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Committee Secretary
Parliamentary Joint Committee on Human Rights
PO Box 6100
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By email: human.rights@aph.gov.au

Dear Secretary

Australian Lawyers for Human Rights (ALHR) is pleased to provide this submission in relation to certain aspects of the Committee's terms of reference, which are to consider the latest evidence and test the continuing necessity for the *Stronger Futures* legislation, being the:

- *Stronger Futures in the Northern Territory Act 2012*;
- *Stronger Futures in the Northern Territory (Consequential and Transitional Provisions) Act 2012*;
- *Social Security Legislation Amendment Act 2012*;

and associated legislative measures.

Background

Please note that because we do not have available to us any empiric evidence in relation to the success or otherwise of the *Stronger Futures measures*, this submission necessarily relates to the wording of the legislation and to its potential, rather than actual, effects.

There may therefore be additional issues in relation to the impact of the legislation which are of concern from a civil liberties and human rights point of view but not mentioned here.

Summary

[1] ALHR's primary concern is that the *Stronger Futures measures* legislation should adhere to international human rights law and standards. We agree with the Committee that the United Nations *Declaration on the Rights of Indigenous Peoples* (the 'Declaration') is relevant to the Committee's mandate.¹

¹ Parliamentary Joint Committee on Human Rights, *Stronger Futures in the Northern Territory Act 2012 and related legislation*, Eleventh Report of 2013, 26 June 2013, <http://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Completed_inquiries/2013> accessed 6 October 2014, par 1.62

- [2] We also believe that, whether or not that Declaration is taken into account, it is clear that the provisions of the *Stronger Futures* legislation are indirectly discriminatory, disproportionate in scope and inconsistent with accepted international human rights standards.

Effect of the legislation

- [3] The *Stronger Futures measures* override existing Northern Territory legislation in many areas. Briefly, the measures:

- restrict the sale of alcohol in specified areas;
- introduce measures to allow the Commonwealth to amend Northern Territory legislation relating to leasing in Community Living Areas and Town Camps in the Northern Territory;
- institute an income management regime whereby money can be withheld out of social security payments by government to meet certain expenses and the remaining money can be used only for approved items;
- allow social security payments to be withheld as a family penalty if children in the family do not attend school for specific periods without acceptable excuse;
- require food stores in certain areas to be licensed, and possibly subject to conditions; and
- restrict access to pornography in certain areas.

- [4] Clearly these measures involve major interference in the affected persons' self-determination and in a number of their human rights, including:

- the right to self-determination guaranteed by article 1 of ICCPR and article 1 of the ICESCR and articles 5 and 23 of the Declaration;
- the right to equal protection of the law and non-discrimination on the basis of race or ethnic origin, guaranteed by article 26 of the ICCPR, the ICERD, and articles 2(1) of the ICCPR and article 2(2) of the ICESCR and article 2(1) of the CRC in relation to the rights contained in those treaties;
- the right to social security guaranteed by article 9 of the ICESCR;
- the right to an adequate standard of living guaranteed by article 11 of the ICESCR; and
- the right not to have one's privacy, home or family unlawfully or arbitrarily interfered with, guaranteed by article 17 of the ICCPR.

- [5] In some cases the individuals concerned have volunteered to be covered by the legislation (for example, in respect of income management) but in most cases the legislation applies whether or not those affected agree with the restrictions upon them and their families.

Need for a demonstrably proportionate response

- [6] We agree with the Committee's conclusions in its previous report² that the government needs to demonstrate, rather than simply state, how the measures contained in the legislation are a proportionate response to the perceived problems. This is particularly

² *op cit*, pars 1.97, 1.126 and 1.127.

relevant not only to the scope of the incursions on human rights (as to which, the Australian Human Rights Commission comments that ‘interventions which infringe on individuals’ human rights must be the least restrictive on the rights of individuals whilst trying to meet the purpose of the intervention³) but as to the foundational issue of whether or not the legislation is discriminatory.

[7] If the legislation can be shown to:

- be based on objective and reasonable grounds;
- reflect a legitimate objective; and
- be a proportionate measure to achieve that objective;

then the differential treatment reflected in the legislation is arguably not discriminatory.⁴ However there is no evidence in this case that the legislation is a proportionate response to the problems identified, particularly in that there appears to have been:

- no consideration by government of any alternative, less intrusive, possibilities, and
- minimal meaningful consultation with affected communities to explore alternative options.⁵

Legislation inherently discriminatory

[8] We agree with the Committee that the *Stronger Futures* legislation does not amount to a substantive equality measure or differential treatment which could be justified on the basis of providing special benefits to a group which would otherwise suffer - or continue to suffer - discrimination, both because the legislation generally does not:

- a. provide benefits (but imposes restrictions);
- b. directly aim to reverse existing discrimination (but arguably increases it).

[9] We agree with the Committee that the definition of ‘special measures’ in Article 1(4) of the ICERD⁶ does not apply to the *Stronger Futures* legislation.⁷

[10] We agree with the Committee and the Australian Human Rights Commission⁸ that, notwithstanding the High Court decision in *Maloney v R*,⁹ it is dubious that a measure which limits the rights of some members of a particular racial group can properly be justified as a ‘special measure,’ even if the measure is:

- a. intended;
- b. designed (which is not clear); and

³ *op cit*, par 13.

⁴ *op cit*, par 1.70.

⁵ this is a point made throughout the Commission’s submission: *op cit*.

⁶ “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.”

⁷ Submission to Senate Community Affairs Legislation Committee in relation to *Stronger Futures in the Northern Territory Bill 2011 and two related Bills*, 6 February 2012, <https://www.humanrights.gov.au/submission-stronger-futures-northern-territory-bill-2011-2012>, accessed 6 October 2014, pars 118ff.

⁸ *op cit*, par 1.91 and following

⁹ [2013] HCA 28

c. likely (which is not at all certain);
to bring about a higher level enjoyment of human rights overall for the group as a whole.

- [11] This is especially the case where no consultation is involved.¹⁰ Indeed, it is not clear that the very concept of penalising some members of the group for the **potential 'greater good'** of the group as a whole is one that is acceptable to anti-discrimination law or consistent with international human rights interpretation.
- [12] We agree with the Senate Standing Committee for the Scrutiny of Bills¹¹ that it is undesirable that the onus of proof is placed upon the defendant in relation to a number of matters covered by the legislation relating to liquor laws. While the original explanatory memorandum stated that this was for consistency with similar existing offences, we agree with the Senate Committee that this is not appropriate in a situation where the legislation is already reliant on enshrining 'special measures'.¹²
- [13] While we welcome the Committee's current review, it appears to us that – given the delicacy and (in our view) discriminatory nature of the legislation -- the legislation contains insufficient mechanisms for independent and comprehensive review and contain insufficient safeguards in relation to accepted standards of oversight in the light of international human rights standards.
- [14] We are particularly concerned that the **removal of welfare payments** for children's non-attendance at school effectively imposes a penalty upon the whole family, including the children, when there may be various valid reasons for the child not attending school – including lack of adequate school facilities – which lie outside the ability of the child and their family to remedy.¹³
- [15] Similarly, the provisions of the *Stronger Futures* laws which prohibit alcohol consumption seem to ignore the lack of appropriate physical and mental health support which are essential to proper alcohol management.¹⁴

Conclusion

- [16] ALHR believes that it is essential that the *Stronger Futures* laws adhere to the Australian government's international legal obligations under various binding instruments and accord with agreed norms of human rights, civil liberties and fundamental democratic freedoms. If legislative provisions do not accord with these standards they should not be adopted.

¹⁰ As the Australian Human Rights Commission notes (*op cit*, par 238), the 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.

¹¹ Senate Standing Committee for the Scrutiny of Bills, *Second Report of 2012* <http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Scrutiny_of_Bills/Reports/2012/index>

¹² *op cit*, p 86ff.

¹³ See Helen Hughes, *Lands of Shame*, Centre for Independent Studies, 2007, 93 and following and Australian Human Rights Commission, *op cit*, Recommendation No. 14 and par 188ff as to lack of government resources and par 198 ff as to severe family impacts if payments are withdrawn. Indeed, says the Commission, withdrawal of payments is likely to entrench the very problems of poverty, ill health and overcrowded housing which research shows are factors that contribute to school absence (par 199).

¹⁴ See Australian Human Rights Commission, *op cit*, Recommendation No. 15.

[17] ALHR believes that a human rights framework will strengthen legislation that is aimed to assist Australia's indigenous people by appropriately balancing the government's various obligations. The *Stronger Futures* legislation does not appear to reflect an appropriate balance and effectively penalises the victims without providing them with assistance or resources.

ALHR

ALHR was established in 1993. ALHR is a network of Australian law students and lawyers active in practising and promoting awareness of international human rights. ALHR has a national membership of over 2600 people, with active National, State and Territory committees. Through training, information, submissions and networking, ALHR promotes the practice of human rights law in Australia. ALHR has extensive experience and expertise in the principles and practice of international law, and human rights law in Australia.

If you would like to discuss any aspect of this submission, please email me at: president@alhr.org.au.

Yours faithfully



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