
- ¹⁷ Office of the High Commissioner for Human Rights, *Expert Mechanism Advice No. 2 (2011): Indigenous peoples and the right to participate in decision-making* (2011), para 13. At http://www.ohchr.org/Documents/Issues/IPeoples/EMRIP/Advice2_Oct2011.pdf (viewed 28 November 2011).
- ¹⁸ Aboriginal Peak Organisations of the Northern Territory, *Response to Stronger Futures* (2011), p 39. At <http://www.amsant.org.au/documents/article/154/111608%20-%20APONT%20submission%20to%20Stronger%20Futures%20-%20Final-2.pdf> (viewed 20 January 2012).
- ¹⁹ Australian Government, *Stronger Futures in the Northern Territory Report on Consultations* (2011), pp 69, 73. At <http://www.indigenous.gov.au/stronger-futures-in-the-northern-territory-report-on-consultations/> (viewed 20 January 2012).
- ²⁰ Australians for Native Title and Reconciliation, *A Better Way: Building healthy, safe and sustainable communities in the Northern Territory through a community development approach* (2011), p 12. At <http://www.antar.org.au/sites/default/files/NT%20Community%20development%20policy%20paper%20FINAL.pdf> (viewed 20 January 2012).
- ²¹ Aboriginal Peak Organisations of the Northern Territory, *Response to Stronger Futures* (2011), p 39. At <http://www.amsant.org.au/documents/article/154/111608%20-%20APONT%20submission%20to%20Stronger%20Futures%20-%20Final-2.pdf> (viewed 20 January 2012).
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- ²³ Australian Government, *Stronger Futures in the Northern Territory Report on Consultations* (2011), p 73. At <http://www.indigenous.gov.au/stronger-futures-in-the-northern-territory-report-on-consultations/> (viewed 20 January 2012); Australian Government, *Northern Territory Emergency Response Evaluation Report* (2011), p 43. At http://www.fahcsia.gov.au/sa/indigenous/pubs/nter_reports/Pages/nter_evaluation_rpt_2011.aspx (viewed 21 November 2011); Australian Government, *Northern Territory Emergency Response: Report of the NTER Review Board* (2008), p 55. At <http://www.nterreview.gov.au/report.htm> (viewed 29 November 2011); Aboriginal Peak Organisations of the Northern Territory, *Response to Stronger Futures* (2011), p 39. At <http://www.nlc.org.au/html/files/20111608%20-%20APONT%20submission%20to%20Stronger%20Futures%20-%20Final.pdf> (viewed 30 November 2011).
- ²⁴ Australian Government, *Stronger Futures in the Northern Territory Report on Consultations* (2011), pp 70-72. At <http://www.indigenous.gov.au/stronger-futures-in-the-northern-territory-report-on-consultations/> (viewed 20 January 2012).
- ²⁵ Australian Government, *Northern Territory Emergency Response Evaluation Report* (2011), pp 132-150, 152-154. At http://www.fahcsia.gov.au/sa/indigenous/pubs/nter_reports/Pages/nter_evaluation_rpt_2011.aspx (viewed 21 November 2011).
- ²⁶ Australian Government, *Overview of options being considered through the Stronger Futures in the Northern Territory program response*, Department of Families, Housing, Community Services and Indigenous Affairs (2011), p 3.

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- ²⁷ Australians for Native Title and Reconciliation, *A Better Way: Building healthy, safe and sustainable communities in the Northern Territory through a community development approach* (2011) p 22. At <http://www.antar.org.au/sites/default/files/NT%20Community%20development%20policy%20paper%20FINAL.pdf> (viewed 20 January 2012).
- ²⁸ Office of the Coordinator General for Remote Indigenous Services, *Six Monthly Report: April 2011 – September 2011* (2011), p 1. At http://cgris.gov.au/site/s2011_report.asp (viewed 12 January 2012).
- ²⁹ Australian Government, *Stronger Futures in the Northern Territory Report on Consultations* (2011), p 7. At <http://www.indigenous.gov.au/stronger-futures-in-the-northern-territory-report-on-consultations/> (viewed 20 January 2012).
- ³⁰ Jenny Macklin, Minister for Families, Housing, Community Services and Indigenous Affairs, 'More jobs, better job opportunities for Aboriginal people in the Northern Territory', (Media Release 14 November 2011). At http://www.jennymacklin.fahcsia.gov.au/mediareleases/2011/Pages/jobs_better_opportunities_nt_14nov11.aspx (viewed 9 December 2011).
- ³¹ M Gooda, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice Report 2010*, Australian Human Rights Commission (2011), pp 105-117. At http://www.humanrights.gov.au/social_justice/sj_report/sjreport10/index.html (viewed 10 January 2012).
- ³² Northern Territory Emergency Response Review Board, *Report of the Northern Territory Review Board*, Attorney-General's Department (2008), p 49. At http://www.terreview.gov.au/docs/report_nter_review/default.htm (viewed 17 January 2012).
- ³³ Northern Territory Emergency Response Review Board, *Report of the Northern Territory Review Board*, Attorney-General's Department (2008), p 49. At http://www.terreview.gov.au/docs/report_nter_review/default.htm (viewed 17 January 2012).
- ³⁴ See M Gooda, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice Report 2010*, Australian Human Rights Commission (2011), ch 3. At http://www.humanrights.gov.au/social_justice/sj_report/sjreport10/index.html (viewed 10 January 2012).
- ³⁵ Lateral violence has been described as: '[T]he organised, harmful behaviours that we do to each other collectively as part of an oppressed group: within our families; within our organisations and; within our communities. When we are consistently oppressed we live with great fear and great anger and we often turn on those who are closest to us': M Gooda, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice Report 2011*, Australian Human Rights Commission (2011), p 52. At http://www.humanrights.gov.au/social_justice/sj_report/sjreport11/index.html (viewed 10 January 2012).
- ³⁶ M Bamblett, *Panel discussion on lateral violence*, (Delivered at panel discussion launch of the Social Justice and Native Title Reports 2011), Sydney, 24 November 2011. At http://www.humanrights.gov.au/about/media/news/2011/132_11.html (viewed 19 Jan 2012).
- ³⁷ The AIATSIS Workshop on identity identified creating safety to enable a place and process for robust discussion was crucial to changing the negative conversations about identity to focus on solutions: S Gorringer, J Ross and C Fforde, 'Will the Real Aborigine Please Stand Up': *Strategies for breaking the stereotypes and changing the conversation*, AIATSIS Research Discussion Paper 28 (2011), p 11. At www.aiatsis.gov.au/research/documents/AIATSISDiscussionPaper28.pdf (viewed 21 September 2011).
- ³⁸ See M Gooda, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice Report 2011*, Australian Human Rights Commission (2011), pp 122-123. At http://www.humanrights.gov.au/social_justice/sj_report/sjreport11/index.html (viewed 10 January 2012).
- ³⁹ National Health and Medical Research Council, *Cultural Competency in Health: A guide for policy, partnerships and participation* (2006), p 7. At <http://www.nhmrc.gov.au/guidelines/publications/hp19-hp26> (viewed 12 September 2009).
- ⁴⁰ The Commission refers the Committee to Chapter 4 of the Social Justice Report 2011 (set out in Appendix 3), which provides a detailed examination of cultural safety and security in the context of lateral violence in Aboriginal and Torres Strait Islander communities. Chapters 2 and 3 provide important context to this discussion: M Gooda, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice Report 2011*, Australian Human Rights Commission (2011). At http://www.humanrights.gov.au/social_justice/sj_report/sjreport11/index.html (viewed 10 January 2012).

⁴¹ M Gooda, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice Report 2011*, Australian Human Rights Commission (2011), pp 125-127. At http://www.humanrights.gov.au/social_justice/sj_report/sjreport11/index.html (viewed 10 January 2012).

⁴² Section 8(1) provides:

(1) This Part does not apply to, or in relation to the application of, special measures to which paragraph 4 of Article 1 of the Convention applies except measures in relation to which sub-section 10(1) applies by virtue of sub-section 10(3).

⁴³ Committee on the Elimination of Racial Discrimination, *General Recommendation No 32 (2009): The meaning and scope of special measures in the International Convention on the Elimination of All Forms Racial Discrimination*, CERD/C/GC/32, 24 September 2009, paras 11–12. At <http://www2.ohchr.org/english/bodies/cerd/comments.htm> (viewed 18 January 2012).

⁴⁴ Article 2(2) of the CERD obliges the Government to take special measures, when the circumstances so warrant, in the social, economic, cultural and other fields, to ensure the adequate development and protection of certain racial groups or individuals belonging to them, for the purpose of guaranteeing them the full and equal enjoyment of human rights and fundamental freedoms.

Article 1(4) of the CERD 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. *International Convention on the Elimination of All Forms of Racial Discrimination*, 1965, arts 1(4), 2(2). At <http://www2.ohchr.org/english/law/cerd.htm> (viewed 18 January 2012).

⁴⁵ See, for example, Committee on the Elimination of Racial Discrimination, *General Recommendation No 32 (2009): The meaning and scope of special measures in the International Convention on the Elimination of All Forms Racial Discrimination*, CERD/C/GC/32, 24 September 2009, para 20. At <http://www2.ohchr.org/english/bodies/cerd/comments.htm> (viewed 18 January 2012).

⁴⁶ *Gerhardy v Brown* (1985) 159 CLR 70,133 (Brennan J).

⁴⁷ Committee on the Elimination of Racial Discrimination, *General Recommendation No 32 (2009): The meaning and scope of special measures in the International Convention on the Elimination of All Forms Racial Discrimination*, CERD/C/GC/32, 24 September 2009, para 16. At <http://www2.ohchr.org/english/bodies/cerd/comments.htm> (viewed 18 January 2012).

⁴⁸ M Gooda, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2010*, Australian Human Rights Commission (2011), Ch 3. At http://www.hreoc.gov.au/social_justice/nt_report/ntreport10/index.html (viewed 18 January 2012).

⁴⁹ *Families, Community Services and Indigenous Affairs and Other Legislation Amendment (Northern Territory National Emergency Response and Other Measures) Act 2007* (Cth), s 4; *Northern Territory National Emergency Response Act 2007* (Cth), s 132; *Social Security and Other Legislation Amendment (Welfare Payment Reform) Act 2007* (Cth), ss 4, 6.

⁵⁰ *Families, Community Services and Indigenous Affairs and Other Legislation Amendment (Northern Territory National Emergency Response and Other Measures) Act 2007* (Cth), s 4; *Northern Territory National Emergency Response Act 2007* (Cth), s 132; *Social Security and Other Legislation Amendment (Welfare Payment Reform) Act 2007* (Cth), ss 4, 6. The original NTER legislation also exempted the operation of the Northern Territory’s anti-discrimination laws: *Families, Community Services and Indigenous Affairs and Other Legislation Amendment (Northern Territory National Emergency Response and Other Measures) Act 2007* (Cth), s 5; *Northern Territory National Emergency Response Act 2007* (Cth), s 133; *Social Security and Other Legislation Amendment (Welfare Payment Reform) Act 2007* (Cth), ss 5, 7. But see *Northern Territory National Emergency Response Act 2007* (Cth), Notes, Table A: ‘Application, saving or transitional provisions’ (*Families, Community Services and Indigenous Affairs and Other Legislation Amendment (Northern Territory National Emergency Response and Other Measures) Act 2007* (Cth), s 4(3)).

⁵¹ Human Rights and Equal Opportunity Commission, ‘A human rights based approach is vital to address the challenges in Indigenous communities’ (Media release, 26 June 2007). At www.humanrights.gov.au/about/media/media_releases/2007/45_07.html (viewed 19 January 2012).

⁵² Human Rights and Equal Opportunity, *Submission to the Senate Legal and Constitutional Committee on the Northern Territory National Emergency Response Legislation* (2007), 10 August 2007. At http://www.humanrights.gov.au/legal/submissions/2007/NTNER_Measures20070810.html (viewed 19 January 2012).

⁵³ Human Rights and Equal Opportunity, *Submission to the Senate Legal and Constitutional Committee on the Northern Territory National emergency Response Legislation* (2007), 10 August 2007. At http://www.humanrights.gov.au/legal/submissions/2007/NTNER_Measures20070810.html (viewed 19 January 2012).

⁵⁴ T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice Report 2007*, Human Rights and Equal Opportunity Commission (2008), ch 3. At http://www.humanrights.gov.au/social_justice/sj_report/sjreport07/index.html (viewed 19 January 2012).

Significantly, the Special Rapporteur on the rights of indigenous peoples (Special Rapporteur) did not accept that the discriminatory aspects of the original NTER measures had not been shown to qualify as special measures. He observed that the Australian Government did not engage in adequate consultation before the measures were enacted. Further the Special Rapporteur considered that the measures were not proportional or necessary to the stated objectives of the NTER: J Anaya, Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, James Anaya: Addendum: Situation of indigenous peoples in Australia, Report to the Human Rights Council, 15th session, UN Doc A/HRC/15/37/Add.4 (2010), Appendix B, paras 20–23. At <http://www2.ohchr.org/english/bodies/hrcouncil/15session/reports.htm> (viewed 18 January 2012). Similarly, the CERD Committee in August 2010 expressed its concern that the NTER legislation discriminated ‘on the basis of race including through the use of so-called “special measures” by the State party.’ The CERD Committee further regretted ‘the discriminatory impact this intervention has had on affected communities, including restrictions on Aboriginal rights to land, property, social security, adequate standards of living, cultural development, work and remedies.’: Committee on the Elimination of Racial Discrimination, Concluding observations of the Committee on the Elimination of Racial Discrimination: Australia, CERD/C/AUS/CO/15-17, 13 September 2010. At <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G10/449/00/PDF/G1044900.pdf?OpenElement> (viewed 19 January 2012).

⁵⁵ *Social Security and Other Legislation Amendment (Welfare Reform and Reinstatement of Racial Discrimination Act) Act 2010* (Cth), sch 1, items 1–3. This also repealed the sections exempting the operation of the Northern Territory’s anti-discrimination laws.

⁵⁶ Those purposes were: alcohol restrictions, five-year leases, community store licensing and prohibited material restrictions. Similar object clauses were not proposed for controls on use of publicly funded computers, law enforcement powers or business management areas powers. However, the Government indicated that it considered these additional three measures to be ‘special measures’ for the purposes of the RDA.

⁵⁷ Australian Human Rights Commission, *The Suspension and Reinstatement of the RDA and Special Measures in the NTER* (2011). At http://www.humanrights.gov.au/racial_discrimination/publications/rda-nter/1.html# (viewed 18 January 2012).

⁵⁸ Commonwealth, *Parliamentary Debates*, House of Representatives, 23 November 2011, (The Hon Jenny Macklin MP, Minister for Families, Housing, Community Services and Indigenous Affairs). At http://parlinfo.aph.gov.au/parlInfo/genpdf/chamber/hansardr/14965034-cdb8-4a26-98aa-26c862a1cd0e/0030/hansard_frag.pdf;fileType=application%2Fpdf (viewed 18 January 2012).

⁵⁹ See Explanatory Memorandum, Stronger Futures in the Northern Territory Bill 2011 (Cth), pp 1-3, 20, 29. At http://parlinfo.aph.gov.au/parlInfo/download/legislation/ems/r4736_ems_f6c14ab7-6aa9-49f1-b604-2e4503a32f6d/upload_pdf/362725.pdf;fileType=application%2Fpdf (viewed 18 January 2012); Explanatory Memorandum, Stronger Futures in the Northern Territory (Consequential and Transitional Provisions) Bill 2011 (Cth), pp 12, 15. At http://parlinfo.aph.gov.au/parlInfo/download/legislation/ems/r4737_ems_f57fea5a-ccc3-43f0-948f-7e5f90788943/upload_pdf/362724.pdf;fileType=application%2Fpdf (viewed 18 January 2012).

⁶⁰ Australian Human Rights Commission, *Submission to the Senate Community Affairs Committee Inquiry into the Welfare Reform and Reinstatement of Racial Discrimination Act Bill 2009 and other Bills* (10 February 2010), para 90.

⁶¹ *International Covenant on Economic, Social and Cultural Rights*, 1966, arts 2, 3.

⁶² For further information see T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice Report 2007*, Human Rights and Equal Opportunity Commission (2008), pp 271-277. At http://www.hreoc.gov.au/social_justice/sj_report/sjreport07/chap3.html#part3 (viewed 25 January 2012).

⁶³ Department of Families, Housing, Community Services and Indigenous Affairs, *Policy Statement: Landmark Reform to the Welfare System, Reinstatement of the Racial Discrimination Act and*

Strengthening of the Northern Territory Emergency Response (2009), p 6. At http://www.facsia.gov.au/sa/indigenous/pubs/nter_reports/policy_statement_nter/Documents/landmark_reform_welfare_system.pdf (viewed 4 February 2010).

⁶⁴ T Calma, Aboriginal and Torres Strait Islander Commissioner, *Social Justice Report 2007*, Human Rights and Equal Opportunity Commission (2008), pp 251-256, 268-280. At http://www.humanrights.gov.au/social_justice/sj_report/sjreport07/index.html (viewed 11 January 2012).

⁶⁵ *Social Security (Administration) Act 1999* (Cth), s 123TA.

⁶⁶ *Social Security (Administration) Act 1999* (Cth), ss 123UGB, 123UGC, 123UGD.

⁶⁷ Australian Human Rights Commission, *Submission to the Senate Community Affairs Committee Inquiry into the Welfare Reform and Reinstatement of Racial Discrimination Act Bill 2009 and other Bills*, (10 February 2010), paras 71-120.

⁶⁸ Social Security Legislation Amendment Bill 2011 (Cth), Part 1, Items 6, 10.

⁶⁹ Social Security Legislation Amendment Bill 2011 (Cth), Schedule 1.

⁷⁰ Social Security Legislation Amendment Bill 2011 (Cth) Part 2.

⁷¹ Social Security Legislation Amendment Bill 2011 (Cth) Part 2.

⁷² Social Security Legislation Amendment Bill 2011 (Cth), Schedule 1.

⁷³ Consultation in these circumstances is not mandatory under the *Legislative Instruments Act 2003* (Cth), s 17- 19.

⁷⁴ See item 19 of the Social Security Legislation Amendment Bill 2011 (Cth) as well as proposed ss 123UCA(3), 123UCC(4) and 123UCB(4).

⁷⁵ Proposed s 123TGAA of the *Social Security (Administration) Act 1999* (Cth).

⁷⁶ Explanatory Memorandum to Social Security Legislation Amendment Bill 2011 (Cth), p 2.

⁷⁷ Commonwealth, Official Committee Hansard: Senate Estimates (Additional Estimates), Senate Community Affairs Legislation Committee (25 February 2011), p 22 (L Hefren-Webb, Department of Families, Housing, Community Services and Indigenous Affairs). At http://www.aph.gov.au/hansard/senate/commtee/committee_transcript.asp?MODE=YEAR&ID=80&YEAR=2011 (viewed 10 October 2011).

⁷⁸ Australian Bureau of Statistics. 1362.7 - *Regional Statistics, Northern Territory, March 2011*. At <http://www.abs.gov.au/ausstats/abs@.nsf/Latestproducts/1362.7Feature%20Article1Mar%202011?opendocument&tabname=Summary&prodno=1362.7&issue=Mar%202011&num=&view=#Aboriginal> (viewed 27 November 2011).

⁷⁹ Australian Bureau of Statistics, *National Regional Profile: Playford (C) (Local Government Area)*, At <http://www.abs.gov.au/AUSSTATS/abs@.nsf/Previousproducts/LGA45680Population/People12004-2008?opendocument&tabname=Summary&prodno=LGA45680&issue=2004-2008> (viewed 18 January 2012).

⁸⁰ Australian Bureau of Statistics, *National Regional Profile: Bankstown (C) (Local Government Area)*.

At

<http://www.abs.gov.au/AUSSTATS/abs@nrp.nsf/Latestproducts/LGA10350Population/People12006-2010?opendocument&tabname=Summary&prodno=LGA10350&issue=2006-2010> (viewed 18 January 2012). Similarly in Logan (Queensland) 25.2 % of its total population: Australian Bureau of Statistics, *National Regional Profile: Logan (C) (Local Government Area)*. At

<http://www.abs.gov.au/AUSSTATS/abs@nrp.nsf/Latestproducts/LGA34590Population/People12006-2010?opendocument&tabname=Summary&prodno=LGA34590&issue=2006-2010> (viewed 18 January 2012).

⁸¹ It also amended the *A New Tax System (Family Assistance) Act 1999* (Cth), the *Student Assistance Act 1973* (Cth) and the *Veterans' Entitlements Act 1986* (Cth).

⁸² *Social Security (Administration) Act 1999* (Cth), ss 124F-124H, 124K-124M.

⁸³ Social Security Legislation Amendment Bill 2011 (Cth), item 11.

⁸⁴ Secretary of the Department for Families, Housing, Community Services and Indigenous Affairs.

⁸⁵ Social Security Legislation Amendment Bill 2011(Cth), item 11, s 124NB.

⁸⁶ Social Security Legislation Amendment Bill 2011(Cth), item 11, s 124ND.

⁸⁷ Social Security Legislation Amendment Bill 2011(Cth), item 11, s 124NE.

⁸⁸ *Social Security (Administration) Act 1999* (Cth), s 123D.

⁸⁹ Social Security Legislation Amendment Bill 2011 (Cth), item 11, s 124NF.

⁹⁰ Social Security Legislation Amendment Bill 2011 (Cth), item 11, s 124NG.

⁹¹ W Jonas, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 1999*, Human Rights and Equal Opportunity Commission (2000), ch 4. At http://www.humanrights.gov.au/social_justice/sj_report/99_report.html (viewed 31 January 2012); T

Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2008*, Human Rights and Equal Opportunity Commission (2009), ch 3. At http://www.humanrights.gov.au/social_justice/sj_report/sjreport08/index.html (viewed 31 January 2012).

⁹² Department of Families, Housing, Community Services and Indigenous Affairs, *Northern Territory Emergency Response Evaluation Report 2011* (2011), p 292. At http://www.fahcsia.gov.au/sa/indigenous/pubs/nter_reports/Pages/nter_evaluation_rpt_2011.aspx (viewed 18 January 2011).

⁹³ T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2008*, Human Rights and Equal Opportunity Commission (2009), p 101. At http://www.humanrights.gov.au/social_justice/sj_report/sjreport08/index.html (viewed 31 January 2012).

⁹⁴ Australian Government Closing the gap clearinghouse, *School attendance and retention of Indigenous Australian students*, Issues Paper No 1 (2010), p 19. At <http://www.aihw.gov.au/closingthegap/> (viewed 31 January 2012).

⁹⁵ Department of Employment and Workplace Relations, *Halls Creek Engaging Families Trial February–July 2006, Evaluation Report* (2006). At http://www.aihw.gov.au/closingthegap/resources/item.cfm?item_id=5372&group_type=BB&group_id=2&q=&start=229 (viewed 18 January 2012).

⁹⁶ Combined Aboriginal Organisations of the Northern Territory, *A proposed emergency response and development plan to protect Aboriginal children in the Northern Territory: A preliminary response to the Australian Government's proposals* (2007), p18. At <http://indigenoustjustice.gov.au/db/publications/276547.html>, (viewed 1 February 2011).

⁹⁷ Department of Employment and Workplace Relations, *Halls Creek Engaging Families Trial February–July 2006, Evaluation Report* (2006). At http://www.aihw.gov.au/closingthegap/resources/item.cfm?item_id=5372&group_type=BB&group_id=2&q=&start=229 (viewed 18 January 2012).

⁹⁸ Department of Employment and Workplace Relations, *Improving School Enrolment and Attendance through Welfare Reform Measure (SEAM): Evaluation Report for the Northern Territory in 2009 with early findings for 2010* (2011), p 25.

⁹⁹ Department of Employment and Workplace Relations, *Halls Creek Engaging Families Trial February–July 2006, Evaluation Report* (2006), p 33. At http://www.aihw.gov.au/closingthegap/resources/item.cfm?item_id=5372&group_type=BB&group_id=2&q=&start=229 (viewed 18 January 2012).

¹⁰⁰ Department of Employment and Workplace Relations, *Improving School Enrolment and Attendance through Welfare Reform Measure (SEAM): Evaluation Report for the Northern Territory in 2009 with early findings for 2010* (2011), p 28.

¹⁰¹ Department of Education, Employment and Workplace Relations, *Improving School Enrolment and Attendance through Welfare Reform Measure (SEAM): Evaluation Report for 2010* (January 2012). At: <http://www.deewr.gov.au/Schooling/Programs/Pages/SEAM.aspx> (viewed 6 February 2012).

¹⁰² Department of Education, Employment and Workplace Relations, *Improving School Enrolment and Attendance through Welfare Reform Measure (SEAM): Evaluation Report for 2010* (January 2012), p iv. At: <http://www.deewr.gov.au/Schooling/Programs/Pages/SEAM.aspx> (viewed 6 February 2012).

¹⁰³ *International Covenant on Economic, Social, and Cultural Rights 1966*, art 9; *Universal Declaration of Human Rights*, 1948, arts 13, 26(1).

¹⁰⁴ *Convention on the Rights of the Child*, 1990, art 28(e).

¹⁰⁵ *International Covenant on Economic, Social, and Cultural Rights 1966*, art 9; *Universal Declaration of Human Rights*, 1948, art 22.

¹⁰⁶ *United Nations Convention on the Rights of the Child*, 1989, arts 3, 26.

¹⁰⁷ Department of Employment and Workplace Relations, *Halls Creek Engaging Families Trial, February–July 2006: Evaluation Report*, (2006), p 12. At <http://mediacentre.deewr.gov.au/NR/rdonlyres/2B10D46E-592B-4531-B149-A5B91E69A13E/0/KA265HallsCreekEngagingFamiliesReport4October.pdf> (also citing Australian Council of Educational Research, 1998); D Fein, W Lee and C Schofield, *The ABC Evaluation: Do Welfare Recipients' Children Have a School Attendance Problem?*(1999) Delaware Health and Social Services, Delaware.

¹⁰⁸ Australian Bureau of Statistics, 'Basic Community Profile – Katherine (UCL 703600), 15.8 sq. Kms', 2001 Census of Population and Housing. At <http://www.censusdata.abs.gov.au/ABSNavigation/prenav/ViewData?&action=404&documentproductn>

[o=UCL703600&documenttype=Details&tabname=Details&areacode=UCL703600&issue=2001&producttype=Community%20Profiles&&producttype=Community%20Profiles&textversion=false&navmapdisplayed=true&breadcrumb=LPD&#Basic%20Community%20Profile](http://www.ahrc.gov.au/Content/Document.aspx?o=UCL703600&documenttype=Details&tabname=Details&areacode=UCL703600&issue=2001&producttype=Community%20Profiles&&producttype=Community%20Profiles&textversion=false&navmapdisplayed=true&breadcrumb=LPD&#Basic%20Community%20Profile) (viewed 18 January 2012).

¹⁰⁹ For example, in the Northern Territory the attendance rates for Aboriginal and Torres Strait Islander children in Term 3, 2011 was 65.2% compared with 90.4% for non-Indigenous children: Northern Territory Department of Education and Training, *Enrolment and attendance statistics (2011)*. At <http://www.det.nt.gov.au/students/at-school/enrolment-attendance/enrolment-attendance-statistics> (viewed 12 January 2012).

¹¹⁰ This may also be a concern in areas such as Cannington, one of the selected trial sites, where there are a high proportion of cultural and linguistically diverse communities. The Commission notes care must similarly be given to ensuring the Bill does not have a disproportionate impact on culturally and linguistically diverse communities.

¹¹¹ For further discussion see T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2007*, Human Rights and Equal Opportunity Commission (2008), pp 273-276. At http://www.humanrights.gov.au/social_justice/sj_report/sjreport07/index.html (viewed 30 January 2012). Also see General Comment 20 on the implementation of ICESCR by the United Nations Committee on Economic, Social and Cultural Rights: UN Doc: E/C. 12/GC/20/CRP. 1. At: <http://www2.ohchr.org/english/bodies/cescr/comments.htm> (viewed 30 January 2012).

¹¹² Australian Government, *Stronger Futures in the Northern Territory Discussion paper* (2011), p 10. At <http://www.indigenous.gov.au/stronger-futures-in-the-northern-territory/> (viewed 18 January 2012).

¹¹³ Department of Employment and Workplace Relations, *Improving School Enrolment and Attendance through Welfare Reform Measure (SEAM): Evaluation Report for the Northern Territory in 2009 with early findings for 2010* (2011), p 25.

¹¹⁴ Australian Government, *Stronger Futures in the Northern Territory: Report on Consultations* (2011), p 23. At <http://www.indigenous.gov.au/stronger-futures-in-the-northern-territory-report-on-consultations/> (viewed 18 January 2012).

¹¹⁵ Australian Government, *Stronger Futures in the Northern Territory: Report on Consultations* (2011), p 24. At <http://www.indigenous.gov.au/stronger-futures-in-the-northern-territory-report-on-consultations/> (viewed 18 January 2012).

¹¹⁶ Concerned Australians, *Cuts to Welfare Payments for School Non-Attendance: Requested or Imposed?* (2011), p 14. At <http://www.concernedaustralians.com.au/> (viewed 18 January 2012).

¹¹⁷ Australian Government, *Stronger Futures in the Northern Territory: Report on Consultations* (2011), p 20. At <http://www.indigenous.gov.au/stronger-futures-in-the-northern-territory-report-on-consultations/> (viewed 18 January 2012).

¹¹⁸ Australian Government, *Stronger Futures in the Northern Territory: Report on Consultations* (2011), p 22. At <http://www.indigenous.gov.au/stronger-futures-in-the-northern-territory-report-on-consultations/> (viewed 18 January 2012).

¹¹⁹ Australian Government, *Stronger Futures in the Northern Territory: Report on Consultations* (2011), p 26. At <http://www.indigenous.gov.au/stronger-futures-in-the-northern-territory-report-on-consultations/> (viewed 18 January 2012).

¹²⁰ Evidence from an Australian study also demonstrates marginally better English literacy outcomes for students from bilingual schools at the end of primary school compared with students from non-bilingual schools with similar languages, demography and contact histories: Department of Employment, Education and Training, Northern Territory Government, *Indigenous Languages and Culture in Northern Territory Schools Report 2004 – 2005* (2004), pp 34-37. At http://www.det.nt.gov.au/_data/assets/pdf_file/0009/5130/ILCreport.pdf (viewed 13 December 2010).

Also see recent reports which suggest that National Assessment Program Literacy and Numeracy (NAPLAN) results have fallen in some schools in the Northern Territory where bilingual education was stopped: M Schliebs, 'Four hours of English policy hitting test results', *The Australian*, 16 November 2010.

¹²¹ Explanatory Memorandum, Social Security Legislation Amendment Bill 2011 (Cth), p 14.

¹²² Social Security Legislation Amendment Bill 2011 (Cth), item 11, s 124NE(2).

¹²³ Social Security Legislation Amendment Bill 2011 (Cth), item 11, s 124NG.

¹²⁴ D Gray and E Wilkes, *Reducing alcohol and other drug related harm*, Closing the gap clearinghouse Resource sheet no. 3 (2010), p 1. At http://www.aihw.gov.au/closingthegap/documents/resource_sheets/ctgc-rs03.rtf (viewed 22 November 2011).

¹²⁵ D Gray and E Wilkes, *Reducing alcohol and other drug related harm*, Closing the gap clearinghouse Resource sheet no. 3 (2010), p 2. At

http://www.aihw.gov.au/closingthegap/documents/resource_sheets/ctgc-rs03.rtf (viewed 22 November 2011).

¹²⁶ *Morton v Queensland Police Service* [2010] QCA 160 [20] (McMurdo P). See also: *Gerhardy v Brown* [1984-1985] 159 CLR 70. Mason J at 101 states that the ‘expression (human rights) includes claims of individuals as members of a racial or ethnic group to equal treatment of the members of that group in common with other persons and to the protection and preservation of the cultural and spiritual heritage of that group’.

¹²⁷ *Gerhardy v Brown* [1984-1985] 159 CLR 70, 135 (Brennan J). Cf *Morton v Queensland Police Service* [2010] QCA 160.

¹²⁸ Australian Human Rights Commission, *Submission to the Senate Community Affairs Committee Inquiry into the Welfare Reform and Reinstatement of Racial Discrimination Act Bill 2009 and other Bills* (10 February 2010), para 129. At

http://www.humanrights.gov.au/legal/submissions/sj_submissions/2010_welfare_reform.html#s9_2 (viewed 19 January 2012).

¹²⁹ *Gerhardy v Brown* [1984-1985] 159 CLR 70, 135 (Brennan J). Cf *Morton v Queensland Police Service* [2010] QCA 160.

¹³⁰ For more information on the community led alcohol restrictions in the Fitzroy Valley see M Gooda, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice Report 2010*, Australian Human Rights Commission (2011), ch 3. At

http://www.humanrights.gov.au/social_justice/sj_report/sjreport10/index.html (viewed 16 December 2011).

¹³¹ See T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice Report 2007*, Human Rights and Equal Opportunity Commission (2008), pp 285-289. At

http://www.humanrights.gov.au/social_justice/sj_report/sjreport07/index.html (viewed 9 January 2012); D Gray and E Wilkes, *Reducing alcohol and other drug related harm*, Closing the gap clearinghouse Resource sheet no. 3 (2010), pp 1-2. At

http://www.aihw.gov.au/closingthegap/documents/resource_sheets/ctgc-rs03.rtf (viewed 22 November 2011).

¹³² Aboriginal and Torres Strait Islander Legal Services and Aboriginal Peak Organisations Northern Territory, *The Future of the Northern Territory ‘Intervention’: Issues Paper* (2010), p 7.

¹³³ See T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice Report 2007* (2008), ch 2. At http://humanrights.gov.au/social_justice/sj_report/sjreport07/chap3.html (viewed 20 January 2010).

¹³⁴ D Gray and E Wilkes, *Reducing alcohol and other drug related harm*, Closing the gap clearinghouse Resource sheet no. 3 (2010), p 7. At

http://www.aihw.gov.au/closingthegap/documents/resource_sheets/ctgc-rs03.rtf (viewed 22 November 2011).

¹³⁵ Department of Families, Housing, Community Services and Indigenous Affairs, *Policy Statement: Landmark Reform to the Welfare System, Reinstatement of the Racial Discrimination Act and Strengthening of the Northern Territory Emergency Response* (2009), p 6. At

http://www.facsia.gov.au/sa/indigenous/pubs/nter_reports/policy_statement_nter/Documents/landmark_reform_welfare_system.pdf (viewed 4 February 2010).

¹³⁶ Department of Families, Housing, Community Services and Indigenous Affairs, *Policy Statement: Landmark Reform to the Welfare System, Reinstatement of the Racial Discrimination Act and Strengthening of the Northern Territory Emergency Response* (2009), p 6. At

http://www.facsia.gov.au/sa/indigenous/pubs/nter_reports/policy_statement_nter/Documents/landmark_reform_welfare_system.pdf (viewed 4 February 2010).

¹³⁷ T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice Report 2007*, Human Rights and Equal Opportunity Commission (2008), pp 285-289. At

http://www.humanrights.gov.au/social_justice/sj_report/sjreport07/index.html (viewed 9 January 2012).

¹³⁸ *Social Security and Other Legislation Amendment (Welfare Reform and Reinstatement of Racial Discrimination Act) Act 2010* (Cth), sch 3.

¹³⁹ These powers have not been carried over to the Stronger Futures Bills which the Commission welcomes.

¹⁴⁰ Australian Human Rights Commission, *Submission to the Senate Community Affairs Committee Inquiry into the Welfare Reform and Reinstatement of Racial Discrimination Act Bill 2009 and other Bills* (2010), 10 February 2010, paras 123-124. At

http://www.humanrights.gov.au/legal/submissions/sj_submissions/2010_welfare_reform.html (viewed 16 December 2011).

¹⁴¹ Australian Human Rights Commission, *Submission to the Senate Community Affairs Committee Inquiry into the Welfare Reform and Reinstatement of Racial Discrimination Act Bill 2009 and other Bills* (2010), 10 February 2010, paras 126-136. At http://www.humanrights.gov.au/legal/submissions/sj_submissions/2010_welfare_reform.html (viewed 16 December 2011).

¹⁴² Australian Human Rights Commission, *Submission to the Senate Community Affairs Committee Inquiry into the Welfare Reform and Reinstatement of Racial Discrimination Act Bill 2009 and other Bills* (2010), 10 February 2010, paras 126-131. At http://www.humanrights.gov.au/legal/submissions/sj_submissions/2010_welfare_reform.html (viewed 16 December 2011).

¹⁴³ Many of the communities which fall within the prescribed areas to which the NTER restrictions apply were “dry” communities before the NTER began. The NTER restrictions, however, applied to a number of communities that did not previously have restrictions and to areas of land beyond the boundaries of the communities. See: *Stronger Futures in the Northern Territory Bill 2011 (Cth), Alcohol Proposals Regulation Impact Statement/ Post Implementation Review*, Department of Families, Housing, Community Services and Indigenous Affairs, (2011), p 7.

¹⁴⁴ *Stronger Futures in the Northern Territory Bill 2011 (Cth)*, s 7.

¹⁴⁵ See *Stronger Futures in the Northern Territory Bill 2011 (Cth)*, s 8.

¹⁴⁶ Before making, revoking or varying a rule the Minister must ensure that information about the proposal to make the rule, together with a short explanation of the consequences if such a rule is made, have been made available in the area in question. The Minister must also ensure people in the affected area have been given a ‘reasonable opportunity’ to make submissions to the Minister about the proposal to make the rule, the consequences if the rule is made and their circumstances, concerns and views: *Stronger Futures in the Northern Territory Bill 2011 (Cth)*, s 27(6).

¹⁴⁷ The Commission notes that the community consultation requirement does not apply if the rule is in relation to the approval of an alcohol management plan: *Stronger Futures in the Northern Territory Bill 2011 (Cth)*, s 27(7). The Explanatory Memorandum states that there should be sufficient community consultation prior to an alcohol management plan being approved: Explanatory Memorandum, *Stronger Futures in the Northern Territory Bill 2011 (Cth)*, p 18. Providing the issues highlighted in this submission regarding the community consultation elements of the alcohol management plans are addressed, the Commission does not envisage that this should cause concern.

¹⁴⁸ *Stronger Futures in the Northern Territory Bill 2011 (Cth)*, ss 27(6), 27(9)(g).

¹⁴⁹ See *Stronger Futures in the Northern Territory (Consequential and Transitional Provisions) Bill 2011*, sch 1, pt 3.

¹⁵⁰ Commonwealth, *Parliamentary Debates*, House of Representatives, 23 November 2011, pp 6,8, 9.

¹⁵¹ *Northern Territory National Emergency Response Act 2007 (Cth)*, s 18 to be repealed by *Stronger Futures in the Northern Territory (Consequential and Transitional Provisions) Bill 2011*, Schedule 1.

¹⁵² *Stronger Futures in the Northern Territory Bill 2011 (Cth)*, s 10.

¹⁵³ Explanatory Memorandum, *Stronger Futures in the Northern Territory Bill 2011 (Cth)*, p 8.

¹⁵⁴ The Northern Territory Minister is the Minister responsible for the NT Liquor Act: *Stronger Futures in the Northern Territory Bill 2011 (Cth)*, s 5.

¹⁵⁵ *Stronger Futures in the Northern Territory Bill 2011 (Cth)*, s 117.

¹⁵⁶ Established under the *Aboriginal and Torres Strait Islander Communities (Justice, Land and Other Matters) Act 1984 (Qld)*, part 4.

¹⁵⁷ See *Liquor Act 1992 (Qld)*, s173I.

¹⁵⁸ KPMG, *Department of Justice and Attorney General Evaluation of the Community Justice Groups: Final Report* (2010), p 47. At http://www.justice.qld.gov.au/_data/assets/pdf_file/0005/131369/cjg-evaluation-report-nov-2010.pdf (viewed 19 January 2012).

¹⁵⁹ P Anderson and R Wild, *Ampe Akelyernemane Meke Mekarle ‘Little Children are Sacred’*, Report of the Northern Territory Board of Inquiry into the Protection of Aboriginal Children from Sexual Abuse (2007), p166. At <http://www.inquirysaac.nt.gov.au/> (viewed 31 January 2012).

¹⁶⁰ *Stronger Futures in the Northern Territory Bill 2011 (Cth)*, s 16(1).

¹⁶¹ *Stronger Futures in the Northern Territory Bill 2011 (Cth)*, ss 16(2), 16(3).

¹⁶² *Stronger Futures in the Northern Territory Bill 2011 (Cth)*, s 17(3).

¹⁶³ Explanatory Memorandum, *Stronger Futures in the Northern Territory Bill 2011 (Cth)*, p 14.

¹⁶⁴ Explanatory Memorandum, *Stronger Futures in the Northern Territory Bill 2011 (Cth)*, 13. See also Australian Government, *Stronger Futures in the Northern Territory: Policy Statement* (2011), p 6. At <http://www.indigenous.gov.au/stronger-futures-in-the-northern-territory/> (viewed 16 December 2011).

¹⁶⁵ *Stronger Futures in the Northern Territory Bill 2011 (Cth)*, s 17(6).

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- ¹⁶⁶ See Explanatory Memorandum, Stronger Futures in the Northern Territory Bill 2011 (Cth), p 14.
- ¹⁶⁷ Stronger Futures in the Northern Territory Bill 2011 (Cth), s 23(2).
- ¹⁶⁸ See Aboriginal and Torres Strait Islander Legal Services and Aboriginal Peak Organisations Northern Territory, *The Future of the Northern Territory 'Intervention': Issues Paper* (2010), pp 7-8.
- ¹⁶⁹ For more detail see: M Gooda, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2010*, Australian Human Rights Commission (2011), p 63. At http://www.humanrights.gov.au/social_justice/nt_report/ntreport10/index.html (viewed 5 January 2011).
- ¹⁷⁰ Stronger Futures in the Northern Territory Bill 2011 (Cth), Division 4, Part 2.
- ¹⁷¹ Commonwealth of Australia, *Northern Territory Emergency Response: Report of the NTER Review Board* (2008), p 25. At <http://www.nerreview.gov.au/report.htm> (viewed 29 November 2011).
- ¹⁷² Stronger Futures in the Northern Territory Bill 2011 (Cth), s 14(2); Australian Government, *Stronger Futures in the Northern Territory: report on consultations* (2011), p 43. At <http://www.indigenous.gov.au/stronger-futures-in-the-northern-territory-report-on-consultations/> (viewed 10 January 2012).
- ¹⁷³ Stronger Futures in the Northern Territory Bill 2011 (Cth), s 14(5).
- ¹⁷⁴ *Northern Territory National Emergency Response Act 2007* (Cth), s 11(3).
- ¹⁷⁵ Stronger Futures in the Northern Territory Bill 2011 (Cth), Division 5, Part 2.
- ¹⁷⁶ Stronger Futures in the Northern Territory Bill 2011 (Cth), s 15(5).
- ¹⁷⁷ Further, under s 3 of the *Administrative Appeals Tribunal Act 1975* (Cth), the enactments that may confer jurisdiction on the Administrative Appeals Tribunal are defined by s 3 of the AAT Act to exclude Acts or Ordinances of the Northern Territory and instruments (including rules, regulations and by-laws) made under such an Act or Ordinance.
- ¹⁷⁸ *Northern Territory National Emergency Response Act 2007* (Cth), s 12.
- ¹⁷⁹ Proposed s 75C(7) of the Liquor Act (NT): Stronger Futures in the Northern Territory Bill 2011 (Cth), s 8.
- ¹⁸⁰ Explanatory Memorandum, Stronger Futures in the Northern Territory Bill 2011 (Cth), p 7.
- ¹⁸¹ Explanatory Memorandum, Stronger Futures in the Northern Territory Bill 2011 (Cth), p 4.
- ¹⁸² See Aboriginal and Torres Strait Islander Legal Services and Aboriginal Peak Organisations Northern Territory, *The Future of the Northern Territory 'Intervention': Issues Paper* (2010), p 7.
- ¹⁸³ See Australian Government, *Northern Territory Emergency Response Evaluation Report 2011* (2011), p 181. At http://www.fahcsia.gov.au/sa/indigenous/pubs/nter_reports/Pages/nter_evaluation_rpt_2011.aspx (viewed 28 November 2011).
- ¹⁸⁴ Human Rights and Equal Opportunity Commission, *Submission to the Senate Legal and Constitutional Committee on the Northern Territory National emergency Response Legislation* (2007), 10 August 2007, paras 55-59.
- ¹⁸⁵ Australian Government, *Stronger Futures in the Northern Territory: Policy Statement* (2011), p 6. At <http://www.indigenous.gov.au/stronger-futures-in-the-northern-territory/> (viewed 16 December 2011).
- ¹⁸⁶ Australian Government, *Stronger Futures in the Northern Territory: report on consultations* (2011), p 39. At <http://www.indigenous.gov.au/stronger-futures-in-the-northern-territory-report-on-consultations/> (viewed 10 January 2012).
- ¹⁸⁷ See Australian Government, *Stronger Futures in the Northern Territory: report on consultations* (2011), pp 40-43. At <http://www.indigenous.gov.au/stronger-futures-in-the-northern-territory-report-on-consultations/> (viewed 10 January 2012).
- ¹⁸⁸ Aboriginal Peak Organisations Northern Territory, *Response to Stronger Futures* (2011), p 20. See also Australian Government, *Stronger Futures in the Northern Territory: report on consultations* (2011), p 42. At <http://www.indigenous.gov.au/stronger-futures-in-the-northern-territory-report-on-consultations/> (viewed 10 January 2012).
- ¹⁸⁹ D Gray and E Wilkes, *Reducing alcohol and other drug related harm*, Closing the gap clearinghouse Resource sheet no. 3 (2010), p 4. At http://www.aihw.gov.au/closingthegap/documents/resource_sheets/ctgc-rs03.rtf (viewed 22 November 2011).
- ¹⁹⁰ *Northern Territory National Emergency Response Act 2007* (Cth), ss 31(1), (2). For further information, see T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2007*, Human Rights and Equal Opportunity Commission (2008), pp 188–196. At http://www.humanrights.gov.au/social_justice/nt_report/ntreport07/index.html (viewed 22 September 2010); T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2009*, Australian Human Rights Commission (2009), pp 151–155. At

http://www.humanrights.gov.au/social_justice/nt_report/ntreport09/index.html (viewed 22 September 2010); Australian Human Rights Commission, *Submission to the Senate Community Affairs Committee Inquiry into the Welfare Reform and Reinstatement of Racial Discrimination Act Bill 2009 and other Bills* (2010), 10 February 2010, paras 137–150. At

http://www.humanrights.gov.au/legal/submissions/sj_submissions/2010_welfare_reform.html (viewed 22 September 2010).

¹⁹¹ *Northern Territory National Emergency Response Act 2007* (Cth), pt 4, div 2. For further information see T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2007*, Human Rights and Equal Opportunity Commission (2008), pp 196–199. At http://www.humanrights.gov.au/social_justice/nt_report/ntreport07/index.html (viewed 22 September 2010).

¹⁹² *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth), pt IIB. For further information see T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2007*, Human Rights and Equal Opportunity Commission (2008), pp 202–206. At http://www.humanrights.gov.au/social_justice/nt_report/ntreport07/index.html (viewed 22 September 2010). The amendments also provided that the future acts regime under the *Native Title Act* does not apply to acts done by, under, or in accordance with certain provisions of the *Northern Territory National Emergency Response Act 2007* (Cth), s 51.

¹⁹³ T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2007*, Human Rights and Equal Opportunity Commission (2008), pp 187–207. At http://www.humanrights.gov.au/social_justice/nt_report/ntreport07/index.html (viewed 22 September 2010); T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2009*, Australian Human Rights Commission (2009), pp 151–158. At

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¹⁹⁶ The five-year lease provisions are repealed from 17 August 2012: *Stronger Futures in the Northern Territory (Consequential and Transitional Provisions) Bill 2011* (Cth), sch 1, item 2.

¹⁹⁶ *Stronger Futures in the Northern Territory (Consequential and Transitional Provisions) Bill 2011* (Cth), sch 2, item 3.

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¹⁹⁹ Explanatory Memorandum, *Stronger Futures in the Northern Territory Bill 2011* (Cth), p 23.

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²⁴¹ Explanatory Memorandum, Stronger Futures in the Northern Territory (Consequential and Transitional Provisions) Bill 2011 (Cth), pp 18-19.

²⁴² *International Covenant on Civil and Political Rights*, 1966, art. 27; *International Covenant on Economic Social and Cultural Rights*, 1966, art 15 (a).

²⁴³ Explanatory Memorandum, Stronger Futures in the Northern Territory (Consequential and Transitional Provisions) Bill 2011 (Cth), p 18.

²⁴⁴ Article 34 of the *Declaration on the Rights of Indigenous Peoples*, 2007 (which should guide all government legislation and policy) states that: "Indigenous peoples have the right to promote, develop and maintain their institutional structures and their distinctive customs, spirituality, traditions, procedures, practices and, in the cases where they exist, juridical systems or customs, in accordance with international human rights standards."

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